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Dear Reader,

Like a great conversation, this year’s submissions to the seventh edition of our undergraduate journal, dialogue, show purpose and personality. Throughout these submissions, purpose and personality weave their way through diverse history and policy perspectives. Ultimately, the journal’s four student papers will contribute to larger discussions in American Politics/Government and East Asian Politics/Government.

The Tower Center Student Forum sponsored and facilitated one of these papers through our policy research committee, and the Tower Scholars program supports three authors. Our Tower Center Student Forum-sponsored paper, for example, discusses how Japan, when faced with security challenges, pragmatically adjusts to guarantee its security. Notably, half of this year’s publications focus on East Asia. This reflects the Tower Center’s growing emphasis on the region with its Sun & Star Program on Japan and East Asia.

All in all, the quality and reach of the journal has continued to increase; each paper within this edition concerns an area of policy—nationally or internationally—that is a significant part of today’s dynamic political discussion. As the Tower Center continues to expand its opportunities and increase the quality of its programs, we are proud that the Tower Center Student Forum is developing at an equal pace. With that, we optimistically look to the future of our undergraduate journal. Please enjoy this edition of dialogue.

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AMERICAN POLITICS/GOVERNMENT
SLAVERY IN THE TANEY COURT

An Examination of the Personal Views of the Justices and Their Influences on the Justices’ Opinions

A.J. Jeffries

For most Americans, the Constitution is our “holy book,” the divinely ordained document handed down by the Founding Fathers to provide the final answer to any and all questions regarding rights or laws. Unfortunately, America does not have an immortal group of Founding Fathers to continually interpret the Constitution, so we are forced to accept mere mortals as our high priests, the Supreme Court Justices. Their interpretations provide a fleshing out of the Constitution, so their decisions carry as much weight as any law passed by Congress. While they have always been respected, learned men, the decisions of these mortals can often be affected by their political inclinations, backgrounds, or the standards of their time. During the era of the Taney court, there were thirteen of these high priests (including Taney) who were called upon to interpret the supreme law of the land with regard to the massively polarizing issue of slavery, and their decisions seemed to have a stronger connection to their personal opinions than to the divine will of the Founding Fathers.

Those thirteen Justices had to interpret the Constitution in a nation divided, so understanding their backgrounds is central to understanding the major decisions of their day. Due to the convention of the time, wherein presidents selected Supreme Court Justices from the circuit they would oversee, the Court always consisted of four Northern Justices and five Southern Justices. During the period from 1836-1864, when Taney served as Chief Justice, there was considerable turnover on the Court, but only thirteen of the Justices made a true impact on the issue of slavery. Those thirteen Justices, whose backgrounds will be examined
with respect to slavery, are as follows, in order of their appointment: Joseph Story, Smith Thompson, John McLean, Henry Baldwin, James Moore Wayne, Roger Brooks Taney, John Catron, John McKinley, Peter V. Daniel, Samuel Nelson, Robert Grier, Benjamin Curtis, and John Campbell. With a thorough examination of their pre-Court lives and Circuit court opinions, their personal views on slavery and their opinions of its constitutionality take shape, and after examining the cases these distinguished men decided on the Court, another thing becomes clear: many of them chose, at times, to set aside their personal opinions on slavery in favor of judicial analysis. With all the attention paid to the spectacularly partisan opinions rendered in *Dred Scott*, many historians disregard prior cases like *Prigg v. Pennsylvania* and *The Amistad* in which the court rendered careful, balanced compromise opinions. Each of these thirteen Justices has their own story, some better documented than others, and only by examining their respective stories can their decisions on the Court be fully understood.

I

For thirty-four years before Taney ascended to the Chief Justiceship, the U.S. Supreme Court was led by John Marshall, a man who was deeply committed to upholding and expanding the power of the Federal government. He was successful in case after case, effectively expanding the power of the government while simultaneously strengthening the role of the federal judiciary. One aspect of that strengthening came when he “led the court to abandon the practice of its first decade whereby seriatim opinions had been handed down in important cases and to resort to an opinion of the Court in each case.”¹ Marshall wanted the Court to present a united front on contentious issues, so he endeavored to form consensuses and write generally acceptable majority opinions. By the end of his tenure on the court, “the ideal of unanimity, of institutional rather than individual spokesmanship had become well entrenched in spite of some diversity of actual behavior.”² This was the Court Justices Story, McLean, Baldwin and Thompson came from, and the difference between the Marshall Court and the Taney Court was a source of great suffering for Justice Story during the last nine years of his time on the bench.

2. Ibid., 3
II

The other aspect of the Federal Judiciary which must be understood before one can delve into the world of the Taney Court is the formation of the judicial circuits. At the time, “by custom, each circuit was represented on the Court by one of its residents,” so the states that made up a circuit effectively limited the candidates for each opening on the Supreme Court. 3 In 1801, the first six circuits were established, creating a balance between the Northern and Southern states. Then, in 1807, the expanding United States created the seventh circuit to serve Tennessee, Ohio, and Kentucky, essentially creating a “swing circuit” wherein the Justice could be from the North or the South. 4 The circuits then remained the same until 1837, when the addition of new states again necessitated the creation of more circuits, the eighth and ninth. Carl Swisher offers a telling analysis of the way these circuits were created:

The states hitherto excluded from circuits were Alabama, Missouri, Louisiana, Arkansas, Missouri, Illinois, Indiana, and Michigan. These states would seem to divide into two circuits, one in the North and the other in the South. But with the passing years regional divisions were becoming more and more sensitive matters, and Southern statesmen were, of course, not averse to collecting both Supreme Court judgeships. 5

Instead of simply dividing the new circuits between the North and the South, Congress took the “swing circuit,” the seventh, which was already represented by the Northern Justice John McLean, and drastically changed it, retaining only Ohio so that it consisted of Illinois, Indiana, Michigan, and Ohio. Then both the new circuits became Southern, with the eighth consisting of Kentucky, Missouri, and Tennessee and the ninth of Alabama, Arkansas, Louisiana, and Mississippi. 6

While an argument can be made that the reasons for the circuits being structured the way they were stemmed from the vast distances Southern circuit justices would have to traverse in the course of their

3. Earl M. Maltz, Slavery and the Supreme Court, 1825-1851 (Lawrence: University Press of Kansas, 2009), 33
5. Swisher, History of the Supreme Court of the United States, 58.
duties (for example, the ninth as it was created covered approximately 10,000 miles), the courts seem to have been created with partisan purposes in mind. The five Southern circuits contained only 8,307,332 people total, while the four Northern circuits contained 9,654,865, more than a million more. Logically, one would expect more people to produce more cases, thereby creating a larger need for judges. Instead, in this case, two separate political purposes dovetailed neatly to create the legislative majority necessary for the Judiciary Act of 1837. During the years before the Judiciary Act passed, “Westerners, a powerful enough constituency to facilitate or forestall legislative action, were simply looking for the plan that promised them the greatest influence and most meaningful representation.” Southern legislators embraced the Westerners’ non-discriminating desire to gain more voices on the Supreme Court, using it to pass an act maximizing the Southern voice on the Court.

III

On the Taney Court, this Southern majority was helped further by the Democratic Party’s success in presidential elections. Andrew Jackson had the opportunity, in part because the Judicial Act of 1837 created the need for two new justices, to appoint six people to the Court, including the new Chief Justice. Then, for the rest of the years of the Taney Court, the White House only saw two Whigs hold office, and the only Justices the party was able to appoint were Benjamin Curtis and Samuel Nelson. Democratic dominance of the White House allowed the appointment of “doughface” Justices like Henry Baldwin, who during his term in Congress “had been one of the northerners opposed to attempts to pass anti-slavery provisos for the territories, as well as conditional admission of new states.” To get judges on the Court, however, presidents still had to get them past a Senate which cared deeply about the composition of the Supreme Court.

During the time of the Taney Court, Supreme Court Justices were often appointed from positions other than the judiciary, so when

they were seeking confirmation they did not have the veil of judicial independence with which many appointees cover their political inclinations today. In fact, in the mid-1800s the opposite was the case—most appointees were loyal political supporters of the presidential incumbent. Such party stalwarts could often be rejected by a Senate held by the opposition party, however, as occurred in the process which ended in the appointment of Joseph Story. More specific, issue-based litmus tests were also frequently applied to nominees. Justice Wayne had to pass the tests of his views on nullification, Native Americans, and most importantly the national bank.\textsuperscript{10} George Woodward, who was nominated for the seat Grier eventually occupied, was rejected because of his “nativist leanings.”\textsuperscript{11} Over time, slavery too became a central part of this judicial litmus test. In attempting to replace John McKinley, Millard Fillmore’s nomination of Senator George Badger was defeated “in part because Badger had supported the Wilmot Proviso.”\textsuperscript{12} An 1846 letter from several of Maryland’s representatives in the House to President Polk supporting Justice Grier’s nomination is equally telling on how important slavery had become to judicial confirmation:

I am urged by several letters from my constituents to call your attention to the importance, especially to the citizens of Maryland, of filling the vacancy on the bench of the Supreme Court, occasioned by the death of Judge Baldwin, with a gentleman who acknowledges the constitutional guarantees of the right of the master to his slave and will enforce it irrespective of the clogs from time to time attempted to be thrown around it by state legislation.\textsuperscript{13}

Clearly, then, appropriate views on slavery had become one of the foremost tests of potential judges by the mid-1840s. The manner in which the judicial circuits were formed, the presidents who had the opportunity to appoint justices, and the Senate’s standards for the worthiness of the judges combined to create the Taney court which passed proslavery decisions like \textit{Dred Scott}, \textit{Prigg vs. Pennsylvania}, and \textit{Groves V. Slaughter}. One of the foremost Justices in the early years of the Taney Court, though, was appointed in a time when proslavery

\textsuperscript{10} Swisher, \textit{History of the Supreme Court of the United States}, 53-54.
\textsuperscript{11} Friedman, \textit{The Justices of the Supreme Court}, 874.
\textsuperscript{12} Maltz, \textit{Slavery and the Supreme Court}, 189.
\textsuperscript{13} Quoted in Swisher, \textit{History of the Supreme Court in the United States}, 232
leanings were not a veritable prerequisite for judicial appointment.

IV

Justice Joseph Story, who served over thirty years on the Supreme Court, was a man of the Marshall court. In fact, “he was ‘a solitary relic of former doctrines,’ the ‘only survivor of the old Court.’”\textsuperscript{14} Despite his origins as a Democratic-Republican, a party which did not support a centralized government, he broke with party doctrine early in his career when he “not only defended the Massachusetts Federalist bench against the assaults of his co-partisans, but actually counterattacked in successive efforts to raise the judiciary’s power and prestige.”\textsuperscript{15} He was the last remnant of the strongly nationalistic court of the Marshall era, so when the Supreme Court he loved became an institution of states’ rights advocates, he began to feel out of place, constantly considering resigning. Instead, he stayed on the Court until his death in 1845, exiting the world as one of the most renowned judges of his day. While he was often in the minority during his later years on the court, Story never relinquished the measured judicial philosophy which he had exercised throughout his time on the bench. The Constitution always came before his personal views, as he explained when he said, “I shall never hesitate to do my duty as a judge, under the Constitution and laws of the United States, be the consequences what they may. The Constitution I have sworn to support, and I cannot forget or repudiate my solemn obligations at pleasure. [Although] I have ever been opposed to slavery…I take my standard of duty as a judge from the Constitution.”\textsuperscript{16}

However, his personal feelings on slavery did shine through any time he felt it constitutionally acceptable to display them. While serving on a circuit court, Story, in a charge to the jury, said, “The existence of slavery under any shape is so repugnant to the natural rights of man and the dictates of justice, that it seems difficult to find for it any adequate justification.”\textsuperscript{17} On principle, he firmly opposed it, and showed his passionate opposition in that “he had made up his mind that it was

\textsuperscript{15}. Friedman, \textit{The Justices of the United States Supreme Court}, Vol. I, 437.
\textsuperscript{16}. Quoted in Maltz, \textit{Slavery and the Supreme Court}, 36.
\textsuperscript{17}. Story, William. \textit{Life and letters of Joseph Story, Associate Justice of the Supreme Court of the United States, and Dane professor of law at Harvard University} (Boston: Little and Brown, 1851), 336.
his duty, judicially and morally, to exert his utmost powers to procure the annihilation of the trade, and nothing availed to check him.”

As the slave trade no longer had protection under the Constitution, Story passionately pursued its demise in any case that came before him. For example, in the 1822 circuit case *La Jeune Eugenie*, he ruled in strong antislavery language that a ship participating in the slave trade can be prosecuted even if it does not, at that point, have any slaves on it.

Privately as well, he opposed slavery. In fact, slavery was the only issue ever to persuade Story to set aside his belief that justices of the Court should never involve themselves in politics. Thanks to an article in the newspaper *Cabinet* which was published after his death, the nation knew that:

> When the Missouri question was agitating the country, Judge Story, notwithstanding his high office, attended a town meeting in his native village of Salem, and made an elaborate speech in favor of the absolute prohibition of slavery, by express act of Congress, in all the Territories of the United States, and against the admission of any new slaveholding state, except on the unalterable condition of the abolition of slavery.

Antislavery forces might have wished he had survived long enough to participate in *Dred Scott*, but at least the eminent jurist’s personal opposition to slavery is clear. Unfortunately for abolitionists, “unlike some opponents of slavery, Story’s willingness to act on such sentiments was circumscribed by a deep suspicion of threats to the established order.”

Justice Story was forced to choose between his personal opposition to slavery and his love of the Constitution and judicial integrity, so his opposition to slavery had to be set aside.

Despite his clear abhorrence of the institution of slavery, Story was certainly no abolitionist, even in his private thought. Instead, he embraced the spirit of compromise which had created the Constitution he “celebrated as the bulwark of American liberty,” saying “he who wished well to his country will adhere steadily to these compromises as fundamental policy which extinguishes some of the most mischievous

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18. Ibid., 348
sources of all political divisions.”

Speaking on the fugitive slave clause in *Prigg v. Pennsylvania*, Story declared that any law limiting the right “of the owner to the immediate possession of his slave” was a defiance of the “positive and absolute right” of a master to his slaves. How, then, to reconcile the justice declaring slavery an unshakable right with the man who deemed it an institution repugnant to the natural rights of man?

Making sense of Story’s position requires a return to his interpretation of the beliefs of the Founding Fathers. Rather than join the early abolitionists of his day, “he followed the intentions, or rather, the hopes, of the framers, who believed that non-extension would doom the institution itself.” He was a committed gradualist on the issue of emancipation, condemning abolitionists “with a passion otherwise reserved for Thomas Jefferson and Andrew Jackson” just as he condemned slavery. These views, combined with his national stature, made him seem the perfect man to write for the majority in both the *Amistad* case and in *Prigg v. Pennsylvania*. The man appointed twelve years after Story, Smith Thompson, did not have as storied a career, so he has never garnered the same attention from historians as Story. However, each of the justices on the Court had an equal vote and voice, and he too contributed to the major decisions of the day.

V

Smith Thompson, appointed from the second circuit by James Monroe, brought “a states’ rights mercantilism tempered with a humanitarian overlay” to the Supreme Court. He was a prominent New York Republican, and so did not find the shift to the states’ rights-dominated Taney Court as odious as Story. Thompson also differed from Story in his commitment to the Court. While Story dedicated his life to judicial pursuits, Thompson remained involved in politics, aspiring

22. Quoted in Maltz, *Slavery and the Supreme Court*, 100.
24. Ibid., 351
to move from his seat on the Court to the presidency.26 On the issue of slavery, he resembled many other men of the day in that “although in 1819 he described the slave trade as ‘inhuman and disgraceful, Thompson [id] not seem to have had strong feelings about the issue of slavery more generally.”27 His abhorrence of the slave trade showed in his most important circuit case respecting slavery, when he had to preside over the Amistad. Despite “declaring that ‘my personal feelings are as abhorrent to the system of slavery as those of any man here,’” Thompson maintained judicial objectivity when addressing the case. In the end, he was able to rule in favor of the slaves, ordering them returned to Africa, and while the Supreme Court did not support that order, his decision was confirmed when The Amistad went before the Court. The next judge to join the Court, John McLean, shared Thompson’s political ambitions, although he had stronger views when it came to the question of slavery.

VI
Over the course of his time serving on the Court, Andrew Jackson’s first appointment, John McLean, presumably disappointed the man who appointed him with his judicial nationalism and fervent abolitionism. While he began his tenure as a moderate, he “shifted to a more nationalistic position than he had adopted in his early years on the Court” and remained there for the rest of his thirty years.28 Earl Maltz, distinguished professor of law at Rutgers University, even goes so far as to describe him as “one of the strongest judicial nationalists on the Taney Court,” which presumably contributed to McLean’s close friendship with Joseph Story.29 Unlike Story, however, McLean was willing to sacrifice his devotion to the national government for the sake of a fight he deemed more important. In an opinion during his second year on the bench, McLean moved beyond what was necessary for his opinion to make that point that “he would incline toward granting freedom to all slaves ‘according to the immutable principle of natural justice.’”30 During his time on the Ohio Supreme Court, he even went so far as to say “viewing the question abstractly, I could not hesitate to

26. Ibid., 479.
27. Maltz, Slavery and the Supreme Court, 37.
29. Maltz, Slavery and the Supreme Court, 39
declare that a slave in any state or country, according to the immutable principles of natural justice, is entitled to his freedom.” 31 McLean’s interpretation of the Constitution also evidenced far more of the view espoused by abolitionists, as evidenced by a 1853 circuit opinion where he said “that slavery was a local institution which ‘could not exist without the authority of law,’” and “had elaborated this view by asserting that legality need not be ‘created by express enactment’ but might arise ‘from long recognized rights, contravened by no legislative action.’” 32 McLean believed in the exercise of judicial restraint as well, though, saying judges “[could not] consider slavery in the abstract” and that “if they disregard[ed] what they conscientiously believe[d] to be the written law in any case, they [would be] act[ing] corruptly, and [would be] traitors to their country.” 33

Despite these fine words, some historians find cause to question how truly he held to the principle of judicial restraint during his pursuit of the presidency from the bench. McLean seemed more concerned with the path he could take to the White House than the principles he would be expected to hold when he got there, allying himself in early life with Jacksonian Democrats, then with the fledgling Republican party later in his career. Just before the Republican national convention in 1856, McLean allowed the publication of “an exchange between McLean and Lewis Cass in which McLean defended the authority of Congress to ban slavery from the territories. At the urging of his supporters, he followed up with another letter.” 34 It is clear that as he began to pursue the Republican nomination more seriously, McLean’s opinions in slavery cases began to adopt stronger rhetoric, as will be shown in his Dred Scott dissent. The next Northerner to join the Court, Henry Baldwin, adopted strong rhetoric in his opinions as well, although he had little else in common with his fellow Northern justices.

**VII**

It is difficult to know how Justice Henry Baldwin would be remembered had his service on the bench not been marred by considerable personal instability, culminating in his absence on year due to mental instability.

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33. Quoted in Ibid., 193.
health issues, but with those problems he is remembered as a fanatically proslavery, states’ rights judge whose erratic behavior alienated many of his fellow justices. As a response to Story’s *Commentaries on the Constitution of the United States*, Baldwin published his own book, *General View of the Origin and Nature of the Constitution*, which explained his constitutional philosophy. From the outset, he says “by taking it as the grant of the people of the several states, I find an easy solution of all questions arising under it; whereas in taking it as the grant of the people of the United States in the aggregate, I am wholly unable to make its various provisions consistent with each other, or to find any safe rule of interpreting them separately.” This fundamentally states’ rights position dovetailed neatly with his view of the powers of the courts, which he believed should be as limited as possible. As with the courts, he believed the federal government’s role in slavery should be limited: it should help recover fugitives, no more.

Baldwin put his proslavery bias on display in an 1833 circuit court case, wherein he told the jury “if this is unjust and oppressive, the sin is on the heads of the makers of laws which tolerate slavery…to visit it on those who have honestly acquired and lawfully hold property, under the guarantee of the laws, is the worst of all oppression, and the rankest injustice towards our fellow man.” In saying this, he does not acknowledge the humanity of the slaves, treating them as a form of property like any other, while simultaneously affirming his passionate support of their masters. During his time on the bench, “Baldwin did not care if no other Justices agreed with him. Slaves were property, and the right was anterior to the Constitution, which merely recognized and protected certain aspects of the right to hold property in slaves.” He even took the support of slavery a step further, asserting that slaves were a higher form of property, political property, due to their three-fifths contribution to the political power of the state in which their owner resided. Clearly, then, he deserved his reputation as a doughface. The next justice appointed eventually garnered the opposite reputation—James Moore Wayne’s decision to stay in Washington upon the outbreak of the Civil War earned him the enmity of the South.

35. Henry Baldwin. *General View of the Origin and Nature of the Constitution* (J.C. Clark, 1837), 1
36. Ibid., 41
Wayne was a southern justice who placed the union above all else, making him one of the foremost nationalists on the Court, although his belief in the Southern right to own slaves allowed him to retain Southern support for most of his tenure on the Court. He established his commitment to a strong central government early, taking such a strong view in favor of national power that Benjamin Curtis called him one of the “most high-toned Federalists on the bench.”

When the Civil War broke out, that same commitment to the national government probably contributed to his decision to remain in Washington, losing all of his possessions in Georgia. His commitment to the national government kept him from truly picking a side as the conflict developed, as despite “more and more Americans accepting polar positions regarding slavery, Wayne tried to maintain his Unionism.”

When it came to slavery, however, Wayne held true to the values of the South. While serving as an Alderman in Savannah, he supported legislation outlawing schools for blacks, and viewed them as inferior creatures. Wayne did own slaves, although “as late as 1854 he denounced slavery as fundamentally evil, expressed the hope that Southerners would gradually emancipate their bondsmen, and advocated action by the Federal Government to encourage the return of all African Americans to Africa through a program of colonization.”

He set that personal distaste aside on the court, though, and “found no difficulty reconciling to his own satisfaction the doctrine that the federal government was omnipotent where foreign or interstate commerce was involved with the doctrine that it was impotent wherever such commerce concerned slavery.”

Like many more moderate Southerners he did oppose the slave trade, but when it came to the institution of slavery itself he contributed to the Court’s reputation as a pro-slavery body, as did his Chief Justice.

Roger Brooks Taney, Chief Justice of the Supreme Court for 28 years, represented all the beliefs of a staunch Jacksonian Democrat—he was a states’ rights man who participated in the fight against the bank, and he was firmly in favor of the institution of slavery. Taney was born

38. Quoted in Ibid., 605.
39. Ibid., 609
40. Maltz, *Slavery and the Supreme Court*, 44
to Michael Taney, who “owned good landed estate on which he always resided, and slaves.”\textsuperscript{42} Due to his family’s secluded life in the country, he did not have much access to education, so he was eventually educated at home, by tutors, as was often the practice of the day, until he went to college. After graduating college, Taney says in the autobiographical portion of his memoir, “in the spring of 1796, I went to Annapolis, to read law in the office of Jeremiah Townley Chase, who was, at that time, one of the Judges of the General Court of Maryland.”\textsuperscript{43} Chase, after his service on the Continental Congress, had opposed the Constitution because it lacked a Bill of Rights, but once the Bill was added became a Federalist. His political opinions seem to have been passed on to his mentee, Taney, although Taney would shed them later in life.

While he started life as a Federalist, by the prime of his political career Taney had subscribed passionately to the Jacksonian view. On slavery, he had a dichotomy even greater than that of Story between his private and professional views. Privately, Taney’s behavior implies that he was passionately opposed to slavery. Fairly early in his life he manumitted all of his slaves, and he served as councilor to an organization formed to protect free blacks who were captured as “fugitive slaves.” He even went so far as to advance a free black the price of his family so that he could free them from slavery.\textsuperscript{44} At the beginning of his political career he even opposed slavery in the public sphere, opposing a resolution by the Maryland senate which demanded that Missouri be admitted as a slave state.\textsuperscript{45} His anti-slavery credentials were further strengthened in the case of \textit{Maryland v. Gruber}, where Taney would defend a minister named Jacob Gruber who was accused of sedition and inciting slaves to rebel for an abolitionist speech he made in Maryland. During his masterful defense, Taney said “a hard necessity indeed, compels us to endure the evil of slavery for a time…it cannot be easily or suddenly removed. Yet, while it continues, it is a blot on our national character; and ever real lover of freedom…hopes it will…be…gradually wiped

\textsuperscript{42} Samuel Tyler, \textit{Memoir of Roger Brooke Taney, LL. D., Chief Justice of the Supreme Court of the United States} (Baltimore: J. Murphy, 1876), 20
\textsuperscript{43} Ibid., 56
\textsuperscript{44} Carl Brent Swisher, \textit{Roger B. Taney} (New York: The MacMillan Company, 1936)
away.” Despite those feelings, though, he believed that “the problems of slavery were so intricate and so peculiarly local as to require local handling,” so as attorney general he felt obligated to “interpret the law so as to leave the control of the subject in local hands, even though some negroes suffered thereby.” The difference in Taney’s opinions seems more than that, though.

It is difficult to reconcile the man who freed his slaves and helped others buy their freedom with the attorney general who wrote, in an unpublished opinion of the Attorney General’s office which was originally intended as part of a response to South Carolina’s Seamen Acts:

The African race in the United States even when free, are everywhere a degraded class, and exercise no political influence. The privileges they are allowed to enjoy, are accorded to them as a matter of kindness and benevolence rather than of right. They are the only class of persons who can be held as mere property, as slaves. And where they are nominally admitted by law to the privileges of citizenship, they have no effectual power to defend them, and are permitted to be citizens by the sufferance of the white population and hold whatever rights they may enjoy at their mercy.

These words may seem far more familiar to people who recall Taney’s opinion in Dred Scott than his denunciations of slavery in Maryland v. Gruber. He reinforced the point in a circuit court opinion in 1840, where he again reiterated his belief that blacks were not citizens. For all his efforts on behalf of the enslaved population in private life, his ever-hardening judicial views did more damage to the cause of free blacks and slaves than his positive efforts ever worked good. When Taney became chief justice, his Court still lacked two of the members who would contend with the first major cases on slavery.

X

As a result of the Judicial Act of 1837, two more Southern justices joined the Court. John Catron of Tennessee remains partly shrouded

46. Swisher, Roger B. Taney, 97.
in mystery, as few records remain of his youth, but his voice on the Court sounded in favor of a moderate states’ rights position and, of course, protection of the institution of slavery, although in that respect too his views were moderate compared to some of his fellow justices. Catron subscribed to the positive good view of slavery, saying in his opinion in the case *Fisher’s Negroes v. Dobbs*, “the slave, who receives the protection and care of a tolerable master, holds a condition here, superior to the negro who is freed from domestic slavery….the freed black man lives amongst us without motive and without hope.”49 Like James Moore Wayne, though, Catron put the health of the union before slaveholding interests. A friend said of him, “his feelings are with the South, yet he clings to the hope that the Union may possibly be preserved, or a reconstruction may take place as many other good citizens of his age still hope for, and that a revolution will occur in public opinion at the North, when they will concede to the South all they ask.”50 He again displayed his preference for the maintenance of the Union when he advocated for extending the Missouri Compromise line out to the Pacific in an effort to put the territory issue to rest for good.51 Despite being part of the proslavery majority, then, Catron was not a particularly partisan justice, and he certainly contributed more to the doings of the court than the other beneficiary of the Judiciary Act of 1837.

XI

John McKinley, the first Supreme Court Justice from Alabama, is primarily remembered by historians for his prodigal capacity to complain about his circuit responsibilities and his minimal contributions to the doings of the Court. He did subscribe to Southern judicial philosophy, providing a states’ rights, pro-slavery voice on the Court when present, but in neither respect was his voice particularly strong. McKinley “has been described as a man who was ‘out of his depth’ on the Court and ‘made no significant contribution to legal thinking in any form.’ During his fifteen years of service on the Court he wrote only twenty-two opinions.”52 While he did indisputably have the largest circuit to cover, and therefore far more to keep him away from D.C., his minimal contributions to the doings of the Court grant him a marginal role at best

49. Quoted in Maltz, *Slavery and the Supreme Court*, 45.
52. Ibid., 47
in the history of the Court.

Despite being a federalist early in his life, a toast McKinley gave later shows where his philosophy had gone in the years before he joined the court: “The Constitution of the United States: The Compact of sovereign and independent States, instituted for national purposes only; limited and specific in its powers but supreme within the prescribed sphere of its action. The powers not delegated belonging to the states exclusively.”53 His final speech in the House of Representatives likewise displays his views on slavery. In it, he “warned against accepting petitions for the abolition of slavery in the District of Columbia. McKinley said he would take his property where he wished within the Union; Congress had no right to interfere.”54 His assertion that he would take “his property where he wished” seem to support the theory that he was a slaveowner, as do his interest in the cotton crop and records of his way of life, although there are not concrete records to prove or disprove it as there are for the other Southern justices. These eight justices, plus Phillip Barbour of Virginia (who would die during the cases), made up the Court who would decide on The Amistad and Groves v. Slaughter, although one more justice would join them before Prigg v. Pennsylvania was decided.

XII

Personal relationships between the justices had a role to play in how effectively the Court would be able to perform its duties, and during the Taney years their relationships became more strained than they had ever been under Marshall. The Court’s divisions even became physical, as the tradition of maintaining one large “mess” where all the justices lived was broken during Taney’s tenure. Smith Thompson was the first to leave the mess, although his decision appeared to be motivated more by a desire for space with his wife than any animosity towards his fellow judges. Greater evidence for division lies in Justice McLean’s words, when “in 1843 McLean suggested to Story that their two families take quarters apart. ‘I do not believe you will enjoy yourself with our brother judges,’ he dryly added.”55 In fact, by 1844, the justices “were not so

congenial to each other as they had formerly been, and no longer did they live in the same house.” 56 Partisan divisions could also be seen in 1843, when Baldwin, Wayne, Catron, and Daniel, on a day Justice Story was absent, banded together to remove Richard Peters, the fifteen-year court reporter and Story’s close friend, and give the job as a “spoil” of their victory to General Benjamin Howard. 57 The four Jacksonians clearly served as a bloc who would vote together to further their own interests.

Clearly the gravity of the issues they faced and their great differences of opinion were straining the justices’ relationships, although the differences may not have been as vast as their separation made them appear. Despite their ideological differences, in the wake of Story’s death Taney wrote a letter in which he lamented Story’s passing, saying “what a loss the court has sustained in the death of Joseph Story! It is irreparable, utterly irreparable in this generation.” 58 The two strongest minds on the early Taney Court maintained a close friendship outside of their legal duties, one quite analogous to the relationship of Antonin Scalia and Ruth Bader Ginsburg today. Amongst the other justices, Story and McLean maintained a close friendship, while Story and Baldwin quietly feuded after Baldwin wrote *General View of Origin and Nature of the Constitution* to oppose Story’s *Commentaries on the Constitution*. As seen in the removal of Richard Peters the Jacksonian jurists banded together, serving in most cases as a strong, partisan voting bloc. Those relationships could be seen in the major cases the men decided.

XIII

As a public event, *The Amistad* case was one of the most prominent faced by the Taney Court, commanding a packed courtroom who anxiously awaited the Court’s ruling on the rights of enslaved Africans to fight for their freedom. While the Court was without a doubt predominately proslavery, the issue of the institution of slavery was held to be separate from that of the slave trade at the time. Many Justices, like James Moore Wayne, actively supported the former while opposing the latter. Viewed through this lens, the 6-1 decision (Barbour died during oral arguments and McKinley was absent) to free the Africans is a perfectly understandable result for the Taney Court, especially given

56. Weisenberger, *The Life of John McLean*, 220
57. Frank, *Justice Daniel Dissenting*, 171
the moderate terms with which the decision was rendered. Justice Story, the passionate opponent of the slave trade, was chosen to give an opinion, and he did so in far softer terms than he had on circuit in *La Jeune Eugenie* almost a decade earlier. In the *Eugenie* case, Story denounced the slave trade in ringing terms, saying it “is repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice.” Such powerful rhetoric condemning the slave trade was, by necessity, conspicuously absent from Story’s *Amistad* opinion, sacrificed for the sake of judicial unity. If he had tried to proclaim, for example, that the natural right of all men to freedom gave the Africans the right to revolt and free themselves, the proslavery justices on the Court would have been up in arms, arguing vehemently against the point. Instead, he prefaced his decision by saying “If these negroes were, at the time, lawfully held as slaves under the laws of Spain and recognized by those laws as property capable of being lawfully bought and sold; we see no reason why they may not justly be deemed within the intent of the treaty, to be included under the denomination of merchandise, and, as such, ought to be restored to the claimants.” Only because they were kidnapped Africans did the defendants have the right to win back their freedom. Had they been born slaves in Cuba, they would have been promptly shipped back to Spanish control.

With those limiting factors in place, it is difficult to see a reading of the law wherein they could be deemed slaves, and therefore easy for proslavery justices to sign onto the opinion. In the words of H. Robert Baker, “*Amistad* was a lesson in how the narrow construction of legal issues could avoid controversy, achieve consensus, and accommodate both moderate antislavery and proslavery interests.” The lone dissenter, proslavery Pennsylvanian Justice Henry Baldwin, remained silent, offering no reasons for his disagreement. All told, *The Amistad* represented the spirit of consensus forming which had embodied the Marshall Court. In order to get a near unanimous decision, the antislavery justices refrained from soaring antislavery rhetoric and limited the scope of the decision, while the proslavery justices joined in a decision that was, despite its narrow scope, a loss for slaveholders.

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60. U.S. v. The Amistad, 40 U.S. 593
Such consensus forming would not occur in the next major slavery case the Court faced.

XIV

*Groves v. Slaughter* was a case from Mississippi which came to bear on the question of a state’s capacity to legislate on the inter-state slave trade, and it divided the Supreme Court in a manner that would not be seen again until Court had to deal with *Dred Scott*. In the case, a man bought slaves and then tried to avoid paying the slave trader because of a constitutional restriction in Mississippi on the inter-state slave trade. The questions facing the Court were twofold: first, did states have the power to legislate on what forms of commerce could be introduced to their territory? And second, was Mississippi’s constitutional rejection of the slave trade self-enforcing, or did it need a law to render it meaningful? Answering no to either of those questions would be enough to decide the case.

While the Court handed down a 5-2 majority opinion (Catron was ill, Barbour was still dead and had yet to be replaced), within those five votes were several different opinions. The official majority opinion, handed down by Justice Smith Thompson, simply avoided the explosive issue of a state’s freedom to reject the inter-state slave trade and determined the case purely by saying Mississippi’s constitutional restriction on the internal slave trade was not self-enforcing, which meant the defendant did have to pay the trader what was owed. McLean was not satisfied with such a narrow opinion in this case, so he added a concurrence stating that he believed states did have the power to regulate their involvement in the inter-state slave trade. In addition to that statement, he added a point which provided a fascinating precedent for future judges, arguing:

> But if slaves are considered in some of the states as merchandise, that cannot divest them of the leading and controlling quality of persons by which they are designated in the Constitution. The character of property is given them by the local law. This law is respected, and all rights under it are protected by the federal authorities; but the Constitution acts upon slaves as persons, and not as property.  

In asserting that by the Federal Constitution slaves are persons rather than mere property, McLean found the opportunity to display his

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antislavery sentiments and, simultaneously, supported the abolitionist argument against the beliefs of southern states that the Constitution treated slaves as property.

After McLean made clear his intentions with his own opinion, it opened the Pandora’s box of internal rancor that existed on the court. Chief Justice Taney began his opinion by saying that while he had not intended to express an opinion on states’ capacity to legislate on the inter-state slave trade “as my Brother McLean has stated his opinion upon it, I am not willing, by remaining silent, to leave any doubt as to mine.” After delivering his opinion that the right to rule on issues of the inter-state slave trade belonged exclusively to the several states, he again made clear his reasons for speaking out on the question, saying “I state my opinion upon it, on account of the interest which a large portion of the Union naturally feel in this matter, and from an apprehension that my silence, when another member of the Court has delivered his opinion, might be misconstrued.” His balanced view of the issue showed both his commitment to states’ rights and his legal support of the institution of slavery. As McLean was the voice of the antislavery citizens of the United States, Taney felt obligated to represent his proslavery compatriots, a dynamic which is telling in terms of the Court’s relations. A similar compulsion brought Baldwin to write his far broader opinion, in which he argued that the power over inter-state commerce of any form rested exclusively with the Federal Government, as was said in the commerce clause. Most of his opinion, however, is devoted to establishing that:

I feel bound to consider slaves as property, by the law of the states before the adoption of the Constitution, and from the first settlement of the colonies; that this right of property exists independently of the Constitution, which does not create, but recognizes and protects it from violation, by any law or regulation of any state, in the cases to which the Constitution applies.

Baldwin, the doughface Pennsylvanian, rather than Taney, served as the true voice of Southern interests on the case, but the wide differences in opinion within the majority showed just how weak the Court’s

63. Ibid., 508.
64. Ibid., 513.
capacity for unity on slavery was despite their successful resolution of *The Amistad*. Justices Story and McKinley dissented, although like Baldwin in *The Amistad* they refrained from issuing an “opinion that would potentially have inflamed the political situation.”\(^{65}\) Despite the divisions, then, the Supreme Court held to its commitment to avoid exacerbating the sectional conflict of the day, an effort they made again a year later in *Prigg v. Pennsylvania*, although there was one more voice on the Court by that time.

**XV**

Peter Vivian Daniel was arguably the most extreme voice on the Taney Court for many years, as he was the last true Jeffersonian, agrarian voice the Court would see. Described by John Frank as “an intransigent, indefatigable, stubborn outpost of eighteenth century thought in nineteenth century United States,” Justice Daniel was indisputably one of the most passionately Southern voices on the Court.\(^{66}\) In private life, he “was extraordinarily sensitive to the pain in those around him, even his slaves,” but in public he was “a vigorous defender of slavery and Southern rights.” Additionally, he was a passionate proponent of states’ rights, although if states’ rights and southern interests “came into conflict, Daniel often gave preference to the protection of Southern interests,” as he did in fugitive slave cases where it proved necessary to empower the national government in order to protect the rights of slaveowners.\(^{67}\) His feelings on race and slavery displayed that violent partisanship, as when he wrote on the Missouri Compromise issue that Congress “had no power to ‘deprive one person of the United States or of the citizens of the United States, of that which belongs to the United States collectively, and as a whole, and is arbitrarily bestowed upon another and favored portion of the union, or of citizens of the Union.’”\(^{68}\) While that opinion was commonly shared, Daniel took a spectacularly narrow view of the Constitution which few other justices joined. For example, in a taxation case, he dissented against a ruling that the government could construct roads in saying “that neither Congress nor the Federal Government in the exercise of all or any of its powers or attributes possesses the power to construct roads, nor any other description of what have been

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66. Frank, *Justice Daniel Dissenting*, VIII.
67. Ibid., 64; Maltz, *Slavery and the Supreme Court*, 50
called internal improvements, within the limits of the states.” His strong convictions, combined with his Constitutional views, left him dissenting alone an incredible forty-six times, twenty-five more than McLean, who as an abolitionist voice on a proslavery court was bound to be on the other side of many cases. Daniel also became one of the most sectional voices on the Court, as “beginning in the late 1840s, Daniel associated all things Northern with the antislavery movement, and hated the North with an obsessive fury that he had hitherto reserved for his Whig political enemies. He refused even to venture north of the Delaware River and became indifferent to the preservation of the Union itself.” Clearly, then, Daniel’s appointment did not affect the balance of power on the Court, but he did add another strong voice to the mix.

XVI

In another deceptively divisive case, Prigg v. Pennsylvania showed a similar trend to Groves v. Slaughter in that it, too, created a divided majority, this time over the question of whether states could place restrictions on slave catchers sent to pursue fugitives within their borders. The case dealt with a slave catcher who had been charged with kidnapping in Pennsylvania for entering the state and catching a slave without following procedures outlined by a Pennsylvania statute. As he had already said in his Commentaries on the Constitution that “under and in virtue of the Constitution, the owner of a slave is clothed with the entire authority in every State in the Union, to seize and recapture his slave whenever he can do it without any breach of the peace or any illegal violence,” Justice Story was the obvious choice to give a Northern voice to the proslavery ruling.

While the majority ruling indisputably dismisses states’ claims to the right to limit the recapture of fugitive slaves, historians differ on whether Story sacrificed his abolitionism for the sake of his Constitutional beliefs or subtly struck a blow against slavery in his majority opinion. He was certainly aware of the case’s import, saying from the start, “Few questions which have ever come before this Court involve more delicate and important considerations; and few upon which the public at large, may be presumed to feel a more profound and pervading interest.”

69. Quoted in Ibid., 215.
70. Ibid., 237.
71. Ibid., 246.
Story clearly acknowledged the point he made in *Commentaries on the Constitution*, reasserting the unqualified right of the master to reclaim his slave, but then he clarified another point which some historians have interpreted as a grand triumph for freedom. In an expression of his belief in Congressional exclusivity, he argued that states have no power to pass any law affecting the reception of slaves or any responsibility to contribute to the fugitives’ rendition. Fugitive slaves were a wholly federal matter. Clearly this is a small triumph for states like Pennsylvania—while they were not allowed to punish slave catchers as kidnappers, they at least did not have to help said slave catchers, and such a result would certainly mesh with Story’s anti-slavery sentiments. Other historians, like Dr. R. Kent Newmeyer, take a less rosy view of Story’s opinion, arguing that

To believe that Story consciously designed his opinion to make freedom triumphant, one must believe that he deliberately introduced a doctrine that would vitiate the right of recapture that he had plainly stated in the most absolute terms, a right he had also defined in his *Commentaries*, and that, if intent means anything, the framers themselves had established. Had Story set out to write an opinion for freedom he would have had to recant his earlier admonition to all patriots to uphold the slavery compromise of 1787; he would have had to deliberately encourage *judicial* circumvention of positive law.\textsuperscript{73}

Newmeyer’s point is by far the stronger—throughout his life, Story had put his antislavery feelings second to his love of the Constitution and the Union, so it is inconceivable that he would have sacrificed those deeply held beliefs to ease impact of *Prigg* on abolitionists. Despite the unlikeliness of his exercising antislavery intent in his opinion, the “loophole” he opened elicited opinions from several other justices, with only Wayne concurring fully with Story’s opinion.

Chief Justice Taney felt compelled to state his objections to Justice Story’s assertion that states are prohibited from involving themselves in fugitive slave rendition at all, even to support the rights of the masters. In his opinion, the Constitution “contains no words prohibiting the several states from passing laws to enforce this right. They are in express terms forbidden to make any regulation that shall impair it. But there the

\textsuperscript{73.} Newmeyer, *Supreme Court Justice Joseph Story*, 377.
prohibition stops.”

Justice Daniel joined Taney on the point, adding nothing further to the discussion. Smith Thompson, in his concurrence, took up the question of whether the fugitive slave clause was self-executing. He argued that while an owner’s right to recover his slave required no legislation to support it, “the delivery of the person of the slave to the owner” was not self-executing, so it required Congressional legislation to have any effect. Justice Baldwin, in yet another disagreeing concurrence, argued that both aspects of the fugitive slave clause were self-executing, and that any legislation passed to support them on a state or Federal level was unconstitutional.

Amongst all these concurrences, John McLean’s dissent still stood out for the vastly different perspective it brought to the questions in Prigg. In the dissent, he argued that “in a State where slavery is allowed, every colored person is presumed to be a slave; and on the same principle, in a non-slaveholding State, every person is presumed to be free, without regard to color.”

From this premise, McLean argued against the elevation of the masters’ rights over those of the sovereign states, pursuing a states’ rights argument which defied his normal judicial inclinations for the sake of his abolitionist sentiments. He believed states had the right to protect anyone within their borders from kidnapping, a right which permitted the limiting of a master’s rendition of his slave. While it was unable to influence the outcome of the case, McLean’s dissent conflates perfectly with the image developed of him above—a nationalist for whom antislavery sentiments transcended all other commitments. McLean’s behavior in the aftermath of Prigg is also quite telling, though—in several fugitive slave cases on circuit he upheld Story’s ruling despite his own disagreement with it, showing that judicial integrity came before even his moral abhorrence of the South’s peculiar institution. McLean would dissent again when the Court took the issue of slavery up once more fifteen years after Prigg, although he would be one of only five justices remaining from the Court who decided Prigg v. Pennsylvania.

XVII

The Court’s first casualty during the inter-case years was Justice Smith Thompson in 1843, so a replacement had to be found from the second circuit. After a long selection process, President Tyler settled on

75. Ibid., 669.
Samuel Nelson, a very moderate proslavery justice from the New York Supreme Court whose views on the states’ rights vs. nationalism debate are difficult to decipher. He displayed strongly nationalist leanings in the 1834 case *Jack v. Martin*, saying on the Fugitive Slave Clause that “if [enforcement is] left to [the states], the great purpose of the provision might be defeated.” Clearly on the vital issue of slavery he did not trust the states to preserve the rights of masters, preferring the exclusive power of a strong national government to enforce the slaveholders’ needs. Nelson was heavily criticized in the Northern papers for being a “New York Democrat of the perishing school” who, when confronted by the opinions of Southern Judges, “had not sufficient virtue to boldly stand up against their heresies.” On the issue of the slave trade, he did not share even the moral opposition some Southern justices displayed, as “his circuit opinions were notable for an apparent lack of zeal in enforcing the federal prohibition on the slave trade.” Smith Thompson, the consummate moderate, was replaced by a moderately proslavery justice, adding a soft voice to the proslavery majority. The next justice appointed would only have strengthened that majority in *Dred Scott* had he survived long enough to sit on the case.

**XVIII**

After the death of Joseph Story, Levi Woodbury ascended to the Court for five years before being replaced by Benjamin Robbins Curtis, a moderate Whig appointed by Millard Fillmore who put the health of the Union before any partisan considerations. Curtis resembled his predecessor on the first circuit in a number of ways, not least of which was his commitment to upholding the law despite his personal beliefs. That is why, when serving on the Massachusetts Supreme Court in *Commonwealth v. Aves*, Curtis argued that slaveholders should be able to retain possession of a slave brought into Massachusetts on a temporary sojourn. His moderate views also made him a popular choice to defend the Fugitive Slave Act of 1850, in defense of which he said “whatever natural rights they have, and I admit those natural rights to their fullest extent, this is not the soil on which to free them.” Regardless of his views on slavery, however, his highest priority was

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77. Quoted in Friedman, *Justices of the United States Supreme Court, Vol. II*, 824.
78. Maltz, *Slavery and the Supreme Court*, 144.
79. Ibid., 184
the Union. That is why “when the sectional dispute over slavery broke out, he stood at Daniel Webster’s side as a staunch nationalist and conservative—both prepared to defend the Constitution and the Union in fair weather and foul.”

Curtis was renowned for his intellect, and seems to have been a worthy successor to Joseph Story. Unfortunately, he would not remain on the Court long enough to leave a truly enduring legacy. Robert Cooper Grier, on the other hand, would eventually serve more than twenty years on the bench after the death of Henry Baldwin.

XIX

Justice Grier was another Pennsylvanian who supported the Southern right to own slaves, although in his mind the law came before any partisan interests. Over the course of his career, “Grier’s circuit court decisions did not disappoint his proslavery supporters. When presented with issues related to fugitive slaves, he made no secret of his own sympathies. At the same time, Grier also demonstrated his fidelity to the principle of the rule of law.”

In 1847 on circuit duty, Grier’s charge to the jury in *Van Metre v. Mitchell* made very clear where his loyalties lay on the slavery question. His charge was so biased that local anti-slavery men protested the result, arguing that the jury’s finding was radically affected by Grier’s partisan charge. Grier demonstrated his commitment to the law above all else four years later, though, when he presided over *U.S. v. Hanaway*, a case in which people were being charged with treason for refusing to aid in the capture of fugitive slaves. This time he defended the rights of slavery’s opponents, making very clear in his jury charge that refusing to aid in fugitive slave rendition in no way constituted treason. Despite adding to the proslavery voices, then, Grier’s appointment shifted the court’s voice as a whole to a slightly more moderate stance, as the third circuit was no longer represented by the radical voice of Henry Baldwin. The appointment of John Archibald Campbell from the ninth circuit made for a similarly large shift, although in Campbell’s case the change came in the form of a greater commitment to his judicial responsibilities than his predecessor.

81. Maltz, *Slavery and the Supreme Court*, 146
82. Friedman, *Justices of the United States Supreme Court*, Vol. II, 877
In 1852 John McKinley died, and after a year with many failed appointments he was replaced by John Archibald Campbell, an Alabama Democrat with fairly moderate views on both slavery and the relationship between the Federal government and the states. As Carl Brent Swisher explains it, “although on the Supreme Court Justice Campbell stood as a defender of the rights of the states and proslavery interests, he was no such agrarian extremist as Justice Daniel.”\(^84\) While Justice Campbell owned many slaves, he “did not deny slavery could be an exceedingly cruel institution.”\(^85\) He even claimed, in a letter to Justice Curtis to have “voluntarily liberated all of my slaves before the war some years.” A close study of documents in the Mobile County Probate Court disprove his claim, but his effort to make the claim at all show a certain degree of shame at continuing to hold slaves.\(^86\) At the very least, his private life did show some efforts to limit the damage slavery caused to the world around him, like in 1847 when he proposed maintaining slave families rather than breaking them apart for sale.\(^87\)

Despite his dislike of slavery, however, on an institutional level he believed “gradual emancipation voluntarily undertaken by Southerners was the only method whereby slaves could gain their freedom without a subsequent destruction of Southern society.”\(^88\) Campbell’s first loyalty was to the South, although he did not support the more radical proslavery elements. For example, sitting on circuit in New Orleans, he vigorously attacked ‘filibustering’ expeditions designed in part to add slaveholding territories such as Cuba to the United States. Most interestingly, when it came to the issue of Congress’s right to legislate on slavery in the territories, he said in a letter to John C. Calhoun, “I think Congress has the power to organize inhabitants of a territory of the U.S. into a body politic, and to determine in what manner they shall be governed. As incident to this power, I think Congress may decide what shall be held and enjoyed as property in that territory and that persons should not be

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84. Swisher, *History of the Supreme Court of the United States*, 244.
86. Ibid., 66-67
Clearly, then, Campbell added another moderate voice to the Court, although he would reverse himself when it came time to decide *Dred Scott*.

**XXI**

Going into 1857 and the *Dred Scott* decision, then, the Supreme Court consisted of McLean, Wayne, Taney, Catron, Daniel, Nelson, Grier, Curtis, and Campbell. It was a court that had grown ever more sectional since the already divided days of *Prigg v. Pennsylvania*. In the words of Justice Catron, “I find that political tendencies are just as strong on all constitutional and political questions as they are in any other department of the government.”

Justice Campbell offered a very different view of life on the Court, saying “deliberations were usually frank and candid. It was a rare incident...when the slightest disturbance, from irritation, excitement, passion, or impatience, occurred.”

The events surrounding *Dred Scott* and its aftermath seem to prove Catron the more accurate reporter of the relations on the Court, although Campbell’s opinion does hold merit as evidence of how pleasant service on the Taney Court could seem to a proslavery southerner. After Senator Hale introduced an amendment during the debates over the Compromise of 1850 which was “designed to ensure access to the Court in all cases involving the legal status of slavery” with no minimum-property-value requirement, the stage was set for the most divisive Supreme Court case of the Taney Period.

**XXII**

*Dred Scott v. Sanford* was the case which embodied, in the minds of many, the image of the Taney Court as a bastion of proslavery sentiments. Scott, a slave who had gone with his master first to live in Illinois, then to serve at Fort Snelling in Wisconsin, was suing for his freedom by the argument that his time in free states had made him a free man. The case brought a number of questions before the Court: Was *Dred Scott* a U.S. citizen, with the right to sue for his freedom in Court? Had his time in Illinois earned him his freedom? Or did his time in Wisconsin merit freedom as a result of the Missouri Compromise?

89. Quoted in Ibid., 76.


All of these questions faced the Court, and with the exception of Wayne and Grier, who merely concurred wholeheartedly with the opinions of others, every justice, whether concurring or dissenting, offered different views on at least one of the questions.

At first, the Court intended to follow the same principles they had in the early 1840s cases, offering as narrow an opinion as possible to avoid inflaming sectional tensions. Justice Nelson was assigned to write one, in which the Court would simply rule that Dred Scott remained a slave because the Constitution’s comity clause required other states and territories to respect Missouri’s laws with respect to Scott’s status as a slave, thereby avoiding a ruling on the Missouri Compromise. While the opinion would still have been inflammatory, and in the mind of Don Fehrenbacher “within the limits that he had set for himself, Nelson leaned toward slavery at every opportunity,” *Dred Scott* might not have been the nationally explosive issue that it became. Unfortunately, a limited opinion was not to be, as justices McLean and Curtis had other designs in their respective dissents.

Upon learning that Curtis and McLean intended to address the Missouri Compromise question in their opinions, Chief Justice Taney took the majority opinion on himself, and fulfilled the wishes of the Justices who “wished to strike a blow against the North.” In it, he issued his infamous decree that blacks were outside the scope and protection of the Constitution, saying, “It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else.” The U.S. Constitution was for white people only, and the power it guaranteed was the exclusive domain of white males. Making a historical argument for why blacks did not merit inclusion as citizens, Taney claimed that for more than a century, blacks had been so inferior that they “had no rights which the white man was bound to respect.” Taney’s final argument for the exclusion of blacks from the rights of citizens rings even more hollow. He said:

93. Ibid., 390.
96. Ibid., 407.
But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and, flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Essentially, he seems to be arguing that because it would be inconceivable to him for the framers of the Constitution to be hypocrites, African-Americans could not have been included in the meaning of the Declaration of Independence’s fine language. After proving to his own satisfaction (as his opinion is thoroughly dismantled in Don Fehrebacher’s *The Dred Scott Case*), Taney should have stopped, having proven Scott had no right to sue in federal court as he could not have been a citizen. Instead, he moved on to addressing the question of slavery in the territories, proving his hardened commitment to strengthening the cause of slavery as much as possible. While Taney had always believed in and supported the institution of slavery, this newfound dedication to it shows how much the sectional crises of the mid-1800s had hardened his views on the issue—it clearly did not concern him that none of the slaves he freed in his private life would gain citizenship from their freedom.

On the issue of slavery in the territories, Taney attempted to prove that the territory clause, granting Congress the capacity to legislate as necessary in the territories, only applied to land held by the United States in 1789. Such a narrow interpretation of the Constitution might be believable from Justice Daniel, but from Taney it seems to be a deliberate disposal of his own judicial opinions to support the cause of slavery. After spending nearly twenty pages attempting to establish the invalidity of the Missouri Compromise, Taney simply states the Southern interpretation of the Constitution: “the right of property in a slave is distinctly and expressly affirmed in the Constitution.”\(^97\) It is a bold assertion, especially given that at no point is the word slave even used in the Constitution. After dismissing the Missouri Compromise question, he finally treats the potential for Scott having gained his

\(^{97}\) Ibid., 451.
freedom in Illinois as a mere afterthought, citing his own opinion in *Strader v. Graham* and saying “as Scott was a slave when he was taken into the State of Illinois by his owner, and was held there as such, and brought back in that character, his status, as free or slave, depended on the laws of Missouri, not Illinois.”

Even disregarding the flawed reasoning employed by the normally brilliant Taney, the majority opinion he wrote provides a grim picture of the Supreme Court. Despite all his personal opposition to slavery, and his earlier efforts to free and help slaves, Taney had hardened by this point into a passionate proslavery jurist, twisting the Constitution to suit the needs of the South. Carl Swisher offers a different interpretation of Taney’s opinion, citing a quote from Taney in which he says “every intelligent person whose life has been passed in a slaveholding state and who has carefully observed the character and capacity of the African race, will see that a sudden and general emancipation would be absolute ruin to the negroes, as well as to the white population.” Even if granted the dubious belief that Taney was attempting to help African-Americans by denying them citizenship and ensuring they could remain slaves anywhere, Swisher’s interpretation still does not protect Taney from the accusation that he set aside traditional Constitutional interpretation in an attempt to put his own beliefs into this opinion. Only Justice Wayne was willing to concur fully with Taney’s opinion, with Nelson, Daniel, Campbell, and Catron each writing separate concurrences.

Nelson, despite the changes in everyone else’s opinions, chose to simply publish the opinion he had written when the Court still intended to make a maximally limited decision on *Dred Scott*. He asserted the importance of the comity clause, and “avoided the two big issues of Negro citizenship and the constitutionality of the Missouri Compromise restriction.” Grier followed Nelson, merely agreeing with Nelson’s opinion and supporting Taney’s opinion with respect to the Missouri Compromise. After the first three justices’ opinions, Justice Catron took a very different tact, in that he disagreed wholeheartedly with Taney’s decision to move past the issue of citizenship and into discussion of the Missouri Compromise. Despite that disagreement, the Missouri

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98. Ibid., 452.
Compromise was the primary focus of his concurrence. Catron took an interesting perspective, arguing that the Missouri Compromise represented a defiance of treaties entered into by the government. He said:

If power existed to draw a line at thirty-six degrees thirty minutes north, so Congress had equal power to draw the line on the thirtieth degree – that is, due west from the city of New Orleans – and to declare that north of that line slavery should never exist. Suppose this had been done before 1812, when Louisiana came into the Union, and the question of infraction of the treaty had then been presented on the present assumption of power to prohibit slavery, who doubts what the decision of this court would have been on such an act of Congress; yet, the difference between the supposed line, and that on thirty-six degrees thirty minutes north, is only in the degree of grossness presented by the lower line.102

In his mind, then, to give Congress the capacity to legislate on whether slavery was permissible in the territories would be a gross violation of the power of treaties. It is an interesting argument, one that fits neatly within Catron’s moderate views, and it has the merit of not altogether dismissing the territory clause of the Constitution. His view looks especially moderate in the face of Peter Daniel’s passionate agrarianism.

Justice Daniel’s opinion was equally true to his nature. In it, he first attempted to offer further support to Chief Justice Taney’s claim that blacks had no right to citizenship, saying, “It is difficult to conceive by what magic the mere surcease or renunciation of an interest in a subject of property, by an individual possessing that interest, can alter the essential character of that property with respect to persons or communities unconnected with such renunciation.”103 Essentially, he is arguing that once someone is a slave, he or she is always a slave, as there is no power which can alter the essential character of a slave. The statement, while seemingly outrageous in the face of universal acceptance of manumission and emancipation, does fit Daniel’s racism, showing that in this case his heart and his Constitutional views go hand

102. 60 U.S. 525.
103. Ibid., 477.
in hand. To oppose the Missouri Compromise, Daniel turned to the doctrine of common property, “declaring that Congress as mere agent or trustee could not discriminate against part of the American people in its administration of the territories.” His narrow view of the powers and purpose of the federal government inclined Daniel naturally to limit its place in the slavery question, so in this case he was able to hold true to his judicial views while still supporting his beliefs. Justice Campbell, in the last concurrence, did not do quite as well.

Remember, if you will, the letter from Campbell to Calhoun in which he asserted that Congress had the power to organize a territory as it willed, including property rights within said territory. Now, in Dred Scott, he asserted the opposite point. While Robert Saunders, Jr. asserts that his opinion changed naturally over the course of the sectional conflicts faced by the Court, it seems unlikely that a clear constitutional interpretation could have changed except in terms of Campbell’s willingness to put aside the Constitution in favor of his support for slavery. A slightly kinder view of his narrow interpretation of the territories clause and his assertions that slaveholders have the same rights as holders of other forms of property could argue that he simply succumbed to the pressures of being an Alabama justice on the Supreme Court as it rendered a decision on the issue closest to the hearts of many people in the South. It is impossible to know his reasoning, as he did not leave any records behind to indicate it, but Campbell’s decision seems to be a direct movement against his earlier beliefs in favor of his status as a Southern man who defended slavery, showing where his priorities lay in 1857. Despite Campbell’s willingness to sacrifice his opinions and the 7-2 ruling in favor of Sanford, there was little unity in the majority. The two dissenters, on the other hand, presented a fairly united front.

Curtis and McLean’s dissents “displayed a fundamental agreement on the major issues that contrasted sharply with the heterogeneity of the majority’s reasoning.” Both men argued from the belief that Scott’s stay in Illinois had been long enough for him to become a permanent resident, and both turned to historical precedent to establish black rights to citizenship. Curtis’s argument is stronger, directly opposing Taney’s assertion that black men had never merited respect in the United States by providing evidence of five states in which there were free black

104. Fehrenbacher, The Dred Scott Case, 399.
105. Ibid., 414.
citizens before the Constitution was signed. In doing so, he effectively defeated part of Taney’s argument. Finally, both men agreed on a broad, Republican interpretation of the territory clause which would have allowed Congress to legislate on the issue of slavery. Despite their common agreements, Curtis’s opinion is generally accepted as the stronger of the two, and there are questions regarding McLean’s true purpose in writing the opinion.

There is some consensus among historians that McLean’s opinion was colored greatly by his presidential ambitions. He had allied himself with the Republican Party, and needed to prove beyond all doubt that he shared their abolitionist values. Because of this, McLean’s dissent is not as respected as that of Justice Curtis, but it does still show how he was able to stay true to his judicial values in the opinion. By taking the position that Congress could bar slavery from the territories, McLean held true to his judicial nationalism while still confirming the higher priority in which he placed his presidential aspirations over his judicial responsibilities. At other parts, however, he put aside judicial impartiality to make partisan appeals to the Republican voter base he attempted to woo, like when he asserted that “a slave is not mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man.” Such sectionalism only served to worsen the divides on the Court. Nothing was more divisive, however, than Chief Justice Taney’s reaction to Curtis’s opinion in the case.

After hearing Curtis’s opinion read, Taney resolved to strengthen his own before publication specifically to defend against the criticisms levied by Curtis. In the course of doing so, he and Curtis began to argue, and the argument grew so fierce that Curtis was eventually forced from the Court. Beyond personal disagreement, however, Curtis’s opinion itself became a point of sectional contention. In the eyes of Earl Maltz:

The language chosen by Curtis was nothing more or less than an open invitation for those who disagreed with Dred Scott to defy the authority of the Court itself. The fact that such a call issued from the pen of a man such as Benjamin Robbins Curtis speaks volumes about the deterioration of sectional relations in the 1850s and the impact that deterioration had on the functioning

106. 60 U.S. 550.
of all national institutions.  

If Benjamin Curtis, moderate as he was, could render an opinion so sectionally charged that it roused the animosity of the entire Southern contingent on the Court, then the environment had clearly become so openly sectional that the justices’ differences could not be resolved.

XXIII

*Dred Scott* quickly defined the legacy of the Supreme Court under Taney, tarnishing the legacies of many of the justices who served during those twenty-eight years. During the Taney period of the Court, justices great and mad served, each bringing his own perspective to the legal issues the Court faced every day it was in session. Some, like Joseph Story, never allowed their personal convictions to overcome judicial reasoning. Others, unfortunately, were not so strong, and even the venerable Chief Justice Roger Taney eventually placed his support of slavery before both his private opposition to it and an impartial reading of the Constitution. By the time the Civil War broke out, the conflict was reflected in the hallowed halls of the Court, with North turning against South on the bench and the collegial judicial environment of the Marshall era quickly fading into a distant memory.

While many of its most prominent cases were wiped from significance by the post-Civil War amendments, the legacy of the Taney Court maintains its significance as a case study on the humanity of the Justices who serve on our Supreme Court. Ideally, it would be the home of impartial, wise arbiters of the law, immune to the influences of the politics around it and devoted wholly to the Constitution. Unfortunately, that will never be the case. The men and women who serve on the Supreme Court bring with them not only differing interpretations of the Constitution, but also different political agendas and beliefs regarding the appropriateness of exercising those agendas from the bench. From the madness of Justice Baldwin to the brilliance of Justice Story, the men of the Taney Court displayed some of the best and worst of what the Supreme Court can offer, but no matter how great, every man among them made clear the profound humanity of the high priests America relies on to interpret the Constitution that guides our country.

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The wording of the First Amendment, “Congress shall make no law...abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble,” has come to represent America’s undying commitment to liberty from tyranny. However, for the justices of the Supreme Court, the wording has become increasingly troubling for those who are trying to tie down the exact meaning. The ambiguity of the words has led to the creation of a number of interpretations and positions on the proper role of free speech in a constitutional democracy. Both Hugo Black and Robert Jackson held the freedom of speech to be tantamount to the maintenance of a constitutional democracy; however, they understood the phrase, “freedom of speech,” to mean two different things and came to different conclusions on what constituted an “abridgement” of this freedom. This difference between the stances of the two justices on the freedom of speech stemmed from the way in which they conceived of liberty and the government’s role in protecting it. Placed in the general context of liberty, the debate in which the justices were participating was and continues to be fundamental to understanding the type of liberties protected by the Constitution.

The ambiguity of the words themselves played an important role in helping to create the wide variety of stances that exist on the right to free speech, and history bears this out. There can be no doubt that the phrase, “Congress shall make no law,” is quite clear and absolute, but what exactly does it do absolutely? What did the framers mean by “abridging,” and would they not have used the word “restricting” if that is what they intended? Furthermore, what did the “freedom of speech
and press” entail? Does this freedom protect everything that can be construed as speech, as some absolutists would contend, or is it limited to protecting speech that does not infringe upon the rights of others? Could one go so far as to say that the framers only meant to protect against prior restraint when constructing the First Amendment? There may not exist definitive answers to these questions, for the reason that the text of the Constitution is far from being absolute, though Black would argue otherwise. There are no definitive absolutes on which speech is protected and which is not, nor are there absolutes on when certain kinds of speech are protected and when they are not. Due to the lack of absolutes, the discussion and history on the freedom of speech is extremely varied and checkered.

The time in which the two justices were participating in this debate over free speech was dominated by the Cold War, the fear of Communism, and the growth of extremists on both sides of the political spectrum. In this sense, the debate over free speech, a fundamental right in America, was extremely important. The title of Arthur Termiello’s speech, “Christ or Chaos—Christian Nationalism or World Communism?,” is quite representative of the rift and polarization of society that were occurring. This debate over what the First Amendment entails was transitioning into a debate over how to best protect democracy… and this debate is ongoing. The ways in which Black and Jackson approached the debate were the antithesis to each other. This divide was greater than the fact that Black held a more idealistic view and Jackson a more pragmatic one. The two justices constructed liberty in two fundamentally different ways.

In order to maintain the focus of the paper, it is necessary to establish the questions that will be addressed. Initially, the paper will deal with this set of questions: What were Black’s and Jackson’s respective positions on free speech, how did they come to hold these positions, did either justice shift his position, and, if so, what caused the shift? After this set has been answered, a broader question can then be addressed. What do their positions on free speech tell us about their understandings of the type of liberty created by the Constitution?

With respect to Black, his reading behind the history of the First Amendment led him to take an approach of absolute protection of free speech, which is clear in both his own writings and the secondary literature on him. It will also be argued that supplementing (and perhaps
influencing) his reading of the history behind the First Amendment protection of free speech was Black’s belief in the essential nature that free speech plays in a democracy. Regarding Black’s later years on the Court, it has been argued that his position on free speech shifted (or at least waivered). This shift has been attributed to the conservative tendencies of the aged and some have even suggested that he was becoming senile; however, the contrary will be argued in this paper. Black maintained internal consistency in his later years on the Court; however, analysis of some of his positions in his early years on the Court indicates that his famous opinions in the years directly preceding WWII represent a shift from his earlier positions.

In opposition to the absolutist approach Black eventually developed, Jackson approached constitutional questions over free speech in a pragmatic manner by balancing the governmental interests at stake. Jackson held that the First Amendment’s protection of free speech was one of many aims the government had an interest in attaining. His understanding of the role of the government that was created by the Constitution in protecting the liberties of the people led him to the conclusion that the right to free speech presupposed order within society. In this sense, it was the role of the government to regulate any speech that threatened order. His conclusion that the maintenance of order was required for any liberty, including free speech, to exist, led him to adopt his balancing approach. However, this balancing approach, at least to free speech, became far more evident after his participation in the Nuremburg trials.

In the following pages, there will be an attempt to draw out the stances of the justices on free speech and how their stances changed over time. This will be accomplished by first examining the opinions and speeches/interviews of both Black and Jackson from before WWII. After their initial positions have been established, there will be an investigation of the positions which they eventually held and how they came to hold these positions. In both sections, the existing literature and notes from the Library of Congress will be used to enhance understanding of their positions and the shifts, as well as to highlight the differences and similarities between the two. Finally, in drawing upon how each justice came to his position, there will be a discussion of the negative and positive approaches to liberty and the role of the government that is implied in each approach. This is probably the most significant aspect of the paper and it has been largely left untouched by
the secondary literature.

II. Hugo L. Black

Justice Hugo Black’s eloquence when defending the “no law means no law” position has made him a champion of the absolutist approach to free speech. With regard to the history of free speech, Black asserted that “our Founding Fathers…knew what history was behind them and they wanted to ordain in this country that Congress…should not tell the people…what they should believe or say or publish”.1 However, with the passing of the Sedition Act of 1798, only a decade after the ratification of the Constitution, a Congress made up of these Founding Fathers made it illegal to publish “false, scandalous, and malicious writings against the government of the United States.”2 History was not always on Black’s side, and neither was the precedent of clear and present danger. If the history which Black called upon for support was muddled at best, how then can his position be vindicated? For Black, just as important as the history behind the Bill of Rights, was the role of the First Amendment’s protection of speech in a constitutional democracy. He “regarded the First Amendment as the foundation of the American democratic process,” in that it was as “important to the life of our government as is the heart to the human body.”3

II. A) Black’s Initial Position

By 1962, Black admitted that “it is my belief that there are ‘absolutes’ in our Bill of Rights, and that they were put there on purpose by men who knew what words meant and meant their prohibitions to be ‘absolutes.”4

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Black was confident that “‘no law’ mean[t] no law.” However, in his early years on the Court, Black did not speak of absolutes with respect to the First Amendment, but rather was focused on the role order played in maintaining liberty. In the second flag salute case, *West Virginia State Board of Ed. v. Barnette* (1943), he set up the same sort of balancing approach he would later condemn. Black opined that

The First Amendment does not...free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner (HLB Library of Congress (LC) Box 270).

Though the primary concern in *Barnette* was freedom of religion rather than freedom of speech, freedom of religion is subject to the same “no law” language and is therefore relevant to Black’s interpretation of the protection afforded to both freedoms in the Constitution. The notion that “time, place or manner” could be subject to governmental regulation was a position that Black held throughout his time on the Court; however, the idea that “laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers” are valid restraints on First Amendment freedoms seems to run contrary to any notion of absolute protection.

Mark Silverstein tries to explain this anomaly in Black’s approach by qualifying it with the fact that, like Jackson, Black acknowledged that order was necessary in order to maintain freedom. In his copy of *The Greek Way* by Edith Hamilton, Black underlined, “liberty depends on self-restraint...freedom is only freedom when controlled and limited.”

The difference between Jackson and Black with respect to order and free speech is that Black “was not troubled by the divisive possibilities of free and unrestrained speech.” In Black’s view, the marketplace

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of ideas was the only way in which a democracy could sustain itself, as competition in the marketplace for the minds of the people made revolution as a means of social change redundant. For Black, both freedom and order demanded the inviolable right to free speech. The problem remains, though, that this was a balancing approach and, furthermore, that it was not an anomaly.

In *Martin v. Struthers* (1942), a Jehovah’s Witness challenged the constitutionality of a city ordinance that prohibited door-to-door distribution of literature. Originally, Black voted in a 5-4 majority to sustain the city ordinance. Black argued that in sustaining the ordinance, he was “weighing the conflicting interests of the appellant in the civil rights she claims and of the community in the protection of the interests of its citizens” (HLB LC Box 270). In this instance, the affront to the appellant right to free speech was discounted against the community’s right to not be bothered by solicitations. Black would later change his vote, however, and write for a new majority that, in striking down the ordinance, he was now “weighing the conflicting interests of the appellant in the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message, against the interests of the community which by this ordinance offers to protect the interests of all its citizens” (HLB LC Box 270). The shift is subtle, but Black was beginning to recognize the right of the population to hear the speech of others. Though this still represented a balancing approach, Black had added a great deal of weight to the side which called for a protection of free speech rights over any interests the government might have. In short, he was giving the right to free speech a preferred position.

In *Cox v. New Hampshire* (1941), Black voted with court to limit free speech to reasonable constrictions. The Court’s opinion written by Chief Justice Hughes states that, “civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses” (HLB LC Box 262). This ruling was upholding a law which prohibited parading without a permit, which had been used to convict Jehovah’s Witnesses. In his opinion, Hughes had highlighted the reasonableness of the law.8 Black, in his turn, was concerned enough

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by the use of the word “reasonable” to draft a concurrence, though he
did not publish it.

Fully realizing the difficulties involved in enforcing
observance of these constitutional privileges in instances where
they apparently clash with exertions of an admitted state power,
I am still not persuaded that invocation of the word ‘reasonable’
offers a solution to the problem these difficulties present.
Standards of reasonableness vary according to individual views.
The broad and I might say limitless range within the area of
differing concepts of the word ‘reasonable’ cause me to fear
its use in relation to the cherished privileges intended to be
 guaranteed by the First Amendment...It is therefore sufficient
to test the constitutionality of this statute by comparing it with
the literal language of the First Amendment (HLB LC Box 262).

Silverstein points out that the need “to purge from the judicial process
the vice of subjectivity caused Black, as early as the decision in Cox, to
look to the literal language of the First Amendment.” Though Black
is not yet proposing an absolutist approach or even a preferred position
philosophy on the First Amendment, he is emphasizing his reliance
upon the literal text of the Constitution.

It is in Bridges v. California (1941) that one can see Black begin to
hold a preferred position philosophy with respect to the First Amendment
 protection of free speech. Black’s majority opinion stated that,

What finally emerges from the “clear and present danger” cases
is a working principle that the substantive evil must be extremely
serious, and the degree of imminence extremely high, before utterances
can be punished. Those cases do not purport to mark the furthermost
constitutional boundaries of protected expression, nor do we here. They
do no more than recognize a minimum compulsion of the Bill of Rights.
For the First Amendment does not speak equivocally. It prohibits any
law “abridging the freedom of speech, or of the press.” It must be taken
as a command of the broadest scope that explicit language, read in the
context of a liberty-loving society, will allow (HLB LC Box 266).

Bridges was a significant opinion for Black, but it must be placed

within the context in which he drafted it. Before a court shuffle placed him in the majority, he wrote a dissent that set out the framework of his preferred position principle. In response to Frankfurter’s circulating majority opinion, Black scribbled the question, “Must we in considering the comparative qualities and importance of right to exercise liberties guaranteed by the first amendment place courts and first amendment on parity?” (HLB LC Box 258). He followed this question with an emphatic answer: “I say no, Amendment ranks higher.”

In his Bridges majority opinion, one can see the influence of his preferred position philosophy. He is still using the clear and present danger principle, which at heart is a balancing approach, but he is adding the preferred position of the First Amendment into the balance. Before the speech can be regulated, “the substantive evil must be extremely serious, and the degree of imminence extremely high.” He has effectively set the scales of the balance where the interest in protecting free speech would nearly always outweigh any other interest, due to the fact that to an individual’s interest in having free speech had been added society’s interest in a free discussion.

II. B) BLACK’S SHIFT TO ABSOLUTISM

Black’s jurisprudential approach to free speech expressed in his Bridges opinion was the position he held throughout the 1940s. The clear and present danger standard coupled with the preferred position philosophy allowed for the near-absolute protection of speech while permitting a limited amount of judicial flexibility. At that point in time, Black willingly admitted that “it may be true that there are no such things as absolute liberties” (HLB LC Box 258). However, once the Court dropped his formulation of the clear and present danger test, Black had a problem. In American Communications Association v. Douds (1950), the majority argued that, in adding the First Amendment “they [the Founders] sought to convey the philosophy that, under the First Amendment, the public has a right to every man’s views and every man the right to speak them” (HLB LC Box 303). However, they quickly added that, “Government may cut him off only when his views are no longer merely views but threaten, clearly and imminently, to ripen into conduct against which the public has a right to protect itself” (HLB LC Box 303). It is in this sense that

the probable effects of the statute upon the free exercise of the right of speech and assembly must be weighed against the
congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by 9 (h) pose continuing threats to that public interest when in positions of union leadership”

Black’s dissent in *Douds* was scathing. With respect to the ruling of the majority opinion, Black asserted that “such a result, while too barbaric to be tolerated in our nation, is not illogical if a government can tamper in the realm of thought and penalize ‘belief’ on the ground that it might lead to illegal conduct. Individual freedom and governmental thought-probing cannot live together” (HLB LC Box 303). The way in which Black constructed the issue in *Douds* suggests that Black was moving toward an absolute protection of speech. The majority of the Court assumed that a belief in communism, a political ideology that supports political strikes, necessarily led to the “evils of conduct” that Congress had a right to prevent. This, essentially, is prior restraint and a form of a test oath, which Black pointed out. Furthermore, the Court ruled that Congress’ right to prevent political strikes outweighed individual’s right to speech. Not only was the Court engaging in prior restraint, it has judged the evil associated with political strikes to be greater than the evil associated with infringing upon the right to free speech.

The Court continued to move away from Black in *Breard v. City of Alexandria* (1951). Whereas in *Martin v. Struthers* the Court had ruled that the right to engage in door-to-door solicitation trumped the right of a community to prohibit solicitations, the Court in *Breard* upheld a law that prohibited solicitations. Black’s dissent here was more of an attack than a disagreement.

Today a new majority adopts the position of the former dissenters and sustains a city ordinance forbidding door-to-door solicitation of subscriptions to the Saturday Evening Post, Newsweek and other magazines. Since this decision cannot be reconciled with the Jones, Murdock and *Martin v. Struthers* cases, it seems to me that good judicial practice calls for their forthright overruling. But whether this is done or not, it should be plain that my disagreement with the majority of the Court as now constituted stems basically from a different concept of the reach of the constitutional liberty of the press rather than from any difference of opinion as to what former cases have held.
Today’s decision marks a revitalization of the judicial views which prevailed before this Court embraced the philosophy that the First Amendment gives a preferred status to the liberties it protects. I adhere to that preferred position philosophy. *It is my belief that the freedom of the people of this Nation cannot survive even a little governmental hobbling of religious or political ideas*, whether they be communicated orally or through the press."

In this dissent, Black was fully aware that the Court was moving away from the precedent he had worked to establish. And this fact, by the end of his dissent had pushed him to the point of adopting an absolute position, though he still professed to simply hold a preferred position philosophy.

In *Dennis v. United States* (1951), Black came to the conclusion that the way in which the Court was using clear and present danger was a far cry from the majority opinion he wrote in *Bridges*. Black argued that

The only way to affirm these convictions is to repudiate directly or indirectly the established “clear and present danger” rule. This the Court does in a way which greatly restricts the protections afforded by the First Amendment. The opinions for affirmance indicate that the chief reason for jettisoning the rule is the expressed fear that advocacy of Communist doctrine endangers the safety of the Republic. Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. They embodied this philosophy in the First Amendment’s command that “Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .” I have always believed that the First Amendment is the keystone of our Government, that the freedoms it guarantees provide the best insurance against destruction of all freedom. At least as to speech in the realm of public matters, I believe that the “clear and present danger” test does not “mark the furthermost constitutional boundaries of protected expression” but does “no more than recognize a minimum compulsion of the Bill of Rights.

Public opinion being what it now is, few will protest the
conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.

Black was still arguing in the terms of his *Bridges* opinion, which he believed was controlling. In fact, “Black at conference voted to reverse on the simple grounds that clear and present danger was not satisfied.”\(^{10}\) However, there is a realization that, if this was the protection that would now be afforded by clear and present danger, than a new test would need to be fashioned. With the shift in the clear and present danger test, Black could no longer accept the result of the judicial balancing; therefore, he moved to take it out of the hands of judges. A year later in *Beauharnais v. Illinois*, Black asserted that “the First Amendment, with the Fourteenth, ‘absolutely’ forbids such laws [restricting free speech] without any ‘ifs’ or ‘buts’ or ‘whereases.’” Gone were the days when Black would conduct balances to calculate if government regulation of speech was appropriate, for the reason that a balancing of interests no longer accurately reflected the proper weighing of constitutional rights.

II. C) **Black’s Absolutism in Full Flow**

In *Konigsberg v. State Bar* (1961), Black attacked the Court’s use of a balancing test. He declared that the position the Court had taken “permits constitutionally protected rights to be ‘balanced’ away whenever a majority of this Court thinks that a State might have interest sufficient to justify abridgment of those freedoms.” Black further explained that:

> I believe that the First Amendment’s unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the ‘balancing’ that was to be done in this field. The history of the First Amendment is too well known to require repeating here except to say that it certainly cannot be denied that the very object of adopting the First Amendment, as well as the other provisions of the Bill of Rights, was to put the freedoms protected there completely out of the area of any congressional

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control that may be attempted through the exercise of precisely those powers that are now being used to ‘balance’ the Bill of Rights out of existence.

Following this line of argument, the Court was powerless to consider the interests at stake in any case involving the rights enumerated in the Bill of Rights. The act of balancing all the interests had already been done by the Founders and the language in the Constitution was clear; the rights included in the Bill of Rights are “completely out of the area of any congressional control.” By this time, Black had realized that the Court had usurped the clear and present danger test as a means to restrict free speech rather than expand it as he felt Holmes and Brandeis had intended.

In *New York Times Co. v. United States* (1971), while advancing his absolutist stance, Black nearly went full circle back to his two opinions in *Bridges*. In *New York Times*, Black asserted that:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

The language he used in his original dissenting opinion in *Bridges* and parts of his majority opinion is identical to his language in *New York Times*. The difference being that instead of the clear and present danger test coupled with the preferred position philosophy being used to protect the vital freedom of speech, Black used an absolutist approach, which he felt compelled to take in response to willingness of the Court to balance away, in the name of security, the very rights that ensured the security of the Republic.

**II. D) Black’s Final Shift?**

It has been argued that Black abandoned not only his absolutist approach in some cases near the end of his time on the Court but also his view that the First Amendment held a preferred position in any balance between interests. In *Brown v. Louisiana* (1965) in particular,
it has been argued that Black betrayed his own cause. However, one can see the roots of his position in *Brown*, where he voted to uphold the convictions of a group of black students who failed to leave a public library when asked to do so, in his opinion in *Barenblatt v. United States* (1959). In *Barenblatt*, Black acknowledged that laws that regulated conduct in a way which indirectly affect speech could be upheld “if the effect on speech is minor in relation to the need for control of the conduct.” Conduct such as sit-ins and picketing were not protected by the Constitution and could therefore be regulated just as the time, place, and manner could be regulated, as well.

### III. Robert Jackson

Black not only believed that the purpose of the First Amendment “was to withdraw from the Government all power to act” in the area of speech, but he stated that “I do not think Congress *should* make any law with respect” to speech. For Black, any sort of balancing act between the freedom of speech and some other government interest reduced the absolute protection of speech to a suggestion; however, Robert Jackson did not accept Black’s adoption of a negative construction of liberty. Whereas Black believed the Constitution withdrew power from the government in order to protect the people’s liberty, Jackson believed this liberty could not exist without order. Jackson espoused a positive construction of liberty, in that it was not the case that natural rights existed inherently and simply needed to be safeguarded from government encroachment, but rather it was the role of the government to guarantee these liberties. Liberty, for Jackson, could only exist under law; the alternative, lawlessness, stripped the people of their freedoms.

Jackson’s stance destroyed any assumptions of the “firstness” of the First Amendment. Jackson’s positivist construction of the liberties *guaranteed* by the Bill of Rights called for a pragmatic balancing of societal interests in cases involving the freedom of speech. It is here where it is important to note the shift that occurred in Jackson’s opinions from before the Nuremburg Trials to after them. Before the trials, in civil

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liberties cases, Jackson would often use the high-principled language he would later condemn as impractical. For Jackson, something had deeply changed him, and caused him to move away from expanding liberties, in cases such as *Bridges, Barnette*, and *Thomas v. Collins* (1945) and instead stimulated him an intense examination of the role of order in a free society and, importantly, the role of the judiciary within the government of maintaining this order.

### III. A) Jackson’s Initial Position

It was difficult to read the cases included in this section without a sense of impending doom for what waited around the corner; however, once one can get past one’s own value judgments, Jackson’s opinions both before and after his experience in Nuremberg are intellectually stirring and deserve to be analyzed in the context in which he wrote them. It is important to note that, like Black, Jackson consistently held a primary goal of expanding liberty as far as possible. It is also important that, like Black, Jackson changed his judicial approach in order to attain his intended result, i.e. ensuring liberty. It is altogether fascinating that two justices, who aimed to achieve the same goal, came to completely opposite conclusions. And, if for nothing else, this needs to be explored.

In the *Bridges* case, it has been pointed out that Black was originally in the minority but that after a court shuffle, he emerged in the majority. A part of this shuffle involved Robert Jackson joining the Court. One of his first acts on the Court was to join Black’s opinion that “the First Amendment does not speak equivocally. It prohibits any law ‘abridging the freedom of speech, or of the press.’ It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.” His joining of this opinion may have simply been a result of him judging the case on the merits and joining the opinion that seemed to support the correct outcome. However, the case was reheard after he had joined and, significantly, the draft opinions had already been circulated. He had the chance to read Frankfurter’s and Black’s original opinions and then work with one of them to form an opinion that he could join. In joining Black’s opinion, he was essentially endorsing a preferred position reading of the First Amendment and moving to protect free speech as broadly as society would allow. Of course, this opinion created a great deal of flexibility for the Court, in that, though it did commit them to a preferred position stance, it allowed for them to determine just how far a “liberty-loving society” should go.
Though his vote in *Bridges* is revealing, many read Jackson’s opinion in *Barnette*, the second flag-salute case, as a great triumph for liberty in America. The language Jackson assumed in his opinion was as noteworthy for its principled nature. If one visits any website created in honor of Jackson, it is this opinion one will find plastered on every page. In short, it is highly quotable and seems to even have had the purpose of espousing patriotic pride in all those who read it. Though an examination of this opinion could serve as the basis for its own paper, it is only necessary to highlight a few aspects of it. For instance, Jackson argued that:

> To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

And then, quite prophetically, he concluded that, “If there are any circumstances which permit an exception [to the absolute protection of First Amendment rights], they do not now occur to us.” Jackson would come to encounter this exception in Nuremberg.

Before he learned of this exception that would sway the balance in favor of censorship, he wrote in *Thomas v. Collins*.

> The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind. The forefathers did not trust any government to separate the true from the false for us. This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society. As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy.
It is probably this Thomas opinion that is most difficult to reconcile with his later opinions in cases such as Terminiello and Dennis, for the reason that he did not give himself an escape clause as he did in Barnette. If this excerpt had been put in the section on Black, it would not have appeared to be out of place.

III. B) Jackson’s Experience at Nuremberg

Jackson believed that the political extremes of fascism and communism had “embroiled Europe generation after generation, crushing its manhood, destroying its homes, and impoverishing its life.”13 Jackson believed that “any tenderness to them is a victory and an encouragement to all the evils which are attached to their names.”14 Jackson came to the conclusion that, “Civilization can afford no compromise with the social forces which would gain renewed strength if we deal ambiguously or indecisively with the men in whom those forces now precariously survive.”15

Though Jackson was making direct reference to the Nazis awaiting trial for war crimes, he was speaking in much broader terms...he spoke of “civilization” and “social forces.” Considering the broad scope that he had adopted, his caution that “any tenderness to them is a victory and an encouragement to all the evils which they represent” is a bit startling. It is one thing to assume that he was speaking of tenderness in the trials that were about to take place, but it seems as though he was speaking about the broad “social forces” of communism and fascism. And, if that was the case, what did he mean by “tenderness”? Had freedom of speech become “tenderness” that civilization could ill afford to distribute to communists and fascists?

III. C) The Shift in Jackson’s Approach to the First Amendment as a Result of his Experience in Nuremberg

If one looks outside the opinions of Jackson to get at the effect of Nuremberg on his thinking, one can examine the various speeches he gave after the trials. In these speeches, there are an incredible amount of references to the “rule of law.” For Jackson, the law was the force that would stabilize society. His mindset could be compressed to the thought

13. Jackson, speech at Nurember
14. Jackson, speech at Nurember
15. Jackson, speech at Nurember
that society must be able to rely upon the law to save it from the wills of those who sought authoritarian power. Communists and fascists had become the exception. They did not contribute to the advancement of civilization, they did not contribute to the distribution of ideas (in Jackson’s mind), and protecting their liberty only endangered the liberty of society at large.

Patrick Schmidt, in his essay “‘The Dilemma to a Free People’”: Justice Robert Jackson, Walter Bagehot, and the Creation of a Conservative Jurisprudence,” analyzes the effect of the outside forces of the Nuremberg experience and the writings of Walter Bagehot on Jackson’s jurisprudence evidenced in his dissent in Terminiello. Schmidt seeks to show how Jackson reconciled his experience in Nuremberg with his pragmatic jurisprudential approach. From Nuremberg, Jackson learned how devoted extremists group were to their cause and “how well-organized extremist groups can manipulate politics and public opinion to secure power.”

Furthermore, Jackson came to the conclusion that “nations must fight to maintain the conditions essential for freedom,” rather than passively tolerate those who seek its demise (Schmidt 524). The situation in Terminiello, in Jackson’s view, “was a local manifestation of a world-wide and standing conflict between two organized groups of revolutionary fanatics, each of which has imported to this country the strong-arm technique developed in the struggle by which their kind has devastated Europe” (RHJ LC Box 155). Jackson had seen this struggle, he had seen its effects, and he knew they could bring it to America…IT COULD HAPPEN HERE! And if it did, the title of Terminiello’s speech would become a reality: Christian Nationalism or World Communism—Which? In contrast to his assertion he made in Barnette that our free institutions appealed to the minds of the American public, Jackson now “stressed the evolution of a democratic state and the forces that could transform it from an open, tolerant, community of exchange into an intolerant, savage, narrowly focused society.”

Jackson began to see the same position he had previously subscribed to as “a dogma of absolute freedom for irresponsible” people to advocate

the demise of the government (RHJ LC Box 155). Jackson’s dissents in *Terminiello* and *Dennis* sound similar to the more recent dissents by Antonin Scalia. One can almost hear Jackson shouting, “Don’t listen to the other justices who believe they are advancing freedom! They think they are advancing liberty, when all they are doing is ensuring its demise!” Jackson, in fact, argued that the “invocation of constitutional liberties as part of the strategy for overthrowing them presents a dilemma to a free people which may not be soluble by constitutional logic alone” (RHJ LC Box 155). In order to achieve the result that best advanced liberty, Black had turned to the express language of the Constitution, while Jackson had been forced to admit that the Constitution was not sufficient to meet threat that communism and fascism posed.

In Jackson’s defense, his belief that the Constitution alone could not solve the present problem did not mean he abandoned his pragmatic, balancing approach to constitutional questions that involve competing interests. He had simply found the exception that tipped the scales in the balance in favor of censorship. In Europe, he had learned that “the crowd mind is never tolerant of any idea which does not conform to its herd opinion. It does not want a tolerant effort at meeting of minds.” In Schmidt’s conclusion that, “given the reality of intolerance and the threat this posed to democracy, Jackson was prepared to allow government power to create and maintain the conditions of future progress.” It is in this sense that Jackson created his pragmatic approach to the problem of extremism that did not rely solely on constitutional logic; the only way to ensure tolerance of ideas is to be intolerant of ideas that are intolerant of alternative ideas. Intolerant extremists did not allow for alternative ideas...there was no chance for a response in this sort of environment. It was no longer a free exchange of ideas, and, worst of all, totalitarianism is very persuasive. From Jackson’s perspective, society could not allow this speech to be uttered with the hope that it would be corrected by more speech, for the reason that totalitarian speech would win the day and then prohibit any corrective speech.


IV. Government’s Role in Guaranteeing the Liberty of Free Speech

There are many instances where a justice will be accused of being inconsistent on certain principles, such as Black abandoning absolute protection of speech or Jackson trying to stifle the liberty he once supported; however, these accusations usually stem from an incomplete understanding of the principles from which the justices are working. It was not Black’s goal to absolutely protect forms of speech he did not believe were protected by the Constitution and he did believe were vital to a democracy, nor was it ever Jackson’s goal to espouse a form of liberty that was left unchecked by order or escape his pragmatic approach to society’s issues. The shared goal of both justices, to maximize liberty, was the overarching principle for both justices; however, they adopted two contrasting ways of thinking of liberty in order to attain this goal. While both men believed in what they saw as the importance of liberty, their understanding of what liberty entails is very different. Black, in his belief that the balancing of interests had already been done by the Founders, adopted a stance that precluded any government participation in the regulation of ideas; his approach implied a negative construction of the liberty of free speech. Jackson, on the other hand, believed that the government played a vital role in ensuring liberty. Any liberty, including free speech, depended upon the maintenance of order within society, and it was the role of the government to positively protect order. The kind of order that ensured liberty, in Jackson’s mind, could only be attained by government regulation when met with the threat of extremism and intolerance.

Black would not argue with the fact that liberty presupposed order, in fact he noted in his copy of Hamilton’s The Greek Way. This order, however, was created by the Constitution, and the Constitution proscribed any sort of government interference in the realm of speech and ideas. Alexander Meiklejohn best puts into context Black’s view of the liberties ensured by the Constitution. He stated that the “Constitution…recognizes and protects two different sets of freedoms. One of these is open to restriction by the government. The other is not open to such restriction.”20 The Bill of Rights was meant to withdraw

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from any governmental power to regulate speech.21 The government was “unqualifiedly forbidden to restrict that freedom.”22 There are other rights, though, that the government can regulate and infringe upon, such as the right to property. Meiklejohn states that, though these two different kinds of liberty exist in the Constitution, “no such accurate use of words has been established” to differentiate between them.23 However, in Two Concepts of Liberty, Isaiah Berlin speaks of two separate constructions of liberty, which accurately portrays the difference between the right to free speech and the right to property. Negative liberty is “the area within which a man can act unobstructed by others.”24 Berlin then constructs positive liberty as the idea that evolves from the notion that negative liberty, left unfettered, limits or destroys the very liberty it claims to protect. Positive liberty, then, causes society to think of itself as a whole rather than a composite of individuals, for the reason that the freedom of the group is far more important than the freedom of the individual. It is in this sense that the government may “coerce others for their own sake,” for if the individual properly could conceive of itself as a part of the whole, then it would realize that it is in its interest to curtail some of its liberty for the advancement of a common goal.25 The common goal for Jackson would be the type of order that ensures liberty. Therefore, if some liberty must be abridged to sustain the order that protects all liberty, then it is rational and pragmatic to do so.

Inherent in Jackson’s willingness to curtail some speech is the assumption that some is dangerous to the liberty of the whole. This is where Jackson and Black diverge in their quest for maximized liberty. In Terminiello, Jackson argued that “if we maintain a general policy of free speaking, we must recognize that its inevitable consequence will be sporadic local outbreaks of violence, for it is the nature of men to be intolerant of attacks upon institutions, personalities and ideas for which they really care.” And as he witnessed in Europe, these outbreaks

of violence led to the polarization of society and the destruction of moderation. In a polarized society, the democratic process is destroyed... as well as the liberties protected by it. For Black, however, as long as the marketplace of ideas was maintained and unrestricted, speech could not be damaging. Black appealed to his reading of history for proof of this belief. James Madison declared the liberties protected in the First Amendment to be “beyond the reach of this government.” Thomas Jefferson, in words that could be directly applied to the problem of communists and fascists, declared that, “If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.” In Douds Black proudly echoed the Founders when he asserted that “the postulate of the First Amendment is that our free institutions can be maintained without proscribing or penalizing political belief, speech, press, assembly, or party affiliation.”

When one considers the statements of the two justices, it becomes evident that they have largely contrasting views of the people and their ability to maintain the democratic process. Jackson believed that the only way to sustain the democratic process was by protecting the moderate masses and proscribing the participation of the extremes. It was a rational and pragmatic response to what he had observed in Europe, the birthplace of the very ideas of liberty America now championed. Black also agreed that government must preserve itself; however, the method he adopted was the antithesis to Jackson’s. The government can be “preserved only by leaving people with the utmost freedom to think and to hop and to talk and to dream if they want to dream. I do not think this government must look to force, stifling the minds and aspirations of the people. Yes, I believe in self-preservation, but I would preserve it as the Founders said, by leaving people free.”

V. Conclusion

Both Black and Jackson shifted their stances on the First Amendment protection of speech. Black felt forced to adopt an absolutist stance on its protection due to his perception that the Court had abandoned the true interpretation of the clear and present danger test. Black, in effect, constructed free speech as a negative liberty. Jackson, though, influenced by his experience in Nuremberg considered the freedom of speech in a much wider context. Speech, with its purpose of the advancement of civilization, was only free when order was maintained, and order could only be sustained by the government’s regulation of speech that called for the destruction of the democratic process. Jackson constructed the right to free speech as a positive liberty that was meant to be created and preserved by the government in the interests of the moderate masses.
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EAST ASIAN POLITICS/GOVERNMENT
INTRODUCTION
China poses a puzzle for observers as it appears to be a strong, stable, and robust country outwardly, but contains internal problems which lead some people to predict that state’s imminent demise in all sorts of creative ways.¹ China, as the world’s second largest economy, one that is a large trading partner for the United States, is itself closely intertwined with other major American trading partners, and given China’s close proximity and historical animosity towards major allies of the United States, the security and stability of China has broad implications for American security and wellbeing.² Anyone who remains abreast of current events knows that over the past decade, worries about the rise of mainland China and its implications for American strategic interests and the global liberal democratic order have been in the forefronts of the minds of many. Such worries have been pervasive in American news media for quite some time. The flip side of the implications of growing mainland Chinese power is the worry that there are many internal divisions within the People’s Republic that have the potential to have broad implications.³

This paper will not pretend to be able to predict how mainland

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China’s power will develop over the next few decades or if the regime in Beijing will face a serious challenge for power, but I will analyze the trends since the Tiananmen Square incident in 1989 to determine whether the People’s Republic has become more stable, less stable, or is roughly equal to how it was around 1989. Possible answers range from a No, that the government of mainland China has not grown less stable, to Perhaps and that the evidence is ambiguous, to a Yes that the Beijing today is in a more precarious position now than it was in 1989. All the answers will consider the underlying instabilities in China and other domestic pressures that may force the hand of the Chinese government and worsen conditions for the country. For the purposes of this paper, I will be arguing the second option, in short arguing that China is more stable today, but that it still has issues that have the potential to pose a serious risk to stability if handled poorly and allowed to escalate.

The paper will first do a brief overview of the history of the issue, beginning from the Tiananmen Square incident and its origins. The climate of the time period, the broad outline of the event, the forces behind what happened, and a general understanding will be the aim of this section. The crisis began with the dismissal of pro-democracy Party official Hu Yaobang, who died while giving a speech in 1989. After his death, students organized to mourn his passing in Tiananmen Square. The mourning turned into pro-democracy protests. The Party lost control of their paper, martial law was declared, and up to several thousand people may have died when tanks tried to clear the area. The near brush with regime collapse has defined much of Chinese public policy since 1989.

Following this experience, the Chinese Communist Party set about trying to bring entrepreneurs and business owners into the Party’s fold, and they have been largely successful in making membership very

attractive, even so far as to make Party membership something that is considered by over fifty percent of college students. By aligning the interests of the business community and the future generation of intellectuals, China is diminishing two possible flashpoints of dissent and rebellion. China seeks to pacify minorities by granting them a disproportionate say in the Chinese government and subsidies. Even with the progress the Chinese government has made, there are many other areas for concern that bring into question the regime’s long term stability. The Chinese state is not capable of always providing public goods. The People’s Republic has a problem of rampant corruption that affects every facet of Chinese life. Chinese people are also increasingly less likely to cooperative with Communist Party authorities, and this type of defiance is problematic to authoritarian regimes. I reconcile these two trends in China and the Communist Party, and come to a conclusion similar to that of David Shambaugh’s, and I argue that both of these are true, that they are not mutually exclusive; that the CCP has been successful in ingratiating itself with more constituencies, but at the same time there is an underlying fragility that has the potential to threaten stability.

_**History**_

In the spring of 1989, as Mikhail Gorbachev’s stunning departure from enforcing communist supremacy led to the crumbling of Warsaw Pact regimes in Eastern Europe, many students in China gathered in Tiananmen Square to mourn the loss of Hu Yaobang, a beloved statesman who was the chairman of the Chinese Communist Party prior to Zhao

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Ziyang.\textsuperscript{15} Hu Yaobang had earned a reputation as a reformer and his passing inspired students to protest for democracy and demand an end to single party rule.\textsuperscript{16} Deng Xiaoping and other members of the Chinese Communist Party leadership advocated a strong position against the students and refused to acquiesce to the students’ demands, a departure from the position of Zhao, who was the leader of the Party at the time.\textsuperscript{17} The differences in the positions between Zhao and the rest of the top Party leadership meant that the protesters were “hearing mixed signals from the leaders,” and so the “students, joined now by urban residents, were emboldened to keep demonstrating.”\textsuperscript{18}

Remarkably, the “\textit{People’s Daily} journalists, for the first time ever, ignored the censors and reported what was actually happening,” and perhaps because the Communist Party felt now that the situation was escalating out of hand, the top leadership overruled the “Politburo Standing Committee,” which had “split on a motion to declare martial law,” and instituted martial law.\textsuperscript{19} Despite the show of force by the Chinese Communist Party, demonstrations did not cease, but instead “Beijing citizens from all walks of life blocked [the troop’s] progress by surrounding the military vehicles,” culminating eventually with the deaths of “hundreds, or possibly thousands, of students, supporters, and bystanders the night of June 4, 1989” by the People’s Liberation Army.\textsuperscript{20} Per Susan L. Shirk, the Tiananmen Square incident was a “life or death” event that had a serious threat of overthrowing Communist Party rule.\textsuperscript{21} Perhaps the best way to demonstrate how great of an impact the near collapse of Communist power had in the Chinese leadership, consider

the excerpt from Shirk’s book *China: Fragile Superpower*:

“The trauma of Tiananmen left China’s communist leaders hanging by a tenuous thread. Just months after the crackdown, the Berlin Wall was torn down, a popular uprising overthrew the Romanian communist dictator Nicolai Ceausescu, and communist regimes in Poland, Czechoslovakia, Hungary, and Bulgaria were toppled in rapid succession. The Soviet Union itself, the strongest communist power the world had ever seen, collapsed in 1991. Would China be next?”

Perhaps for this reason, China sees it appropriate to spend more on internal policing than it does on defense from foreign threats. Since Tiananmen, the Chinese Communist Party has embarked on certain policies to ensure that there is as little unrest in society as possible. According to Shirk, the first of these is to maintain a unified front on decision making, which necessarily means there will continue to be a degree of mystery when it comes to decision making by the Party. The second most important priority for the Party is to ensure that student, ethnic, labor, rural, and nationalist unrest do not go out of hand, to retain the support of the People’s Liberation Army, and use nationalism to strengthen their position at home.

**Maintaining Control: Reason for the Chinese Leadership to be Upbeat**

When considering how successfully Beijing has been able to align the interest of various interest groups with that of the Party, one would have a positive attitude towards the CCP’s ability to maintain one party rule. The Chinese Communist Party today has also been able to gain a significant level of control over the state primarily by ensuring

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robust growth. The strategy of the Party for maintaining control is by ensuring growth and the ensuing prosperity to bolster their standing amongst the people. The means by which the Chinese Communist Party has been able to sidestep the democratization which is predicted by modernization theory is by using state capitalism to grant access to markets and thus secure the support of the business class and thwart the demand for democracy. This strategy has thus far worked. The problem, however, is that this system is perfect for corruption to occur, which itself is detrimental to growth. Because the Chinese Communist Party needs growth to maintain one party rule, this produces a unique quagmire. China needs growth to maintain rule by the Chinese Communist Party, but growth is being hindered by state capitalism, which is necessary to prevent an independent business class from arising and possibly demanding democracy.

Especially since 2002, the Party has made efforts to actively recruit more entrepreneurs into the Communist Party. Not that this trend was not already in place long before. Per Teresa Wright in her book *Party and State in Post-Mao China*, “from the late 1980s to the present, the Party has moved from tolerating to embracing private business,” as the successes of the Special Economic Zones proved lucrative for China. The recruitment of business owners has proven to be successful and

gotten traction. Now, less than half of the members of the Chinese Communist Party are farmers “or rank and file workers,” a massive departure from the “Maoist period, when nearly two-thirds of CCP members” came from the bottom rungs of the socioeconomic scale.\textsuperscript{36} This is a smart move by the Chinese Communist Party. By ingratiating business owners into the Party and aligning their interests with those of the Party, a large and powerful bloc in Chinese society, one can logically conclude, will be more loyal to Beijing than they would have been otherwise, which bolsters the regime’s chances of survival.

Business owners and entrepreneurs are not the only segment of society that the Chinese Communist Party has sought to co-opt. The Tiananmen Square protests began as a student protest and there was a strong pro-democracy element to the protests.\textsuperscript{37} Unsurprisingly, and wisely on the part of Beijing, the Chinese Communist Party now seeks to align the interests of the students with that of the Party.\textsuperscript{38} The Party has not always had a good relationship with intellectuals, however. During the Cultural Revolution, intellectuals were specifically targeted and suffered greatly, and this translated into hesitation on the part of students and intellectuals in joining the Party during the early part of the reform era.\textsuperscript{39} The Tiananmen Square incident probably did not help improve the Party’s image amongst intellectuals either. Nonetheless, CCP has been successful in turning around its image and being attractive to the intellectual segment of mainland Chinese society. Party leaders are seen are good employees and competent workers, making them more attractive to employers and giving students a much greater incentive to become a member of the Party.\textsuperscript{40}

This is evidenced by the fact that “In 1990, less than one percent of college attendees had been accepted into the Party,” but in only eleven years the CCP was successful in raising the number to eight percent and

\begin{itemize}
\item \textsuperscript{39} Wright, Teresa. Party and State in Post-Mao China. Cambridge: Polity Press, 2015, 44.
\item \textsuperscript{40} Wright, Teresa. Party and State in Post-Mao China. Cambridge: Polity Press, 2015, 45.
\end{itemize}
over half of all college students have answered in polls that they would consider becoming a part of the CCP. According to Wright, at the beginning of the reform period and the end of the Cultural Revolution, only about thirteen percent of Party members had completed secondary school, but now the number is over fifty percent, and over forty percent of Party members have college degrees. By including students and intellectuals within the Party, it achieves two things. The Party not only has greater expertise on a variety of different areas, but by tying the intellectuals into the Party, it, like with Chinese entrepreneurs, aligns the interest of the Party with that of students, and so decreases the probability that they will attempt to subvert the existing order. The aforementioned evidence demonstrates that the Party’s appeal has to do partially with the fact that Party members have an edge on most applicants for jobs. The fact that many students at least consider joining the Party demonstrates a willingness to work within the existing system and comply with the Communist Party-led order that is in place as opposed to advocating for its removal and introducing chaos into the status quo. While this is not certain, this is a rational guess and the mere fact that the Party itself has invested so much time and resources appears to suggest that they probably agree and believe that this works.

Minorities, another potential problem area, are in some ways given preferential treatment. Ethnic minorities have a form of positive discrimination, or affirmative action, in which they are disproportionately represented in the Chinese government, and are eligible for subsidies. This has now come to a point where even Han Chinese may try to pass as an ethnic minority just so they will be eligible for greater public assistance or other advantages. When one observes these trends, one is likely to be very optimistic. Here there appears to be evidence that the Chinese Communist Party has been able to pacify its opponents, and especially those with power, the business owners and students. When considering these facts and only these facts it would appear logical to

43. Takeuchi, Hiroki. “Post Mao (Limited) Political Reform.” Lecture, Chinese Politics at Southern Methodist University, Dallas, 1 December 2015.
come to the conclusion that the Chinese regime will remain in place for quite some time. However, there are of course detractors and those that are far less optimistic about the CCP’s prospects.

**Continued Problems: Reasons for the Chinese Leadership to be Cautious**

Even with the best of efforts, mainland China continues to have some major problems. If one considers these problems, one could justifiably hold a very cautious or fatalistic attitude about the Chinese regime, as evidenced by Shambaugh’s referral of Chang, who believes that the Party has decayed and its sluggish organization cannot keep with the breakneck pace of change and will lead to regime collapse.\(^{45}\) Others hold more tempered views. According to Pei, Beijing is increasingly unable to effectively execute the “extraction of revenues, the provision of public goods, the collection of information, and the enforcement of laws and rules.”\(^{46}\) The last one should be especially worrying. If the Chinese Communist Party is increasingly unable to maintain order and the citizenry is increasingly willing to defy the Party, it logically follows that these trends should run counter to the Party’s goal of maintaining stability in the country. The Chinese Communist Party also has trouble controlling the People’s Liberation Army, which engages in business activities, the legality of which is sometimes dubious.\(^{47}\)

Beyond the “erosion of state capacity in China,” other major issues in the country are corruption which had provided a damper on robust economic growth.\(^{48}\)

Much like the United States, mainland China also appears to be undergoing problems due to inequality. According to Pei’s book China’s Trapped Transition:

“The idea that severe structural imbalances have accumulated in China’s society and political system has gained currency within China. Specifically, such imbalances refer to the rising inequality (socioeconomic, regional, and urban-rural), the growing tensions


between the ruling elite and the masses, the erosion of values, and the simultaneous consolidation of an elite-based exclusivist ruling coalition and increasing marginalization of weak groups, such as workers, peasants, and migrant laborers.”

Another area that demonstrates the Communist Party’s waning power is the “erosion of the CCP’s mobilization capacity.” At the inception of the Chinese state, according to Pei, the Party was able to mobilize people in various campaigns to undertake various projects that Chairman Mao or the Party wanted to have executed by the people, which is a stark departure to today when in 1999, “despite a massive official propaganda campaign against Falun Gong, the CCP could not mobilize a single social group to support its crackdown,” which demonstrates a tremendous evolution in Chinese society from the era of the Cultural Revolution and when the leader of the Party had to only utter a word to the Chinese newspapers and everyone in the country would do what the leader merely suggested be done. Per Shambaugh, “When compliance and discipline break down, an authoritarian state is endangered,” and CCP’s diminishing grip on its population does not bode well for the Party’s prospects.

The evidence provided from Shirk’s work demonstrates that the Chinese Communist Party places a premium on maintaining its power, given the fact that it has taken so many measures to ensure that unrest will be prevented before it even starts, kept low if it does occur, and that the Party will have the means to crush opposition if need be with the support of the People’s Liberation Army. The evidence provided by Pei, which suggests that Beijing is increasingly unable to perform basic and crucial functions necessary for a functioning government, however,

demonstrates the decline of the Party’s ability to hold onto that kind of power. Coupled with the evidence that the Chinese state spends more on maintaining order internally than it does on defense against foreign threats, it paints a picture of a country that is increasingly incapable of meeting its first priority of keeping control of the country. One must be concerned that any severe economic downturn or destabilizing effect has the potential to greatly escalate. Particularly if Pei’s evidence is correct and the Chinese people are increasingly unwilling to follow rules set forth by the Party, logically that would suggest that Beijing’s control over the country is receding. That does not bode well for Chinese stability and one may reasonably fear the consequences of unforeseen events that have the potential to cause mass mayhem.

The lack of evidence for a clear and coherent opposition in the country suggests that there is no reason currently to believe that the collapse of the Chinese regime is imminent, or even likely in the foreseeable future. However, the large amount of resources devoted to maintaining control, but the decline in the Party’s ability to fully perform functions essential to a state suggests that in general the country may not be fully capable of handling a large unforeseen crisis and that there may be an avenue for internal dissent to succeed. Another area that has the potential to greatly destabilize the country is foreign policy and the intense nationalism that many in China subscribe to. The Communist Party is concerned about hypernationalism because “too much patriotism can be a bad thing if it triggers protests that imperil CCP rule or forces the government into a confrontation with the American superpower.” This in itself is a unique quagmire for the Communist Party, in which its not secession or frustration of the domestic policies of the government can jeopardize Party rule, but its extreme nationalism and the demand from the people that the country make a stand against “hegemons” and those that have forced China into a “century of humiliation.”

Can Both of These Views Be Reconciled?

David Shambaugh identifies the strange puzzle that the issue of regime stability in China posits. On the one hand, Beijing has been largely successful in tying their interest with the interest of key demographic groups in the country, but also at the same time there are underlying instabilities that have the potential to escalate and cause serious harm, as demonstrated by the evidence in the last two sections. Can these two different views be reconciled?

Finding the truth will require finding common ground between these two different views and viewing these facts as pieces of a puzzle that form a much more comprehensive picture, that the Communist Party has succeeded in ensuring that enough interests are tied with theirs to ensure greater stability and that the People’s Republic is at the threat of collapse. Because of the extensive and closely intertwined relationship between the United States and China, the People’s Republic’s regime stability has broad implications for the United States. Undoubtedly, the collapse of the world’s second largest economy will most certainly have a massive impact on the economy and the security of the world’s largest economy, making it all the more urgent that American policymakers have a thorough understanding of the nature of the Chinese regime and its current status.

Thus there is moral impetus for American policymakers to be able to bring together these disparate set of facts and create a complete picture. David Shambaugh attempts to do precisely this when he argues that the Chinese state may be in a state of “atrophy,” but that at the same time, the Party and government is trying to “adapt” and reform itself to remain viable. Once again, I agree with Shambaugh. The evidence aforementioned does not paint pictures that could only be true in parallel universes; they fit together quite neatly. Since the Tiananmen Square incident in 1989, the Chinese Communist Party has placed a renewed emphasis on co-opting various groups in the country and

60. Takeuchi, Hiroki. “Introduction to Chinese Politics.” Lecture, Chinese Politics at Southern Methodist University, Dallas, 27 August 2015.
making Party membership more attractive to Chinese citizens.\(^\text{62}\) At the same time, Chinese citizens have become less likely to cooperate with the authorities.\(^\text{63}\) Tensions have been largely limited because of robust economic growth, but they have the potential to become much more problematic if growth slows substantially and the Chinese government is unable to meet its end of the social contract where it provides increasing levels of prosperity.\(^\text{64}\) Essentially what this means is that the Chinese government is for the time being relatively stable, and because it has co-opted so many of the groups with the potential to dissent, one can say this grants the Chinese government more room to maneuver than it had right before the Tiananmen Square incident, but if conditions turn bad enough, it could threaten the survival of the regime.\(^\text{65}\)

In particular, the issue of state capitalism creates a challenge for China. It relies on state capitalism to sidestep modernization theory, which says a burgeoning middle class will demand democratic reforms and that state capitalism will handicap long-term growth, making the regime unstable.\(^\text{66}\) The aforementioned evidence demonstrates that the regime has been able to tie the interest of the Party with other powerful interest groups, but this has a tremendous potential of becoming problematic. Use of personal relationships is a deeply ingrained part of Chinese culture, which makes fighting corruption an enormous challenge.\(^\text{67}\) This appears like a ticking time bomb and will work well with the argument of the pessimists, but given the lack of a coherent opposition to the one party state and the lack of predictability of the future, I argue that the best answer is that the state is more stable than it was during Tiananmen because it has been able to co-opt many of the same groups that challenged Party dominance in 1989 and several others on top of


that, but at the same time poor economic conditions or major crises have the potential to escalate with devastating consequences if handled improperly. China also has the curious issue of hypernationalism, which also has the potential to derail the Chinese state.\textsuperscript{68} That is certainly a concern, and one could imagine a fluke event happening that might be poorly handled and which could escalate out of control, but because that would require so many variables to line up to come to fruition, I argue that my answer still stands, and that it is the most tempered and rational answer that does not give into unwarranted fatalism or blind optimism.

**Conclusion**

The Chinese government today is in a unique position where there is a myriad of different threats to maintaining Communist Party power, yet the government has been able to quell potential uprising by high levels of growth and rising prosperity. Nevertheless the means by which the government has been able to maintain power is also what is dampening its growth, thus endangering long-term stability. The Party has undertaken many measures to prevent unrest before it starts and to ensure that the Party has the ability to crack down on those that do if need be. Mainland China also has the issue of hypernationalism, and while that can allow Beijing to appear strong against foreigners, it also has the potential to destabilize the country. Potential avenues through which China may be destabilized are numerous. However, given the lack of a coherent opposition and the extensive measures that the Party has taken to maintain control, the answer to whether the government today is more or less stable than before the Tiananmen Square incident of 1989 is ambiguous.

Nineteen eighty-nine was a pivotal year, and it instilled in the Communist Party leadership a fear of what may transpire if regime collapse comes about.\textsuperscript{69} Since then the Chinese government has set about trying to fuse the interests of powerful groups within the country to the interest of the Party, so that their incentives line up with those of the regime and as a consequence promote greater stability.\textsuperscript{70} Given the great


\textsuperscript{70} Takeuchi, Hiroki. “The Trajectory of Post-Mao Reforms.” Lecture, Chinese Politics at Southern Methodist University, Dallas, 20 October 2015.
benefits that Party membership provides, many have indeed taken that route and become Party members, which also demonstrates a willingness to work within the existing system as opposed to trying to subvert it.\textsuperscript{71} At the same time, the regime also has a host of challenges, such as corruption, an inability to provide public goods, and a growing defiance against authorities.\textsuperscript{72} I therefore come to the conclusion that the Chinese state is more stable than the time around Tiananmen, but that a very bad day could bring everything down to a crashing halt. Given China’s close ties with the United States and America’s interconnectedness with the Western Pacific, this poses a great challenge for the United States, which needs a stable and prosperous China for its own strategic interest and wellbeing, but the problem is compounded by the possibility of sudden regime collapse. This makes treading policy with China all the more dangerous for the United States, and has the potential to have even greater consequences for the future of America and the world than it already has.

**ANNOTATED BIBLIOGRAPHY**


**Annotation:**

China’s Trapped Transition covers the challenges posed by the Chinese Communist Party’s move to a more market oriented economy, and the challenges it raises for the regime.

**Summary:**

Per Pei, “the combination of market reforms and preservation of a one-party state creates contradictions and paradoxes, the implications of which the ruling elites have either chosen to ignore or are reluctant to face directly” (Pei p. 7). Conventional wisdom in political science says that freer markets will create a burgeoning middle class that will clamor for democracy, in something called modernization theory.

\textsuperscript{71} Takeuchi, Hiroki. “Post Mao (Limited) Political Reform.” Lecture, Chinese Politics at Southern Methodist University, Dallas, 1 December 2015.

\textsuperscript{72} Pei, Minxin. China’s Trapped Transition the Limits of Developmental Autocracy. Cambridge, Massachusetts: Harvard University Press, 2006, 12-13 & 181.
China, however, has not followed that route and that is something that Pei analyzes.

Multiple East Asian countries moved to freer economies and later loosened government controls, but China is different, and quite a different one at that. Pei mentions “China’s huge size and enormous regional disparities” (Pei p. 18). That is an interesting point; perhaps China is slow to become a democracy because not enough social capital exists for the country to undergo democratization? A part of the reason why the path toward democratization is sluggish is because of the high level of corruption in China, much of which has been trending towards younger Party and government officials. This is a new phenomenon, because it used to be that those officials close to their retirement age who engaged in corrupt practices.

An interesting point is when Pei describes the Chinese state as predatory. A comparison is drawn with other formerly communist countries that have essentially become oligarchies. Per Pei, the Chinese regime is very hesitant to move the country towards democracy again because of the experience of other communist countries from 1989 to 1991, when virtually every communist state and the Soviet Union underwent regime change and some underwent territorial disintegration. Political reform in the Chinese Communist Party has long been viewed with caution and suspicion. Political reform is seen not as an end in its own right, but as an instrument to cement and further solidify the Communist Party’s power.

Of the utmost importance for the Chinese regime is the preservation of Communist Party supremacy. Political reform is undertaken to protect the Party’s power, and economic reform is seen as an instrument to legitimize the Party’s rule in the hearts and minds of the Chinese people. Despite the economic miracle that has taken place in the People’s Republic as a result of economic liberalization in the past few decades, some sectors have been more successfully privatized than others. One example is the banking sector.

The author’s fifth chapter is more cautionary than the other ones, which also have a cautionary feel to them. The author warns that China has a “mounting governance deficit,” and it risks becoming a “predatory state” like Indonesia, a country that had high growth rates, but poor governance and suffered as a consequence (Pei p. 167).

Annotation:
Susan L. Shirk worked in the State Department for the Clinton administration and is an expert on China. Her book is about how domestic political pressures have the potential to erase decades of development.

Summary:
*China: Fragile Superpower* begins with a hypothetical scenario and describing a near miss in 1996 when the United States and the People’s Republic almost entered into an armed conflict. The author describes China as a country that is able to project power abroad and has the ability to exercise much influence, but there are strong underlying instabilities that jeopardize the integrity of the mainland Chinese regime. She briefly covers the stunningly high and sustained levels of growth that mainland China has been able to achieve for the past several decades, the country’s dependence on the American economy, questions as to the sustainability of this incredible economic growth, corruption, and the uneven distribution of wealth that has favored the coastal cities as opposed to the interior of China.

The author covers some of the history since the end of Mao’s rule. She describes Deng Xiaoping as charming and intelligent. On challenges to regime preservation from within the nation’s borders, one of the biggest fears for Beijing is a challenge to the regime’s legitimacy from the students. In order to maintain power, the Chinese Communist Party has adopted some strategies to deflect blame, or reduce anger directed at the Party. The Communist Party in fact tries to “identify with the protestors” (Shirk p. 66). Coercion, populism, and high levels of economic growth and prosperity are some other strategies that the party uses to maintain power and legitimacy.

Shirk’s book argues that the Chinese government has tremendous internal pressures to go to war for Taiwan, against Japan, and the United States due to domestic demand. The Chinese government is itself very vocal and strongly denounces what it sees as slights against the Chinese state and civilization. As a result of state propaganda and Chinese history and culture, there is a strong, vocal, hyper-nationalist group that is very likely to demand that the country go to war if Taiwan declares independence, or an issue arises over Japan or the United States. The
feelings of animosity go from a feeling of shame and humiliation for having lost Taiwan and not fully unified the country, to hatred against Japan and deep suspicion of the United States. Some people in China see a war between these countries as one of national pride. The Chinese government is able to maintain loyalty and support for the regime in part by directing anger and grievances towards outside powers that are described as hegemons and their historical injustices against China. If the government fails to address slights against the country from foreign powers, the regime risks losing the support of a large, vocal, angry group of hyper-nationalists. This places the Chinese Communist Party in a tight spot. The Party must demonstrate its nationalist credentials by engaging in over the top rhetoric, but this also perpetuates a hyper-nationalist attitude against many Chinese people and ultimately threatens the survival of the regime.

Ironically, this very vocal group is probably a vocal minority, and there is a silent majority that takes a more cerebral approach to these issues, or they do not care. A war between China and American allies in the Pacific would severely impact China economy, and a serious confrontation has the potential to erase decades of economic growth and development.
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I. Introduction

In the spring of 2015, Prime Minister Shinzo Abe visited the United States to promote greater US-Japan defense ties. What followed from Abe’s visit was the creation of the new 2015 Guidelines for US-Japan Defense Cooperation that indicated closer US-Japanese cooperation in the maritime, cyber and space realms. Compared to the 1997 Guidelines, the 2015 Guidelines also indicated a far more proactive Japan in the security realm. To many analysts, the guidelines signaled that Japan is stepping out of its passive role within the alliance and is beginning to work towards a mutual partnership with the United States in Asia-Pacific security. Of course, greater assertion in security policy by a nation rooted in a strong sense of pacifism is not without controversy. The Abe administration’s push on security reform continues to meet strong public backlash and the passage of the 2015 Security Legislation in September drew incredible ire from not only rival parties within the Diet but also China and South Korea.

Under the stipulations of the 2015 Security Legislation, the Self-Defense Forces (SDF) could be deployed into foreign wars for “collective self-defense” purposes and this new ability of the SDF is widely condemned as overstepping the pacifist clause of the Japanese constitution. Groups of Japanese academics, opposition parties within

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the Diet, and student groups argue the bill is a violation of Article 9 and press that the bill is a right-ward shift towards nationalism.\(^2\) Japan, since the end of World War II, maintained a strongly rooted sense of pacifism that renounces the use of armed force and the passage of the legislation is viewed as challenging these long-established norms. China blasted the legislation as an attempt by the Abe administration to crush Japan’s pacifism while South Korea urged Japan to remain committed to said pacifism and urged reconsideration of its direction.\(^3\)

However, while a large percentage of Japanese view the 2015 Security Legislation as a violation of long-established pacifism, an alternate explanation argues Japan is not pacifist, but rather uses pacifism as a check while modifying its security arrangements when needed. Post-World War II, Japan used pacifism as a means to let the US cover the bulk of its defense arrangements while Japan focused on economic reconstruction.\(^4\) The Cold War environment provided Japan the umbrella of US security but in the new era of post-Cold War uncertainty, Japan is gradually adjusting its security arrangements to meet new challenges. As Jennifer Lind of the Cato Institute writes, “Japan’s increased military participation…conforms to a pattern in which uncertainty about its U.S. ally encourages greater Japanese activism.”\(^5\) Japan faces new security challenges from the rise of China and a nuclear North Korea and since the US cannot solely guarantee Japan’s security, Japan pragmatically adjusts.

The new security legislation, while controversial, is a part of Japan’s pragmatic adjustments to its security arrangements. These adjustments are motivated primarily through two factors. First, pacifism, while certainly rooted in domestic Japanese politics, is flexible and it serves as more as an elastic system of checks-and-balances on security reform. Japan’s pacifist identity underwent numerous challenges and adjustments


over the decades and the new 2015 Security Legislation is just the latest. Second, changes in Japan’s international environment, via the rise of China, the US pivot to Asia and the situation on the Korean Peninsula, act as an external force motivating Japan’s security calculus. Japan, just as it rapidly industrialized during the Meiji Restoration under pressure from the Western imperial powers, responds to external pressures. An additional factor contributing to the passage of the security legislation is the strengthening of the Prime Minister’s Kantei (cabinet). Reforms ushered in the 1990s strengthened the ability of the Kantei to coordinate and propose policy, and the Koizumi and Abe administrations utilized this ability to great effect in reforming security institutions.

The culminating result of these factors is that the Self-Defense Forces incrementally increased its role. Originally envisioned as a police reserves unit in the beginning of the Cold War, the SDF continues to move across the spectrum towards a normal military. Key pieces of legislation passed under the Koizumi administration shifted the SDF from its traditional peace-keeping only role towards a support role in the Iraq War. The 2015 Security Legislation merely shifts this support role to a collective self-defense role. While the 2015 Security Legislation will come under challenge, it is likely to be accepted and incorporated into Japan’s security identity and the reform process will move forward.

II. Pacifism’s Pervasiveness: The Key Challenge to Reform

As the mass public outrage at the 2015 security legislation indicates, initiating and implementing security reform in Japan is a severe challenge. Despite the changing threat environment for Japan, pacifist ideals remain strong in Japanese law, policymakers and the public, but why? The answer, when viewed from a normative lens, indicates that pacifism is heavily rooted within Japanese security politics. Japan’s post-World War II government did not simply implement a ban on the use of force through Article 9, but rather, tempered a non-militarist security identity into the very heart of security politics. This identity, while malleable, pervades the security debate and influences policymakers and the public.

Japan’s security identity influences security policy through a variety of methods and through its key tenants. The identity’s framework enables political actors to unite under similar beliefs, identify focal points for public opinion regarding foreign policy, and the institutionalize the
identity into foreign policy to create incentives for following the identity. These methods are tied to the three central tenants of “no traditional armed forces, no use of force…except in self-defense, [and] no Japanese participation in foreign wars.” Pacifism became the new normal under the guidance of the economically-focused Yoshida Doctrine as Japan sought to rebuild its economy and avoid entanglement in Cold War security conflicts. However, while the identity appears to be seemingly narrowed on pacifism, it was in fact a compromise viewpoint that took the considerations of multiple factions into account in the post-war period. Japan’s politically left and right, pacifist and militarist, and pro-US and pro-Soviet all shaped the identity through the contestation of competing values. Contest, rather than consensus, played a pivotal role in shaping Japan’s security identity.

For reform advocates, overcoming the pacifist security identity will be the primary challenge, as all opposition, both public and private, stems from the ever-permeating norms. As the constructivist Andrew Oros states, “identity shift cannot take place without the presence of an alternative set of unifying principles and respected political actors to advocate for them.” While Abe’s LDP has pushed through legislation that appears to break from the identity’s orthodoxy, in actuality, the changes constituted to Japan’s security politics have yet to completely break free from the confines of the identity. The 2015 Security Legislation focused on enabling “collective self-defense” to assist allies with Japanese forces rather than the legalization of interventionist military action as such reform is impossible in the environment. Previous reform attempts, rather than break from the identity, have largely focused on operating within the context of the identity’s tenants and the 2015 legislation is no different. For instance, Prime Minister Koizumi’s 2001 Anti-Terror Legislation and SDF deployment in the Iraq War focused on a humanitarian mission rather than combative as Diet approval would have been impossible otherwise. Koizumi possessed the legal


framework to deploy the SDF but the security identity shaped the Diet’s demeanor in approaching the Iraq War to oppose combative operations.

Additionally, the security identity influences the public’s will for security reform, and substantial changes are needed in order to truly change the pacifist identity. Public opinion still opposes the expansion of military capabilities and Shinzo Abe does not enjoy the popularity ratings that Prime Ministers like Jun’ichiro Koizumi enjoyed that would assist him in pushing further reform.\textsuperscript{10} The LDP enjoys majority rule of the Diet again after reclaiming their position from the rival DPJ, but their control over the Diet does not grant them the ability to push reform too far from the identity’s tenants. Electoral politics continue to play a role as politicians will cater to pacifist viewpoints to secure an advantage in general elections.\textsuperscript{11} As Oros identifies, either substantial changes in Japan’s international environment, the US-Japan relationship or the level of populism within Japan are necessary as triggers to undue the tenants of the security identity and create a new identity.\textsuperscript{12} Were Japan to become immediately threatened by China or North Korea, break from its long-standing alliance with the US, or undergo a major political realignment in the Diet, then Japan’s pacifism could be replaced a new normal.

**III. On the External Side: Japan’s Changing International Environment**

Japanese security politics are heavily influenced by its external environment. As a middle power, Japan finds itself between a rising China and a Pacific-looking United States and in the wake of the post-Cold War Era, Japan finds itself in a balancing act. On one hand, China’s military modernization, ventures into the South China Sea and its growing economic power provides the largest threat to Japanese interests that threatens to change the regional balance of power. On the other hand, the United States, while Japan’s chief ally, runs the risk of entangling Japan in its conflicts while also stoking fears of abandonment should Japan vary too far from US policy interests. Japanese grand strategy


is built upon pragmatic hedging, and in order to ensure its security, Japan will hedge in the direction, whether west or east, that will suit its interests. Understanding the international environment that surrounds Japan is critical for understanding what factors are influencing security reform as well as to what extent the reforms will reach in their levels of change.

1. **China**

Japan’s international environment is critical to understanding Japanese security arrangements and there is no more influential environmental factor than the rise of China. China and Japan share a history of mistrust due to World War II and the Cold War. Historical issues continue to mar the Sino-Japanese relationship and the two states increasingly view each other as rivals for leading an East Asian order. To Japanese policymakers, China represents not only a security threat but also an economic threat. The rise of China means that “greater proximity, economic dependency, and a new emerging regional balance of power” create an array of “competing choices” for dealing with China that Japan must balance. Several factors characterize the Sino-Japanese relationship, and understanding these factors are critical to analyzing the impact China unleashes on Japanese domestic security arrangements.

First, the rapid growth of the Chinese economy threatens Japanese domestic industries and there is a deep concern over economic dependency. China eclipsed Japan in 2010 for the second largest economy in the world and the Chinese economy effectively outperformed the Japanese on the global market. This shift in economic power represented the changing Sino-Japanese dynamic and marked the departure from the economic relationship established during Deng Xiaoping’s tenure as the paramount leader of China. Previously, Japan saw an open-market China as an opportunity “to advance Japanese economic interests through investment in infrastructure projects” to create trade and further openness to investment. China received 10-15% of Japanese ODA as Japanese policymakers and business leaders increasingly viewed economic interdependence as a method of improving Sino-Japanese

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relations. This belief however, soon faced challenges.

Economic interdependence with China led to fears of a “hollowing” of the Japanese workforce as China’s economy grew, while on the international stage, China’s aggressive pursuit of economic ties challenged Japanese influence. During the 1990s, the term “hollowing” emerged to describe Japanese economic security concerns over low-wage Chinese workers harming Japanese jobs and small-to-mid-size firms as Sino-Japanese trade continued. The contraction of Japan’s manufacturing sector alongside China’s elevation to the number one destination for U.S. investment underscored domestic fears over Chinese economic primacy. While fears of “hollowing” largely subsided in the 2000s, China’s expansion of bilateral trade with the rest of Asia marked the beginning of new fears. The establishment of the ASEAN+3 in 2004 placed China on equal economic footing with Japan in the region and Japanese leaders grew frustrated with the growing influence of China.

Second, the rise of China comprises a new direct security threat as China continues its military modernization program and expands its influence into disputed maritime territories. Alongside China’s economic modernization came an expansive military modernization program that coincides with China’s goal to “safeguard its national unification, territorial integrity and development interests.” As China’s 2015 Defense White-Paper outlines, China seeks to shift the focus of the People’s Liberation Army Navy (PLAN) from “offshore waters defense” to include “open seas protection.” Maritime interests have become a new priority for China on its path to becoming a regional power. Emphasis is placed on the need to transition from a focus on land-power to a focus on sea-power within China’s white paper in

order to safeguard its maritime interests. China and Japan share a long maritime boundary and naturally, with their history of mistrust and mutual desire for regional influence, conflicts would arise. However, a closer examination of China and Japan’s shared maritime boundary and territorial disputes is required to explain the emerging maritime security contest between the two powers.

Regarding China and Japan’s shared maritime boundary, differences over their exclusive economic zone (EEZ) boundaries and ownership claims over disputed island territories are an on-going source of tension. Originally, territorial disputes between China and Japan were handled based on Deng Xiaoping’s advice to “leave the sensitive territorial dispute for future generations” in order to avoid contention. However, Beijing and Tokyo have shifted from this method and are both vying for recognition of their claimed EEZ’s and island territories via the United Nations Convention on the Law of the Sea with difficulty. Officially, bilateral negotiations are to determine ownership under the UNCLOS but they have not produced a settlement and Tokyo and Beijing continue to probe one another. Repeated incursions into the Japanese EEZ prompted Tokyo’s attention and by 2005, the Japanese Coast Guard’s modernization program was underway. Maritime Self-Defense Force planners now acknowledge the potential for Chinese seizure of disputed islands as well as the development of a gas-field near the EEZ boundary and are responding. Now more than ever, Chinese and Japanese maritime forces are coming into contact with each other, and this increases the potential for conflict.

Likewise, tensions over the disputed Senkaku Islands are marred in nationalist activism and raise fundamental questions about the abilities of Japan to manage its maritime relations with China. The 2010 Fishing

Trawler Incident resulted in one of the most contentious bilateral disputes between Tokyo and Beijing, and the incident provoked strong nationalist responses on both sides. Beijing countered the arrest of the Chinese trawler captain by carrying out the arrest of four Japanese citizens and ordered an embargo of rare-earth metals against Japan. The Senkaku incident demonstrated that Japan was ill-prepared to cope with China diplomatically, as China had the upper-hand in negotiations and civilian activists were damaging Tokyo’s ability to respond. Conservative politicians utilized the Senkaku Incident as a rallying cry for a stronger Japanese military and the DPJ government of Japan faced heavy opposition in trying to coordinate coherent policy. The purchase of the Senkakus in 2012 by Japan resulted in further intrusions into the disputed territories by China, but this time, by military vessels.

China and Japan remain in an inconclusive stalemate over the Senkaku Islands, but the increasing frequency of military vessels within the territories signals the growing tensions between the two governments. Whether China and Japan can return to Deng Xiaoping’s policy of “[leaving] the sensitive territorial dispute for future generations” remains to be seen but looks to be unlikely. The increasing presence of the Japanese Coast Guard and Chinese State Oceanic Administration vessels, combined with the expansion of China’s ADIZ to include the Senkaku islands signals the issue will not be resolved in the near future. Japanese policymakers indicate the maritime security of the South China Sea remains the top priority for the Maritime Self Defense Forces.

2. The United States of America

Japan and the United States share a long, complex history that impacts their relationship on the international stage. From Commodore Matthew Perry’s opening of Japan in the 19th find its security guarantees gone.

Additionally, while conservatives fear US abandonment, pacifists and automists are in an unlikely alliance over a fear of entanglement with the US’s conflicts. Japanese involvement with the US risks pulling Japan into conflicts within Asia and abroad that would oppose its economic interests and its potential security. During the Cold War, this concern mainly manifested itself as a concern that Japan could be pulled into a potential nuclear confrontation with the Soviet Union or China. As for the present day, many fear being drawn into US conflicts in the Middle East. Japan relied on middle eastern oil for 90% of its fuel needs in 2005, and 15% of this oil came from Iran. Pressures on Japan by the US over Iran’s nuclear program have led to Japan hedging its economic security in a direction counter to US interests as energy security occupies a vital interest for Tokyo. Entanglement in the US’s conflicts in the middle east would threaten Japan’s energy sector, and in this regard, Japan diverts from US policy in treating the Iran nuclear issue as separate from its on-going trade.

Thus, in order to balance autonomy and keep the US close enough for security purposes, Japan frequently hedges towards and against US interests. As Samuels aptly states, “the irony of the Japan-U.S. alliance is that the United States poses as great a threat to Japan as any neighbor.” Japan’s security alliance with the US runs the risk of entangling Japan in the US’s conflicts worldwide or face the risk of potential abandonment of Japanese security should they not meet US demands. While Samuels notes that the US and Japan share many strategic goals, Japan risks isolation within Asia should it follow US policy too closely. Japan’s historically different interactions with China resulted in a divergence in policy between Japan and the US in dealing with Beijing that frustrated US policymakers. Balancing US and Asian interests remains as Japan’s pragmatic grand strategy, and closer Japanese-US security cooperation in the wake of China’s rise is a necessity for Japan.

3. The Korean Peninsula

Like with China, Japan shares an old, controversial relationship with both the Republic of Korea (ROK) and Democratic People’s Republic of Korea (DPRK) due to historical grievances. The issue of “comfort women” still mars the Japan-ROK relationship while the belligerent nature of the DPRK regime and its pursuit of nuclear weapons provides an existential threat to Japan. While technically Japan and the ROK could be considered allies via their bilateral defense treaties with the US, attempts to foster closer security relations soured over the comfort women issue until the recent agreement between Prime Minister Abe and President Park. As for the DPRK, the regime’s pursuit of nuclear weapons has provided a catalyst for increased security reform within Japan alongside closer US-Japanese security relations. The DPRK’s frequent “saber rattling” and threats to destroy Japan empowers security reformists to pursue greater defense capabilities to create a bulwark against DPRK aggression.

Regarding the Japan-ROK relationship, the two states are enjoying improved relations from the Abe-Park agreement over comfort women, Japanese-Korean relations should be viewed with some pessimism. While the two states share close economic interdependence, the historical issues still hold a significant amount of weight in their relations. Visits to Yasukuni Shrine by Japanese, where several war criminals are enshrined, still provokes outrage in ROK domestic politics against Japan. Though the comfort women deal seeks to resolve the issue, there is still strong domestic opposition within the ROK against what is perceived as attempts at revisionism by Japanese policymakers. In the past, tensions over Yasukuni Shrine and comfort women led to the cancellation of an intelligence sharing agreement over North Korea’s nuclear program. Though the agreement was eventually signed, ROK domestic outrage delayed the signing and observers should be cautious regarding the notion of closer Japan-ROK security cooperation.

As for the DPRK, their belligerent nature and desire to achieve a nuclear weapon provides a direct threat to Japanese domestic security.

As Richard Samuels noted, Japan is directly threatened by a nuclear DPRK while the matter remains one of proliferation for the US.\textsuperscript{41} Japan’s alliance with the United States naturally places Japan in a position of opposition to the DPRK, and the DPRK’s spy-ship intrusions into Japanese waters and abduction of Japanese citizens in the 1970s has earned it incredible ire within the public sphere of Japan.\textsuperscript{42} Nevertheless, in the context of Japanese security reform, the public ire for the DPRK fueled the LDP’s drive for modernizing Japan’s defense forces.\textsuperscript{43} While pacifism remains entrenched within Japanese security arrangements, the DPRK provides additional pressure towards reform alongside China and the US.

\textbf{IV. On the Domestic Side: Security Institutions and Their Evolution}

In addition to understanding Japan’s external environment, understanding the domestic institutions that shape Japanese security policy is critical to understanding the nature of reform within Japan. Article 9 of the Japanese Constitution and the pacifist security identity that pervades Japanese politics not only roots itself within the minds of policymakers and the public, but also within the institutional frameworks governing Japan’s security practices. The Prime Minister and the Kantei, or cabinet office, are incrementally increasing their powers over security politics and enabling reform while the Self-Defense Forces are undergoing an evolution. Compared to its origins as the National Police Reserves, the Self-Defense Forces as an institution have evolved to meet Japan’s strategic challenges in the land, sea and air realms. While the Prime Minister, Kantei, and Self-Defense Forces have evolved, there are still institutional and legal challenges present that prevent Japan from decisively managing new security challenges.

\textbf{1. The Prime Minister and the Kantei}

While the majority of Japan security analysts focus on the Diet’s internal debate over reforming the SDF and the changing international climate as the primary factors driving security reform, the importance


of the Prime Minister and the *Kantei* is often overlooked. The *Kantei*, or the cabinet of the Prime Minister, while traditionally an informal and weak institution, grew in power and importance in the previous decade to transform into a key driver of reform. The Hashimoto administration spearheaded the structural reforms of the *Kantei* and under the leadership of the later Koizumi administration, the *Kantei* became paramount to reform. Understanding the nature of the *Kantei*’s evolution and its new abilities provides insight to the toolset available to the Prime Minister in pushing security reform.

Beginning in the late 1990s under the direction of Hashimoto’s Administrative Reform Council, the *Kantei* underwent several key changes designed to strengthen its authority in coordinating policy under the Prime Minister’s authority. These changes, while initially thought of as insignificant to the larger defense debate going on within the Diet, played a pivotal role in the grand scheme of Japan’s security arrangements. The increased power for the Chief Cabinet Secretary, the ability to create Ad Hoc policy offices, and the improved coordination abilities shifted foreign-policy power from the bureaucratic Ministry of Foreign Affairs to the *Kantei*. Each of these changes facilitated this power-shift within Japanese security politics.

First, in regards to the increased power of the Chief Cabinet Secretaries, the rise in prominence of the Chief Cabinet Secretary (CCS) combined with Hashimoto’s reforms transformed a once unimportant role into a pivotal one for launching and coordinating policy. Until the 1980s, the CCS was considered a role of little significance until Prime Minister Nakasone’s appointment of a political heavy-weight to the position in 1982. Since then, the CCS has increasingly increased its prominence in policy-making and in a sense, becoming a “shadow prime minister” role. The CCS’s functions include coordinating policy, handling issues at cabinet meetings, chairing sub-cabinet meetings, screening high appointment official candidates and advising administrative vice

ministers.47 Hashimoto’s reforms in 2001 required new appointments to be approved by the cabinet and the screening process became a method for the Prime Minister to assert more leadership over the bureaucracy.48 Likewise, the 2001 reforms reorganized the Vice Ministries and the CCS became a chief advisor in consulting the Vice-Ministers on their institutions which granted the Kantei more sway over the bureaucracy.49

Second, the ability to create Ad Hoc policy-offices dramatically improved the policy coordination and initiation abilities of the Prime Minister. Hashimoto’s reforms permitted the Prime Minister to create flexible, more responsive policy-offices that do not fall within one institution’s framework.50 The framework for creating these policy-offices remains flexible and the Prime Minister can frequently create new ones or dissolve them when necessary.51 More than fifteen ad-hoc offices had been established following May 2006, and some lacked no legal basis for their existence other than the Prime Minister ordering their creation.52 Such offices greatly expanded the size of the Kantei and granted greater institutional power to the Prime Minister’s office in spearheading policy creation.

Third, the expansion of policy coordination abilities for the Kantei facilitated the shift in the foreign policy dynamic towards the Prime Minister and away from the bureaucracies. Under the old laws governing the Kantei’s behavior, the Kantei could only act on policy coordination after other ministries requested their assistance.53 The new laws under Hashimoto’s reforms “allows the Kantei to initiate polices by clearly providing the authority to plan and draft concrete proposals under the

direction of the cabinet and the prime minister” to great effect.\textsuperscript{54} These new laws essentially transferred the policy-initiation ability away from the bureaucracy and transferred it to the Prime Minister and his cabinet. Hashimoto’s administration, and later Koizumi’s would greatly use this new ability to lead the LDP and security reform in the direction they so desired.

Indeed, as in examination of Koizumi’s security reforms, the effects of the Hashimoto’s reforms are apparent in how Koizumi utilized the \textit{Kantei’s} new abilities to achieve reform. Koizumi’s administration undertook notable, and at times, politically risky moves that faced entrenched opposition within the LDP that he bypassed through the \textit{Kantei’s} strengthened abilities like the 2001 Anti-Terror Legislation and the deployment of the SDF to Iraq.\textsuperscript{55} Through the new top-down decision making model made possible by the strengthened Kantei, Koizumi repeatedly bypassed the LDP and the bureaucracies by appealing directly to opposition parties, interest groups and the electorate.\textsuperscript{56} The DPJ, in its desire to become a viable opposition party to the LDP, generally supported Koizumi’s reforms after negotiation while high-public support prevented LDP \textit{zoku} policy-members from blocking reform.\textsuperscript{57} Notably, Koizumi stayed within the constitutional framework of Japan and did not challenge the established security norms too directly, with actions like the SDF deployment being a peacekeeping mission, as a direct challenge would dissolve the needed coalition for support.\textsuperscript{58}

\textbf{2. The Self-Defense Forces}

It would be impossible to discuss the evolution of Japan’s defense structure without delving into the Self-Defense Forces themselves. From their origins as the National Police Reserves to their present status, the Self-Defense Forces have undergone numerous changes as Japan adapted to new security challenges. Many of these changes


play into Japan’s dual-hedging strategy as Japanese policymakers expand the SDF’s role as necessary to maintain US-Japanese security ties. The desire for an expansion of the SDF’s collective self-defense abilities largely stemmed from Japan’s participation, or lack thereof, during the Gulf War. Japan’s dollar diplomacy drew heavy criticism as the Japanese contributed no physical presence, whether humanitarian, combat or logistics during the war due to constitutional constraints.\(^{59}\) The humiliation Japan suffered on the international stage from the Gulf War debacle influenced the Diet’s passage of the 1992 United Nations Peacekeeping Operations Cooperation Bill.\(^{60}\) The UNPOC lifted the decades old ban on the deployment of the SDF abroad for peacekeeping and this lift marked the first significant challenge to pacifist security identity.\(^{61}\) Additional reforms throughout the 2000s came as Japan faced new security challenges and this section will explore their significance to Japanese security arrangements.

First, the 2001 Anti-Terror Special Measures Law enabled the deployment of the SDF abroad for logistical support for the US alliance without compromising the pacifist identity. Koizumi’s administration, following the 9/11 attacks, sought to ensure that Japan would play a more active role in the US-Japan alliance and pursued reform measures within the confines of the pacifist security identity.\(^{62}\) The Anti-Terror Special Measures expanded the SDF’s role beyond humanitarian assistance into logistical support with little controversy as Japan flew C-130s to provide relief supplies, but also expanded the pacifist security identity via new restrictions on supplying arms.\(^{63}\) The law included stipulations prohibiting the SDF from resupplying ammunition or refueling combat vehicles within foreign territory which would later


become an issue during the 2003 Iraq Legislation fight. The Anti-Terror law also included provisions long-desired by US policymakers enabling the SDF to defend US bases within Japan should they come under attack. While not breaking from the security identity, the new Anti-Terror Special Measures Law enabled a more active role for the SDF in the US-Japan alliance and incrementally moved the SDF more towards a “normal” military.

Second, the Koizumi administration passed the 2003 Emergency Legislation which provided a “permanent legal framework for allowing the Self-Defense Forces (SDF) to use force” should Japan come under attack. Against the backdrop of the 9/11 attacks and the intrusion of a DPRK ship into Japanese waters, Koizumi’s administration sought to improve the responsiveness of the SDF in the event of a domestic crisis. The Emergency Law revised the Security Council Establishment Law to give the Prime Minister and the Security Council of Japan greater coordination powers while undoing bureaucratic hurdles like the Road Law which required approval for the SDF to modify roads for troop transportation. Controversially, the legislation attempted to grant the same degree of legal exemptions from prior laws to the US military, but this provision failed under heavy LDP opposition. Here, Japan normalized its protocols for the event of an attack on domestic Japanese soil. The bill largely did not deviate from the pacifist identity with the exception of the US legal exemption provision which was removed due to heavy opposition.

Third, 2003 saw the passage of the Iraq Special Measures Legislation. While the Anti-Terror Legislation created a framework for SDF deployment abroad, the physical deployment of Ground Self-Defense

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Force (GSDF) personnel into the region drew incredible opposition. This opposition largely stemmed from the perception of the GSDF actively integrating with US military personnel and engaging in the use of force, while in actuality, the SDF continued its humanitarian role. GSDF troops concentrated on humanitarian and logistical assistance and completed their mission by 2006 without firing a single shot or suffering a single casualty. The SDF exercised extreme caution in its role and upheld Japan’s pacifist identity in its operations.

While these legal measures were largely incremental changes to Japan’s established security identity, the most significant recent changes occurred from the issuing of the new 2015 US-Japan Defense guidelines. The 2015 Defense Guidelines accompanied Abe’s new 2015 Security Legislation by updating the previous protocols to reflect the more modern, more proactive SDF. Notably, the guidelines provide a framework for closer cooperation on intelligence, surveillance, reconnaissance, maritime security, logistics and so forth in the event of an attack on Japan. Two new features of the 2015 guidelines compared to their 1997 counterpart is the emphasis on the global nature of the US-Japan alliance and the emphasis on space and cyberspace.

Regarding the former, the guidelines state “the two governments will reinforce efforts and seek additional opportunities to cooperate with regional [partners]...as well as international organizations,” indicating a larger Asia-Pacific oriented alliance. With the ASEAN countries playing an increasingly important role in the Asia-Pacific and maritime boundaries becoming increasingly contentious, the guidelines indicate the US-Japanese alliance will seek to promote stability within the region. This role indicates a shift from the US-Japanese alliance solely focusing on the defense of Japan to one where Japan and the US are mutual partners seeking to promote a mutually beneficial East Asian order.

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As for the emphasis on space and cyber as new realms of cooperation, China’s involvement in these areas challenges US hegemony and US-Japanese cooperation is an effort to contest them. Chinese cyberattacks pose an economic threat to US corporations and a security threat to the US government as Chinese cyberattacks resulted in the theft of classified files from the Defense Department’s network and Office of Personnel Management. Japan likewise, reported over 24 million cyberattacks in 2014, 40% of which were traced back to China. Closer US-Japanese cyber-security ties will enable the two states to coordinate strategy and policy options to deter Chinese economic espionage and safeguard military secrets against the People’s Liberation Army’s cyber division. As for space, the agreement signals closer US-Japanese intelligence sharing as the SDF and US will “pursue opportunities for cooperation in maritime domain awareness” security and closer intelligence sharing will foster greater cooperation and responsiveness between the US and Japanese governments against China’s maritime forces.

V. Conclusion

Is military reform dead in Japan? Are Japan’s security institutions withering? The answer is not clear-cut but current literature on the subject indicates that reform is still alive in Japan. While normal-nationalists and pro-security reform policymakers desire to expand Japan’s security arrangements, pacifism continues to act as the metaphorical speedbump in the process. Security reform, while attractive to many like a brand new Audi, must proceed at an acceptable pace otherwise pacifism will throttle-stop it. Article 9 will remain the ultimate barrier to full remilitarization of Japan and Japanese policymakers are content with this reality. The 2015 Defense Guidelines between the US and Japan indicates that Japan, while still relying on US security arrangements, seeks to become a more proactive player in the Asia-Pacific. Enabling collective self-defense finally allows Japan to come to the aid of the US, and with China’s continued aggression and expansion of influence in the region, Japan is branching outward.

Pragmatism continues to guide Japanese foreign policy. In the past,


Japan could rely on the US’s shield while it reconstructed its economy but today it can no longer be passive. Chinese activity in the South China Sea provides the most direct security threat to Japanese interests, and as Sheila Smith’s analysis highlighted, Japan was underequipped to manage crises in the region. Security reform is a necessity to manage the challenges the Asia-Pacific will throw at Japan and Japan will do whatever is necessary to overcome these challenges. Full normalization of the military is unlikely as long as Article 9 remains in place and as pacifism remains prevalent in the Japanese public. It will take a larger punctuated equilibrium to gain the necessary political support to attempt to repeal Article 9 and pursue full normalization of the military, but such an equilibrium would be indicative of a much larger problem in the Asia-Pacific.
Works Cited


