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ARTICLES

The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court

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INTRODUCTION

Today's Supreme Court is, in the minds of many, impregnable. According to recent commentators the Court has—without serious challenge—created federalism doctrine out of whole cloth and applied it aggressively to strike congressional statutes,¹ inappropriately decided the outcome of a presidential election,² and arrogated to itself the sole power to determine what the Constitution

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1. See William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 90 (2001) (challenging Court's aggressive review of legislative records, particularly in federalism cases); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We The Court*, 115 HARV. L. REV. 4, 137–53 (2001) (vehemently criticizing Supreme Court's recent federalism decisions on this ground); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 445, 459–67 (2000) (questioning pedigree of Court's standard of scrutiny in federalism cases).

2. See, e.g., Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408 (2001) (contending that Court's decision in *Bush v. Gore* was partisan and decided 2000 presidential election); Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1095 (2001) (arguing that Court should have deemed *Bush v. Gore* nonjusticiable); Richard D. Friedman, *Trying to Make Peace with Bush v. Gore*, 29 FLA. ST. U. L. REV. 811, 817–31 (2001) (arguing that Court's decision in *Bush v. Gore* was wrong as matter of law); Louis Michael Seidman, *What's So Bad About Bush v. Gore: An Essay on Our Unsettled Election*, 47 WAYNE ST. L. REV. 953, 962, 1019 (2001) (arguing that decision was decided on partisan grounds and was "simply indefensible in terms of the standard rules of constitutional interpretation"); PAUL D. CARRINGTON & H. JEFFERSON POWELL, *THE RIGHT TO SELF GOVERNMENT AFTER BUSH V. GORE*, (Duke Univ. Sch. of Law, Public Law & Legal Theory Working Paper Series, Working Paper No. 26, 2001), available at <http://www.law.duke.edu/pub/selfgov/> (last visited Oct. 4, 2002) (on file with author) (discussing how Court's decision to resolve election was inappropriate and reflects forgotten understanding of Court's proper role in democratic society). This is but the front end of a flood of similar commentary.

means.³ The Warren Court also is frequently accused of activism, but that Court struck down state statutes that often lacked national support, and it ultimately faced a backlash after misjudging the national mood.⁴ The Rehnquist Court pursues its aggressive strategy against congressional statutes bearing the imprimatur of national backing, yet does so with seeming impunity. As Larry Kramer recently explained: “The Rehnquist Court no longer views itself as first among equals, but has instead staked its claim to being the *only* institution empowered to speak with authority when it comes to the meaning of the Constitution.”⁵

Listen, for the sake of comparison, to words of a time generally considered very different from our own. The year is 1867; the Speaker is Representative John Bingham, hardly the most radical member of the Reconstruction Congress. Bingham believed—as did many others during this volatile time—that the Supreme Court might act to intervene and invalidate military rule of the South before Reconstruction was accomplished and the Southern states were readmitted to the Union on Congress’s terms. Yet, Bingham claimed that there was little cause for concern about the Supreme Court:

If . . . the [C]ourt usurps power to decide political questions and def[ies] a free people’s will *it will only remain for a people thus insulted and defied to demonstrate that the servant is not above his lord* by procuring a further constitutional amendment and ratifying the same, which will defy judicial usurpation *by annihilating the usurpers in the abolition of the tribunal itself.*⁶

This snapshot portrays the Supreme Court in what appears to be quite different circumstances from those of the current Court, but it turns out that very similar forces account for both the apparent vulnerability of Reconstruction’s Court and the seeming impregnability of today’s. Understanding these forces is extremely important because, taken together, they determine the level of independence of the judiciary from popular politics. Too much judicial independence may threaten popular sovereignty; too little may undermine individual liberty. It is important to get it right and getting it right requires an appreciation of precisely how politics affects judicial review.⁷

This Article examines the political forces that determine the judiciary’s

3. See, e.g., Laura S. Fitzgerald, *Beyond Marbury: Jurisdictional Self-Dealing in Seminole Tribe*, 52 VAND. L. REV. 407 (1999) (challenging Court’s usurpation of primacy in interpreting Constitution); Kramer, *supra* note 1, at 14 (same).

4. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part V*, 112 YALE L.J. 153 (2002).

5. Kramer, *supra* note 1, at 14.

6. CONG. GLOBE, 39th Cong., 2d Sess. 501–02 (1867), *quoted in* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 196 (1998) (emphasis added).

7. Understanding the relationship between judicial review and politics is essential to determining the appropriate bounds of political pressure placed upon not only the United States’s federal judiciary, which has had a relatively stable institutional structure for some time, but also the fifty state judiciaries, and the judiciaries of numerous countries and confederations, such as the European Union. In the American states, some judiciaries are elected and there is constant discussion of judicial reform.

independence from majoritarian politics—and, thus, its freedom to engage in judicial review. The thesis of this Article is that politics can threaten judicial independence, but also can serve to protect it. Three forces in particular take center stage here. The first is the judiciary's own role as a "political" actor: Judges can act willfully and weather the consequences or they can be sensitive to the political environment in which they operate.⁸ The second is the political economy of court-tampering, or what is required politically before the political branches can take punitive action against judges. It turns out to be surprisingly difficult to take action against the federal judiciary and doing so requires a confluence of political events that rarely is encountered today.⁹ The third is public support for preserving a realm for judicial review separate and apart from ordinary politics. Although seldom studied, it ultimately is popular approval or disapproval—both of court decisions and actions threatened against courts—that determines the freedom with which any institution may act.¹⁰

The focus of this study is the Supreme Court during Reconstruction, arguably the single best period in American history for studying the relationship between politics and judicial review. Like nuclear particles observable only when they collide, the boundaries of law and politics are seen most sharply when clashes between the two occur. Today those clashes are rare.

During Reconstruction, quite unlike any other period in American history, the Supreme Court's independence was in almost constant jeopardy.¹¹ As a time when there were threats to abolish, reform, or reconstruct the Supreme Court at an institutional level, Reconstruction offers us a window into what it truly means to be a "political court." Yet, with the exception of one landmark Supreme Court decision, *Ex Parte McCordle*¹² (the import of which is often misstated or misunderstood), most of what happened during this period has been lost to the canonical lore of constitutional history. Legal academics pay abundant attention to *Marbury v. Madison*,¹³ *Lochner v. New York*,¹⁴ and the New Deal Court-packing plan, all milestones in the story of judicial review. However, little notice is paid to Reconstruction debates about subjugating the Supreme Court to popular will, about the constant manipulation of the Court's size during that period, about the *Legal Tender Case* controversy,¹⁵ or even

Abroad, experimentation with American-style judicial review is common, with many variations on judicial structure being employed.

8. See *infra* section II.A (developing this idea).

9. See *infra* section III.A (explaining political economy of court-tampering).

10. See *infra* notes 107–13 (detailing public's role in driving Reconstruction).

11. See Karen Orren & Stephen Skowronck, What is Political Development? 13 (unpublished manuscript, on file with author) (asserting that what is important about judiciary's role in Reconstruction was "its continuing authority as ultimate institutional decisionmaker on the meaning of the Constitution").

12. 74 U.S. (7 Wall.) 506 (1869).

13. 5 U.S. (1 Cranch) 137 (1803).

14. 198 U.S. 45 (1905).

15. See *infra* section II.c.

about the close particulars surrounding Congress's decision to strip the Supreme Court's jurisdiction, the subject of the *McCardle* decision.¹⁶

This Article underscores the importance of restoring Reconstruction's judicial controversies to the canon of constitutional law by using those controversies to spell out the circumstances under which politics may affect judicial review. Part I sets the stage. Reconstruction was an extremely chaotic time and narratives of the period typically are difficult to follow. Part I simplifies the story to make it accessible for the purpose of analyzing the interrelationship of politics and judicial independence. Section I.A describes the importance of legal issues that came before the Supreme Court during Reconstruction. Section I.B narrates the tale of conflict between Congress and the executive branch over the terms by which the Southern states would be readmitted to the Union. Section I.C describes how the Court necessarily became a central player in the South's attempts to resist the plan for Southern Reconstruction ultimately adopted by Congress.

Part II turns to the first of the factors influencing the independence of the judiciary: the Court's own actions. The threat to the Supreme Court during Reconstruction is unquestioned, but there has been persistent controversy throughout history about the extent to which politics actually influenced the decisions (and nondecisions) of the Reconstruction Court. Answering this question may prove impossible, but answering a closely-related one is not. Although in any given situation it may be impossible to tease out law from politics as the primary determinant of judicial action, the Reconstruction story, taken as a whole, leaves a reader with two inescapable impressions: (1) the Court operated in an environment of serious political threat and (2) the Court's own actions determined the extent to which politics would hold the Court to account.

Section II.A begins by describing the atmosphere of legislative and popular hegemony in which a Court weakened by *Dred Scott* and the Civil War was forced to maneuver. Section II.B relates the story of the *McCardle* case, arguably Congress's one successful use of its jurisdiction-stripping power to curtail the ability of the Supreme Court to protect individual liberty. *McCardle* commonly is taught as a law case, as the precedent sanctioning Congress's power

16. See *infra* section II.B. The legal academic who has devoted sustained attention most recently to Reconstruction is Bruce Ackerman, but his focus by definition was much more upon Congress and its interaction with the executive branch than it was upon the judiciary (although machinations involving the courts obviously are a part of his story). See generally 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998). Political Scientists Lee Epstein and Thomas G. Walker have developed a game theoretical model of the interbranch interaction described here. Lee Epstein & Thomas G. Walker, *The Role of the Supreme Court in American Society: Playing the Reconstruction Game*, in *CONTEMPLATING COURTS* 315 (Lee Epstein ed., 1995). The most extensive work dealing with the judiciary during this period is Richard D. Friedman's *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 *CARDOZO L. REV.* 1 (1983). The only casebook that even deals with the *Legal Tender* decisions is PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 231-39 (4th ed. 2000) (treating Court-packing question in one short note).

over the jurisdiction of the Supreme Court. But it is difficult when reading *McCardle* in context not to treat the case as a highly dubious precedent from a Court under pressure—from politics as much as law. Section II.c describes the *Legal Tender Case* controversy, during which furious claims of Court-packing arose. Whether the political branches manipulated the Court's size and membership specifically to effect outcomes during that controversy—or the several other times the Court's size was changed during the Civil War and Reconstruction—is open to the debate of historians. Whether the public perceived that the political branches had done so is not. The *Legal Tender* story makes clear that the answer is yes: The public believed that the Court acted precipitously, and the Court's reputation was not enhanced when it appeared that politics responded with the upper hand.

Part III explains how, even in a time of grave political threat, politics also may serve to protect the Court and judicial independence. Section III.A makes the simple but powerful point that taking action against the Court requires a congruence of agreement and action among the political branches. This will work in all but the most extraordinary circumstances to immunize the Court. As it turns out, however, Reconstruction was one of those rare times—completely predictable as a matter of theory—when the political forces aligned to threaten the Court. Yet, although the Court was subject to tampering during this period, the question remains why more forceful action was not taken against it. Section III.B addresses this question, explaining how public sentiments about the rule of law may offer protection for the judiciary during troubled times. This section provides evidence that even in the passion-filled Reconstruction era, there were strains of concern about the rule of law and an independent judiciary that provided a safe harbor for the Court. Thus, political actors taking aim at the Court rarely were willing to do so openly. Consistently, the least possible political pressure was applied to ensure that legal outcomes would not frustrate political aims. Most important, in the aftermath of such action, political actors and the public regularly displayed concern—and perhaps even regret—about what had happened.

The lesson here is a decidedly ambivalent one: Politics does serve to protect the courts, particularly the Supreme Court and the federal judiciary. As this study explains, that is largely because of divided government and embedded rule of law values in the body politic. But the study also makes clear that when the chips are down and the judiciary has in its hands something of great value to the public, politics may threaten the judiciary. At such times, it is up to the judiciary to secure its own fate. Ironically, however, if the judiciary acts to sidestep danger, it likely will be subject to criticism that politics, and not law, carried the day.

I. POLITICS CONFRONT THE COURT

Reconstruction presented an epic struggle between a revolutionary Congress

and the executive branch,¹⁷ one of only two instances in American history when a President was impeached by the House of Representatives. And unlike the other instance—the impeachment of Bill Clinton—at the center of the Johnson impeachment was a fundamental power struggle between the two branches on the most critical issues of the day.¹⁸ The predominant questions that split the branches were the terms on which the Southern states would return to the Union, as well as which branch of government would have the power to make that decision.¹⁹

The Supreme Court's role as a pawn in this political power struggle is *the* defining reality regarding the political security of the Court during Reconstruction.²⁰ Early decisions suggested that the Court, in effect, would be aligned with the Executive as to critical constitutional questions.²¹ But the Republicans in Congress—especially the radicals—and their supporters were not prepared to let anything interfere with their program, including rival views of the Constitution.²²

It is no wonder, with powerful members of Congress speaking of “annihilating” the Supreme Court,²³ that the Justices themselves had to walk a very narrow and careful path during this period. On the one hand, the Court could cast caution to the wind, render constitutional judgment as it saw fit, and run the

17. The struggle began while Lincoln was President. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877*, at 61 (1988). However, even moderate Republicans opposed Johnson's Reconstruction plan. See *id.* at 22. His veto of the Civil Rights Bill split him off from moderates altogether. See *id.* at 250.

18. On the impeachment of Johnson, see *id.* at 333; WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 203–74* (1992). For a recent piece developing this thesis in the context of the Clinton impeachment, see Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 U. PA. J. CONST. L. 422 (2000).

19. See FONER, *supra* note 17, at 35 (“Of the Civil War's innumerable legacies, none proved so divisive as the series of questions, that came to form the essence of Reconstruction. On what terms should the defeated Confederacy be reunited with the Union? Who should establish these terms, Congress or the President?”); WILLIAM LASSER, *THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS* 59 (1988) (“The secession of the South raised new and complex constitutional issues ranging from the status of the ex-slaves to the status of the Southern states The list of constitutional questions was seemingly endless . . .”).

20. See STANLEY I. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* 4 (1968) (describing Reconstruction politics as pitting “band of ‘vindictive’ men in Congress” against what they considered an “obstinate president” and “fussy judiciary” overly concerned with “traditional constitutional limitations and niceties”); LASSER, *supra* note 19, at 59 (explaining that Court was “caught in the crossfire” of political war between legislative and executive branches).

21. See *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1866) (acknowledging “general principles which forbid judicial interference with the exercise of Executive discretion”); cf. *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 61–62 (1867) (refusing to assert jurisdiction over political question potentially curtailing state executive power).

22. See 6 CHARLES FAIRMAN, *HISTORY OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–88* Part One, at 403 (Stanley N. Katz ed., 1971) (“Democratic success caused Republican leaders to become more determined, more united, more daring. Now they must get on with the business of Reconstruction, with an eye toward placing their party in a strong position [regarding] the South.”).

23. See *supra* note 6.

risk that Bingham and company would make good on their promise to “abolish the tribunal itself.”²⁴ On the other hand, the Court could decide that discretion was the better part of valor and remain silent until the trouble had passed.

As it happened, the Court took neither course, instead vacillating between them, alternatively placing itself in the way of jeopardy and then acting (or declining to act) to save itself. And as the Court responded to the events of the day, politics responded to the Court. Section A describes the events following the Civil War that brought the Court to center stage. Section B then discusses the political environment in which it was forced to act, and the Court's response under pressure.

A. 1865: THE POLITICAL AND LEGAL ISSUES OF THE DAY

On April 9, 1865, Lee surrendered at Appomattox. Five days later, Lincoln was assassinated and Andrew Johnson, succeeding Lincoln, began the process of bringing the Southern states back into the Union.²⁵ Initially, there was substantial support in the North for Johnson's efforts.²⁶ Southern state conventions, however, were not friendly even to Johnson's measured approach. The Thirteenth Amendment to the Constitution was ratified, bringing a formal end to slavery, but by late 1865, the rebel states had enacted Black Codes which, though ostensibly acknowledging emancipation, provided for the continued subjugation of African-American citizens.²⁷ When Southern delegates appeared at the thirty-ninth Congress in December of 1865, a displeased legislature declined to seat them.²⁸

To oversimplify greatly, two issues in particular were of great importance to the Reconstruction Congress. First, the legislature had to determine the terms under which the Southern states would be readmitted to the Union and their citizens would be restored to full political rights. Second, the legislature had to figure out how to approach the protection and ultimate treatment of the former slaves. The fates of these two issues were interrelated, and attempts to address

24. CONG. GLOBE, 39th Cong., 2d Sess. 501–02 (1867), quoted in ACKERMAN, *supra* note 16, at 196.

25. This process began modestly, with Johnson “recommending” that a qualified suffrage be granted to the freedmen by state action. FAIRMAN, *supra* note 22, at 105.

26. Early on, even radical Republicans believed Johnson would act favorably to their cause. See FONER, *supra* note 17, at 177–78 (quoting a radical: “‘I believe,’ one declared, ‘that the Almighty continued Mr. Lincoln in office as long as he was useful, and then substituted a better man to finish the work’”). Witness also the words of Maine Senator Lot Morrill: “We all endorse President Johnson . . . He is probably the most popular President in our history. All parties do him homage.” FAIRMAN, *supra* note 22, at 105 (quoting AUGUSTA KENNEBEC J., Dec. 8, 1865).

27. The tactics of such Codes included prohibiting freedmen to appear as witnesses against whites; highly expansive vagrancy laws, including such offenses as “mispending of earnings”; and a battery of petty offenses. See FAIRMAN, *supra* note 22, at 110–17.

28. *Id.* at 117–18.

them provided the impetus for the chaotic political events in which the Court found itself enmeshed.

The judiciary inevitably becomes involved in a dispute once issues are framed in legal terms, even if the subject matter arguably is more appropriately political. One of the themes of Reconstruction was that the lines between law and politics could become maddeningly blurred under pressure.²⁹ The Reconstruction Supreme Court was presented with three highly-politicized legal issues—loyalty oaths, martial law, and the status of paper money as legal tender—the resolution of which had the potential to jeopardize the Court's independence. All three were on the Court's docket in December of 1865, as armed hostilities came to an end and political battles intensified.

1. Loyalty Oaths

The issue of loyalty oaths was central to congressional plans for Reconstruction and figured prominently in the ultimate struggle between Andrew Johnson and Congress. Although a seeming formality, the oath was crucial in defining the terms upon which Southerners and Southern sympathizers would regain their right of participation in the Union's affairs. Johnson's program of presidential Reconstruction would have required only that the affiant promise future loyalty to the Union.³⁰ By contrast, the "Ironclad Oath," adopted by Congress for certain actors, included swearing that one had never voluntarily rendered assistance to the Confederacy.³¹ Eric Foner reports Senator Jacob Howard as explaining that "[t]he people of the North are not such fools as to fight through such a war as this, . . . and then turn around and say to the traitors, 'all you have to do is come back into the councils of the nation and take an oath that henceforth you will be true to the Government.'"³²

In two cases on the 1865 docket—*Garland*³³ and *Cummings*³⁴—the Court faced the legality of loyalty oaths. *Garland* was a lawyer³⁵ who refused to take the oath mandated by Congress prior to readmission to the Supreme Court's bar.³⁶ *Cummings* was a clergyman who refused to take a state oath similarly required.³⁷ The primary constitutional challenge in each case was that such oaths were ex post facto laws and bills of attainder imposing retroactive punishment.³⁸

29. See *infra* section III.B.2.

30. FONER, *supra* note 17, at 183.

31. *Id.* at 60. Somewhere in between were those Southerners who had opposed secession but aided the Confederacy once the decision to secede had been made.

32. *Id.* at 60–61.

33. *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

34. *Cummings v. Missouri*, 72 U.S. (4 Wall.) 277 (1867).

35. *Garland* was also previously a Confederate Senator from Arkansas. FAIRMAN, *supra* note 22, at 134.

36. *Garland*, 71 U.S. (4 Wall.) at 337.

37. *Cummings*, 71 U.S. (4 Wall.) at 281–82.

38. *Cummings*, 72 U.S. (4 Wall.) at 284; *Garland*, 71 U.S. (4 Wall.) at 339.

2. Martial Law

Without question, the most important matter before the Court in Congress's eyes concerned the constitutionality of military rule of the formerly rebellious territories.³⁹ It was essential to Congress that military government be maintained until loyal civilian governments could be established in a manner consistent with the developing congressional plan for Reconstruction.⁴⁰ On the docket in 1865 was the case of *Ex Parte Milligan*,⁴¹ in which the Court was asked to rule on the constitutionality of military tribunals. Milligan was a Copperhead (a Southern supporter) living in Indiana, who had been sentenced to death by a military tribunal for treason.⁴² He had taken part in a conspiracy to release Confederates being held in several prison camps and to foment an uprising in Louisville.⁴³ The Supreme Court was presented with the question whether Milligan's trial before a military tribunal and resulting sentence of death were constitutional. Because Milligan had been tried and sentenced in a state where a loyal civil government was up and running, his case technically presented a somewhat different question than the constitutionality of martial law in the formerly rebel territories that had not yet been readmitted to the Union.⁴⁴ Nonetheless, the issues were soon to merge in the public eye.⁴⁵

3. Legal Tender

To fund its operation during the war, the government had issued paper money as legal tender.⁴⁶ This measure was subject to challenge both for the practical reason that the floating market value of tender often fell below that of specie, and for the legal reason that the Constitution gave Congress the power to "coin" money and the tender obviously was not "coin."⁴⁷ Throughout the war, the Court never ruled on the constitutionality of the measure, although every state court to consider it upheld it.⁴⁸ *Hepburn v. Griswold*,⁴⁹ pending in December of 1865, presented a challenge to the Legal Tender Acts, which made "greenbacks" legal tender in lieu of coin.⁵⁰ As it turned out, *Hepburn* would be carried for four Terms on the Court's docket before it was decided.

39. See FAIRMAN, *supra* note 22, at 94–100, 117–24; 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 418–97 (1926).

40. WARREN, *supra* note 39, at 418–19.

41. 71 U.S. (4 Wall.) 2 (1866).

42. The previous May President Johnson had commuted the sentence to life imprisonment at hard labor. FAIRMAN, *supra* note 22, at 199 & n.64.

43. FAIRMAN, *supra* note 22, at 194–95.

44. *Milligan*, 71 U.S. (4 Wall.) at 126–27.

45. FAIRMAN, *supra* note 22, at 214–22.

46. See *id.* at 678–90.

47. See *id.* at 710–12 (referring to U.S. Const. art. I, § 8); WARREN, *supra* note 39, at 499.

48. That is, except for *Griswold v. Hepburn* itself, in which the Court of Appeals of Kentucky deemed the Act unconstitutional. 63 Ky. (2 Duval) 20 (1865). For state court cases upholding the Act, see FAIRMAN, *supra* note 22, at 692–94; WARREN, *supra* note 39, at 499.

49. 75 U.S. 603 (1868).

50. *Id.* at 610.

B. 1866–67: POLITICS ENGULF THE COURT

1. The Political Fray

Tensions between President Johnson and Congress erupted in 1866. The thirty-ninth Congress immediately formed the Joint Committee on Reconstruction. The recent conduct of the South “‘forced upon the early attention of Congress’ the question of how the liberties of the black race were to be made secure.”⁵¹ Congress passed civil rights legislation and extended the Freedmen’s Bureau, but Johnson vetoed the bills.⁵² The vetoes were overridden by Congress and Johnson left the Republican Party.⁵³

On June 13, 1866, Congress passed the Fourteenth Amendment and sent it to the states for ratification.⁵⁴ Tennessee quickly ratified the Amendment and was readmitted to the Union. But it would be twenty-three months before another state was readmitted,⁵⁵ during which time the South would try to avoid a plan for reentry into the Union that was noxious to many Southerners. In doing so, the South was aided by Andrew Johnson, who suggested that Congress was acting illegally in conditioning readmission upon ratification and in continuing military rule in the South.⁵⁶

The presence of these pending issues made the election of 1866 a hotly contested one.⁵⁷ Elections throughout this period served as a referendum on the actions of Congress and the President, and given the high tensions between the two branches, the election of 1866 was particularly important in this respect.⁵⁸ The country swept the Republicans to an enormous victory, obtaining well over the number of members in each house necessary to override a presidential veto.⁵⁹

2. The Court’s Entrance into the Fray

For most of 1866, the Court managed to avoid the ongoing political battles. *Milligan* was argued in March of that year⁶⁰ and decided in April on the last day of the Term (in favor of the prisoner).⁶¹ The case garnered close attention because of the light it might shed on martial law in the South.⁶² Yet, the Court

51. FAIRMAN, *supra* note 22, at 117 (quoting THE NATION, Dec. 7, 1865, at 710).

52. *Id.* at 127–28.

53. *Id.* at 128.

54. See FONER, *supra* note 17, at 239–55 (discussing developing rift between Congress and President).

55. *Id.* at 261.

56. FAIRMAN, *supra* note 22, at 308.

57. See *supra* section I.B.1 (discussing Reconstruction-era electoral politics).

58. As part of the campaign, Johnson went on his famous “swing around the circle” speaking tour, which was a legendary disaster. FONER, *supra* note 17, at 261–71.

59. In fact, Republicans prevailed by a preponderance of almost three-to-one in the House and almost four-to-one in the Senate. FAIRMAN, *supra* note 22, at 182.

60. *Id.* at 143, 200.

61. *Id.* at 143–44.

62. See, e.g., *The Decision in the Milligan Case*, DAILY MORNING CHRON., Jan. 1, 1867, at 2; *The Late Decision of the Supreme Court on Military Trials During the War*, N.Y. HERALD, Dec. 20, 1866, at 4;

delayed publishing its opinions until the next Term and the decision itself raised no great stir.⁶³ The *Test Oath Cases* also were held off until the next Term.⁶⁴ Although speculation about the cases was rampant,⁶⁵ they would not actually be decided for another several months.

By late 1866, however, the Court had become enmeshed in the interbranch struggle. On December 14, the Court handed down its opinion in *Milligan*, taking the highly unusual step of prohibiting newspaper reporters from taking notes to ensure accuracy when the decisions themselves were published.⁶⁶ Reaction to the Court's announcement of its opinions was strong and negative.⁶⁷ Johnson added fuel to the growing fire of hostile reaction by relying on the Court's decision to release a notorious military prisoner, Dr. James L. Watson.⁶⁸

The published *Milligan* decision—released on January 1, 1867—suggested to many that the Court presented a real threat to congressional Reconstruction. The Court was unanimous in declaring that the trial of Milligan himself was unlawful. Four of the Justices, in a concurrence by Chief Justice Chase, placed their decision purely on statutory grounds, in an opinion that did not call into question Congress's plans for the South.⁶⁹ The five-Justice majority opinion, however, rested on the Constitution and intimated that military rule of the South itself might be in jeopardy now that the war had ended.⁷⁰ Charles Warren,

The Milligan Case, DAILY NAT'L INTELLIGENCER, Dec. 20, 1866, at 16,952 (1866); see also LASSER, *supra* note 19, at 69 (noting that oral arguments in *Milligan* attracted press attention from both sides of political spectrum).

63. FAIRMAN, *supra* note 22, at 144.

64. *Id.*

65. See *id.* at 151–60.

66. *Id.* at 214.

67. *Id.* at 214–22 (discussing reaction).

68. Watson had shot and killed a Negro who, the day before, had gotten into an accident with a carriage transporting Watson's wife. Watson was being held by military authorities in Virginia. See *id.* at 214.

69. The concurrence noted that the constitutionality of the 1863 Act suspending habeas corpus was unquestioned. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 133 (1866) (Chase, C.J., concurring). Chase then applied the statute against the facts at hand and found the military tribunal's conduct unlawful. *Id.* at 134–36. Yet, the concurrence was emphatic that Congress could have acted differently:

We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising this power; but that fact could not deprive Congress of the right to exercise it.

Id. at 140.

70. The majority identified two types of constitutional violations in Milligan's trial. One ground was based on Article III: "One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior." *Milligan*, 71 U.S. at 122. The other grounds were based on protections of trial by jury offered by the Fifth and Sixth Amendments. See *id.* at 122–24; see also *id.* at 109 (using strong language to suggest that fundamental sacrifices of liberty tolerable in crisis could now be examined dispassionately amidst assured public safety).

The majority also provided Congress with genuine cause for concern that Reconstruction was threatened by the Court, stating that the test for the acceptability of "martial rule" was whether

praising the decision as one of the “bulwarks of American liberty,” correctly observed that, “it is difficult to realize now the storm of invective and opprobrium which burst upon the Court at the time when it was first made public.”⁷¹

Before *Milligan*, the Supreme Court “played only a peripheral role in the main drama of Reconstruction, . . . [representing] a brooding omnipresence to the parties most immediately involved.”⁷² The Court’s position was uncertain and popular understanding of the situation was that of “an obstinate President defying the will of the people.”⁷³ After *Milligan*, it looked like “an Executive furnished with a [c]onstitutional standpoint by the Supreme Judiciary, giving validity to his acts [and] checkmating Congress at the most eventful moment by denying its power [and] annulling its legislation.”⁷⁴ Some were not ready to

the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for civil authority As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.

Id. at 127 (emphasis in original).

It is worth noting, however, that some of the majority’s language can be read as indicating that the Court was allowing itself wiggle room to rule differently in cases from the former Confederacy. *See id.* at 121 (saying that military jurisdiction is inappropriate “in states which *have upheld* the authority of the government” (emphasis added)); *see also id.* at 122 (praising loyalty of Indiana and safe exercise of federal judicial power that occurred there).

71. WARREN, *supra* note 39, at 427–28. The *Daily Morning Chronicle* launched an especially strong attack, essentially calling the Court traitorous, editorializing that “the hearts of traitors will be made glad by the announcement that treason, vanquished upon the battle field, and hunted from every other retreat, has at last found a secure shelter in the bosom of the Supreme Court.” *The Chronicle and the Supreme Court*, DAILY NAT’L INTELLIGENCER, Dec. 20, 1866, at 16,952. The *Intelligencer* struck back: “They cannot understand that there is anything higher or holier than their own will” *Id.* Reverdy Johnson rose on the floor of the House to defend the Court and decry the story in the *Chronicle*:

It is . . . indefensible for any one holding a public capacity to assail the integrity of the Supreme Court of the United States. The Senate will understand I suppose to what I allude. There appeared yesterday in a paper, which is semi-official as far as the party in power is concerned, an attack upon that high tribunal

CONG. GLOBE, 39th Cong., 2d Sess. 210 (1866).

72. KUTLER, *supra* note 20, at 30.

73. FAIRMAN, *supra* note 22, at 216 (quoting letter from John Jay, Reconstruction supporter and liberal friend of Chief Justice Chase, to Chase).

74. *Id.* Even then, the issue was Reconstruction, not the parties to any individual case. Media coverage of the *Milligan* decision was extensive. *See The Democracy Vindicated—Decision [sic] of the Supreme Court*, CAIRO DEMOCRAT, Dec. 23, 1866, at 1; *The Late Decision of the Supreme Court on Military Trials During the War*, *supra* note 62, at 4; *The Milligan Case*, *supra* note 62, at 16,952. *See generally* LASSER, *supra* note 19, at 69 (describing dual-sided press coverage of oral arguments). Nonetheless, as Charles Fairman observed, what was happening to Milligan himself played little part in the newspaper columns: “It is a notable fact that in the discussion of the *Milligan* opinion, very little was said about Milligan” FAIRMAN, *supra* note 22, at 221. Rather, “comment was largely concerned with applications to the immediate future. The opinion was read as indicating that the Court was prepared to hamper Congress in the matter of restoring the Union” *Id.*; *see also Trials by Military Commissions—The Supreme Court Decision*, N.Y. TIMES, Jan. 3, 1867, at 4 (discussing possible import of *Milligan* decision for Congress’s ability to extract promises of loyalty in exchange for restoration of

believe that a Court full of Lincoln appointees⁷⁵ was going down this road; others were less sure. *Harper's Weekly* reported that "rebels have already possession of two of the three branches of the Government—the Executive and the Judiciary—leaving the Legislative only to the Union men of the country."⁷⁶ Many papers, on all sides of the debate, saw the alignment of the branches of government in this way.⁷⁷

In mid-January, the Court aggravated matters further when, in a 5-4 decision, it invalidated the test oaths. Ruling against the government in both *Garland* and *Cummings*, the Court held that the Ironclad Oath imposed a penalty rather than a qualification and thus violated the Ex Post Facto and Bill of Attainder Clauses.⁷⁸ The attacks on the test oath decisions were again of the most violent character.⁷⁹

These decisions—and *Milligan* in particular—threw Congress into high gear

privileges: "Whether [Congress's] action in this regard is to be affirmed or annulled by the Supreme Court remains to be seen."). Similarly, when the Court struck down the test oath for lawyers practicing in the federal courts in *Garland*, "what was lost . . . was no more than Thad Stevens and many other Republicans wanted to concede." FAIRMAN, *supra* note 22, at 246. Again, "[t]he alarm was for substantial matters in the immediate future." *Id.*

75. Lincoln appointed four Associate Justices (Swayne, Miller, Davis, and Field) and Chief Justice Chase. FAIRMAN, *supra* note 22, at 378–80, 405.

76. *The New Dred Scott*, HARPER'S WKLY., Jan. 19, 1867, at 34.

77. See, e.g., *A New Secession Impending*, NEWARK EVENING COURIER, Jan. 2, 1867, at 2 ("The Executive is dearly committed thereto, and the Judiciary has swung from its Union moorings and gone over to his side."); *Congress and the Supreme Court*, WORLD, Jan. 21, 1867, at 4 (quoting *Chi. Tribune*) ("[T]hat tribunal [the Supreme Court] . . . seems to have joined hands with a corrupt and treacherous Executive, to give victory to the rebellion . . ."); *Impeachment of the President*, WORLD, Jan. 9, 1867, at 4 ("[W]ith the two great co-ordinate departments of the government against them, the further progress of their measures is blocked."); *Impeachment of the Supreme Court*, DAILY NAT'L INTELLIGENCER, Dec. 20, 1886, at 16,952 (commenting that after *Milligan* it was inappropriate for Congress to contradict Supreme Court judges, "five of whom were selected and put upon that bench by the late President Lincoln himself," who unanimously supported the ruling); *The Lesson of the Crisis*, NATION, Jan. 17, 1867, at 50 (explaining how South and Democratic party thought that they had stymied Congress when both Executive and Supreme Court came "to their aid"); *The Monetary Screw*, CIN. DAILY GAZETTE, Jan. 23, 1867, at 2 ("[W]e see Judges . . . whose political sympathies were kept quiet . . . warmed into reptile life again by treachery in the Executive."); *The New Dred Scott*, *supra* note 76, at 34 ("[T]he late rebels have already possession of two of the three branches of the Government—the Executive and the Judiciary—leaving the Legislative only to the Union men of the country."); see also FAIRMAN, *supra* note 22, at 216 (insinuating that it will be difficult for Republican leaders to overcome opposition composed of an "Executive furnished with a [c]onstitutional standpoint by the Supreme Judiciary, giving validity to his act, and checkmating Congress . . . by denying its power [and] annulling its legislation") (quoting letter from John Jay to Chief Justice Chase (Jan. 5, 1867)).

78. *Cummings*, 71 U.S. (4 Wall.) 277, 320, 329 (1867); *Garland*, 71 U.S. (4 Wall.) 333, 377 (1866). The Court's breakdown in *Garland* and *Cummings* was similar, but not identical, to the breakdown of the *Milligan* Court. In *Milligan*, Justice Davis authored the opinion for the "anti-Reconstruction bloc" and was joined by Justices Nelson, Clifford, Grier, and Field. See 71 U.S. (4 Wall.) 2, 107 (1866). Chief Justice Chase authored the *Milligan* concurrence for the "pro-Reconstruction" bloc of Miller, Swayne, and Wayne. See *id.* at 132 (Chase, C.J., concurring). The blocs remained the same in *Cummings* and *Garland*, but for the switch between blocs by Justices Davis and Wayne. See *Cummings*, 71 U.S. (4 Wall.) at 332; *Garland*, 71 U.S. (4 Wall.) at 382.

79. WARREN, *supra* note 39, at 451.

on Reconstruction. On January 2, 1867, the day after *Milligan* was released, Thaddeus Stevens gave an impassioned speech: “[T]he late decision of the Supreme Court of the United States has rendered immediate action by Congress upon the question of the establishment of governments in the rebel States absolutely indispensable.” *Milligan*, moreover, “may appear ‘not as infamous as the *Dred Scott* decision,’ but in truth it was ‘far more dangerous’ by reason of ‘its operation upon the lives and the liberties of the loyal men,’ black and white, in the South.”⁸⁰

Congress acted on March 2, 1867, passing Reconstruction legislation in the closing moments of the thirty-ninth Congress over the veto of Andrew Johnson.⁸¹ Supplementary legislation was passed by the fortieth Congress shortly thereafter. This package of laws set out the terms of readmission to the Union and provided for military rule in the South until readmission was accomplished.⁸² And it was the timing of those terms that thrust the Court onto center stage.

C. 1867–68: THE COURT IS FORCED TO CENTER STAGE

Congress’s plan for Reconstruction—and the options open to Southerners under that plan—made the Supreme Court the center of attention. The congressional plan basically required that each Southern state hold an election to decide whether to have a constitutional convention.⁸³ If voters answered in the affirmative, that convention would draft a state constitution providing for manhood suffrage. Finally, each state had to approve the new state constitution drafted by its convention and ratify the Fourteenth Amendment to the Constitution of the United States.⁸⁴

This plan posed a tactical problem to Southerners opposed to congressional Reconstruction, and a time-pressured one at that. One option was to comply with the plan and hope to do so in time to participate in the national elections of 1868.⁸⁵ An alternative was to attempt to hinder the plan by, among other things, failing to vote to hold the state constitutional conventions.⁸⁶ Reconstruction legislation provided that a majority of those individuals in each state who registered to vote had to approve the convention. Thus, hostile Southerners could register and then fail to show up at the polls, hoping that their numbers

80. FAIRMAN, *supra* note 22, at 267 (quoting CONG. GLOBE, 39th Cong., 2d Sess. 251 (1867) (statement of Sen. Stevens)). Stevens, a radical, was the floor leader of House Republicans. FONER, *supra* note 17, at 229 (“The recognized floor leader of House Republicans, Stevens was a master of congressional infighting, parliamentary tactics, and blunt speaking.”).

81. See FAIRMAN, *supra* note 22, at 307–09; FONER, *supra* note 17, at 272.

82. FAIRMAN, *supra* note 22, at 333–43.

83. *Id.* at 404.

84. FONER, *supra* note 17, at 276–77.

85. See FAIRMAN, *supra* note 22, at 366 (“If the States would reorganize promptly, the prospect was that ‘the sixty or seventy Southern electoral votes’ could be counted in the [p]residential election of 1868, which ‘would in all probability turn the scale.’” (quoting N.Y. WORLD, Feb. 23, 1867)).

86. FAIRMAN, *supra* note 22, at 404.

would be sufficient to deprive the election of a majority of its registered voters.⁸⁷ Although many Southerners did sit out the vote on holding a convention, this tactic was unsuccessful.⁸⁸ Efforts to reenter the Union thus proceeded in the Southern states.

The third strategy open to Southerners—and one they vigorously pursued—was to seek to have the Supreme Court hold the Reconstruction legislation unconstitutional before the number of states required to ratify the Fourteenth Amendment had done so (and thereby been readmitted to the Union).⁸⁹ As the elections for constitutional conventions ran their course, southern politicians and legal advocates organized a deliberate campaign of litigation to coax the Supreme Court into ruling on the constitutionality of the Reconstruction legislation before the Southern ratification votes on the Fourteenth Amendment were cast.⁹⁰ Thus, from the point at which the Reconstruction legislation was enacted, it was a footrace to the finish.

During this period—from March of 1867 until the ratification of the Fourteenth Amendment in July of 1868—the Court confronted the most critical questions of the day and faced its greatest peril. The real impact of a potential ruling invalidating the Reconstruction legislation was difficult to determine, but many viewed the possibility as catastrophic. Their concerns were as much about politics as law. In state elections held in the fall of 1867, Democrats made a surprisingly strong showing, reflecting to some extent Northern discontent with the terms Congress had imposed on the Southern states.⁹¹ Thus, Republicans were anxious to have the states admitted before another round of elections,⁹² and it was clear that they would tolerate no meddling by either of the other branches of government in seeing this accomplished. In the spring of 1868, Andrew Johnson—whose constant interference with congressional plans finally became intolerable to Republicans—was impeached and tried before the Senate.⁹³

87. *Id.*

88. *Id.* at 405–32 (describing vote in each state).

89. *See id.* at 366–67 (describing options open to South).

90. The chief strategist for the South was former Attorney General, Jeremiah S. Black. *Id.* at 308. The South's litigation aimed at having congressional Reconstruction held unconstitutional. *See id.* at 443.

91. FONER, *supra* note 17, at 314–16.

92. FAIRMAN, *supra* note 22, at 403 (“Democratic success caused Republican leaders to become more determined, more united, more daring. Now they must get on with the business of Reconstruction, with an eye to placing their party in a strong position in the South.”).

93. There were eleven counts of impeachment against Johnson; nine concerned Johnson's violation of two statutes (the Tenure in Office Act, which prohibited removal from office of any official whose nomination had required senatorial consent until a replacement was in office, and an act requiring all orders to military officers to be first sent to General Grant) passed by Congress to ensure implementation of congressional goals for Reconstruction, while the other two attacked Johnson for “denying the authority of Congress and attempting to bring it ‘into disgrace.’” FONER, *supra* note 17, at 333–35. Foner, however, states that these grounds were merely pretenses that masked congressional antipathy to perceived incompetence and intransigence by Johnson. *Id.* at 335. Keith Whittington also emphasizes that the underlying battle was over competing visions of the separation of powers. *See Whittington,*

(Ultimately, he was acquitted.⁹⁴) The Supreme Court was in the same position; it likely faced congressional action should it similarly threaten the congressional scheme. And the Southern litigation strategy was destined to put the Court in just such harm's way.

II. POLITICS INFLUENCE THE COURT?

Reconstruction arguably represents the last time in American history that serious political action was taken against the Supreme Court to affect the outcome of pending cases. Jurisdiction-stripping and Court-packing, two of the weapons in Congress's arsenal, arguably were brought to bear to control the Court. Section II.A describes the political environment surrounding the Reconstruction Court. Section II.B presents the story of the *McCardle* litigation, in which the Court's acquiescence in denial of its jurisdiction potentially affected liberty interests. Section II.C is the story of Court-packing and the *Legal Tender* decisions, an example of politics perhaps affecting a decision involving property rights.

As the events described in this Part make clear, whether the Court actually is subjected to tampering is, at times, within its own power. The Court can, through the use of what Alexander Bickel called the "passive virtues," avoid speaking to constitutional questions when doing so may imperil its existence.⁹⁵ Although the use of this technique has been criticized as unprincipled,⁹⁶ there is little doubt that, throughout its history, the Court has at times decided that discretion was the best course. The story of Reconstruction is, in this regard, a complex one.

Traditionally, historians have told not one, but two, standard stories about the Reconstruction Court. Many historians have depicted the Supreme Court as weak and helpless in the aftermath of *Dred Scott* and the Civil War, dominated by the Republican Congress, and subject to constant manipulation for partisan ends.⁹⁷ In the 1960s, Stanley Kutler offered a revisionist interpretation, arguing that "the Court during this period was characterized by forcefulness and not

supra note 18, at 434–50, 464 (arguing that Johnson's impeachment stimulated a "rich constitutional debate" over separation of powers and republicanism).

94. See FONER, *supra* note 17, at 336. Johnson was acquitted by one vote, with seven Republicans crossing the aisle to vote against conviction; however, the margin was not really so close, as a number of Senators were ready to switch sides if necessary to prevent Johnson's conviction. *Id.*

95. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111–113 (1962).

96. See generally Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

97. See KUTLER, *supra* note 20, at 6 ("By almost all accounts . . . the Supreme Court during Reconstruction was discredited, intimidated, and impotent. The period represented the nadir of judicial power, influence, and prestige."); see also WILLIAM A. DUNNING, *RECONSTRUCTION, POLITICAL AND ECONOMIC 1865–1877*, at 256 (1907) ("During the struggle between Congress and President Johnson, the Supreme Court took great pains to avoid becoming involved, and showed itself in the highest degree sensitive to the manifestations of public opinion and the currents of political feeling in the North.").

timidity, by judicious and self-imposed restraint rather than retreat, by boldness and defiance instead of cowardice and impotence, and by a creative and determinative role with no abdication of its rightful powers."⁹⁸

As this Part makes clear, one might have wished the revisionist pendulum had not swung so far. The Reconstruction period was characterized by a Court that, at times, was quite cautious about its safety, but at other times, equally oblivious to peril. Considering the events collectively, it is obvious that the Court was aware of a political threat and sought to avoid it. But it is equally obvious that the Court was insufficiently savvy or perhaps too confident of its own authority. The Court may have avoided trouble at times, but seems to have invited it at others.

A. THE POLITICAL ENVIRONMENT IN WHICH THE COURT OPERATED

This section describes the political environment in which the Reconstruction Court was called upon to act. Bear in mind that three factors interacted to define the Court's political position: (1) the ability of the political branches to take action against the Court; (2) the Court's own decisions in cases; and (3) the public's agreement with, or tolerance of, the actions of the political branches and the Court. The attention of Part III is on the political branches and the public. This section makes clear that the Court operated in as hostile an environment as it has encountered for most of its history.

1. Legislative Hegemony

The primary, overwhelming *realpolitik* of the Reconstruction was that power rested in a Congress firmly controlled by the Republican Party, and often under the influence of the Radicals. As such, the body took on a revolutionary cast.⁹⁹

98. KUTLER, *supra* note 20, at 6. The two stories about the Court mirror somewhat a shift in opinion about the entire period. The standard story for much of this century painted a beleaguered Andrew Johnson trying desperately to bring the South back into the Union as quickly as possible, consistent with Lincoln's own aims, and frustrated at every turn by the radical Congress calling for blood. See WILLIAM A. DUNNING, *ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION AND RELATED TOPICS* 78 (1898) ("Upon the collapse of the confederacy and the death of President Lincoln, Mr. Johnson devoted himself to the application of his predecessor's plan in the other states"). Revisionists questioned Johnson's abilities and motives and found much to celebrate in the work of the Republican Congress. Stanley Kutler commented on the new version of Reconstruction:

Thus, Andrew Johnson was not necessarily a harassed, persecuted figure who clung to the flag and the Constitution and, in the long run, upheld the "right" positions. Eric McKittrick has argued, just as plausibly, that he was an inept, blundering, obstinate, even obtuse man whose thinking never came abreast of reality and the open character of constitutional questions.

KUTLER, *supra* note 20, at 1.

99. The accusation of being "revolutionary" came from both sides of the aisle. See CONG. GLOBE, 4th Cong., 2d Sess. 479 (1868) ("I find myself here to-day under circumstances which would lead me to suppose that I am in the midst of a revolutionary tribunal."); FONER, *supra* note 17, at 245 ("I admit . . . that this species of legislation is absolutely revolutionary. But are we not in the midst of revolution?" (quoting Sen. Lot M. Morrill)).

In this environment, legislative supremacy was everything.¹⁰⁰ Thaddeus Stevens spoke words that reflected what many seemed to believe when he explained:

In this country the whole sovereignty rests with the people, and is exercised through their Representatives in Congress assembled. The legislative power is the sole guardian of that sovereignty. No other branch of the Government, no other Department, no other officer of the Government, possesses one single particle of the sovereignty of the people. No any one official, from the President and Chief Justice down, can do any one act which is not prescribed and directed by the legislative power.¹⁰¹

Harper's Weekly offered a similar understanding: "The President, by the Constitution, is made a co-ordinate but not a co-equal branch of the Government. So, also, is the Supreme Court. But Congress, or the Legislative branch, is wisely made the chief and superior branch. The Executive and the judiciary are 'checks and balances' only."¹⁰²

Dissenting voices seemed resigned on this point. Representative Woodward expressed typical concern about "legislative oligarchy," observing that "the legislative department of the country is determined to consolidate all the powers of the Government into its own hands."¹⁰³ In the press, the tone often was mocking. The *Cairo Democrat* asked, "When this modest Congress has swallowed all the other co-ordinate branches of this Government, will it then have the great kindness to swallow itself?"¹⁰⁴ President Johnson's organ, the *Daily National Intelligencer*, chose facetiousness: "They cannot understand that there is anything higher or holier than their own will It is truly lamentable that both the Executive and the judiciary stand in the way of the almighty legislative department of the Government."¹⁰⁵ Even the Republican-leaning *Nation* asked, as "the majority of Congress is sure not to do wrong, why have a Constitution at

100. See LASSER, *supra* note 19, at 108 (asserting that Republicans' theory of government was "nothing less than a theory of legislative sovereignty").

101. CONG. GLOBE, 39th Cong., 2d Sess. 252 (1867); see also CONG. GLOBE, 40th Cong., 2d Sess. 478 (1868) (statement of Rep. Williams) (defending bill requiring Court to be unanimous in striking down acts of Congress and explaining necessity of provision "intended . . . to defend the legislative power, which is the true sovereign power of the nation"); CONG. GLOBE, 39th Cong., 2d Sess. 501 (1867) (statement of Rep. Bingham) ("But, say some, there are two departments of the Government against this asserted power of the people of the organized States, the executive and judicial. My answer is, neither of these departments has any voice in the matter—no right to challenge the authority of the people.").

102. *Usurpation*, HARPER'S WKLY., Feb. 9, 1867, at 82.

103. CONG. GLOBE, 40th Cong., 2d Sess. 2168 (1868); see also *id.* at 2121 (statement of Sen. Johnson) ("What is the honorable member's doctrine practically? Congress is the law-making power; and nobody has a right to question the authority of any laws which they make."); *Congress and the Supreme Court*, WORLD, Dec. 11, 1869, at 6 (deriding Congress's attempts to gradually usurp power of Supreme Court).

104. *Impeach! Impeach!*, CAIRO DEMOCRAT, Jan. 8, 1867, at 2.

105. *The Impeachment of the Supreme Court*, DAILY NAT'L INTELLIGENCER, Dec. 20, 1866, at 16,952.

all? Why restrain this body of sages by any restrictions whatsoever?"¹⁰⁶

The source of congressional power was said to be its close relationship with the people. Reconstruction was undoubtedly a time of great popular engagement.¹⁰⁷ The "people" were invoked constantly as the basis for action;¹⁰⁸ on both sides of the aisle, they seemed to be watching carefully.¹⁰⁹ Newspapers contained detailed, blow-by-blow descriptions of the events occurring on the national stage. They offered verbatim reporting of congressional debates, oral arguments in the Supreme Court, and even motions filed there.¹¹⁰ News coverage was extremely inbred; as political battles were fought out on those pages, newspapers of every political stripe covered one another as carefully as they covered politics.¹¹¹ Voter turnout in the elections of 1864–68 was more than

106. NATION, Dec. 16, 1869, at 526.

107. Bruce Ackerman correctly identifies Reconstruction as a time of great popular mobilization. See ACKERMAN, *supra* note 16, at 161 (describing how organized mass political parties contributed to mobilizing American people); *id.* at 162 (arguing that popular mobilization was impetus for Fourteenth Amendment); see also FAIRMAN, *supra* note 22, at 108 (describing engagement of people in South in early 1866).

108. See, e.g., CONG. GLOBE, 40th Cong., 2d Sess. 479 (1868) ("If the House and Senate are absolute, if they may override the will of the people . . . then we have already established a despotism in our country . . ."); *id.* at 482 ("I cannot conceive how the intelligent people of the United States could complain of the action of Congress when that action is intended to guaranty to the people the rights given to them under the charter of their liberties . . ."); *id.* at 483 ("I do not recognize the title of the gentleman to pronounce judgment upon us all in the name of all the people of the United States."); *id.* at 484 ("I desire for one, as a representative of the people, so to provide by law as that hereafter the Supreme Court of the United States shall not dare to disregard a solemn enactment of the people . . ."); see also CONG. GLOBE, 39th Cong., 2d Sess. 501 (1867) ("[T]here are two departments of the Government against this asserted power of the people of the organized States, the executive and judicial. My answer is, neither of these departments has any voice in the matter—no authority to challenge the authority of the people."). Compare *The Late Decision of the Supreme Court on Military Trials During the War*, *supra* note 62, at 4 ("We hold, however, that the war, that last appeal of kings and peoples, has resulted in a great revolution, superseding the constitution as it was, and demanding from the results of war and from the sovereign voice of the people victorious in the war a new interpretation and a new departure even by the Supreme Court."), with *Progressive Radicalism*, DET. FREE PRESS, Dec. 22, 1866, at 4 (asking whether it is possible "that half of our people, the President, the Cabinet, the Supreme Court of the United States, and the Constitution of our country are all *treasonable*, and that the radicals alone are right?").

109. See, e.g., ACKERMAN, *supra* note 16, at 132 (describing popular reaction to Emancipation Proclamation and effects of 1862 and 1864 elections on Lincoln); FONER, *supra* note 17, at 25 (describing how Civil War mobilized Northern reformers).

110. See, e.g., *The McCordle Case: Judge Trumbull's Argument in the United States Supreme Court*, CHI. TRIB., Feb. 12, 1868, at 2 (publishing transcript of Trumbull's argument in support of motion to dismiss McCordle's appeal); *Washington: Beginning of the Radical War on the Supreme Court*, WORLD, Jan. 4, 1867, at 4 (summarizing disparaging statements made by Thaddeus Stevens about Supreme Court in House of Representatives); *Washington: The Southern Cases in the Supreme Court*, INDIANAPOLIS J., Mar. 28, 1868, at 1 (reporting on habeas motion filed by General Davis in case of Martin and Gill, which would presumably test Supreme Court's position on revocation of its jurisdiction); NATION, Feb. 13, 1868, at 1 (briefly summarizing Trumbull's argument).

111. See *Congress and the Supreme Court*, *supra* note 103, at 4 (critiquing editorial published in *Chicago Tribune*: "The leading Radical organ of the West—the *Chicago Tribune*—makes the most elaborate and ingenious attempt we have seen to discover a method of circumscribing the authority of the Supreme Court."); *The Chronicle and the Supreme Court*, DAILY NAT'L INTELLIGENCER, Dec. 20, 1866, at 16,952; *The Tribune Attacks Chief-Justice Chase*, WORLD, Jan. 12, 1867, at 4; see also *The New*

eighty percent of the eligible electorate.¹¹² Shifting electoral results often had an important influence on policy decisions.¹¹³

2. Judicial Weakness

Contrast with legislative hegemony the Supreme Court's weakened position. The prestige of the Court was quite low coming into Reconstruction.¹¹⁴ *Dred Scott* continued to be a significant blot on its record, frequently referred to as a basis for doubting the Court. Reporting on one of the *Test Oath Cases*, for example, the *Daily Morning Chronicle* began, "Dred Scott Number Three has just been enacted in the Supreme Court of the United States . . ." ¹¹⁵ (*Milligan* was *Dred Scott* Number Two.)¹¹⁶

Perhaps the best measure of the Court's relatively weak position was the lack of any strong feeling in favor of "judicial supremacy"—the notion that decisions of the Supreme Court would bind the other branches, particularly beyond the parameters of a particular case. *Dred Scott* had seriously wounded any nascent sense of judicial supremacy; Lincoln's challenge to the decision rested specifically on a denial that the Court could bind the other branches for all

Dred Scott, *supra* note 76, at 34 ("And what do you propose to do about it?" sneered the *Express*. "Well, the *Dred Scott* decision is now eleven years old, and what the people of the United States have done about it must be tolerably clear even to the *Express*."); *The Supreme Court Decisions*, DAILY MORNING CHRON., Jan. 19, 1867, at 2 (summarizing editorial appearing in *New York Herald* earlier that week).

112. WALTER DEAN BURNHAM, *THE SYSTEM OF 1896: AN ANALYSIS, IN THE EVOLUTION OF AMERICAN ELECTORAL SYSTEMS* 147, 192–93 (Paul Kleppner ed., 1981).

113. Republicans fared well in the 1865 elections. See FONER, *supra* note 17, at 219. Nonetheless, referenda on black suffrage—measures favored by radicals—failed, which "emboldened Democrats and the white South, strengthened Johnson's hand, and weakened the Radicals." *Id.* at 223. However, Presidential Reconstruction was dealt a serious blow in the national elections of 1866. Not only did Johnson have few friends going into the election, but his "swing around the circle" campaign tour proved disastrous. *Id.* at 260, 264. The voters elected a Congress with a sufficient number of Republicans to override presidential vetoes. In state and local elections in 1867, the tide shifted again: "Democrats gained ground dramatically," although the small number of important offices at stake ameliorated any impact of the shift. See FONER, *supra* note 17, at 315; LASSER, *supra* note 19, at 96. Finally, the Republican Ulysses S. Grant won the election of 1868, but with a surprisingly low margin of the popular vote. See FONER, *supra* note 17, at 343.

114. See LASSER, *supra* note 19, at 58 ("Roger Taney feared the Court would never recover its strength and independence."); WARREN, *supra* note 39, at 316 ("The country will feel the consequences of the [*Dred Scott*] decision more deeply and more permanently, in the loss of confidence in the sound judicial integrity and strictly legal character of their tribunals . . ." (quoting Timothy Farrar, *The Dred Scott Case*, N. AM. REV. LXXXV (1857))).

115. *Letters from "Occasional,"* DAILY MORNING CHRON., Jan. 16, 1867, at 1. The *Chronicle* was referring to *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

116. See David P. Currie, *The Constitution in the Supreme Court: Civil War and Reconstruction, 1865–1873*, 51 U. CHI. L. REV. 131, 144 (1984) (noting that "there were those who labeled *Milligan* and the oath cases '*Dred Scott* II and III'"); see also FAIRMAN, *supra* note 22, at 232 ("[T]he Republican press every where has denounced the opinion as a second *Dred Scott* opinion . . ." (quoting letter from Justice Davis to Judge Rockwell)); WARREN, *supra* note 39, at 432 (describing how *Milligan* decision was compared to *Dred Scott*).

time.¹¹⁷ During wartime, the Court had not proven particularly effective at protecting constitutional liberties, as *Ex Parte Merryman*¹¹⁸ made clear. In *Merryman*, the Chief Justice, on Circuit, issued a writ of habeas corpus to produce a prisoner held in military custody, allegedly for fomenting insurrection. Pursuant to presidential orders, the commanding officer declined to comply.¹¹⁹ Taney's opinion in *Merryman* was a bow to his inefficacy: "I have exercised all the power which the [C]onstitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome."¹²⁰

Some during Reconstruction made bold statements that the decisions of the Supreme Court were supreme law, but such speakers almost invariably agreed with the Court's decisions and opposed congressional Reconstruction.¹²¹ Thus, the *Cairo Democrat* commented on the *Milligan* case: "The Supreme Court of the United States under the Constitution, is the final arbiter of all questions properly before it."¹²² Much rarer, and more ambivalent, were those who grudgingly accepted supremacy, even while disagreeing with the Court. Comments by the *New York Times* on *Milligan* are about as good as it gets from that quarter: "Legally from his decision there is no appeal. But from the principles which govern his decision there is an appeal to the moral sense and patriotism of the country."¹²³

The threat that the Court posed to Reconstruction was itself as much political as legal. After all, with denials of supremacy all about, who could care what the

117. See WARREN, *supra* note 39, at 331–32. Lincoln criticized Douglas's defense of the decision during the course of the 1858 Senate campaign, saying that Douglas

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

Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 426 (1998) (quoting THE LINCOLN-DOUGLAS DEBATES 75 (Harold Holzer ed., 1993)).

118. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

119. *Id.* at 148.

120. *Id.* at 153.

121. See, e.g., CONG. GLOBE, 40th Cong., 2d Sess. 479–80 (1868) (statement of Rep. Marshall, Democrat) (describing situations sympathetic to Democratic cause in which it would be unjust to strip Court's power to declare act of Congress unconstitutional); CONG. GLOBE, 39th Cong., 2d Sess. 480 (1868) ("Is the judgment entered up a decision of the Supreme Court or is it a judgment entered up in conformity with the decree of the Federal Congress directing them to do so?"); KUTLER, *supra* note 20, at 34–35; LASSER, *supra* note 19, at 89.

122. *The Supreme Court and the Democratic Party*, CAIRO DEMOCRAT, Jan. 9, 1867, at 2; see also *The Law the Will of the People*, DAILY NAT'L INTELLIGENCER, Jan. 3, 1867 ("The Supreme Court must respect [the Constitution], for its sole office is to determine the meaning of the instrument which called that tribunal into existence, and the conformity thereto of the acts of the legislature and the Executive.").

123. *Trials by Military Commissions—The Supreme Court Decision*, *supra* note 74, at 4.

Court actually did? It turns out, however, that judicial pronouncements had important rhetorical value in the precarious politics of the time. As Congress rushed to adopt its own version of Reconstruction, a battle was being fought for public opinion; the machinations among the branches were the fodder of several critical national and state elections occurring in this limited time frame.¹²⁴ As Stanley Kutler correctly observes, “Democratic opposition persistently exploited *Milligan* to label the Reconstruction Acts unconstitutional.”¹²⁵ A similar example presented itself when Congress acted to strip the Supreme Court’s jurisdiction so that it could not resolve the *McCardle* case. The challenge to the legislation was acerbic. Senator Hendricks mocked the Republicans who, “[w]ith five judges out of eight of [their] own appointment,” still could not let the Supreme Court decide the case: “I say, before the country and the world, it is an admission that your legislation will not stand the test of judicial examination.”¹²⁶ Representative Woodward was typical in threatening to focus popular attention on the matter: “[I]f there is responsibility in it, gentlemen must expect to bear it. The people of the country shall have their attention riveted upon the facts of this case, if I can rivet it.”¹²⁷

124. There was constant electoral pressure to maintain a strong majority for the Republican position in the Congress, as well as to fend off Democratic gains in popular opinion. National elections in 1866 and 1868 were critical. The 1866 election would determine the terms under which the Southern states would return to the Union. See DUNNING, *supra* note 97, at 71 (“[I]f the result showed a majority in the next Congress against the [P]resident, his policy would be doomed; if the majority proved to be with him, the policy of Congress would be doomed. No other element entered into the problem.”). President Johnson sought to reconcile Northern sympathies to his cause by initiating a public campaign of unprecedented scale. Accompanied by notables such as Grant and Admiral Farragut, Johnson’s “swing around the circle” speaking tour swept across the North and West. See FONER, *supra* note 17, at 264. This tour, however, was more detrimental than helpful. Johnson proved to be tactless and undiplomatic. See *id.* at 265 (“[W]hen a member of the audience yelled ‘hang Jeff Davis,’ the President replied, ‘Why not hang Thad Stevens and Wendell Phillips?’”). In the end, the tour was thought to have actually *cost* him votes. See *id.* at 265 (“[T]he President returned to Washington from what one admirer called ‘a tour it were better had never been made.’”).

125. KUTLER, *supra* note 20, at 74.

126. CONG. GLOBE, 40th Cong., 2d Sess. 2118 (1868); see also *id.* at 2117 (statement of Rep. Hendricks) (“More than one half the people of the United States deny the constitutionality of your legislation In the North alone there are one million eight hundred thousand voters that have expressed their opinion on this subject.”); *id.* at 2124 (statement of Rep. Bayard) (“[D]o you suppose that if you intercept that decision by retrospective legislation the people of the United States will not view it as precisely the same in effect as if the [C]ourt had decided the question, as an admission of the unconstitutionality of your measures of legislation?”); *id.* at 2094 (statement of President Johnson) (“[The passage of the jurisdiction-stripping legislation] will be justly held by a large portion of the people as an admission of the unconstitutionality of the act on which its judgment may be forbidden or forestalled.”); *id.* at 2097 (statement of Rep. Doolittle) (“[T]he truth is, and we may as well look it square in the face, [the reason for stripping the Court’s jurisdiction] is because men know that these acts will be decided to be unconstitutional.”). For the composition of the Court under Chase, see LASSER, *supra* note 19, at 66. At the time, there were only eight Justices on a Court designated to have ten. Justice Catron died in 1865 and his seat was left vacant. See FAIRMAN, *supra* note 22, at 3. Justice Wayne died in July of 1867. See *id.* at 248.

127. CONG. GLOBE, 40th Cong., 2d Sess. 2167 (1868); see also *id.* at 2117 (statement of Rep. Hendricks) (describing people’s profound interest in outcome of case). And, indeed, public attention was riveted on the case. See, e.g., *Action of the Supreme Court on the McCardle case*, INDIANAPOLIS J.,

The Court's weakened position is underscored by contrasting public commentary on the Court during Reconstruction with other, similar times of judicial peril. At other times in history when popular democracy held sway and the Court threatened the agenda of the political branches, the Court was accused of interfering with the proper workings of democracy; what Alexander Bickel famously termed "the counter-majoritarian difficulty."¹²⁸ During the *Lochner* era, for example, the Court continually was subjected to such criticism.¹²⁹

In contrast, during Reconstruction, the countermajoritarian problem was raised, but in the face of legislative hegemony, it was deemed impossible and intolerable, both theoretically and practically. This certainly was the case in rare utterances of countermajoritarian concern in Congress, such as Representative Bingham's comments that "[i]t will be a sad day for American institutions and for the sacred cause of representative government among men, when any tribunal in this land created by the will of the people shall be above and superior to the people's power."¹³⁰ Senator Freylinghuysen similarly remarked,

It would be a strange thing if this nation, after all the wars we have had, after living for ninety years thinking we lived under republican democracy, should wake up and find that our Government was an aristocracy, and that one or five members of the Supreme Court could regulate the political interests and relations of the country.¹³¹

The *Philadelphia Inquirer* was of the same view, doubting that the Court had power to issue process against the President, as requested in *Mississippi v. Johnson*:

Thus the whole theory of our institutions would be destroyed, and the Supreme Court composed of seven men, not chosen by the people, becomes in fact superior to Congress which makes the laws, and to the President who executes them, simply from its power to pronounce a law valid or invalid at the option of the judges.¹³²

The very improbability of it all was expressed in more strident terms by the *Cincinnati Daily Gazette*:

... seeing Judges, originally appointed from low partizan considerations, and whose political sympathies were kept quiet by the great uprising of patriotism to put down the rebellion, and by the influence of a patriotic administration, warmed into reptile life again by treachery in the Executive, and coming up with alacrity to bind the hands of the nation against its own preservation, and to thrust their fangs into its vitals.

Apr. 7, 1868, at 1 (discrediting argument that Supreme Court was racing to decide case before Congress could legislate against it); *Judge Trumbull's Argument in the United States Supreme Court*, CHI. TRIB., Feb. 12, 1868, at 2 (summarizing Trumbull's argument in support of motion to dismiss *McCardle*'s case for lack of jurisdiction); *The Week*, NATION, Jan. 16, 1868, at 1 (describing facts of *McCardle* case).

128. See BICKEL, *supra* note 95, at 17.

129. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1438-47 (2001).

130. CONG. GLOBE, 40th Cong., 2d Sess. 483 (1868).

131. *Id.* at 791.

132. *The Mississippi Bill*, PHILA. INQUIRER, Apr. 15, 1867, at 4.

It is such a body that attempts to make itself supreme over Constitution and law, and to usurp the powers of the Legislature and the sovereign people.¹³³

3. The Threat to Discipline the Court

The question, of course, was what was to be done about the possibility that the Supreme Court might actually try to rule on Reconstruction. In characteristic blunderbuss style, the *New York Herald* put this question to the nation:

Shall the opinions of a bare majority of these nine old superannuated pettifoggers of the Supreme Court, left to the country as the legacy of the old defunct Southern slaveholding oligarchy, prevail, or shall these old marplots make way for the will of the sovereign people and the national constitution as expounded by Washington and Hamilton, and as established by a million of Union bayonets in a four years' civil war? This is the great question for 1868.¹³⁴

The answers were varied, but the thrust of them was clear: One way or another, the Court was to be subjected to the will of the people. One writer to the *Nation*, himself a federal judge, suggested eliminating judicial review altogether.¹³⁵ *Harper's Weekly* suggested "remodeling" the Court, an "extreme measure" justified by the "extraordinary emergenc[y] . . . if the five Judges should deliberately undertake to nullify the will of the majority of the people . . ."¹³⁶ The *Chicago Tribune* supported fixing the number of judges necessary to decide constitutional cases.¹³⁷ The *Cincinnati Daily Gazette* favored requiring unanimity on the Court, thus solving the political problem though ostensibly not "reduc[ing] the province of the judiciary."¹³⁸

Republicans made clear what the outcome would be, no matter what the cost

133. *The Judiciary Bill*, CIN. DAILY GAZETTE, Jan. 23, 1867, at 2.

134. *Congress and the Supreme Court—The Great Issue for the Next Presidency*, N.Y. HERALD, Jan. 5, 1867, at 4.

135. *The Burden on the Supreme Court*, NATION, Jan. 13, 1870, at 1. He wrote:

I earnestly appeal to the editor of the *Nation*, and to all thoughtful men who desire to preserve the moral power of the judiciary and the law-revering character of our people, to assist in taking from the judicial branch of the Government a burden which it is the least able to bear, freeing it at the same time from the popular clamor and odium which is flung at it whenever an unpopular constitutional decision is rendered by a divided [C]ourt, and at the same time bringing the responsibility of guarding the Constitution home to the legislative branch, where it properly belongs.

Id.

136. *Constitutional Forms*, HARPER'S WKLY., Feb. 9, 1867, at 82.

137. *Reported in Congress and the Supreme Court*, N.Y. WORLD, Jan. 21, 1867, at 4 ("We believe the remedy is simple. The power of Congress to fix the number of judges that shall constitute a quorum in all cases . . . is unquestionable." (emphasis in original)).

138. *The Judiciary Bill*, *supra* note 133, at 2 (supporting bill in House of Representatives providing "that any judgment against the constitutionality of an act of Congress, shall require the agreement of all the Judges").

to other constitutional values.¹³⁹ It is no surprise that the District of Columbia's *Daily Morning Chronicle*, the arm of Senate Republicans, insisted that the people would not stand idly by while the Supreme Court interpreted the Constitution in a way that "places the rights of the individual before the safety of the whole people, and which would make it a straight waistcoat binding the arms of the nation while its assailants stab it to death."¹⁴⁰ However, the moderate Republican *New York Times* was equally emphatic, opining, "The people will not believe that the hands of their representatives are tied in the presence of conspirators, or that the Government is constitutionally helpless in the presence of rebellion."¹⁴¹

Most stunning of all was the *Nation*. The *Nation* was a Republican journal, yet more independent than the rest,¹⁴² typically of pragmatic cast, a journal which steadfastly defended judicial independence. On this point, however, the editors of the *Nation* were intractable:

[I]f there is any lesson which history teaches clearly, it is that there never has existed, and there never is likely to exist, a nation which will allow constitutions or any forms of any kind on paper to stand between it and such a change in policy as it deems necessary to its safety.¹⁴³

Thus the message was clear: Let the Supreme Court beware, for "the question of reconstruction is a question too momentous, too wide in its range, and affecting too vitally the destiny of the nation, to allow of its being submitted to any court of law or decided upon any technical rules of interpretation."¹⁴⁴ If the Court should act to threaten Reconstruction, it would do so at its peril.

B. THE CONTROVERSY THAT BECAME *MCCARDLE*

The South's efforts to get the Supreme Court to rule on the constitutionality of Reconstruction provided the opportunity to test Congress's sincerity in its

139. See Friedman, *supra* note 16, at 19 ("[T]he issues relating to war and [R]econstruction were perceived to be of crucial importance to the survival and character of the nation—so much so that Congress did not shrink from precluding a decision that might sound a death knell for its program.").

140. *The Decision in the Milligan Case*, *supra* note 62, at 2 (insisting that "masses of the American people are [no less ardent than] these five judges in their reverence for the Constitution and their regard for the rights of the citizen . . ."). For party affiliation of the newspaper, see WARREN, *supra* note 39, at 433, designating the *Daily Morning Chronicle* "the semi-official organ of the Republican Senate."

141. *Trials by Military Commissions—The Supreme Court Decisions*, *supra* note 74, at 4. The *New York Times* was influenced by moderate Republican Congressman Henry J. Raymond, who attempted to remain reasonable and above the fray. See FAIRMAN, *supra* note 22, at 219.

142. The *Nation* was "founded in 1865 by antislavery crusaders . . ." FONER, *supra* note 17, at 24.

143. *The Lesson of the Crisis*, NATION, Jan. 17, 1867, at 50.

144. *Id.* The *Nation* was adamant that the Supreme Court not be allowed to interfere with Reconstruction. FAIRMAN, *supra* note 22, at 508 (stating that "any interference of the Supreme Court with the process of reconstruction, as Congress is carrying it on, would be *legislation*, and legislation of the highest order, no matter by what name it was called" and declaring that Trumbull was "on the right track" in his attempt to protect Reconstruction from judicial interference (emphasis in original)).

threats to act against the Court. The *McCardle* litigation became the central focus of the Southern litigation agenda, but there were more deliberate attempts that preceded it. In April of 1867, shortly after passage of the Reconstruction legislation, both Mississippi and Georgia filed original suits in the Supreme Court hoping to obtain such a ruling. *Mississippi v. Johnson*¹⁴⁵ was a suit against the President of the United States requesting an injunction against enforcing the Reconstruction legislation. *Georgia v. Stanton*¹⁴⁶ was a suit against the Secretary of War and others seeking similar relief. Both suits ultimately were dismissed on the ground that they presented political questions.¹⁴⁷

In February of 1868, after the *Johnson* and *Stanton* opinions were released, Georgia filed another suit trying to sidestep the political question doctrine. This suit, against Generals Grant, Meade, and Ruger, sought an injunction to prevent seizure of Georgia's state treasury by military officials.¹⁴⁸ On March 20, process was issued to the defendants and counsel for Georgia moved for a preliminary injunction.¹⁴⁹ Recall that the Court's Term traditionally ended in April, and Georgia wanted a ruling before then—and, therefore, before many of the southern conventions.¹⁵⁰ The Supreme Court ordered notice to the defendants of the preliminary injunction hearing, whereupon Secretary Stanton telegraphed the generals suggesting that this would be a very good time to depart on military inspection tours, which they did.¹⁵¹ When the defendants could not be served, the Court rejected Georgia's plea to proceed *ex parte* and held the cases until the next Term. Thus, a ruling in the Georgia case was avoided in the early part of 1868.¹⁵²

Unlike the cases initially brought by Mississippi and Georgia, another piece of litigation that made its way to the Court at this crucial moment involved private rights and could not be ducked so easily on the ground that it presented a

145. 71 U.S. (4 Wall.) 475 (1867).

146. 73 U.S. (6 Wall.) 50 (1867) (mem.) (arguing that case was justiciable because it involved property rights to state's Treasury, rather than political question).

147. FAIRMAN, *supra* note 22, at 391–93.

148. *Georgia v. Grant*, 73 U.S. (6 Wall.) 241 (1867) (mem.).

149. FAIRMAN, *supra* note 22, at 420.

150. *Id.* at 433.

151. *Id.* at 470.

152. *Id.* at 470–71. One of the less well-known attempts by Johnson to derail the congressional Reconstruction plan was described by Gideon Welles:

On Wednesday, Gen. [Thomas] appeared before Judge [Carter, the Chief Justice of the Supreme Court for the District of Columbia] and gave himself up to be imprisoned. His object was to sue out a writ of *habeas corpus*, and get the case before the Supreme Court, who would, without doubt declare the tenure-of-office act unconstitutional. This neither the radicals, Stanton, nor Carter wanted. They knew the law is [sic] unconstitutional, and that the Court will so decide when[ever] the law comes under their action. This being the case, Carter, who had been in such haste to arrest Gen. Thomas, after [hearing] and evidence, released him.

LASSER, *supra* note 19, at 100.

political question. That was the case of *Ex Parte McCardle*.¹⁵³ McCardle was a Vicksburg, Mississippi newspaper editor with a poison pen. In November 1867, when military authorities could no longer endure his vicious comments and his pleas to white Southerners not to vote in the ratification convention, they had him arrested for disturbing the peace and inciting insurrection.¹⁵⁴ In military custody, McCardle applied for a writ of habeas corpus in federal court, raising the question of the constitutionality of the Reconstruction legislation. On November 25, a federal district court denied the writ, remanding McCardle to military custody. (He subsequently was released on bail pending disposition of his appeal.)¹⁵⁵

Central to the subsequent resolution of the *McCardle* case was the jurisdictional grant under which the petitioner sought review in the Supreme Court.¹⁵⁶ Prior to 1867, federal courts could only grant a writ of habeas corpus to prisoners in federal custody. During that period the Supreme Court would review such cases upon application to it for an original writ of habeas corpus.¹⁵⁷ In 1867, as part of Reconstruction, Congress enlarged the jurisdiction of the federal courts, to permit those courts the “power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States.”¹⁵⁸ “All cases” included—for the first time—“prisoners in custody of state officials.”¹⁵⁹ The motivation for this law was not altogether clear, but it likely was prompted by Southern conduct toward emancipated slaves under the Black Codes.¹⁶⁰

When Congress expanded the habeas corpus jurisdiction of the federal courts, it also for the first time provided a statutory route to the Supreme Court to review habeas decisions of the lower federal courts, as happened in McCardle’s case. Section I of the 1867 jurisdictional statute specifically provided that the

153. 74 U.S. (7 Wall.) 506 (1868).

154. McCardle

urge[d] every decent white man, every honorable gentleman of the Caucasian race, to avoid Gen[er]al Ord’s election as he would avoid pestilence and a prison. As this advice does not apply to, and is not intended for the white sneaks of the loyal league, we shall expect to see these last-named despicable vermin out in all their strength.

FAIRMAN, *supra* note 22, at 420. McCardle sought the names of those who did vote, offering to pay a dollar for the name of each voter. We shall publish the names of those voters if we can obtain them, and some day we shall; but if we do not, we shall with pride chronicle the fact that in the heroic city of Vicksburg, the gallant Saragossa of the South, there were only eight cowards, dogs and scoundrels . . .

Id. at 420–21.

155. 74 U.S. (7 Wall.) at 508; *see* FAIRMAN, *supra* note 22, at 450.

156. Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 Nw. U. L. REV. 1, 11 (1990).

157. *See* William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 247 (1973). Although technically this was an exercise of appellate jurisdiction because the petitioner would request an “original” writ, the strictures on the Court’s appellate jurisdiction were said not to apply. *See id.*; *see also* *Ex Parte Buford*, 7 U.S. (3 Cranch) 447 (1806).

158. Act of Feb. 5, 1867, ch. 28, p.82, §1, 14 Stat. 385.

159. Friedman, *supra* note 156, at 11; Van Alstyne, *supra* note 157, at 234–35.

160. Friedman, *supra* note 156, at 11–12; Van Alstyne, *supra* note 157, at 234–35.

Court's jurisdiction would lie "from the judgment of" a "circuit court to the Supreme Court of the United States."¹⁶¹ This was the provision under which McCardle's appeal to the Court was filed, a fact that ultimately would prove of great significance.

McCardle's appeal was filed in the Supreme Court on December 23, 1867.¹⁶² Shortly thereafter, his counsel moved to advance the case on the docket. Representing the government, Lyman Trumbull—a Senator from Illinois and chair of the Senate Judiciary Committee—objected, arguing that because McCardle was already released on bail and would not personally suffer by waiting for the Court to decide his case, he "could not imagine any reason" for advancing it.¹⁶³ On January 21, 1868, over Trumbull's objection, the Court advanced the case and set argument for the first Monday of March. Trumbull then moved to dismiss for lack of jurisdiction, a motion that was promptly rejected. The case was argued, with each side having three times the usual time for oral argument.¹⁶⁴ (Meanwhile, on February 24, the House of Representatives impeached Andrew Johnson and Chief Justice Chase began presiding at Johnson's trial before the Senate. The Republicans ultimately failed to muster the necessary two-thirds vote to convict and the effort ended in May of that year.)¹⁶⁵

The Court's attention to the *McCardle* case spurred Congress to quick action. The attack began in the House of Representatives when a controversial amendment dealing with what constituted a quorum of the Court to decide cases was offered to an otherwise unobjectionable bill.¹⁶⁶ The amendment required a two-thirds vote of the Supreme Court to strike any congressional enactment as unconstitutional.¹⁶⁷ Representative Williams offered a yet stronger version, which would have required a unanimous vote.¹⁶⁸ Although Williams's measure

161. Act of Feb. 5, 1867, ch. 28, §1, 14 Stat. 386.

162. See FAIRMAN, *supra* note 22, at 449.

163. See *id.* at 450. On the other hand, Black argued that a quick decision was perfectly appropriate for a criminal case. According to the NATIONAL INTELLIGENCER, "he wanted to know if the Court would take the responsibility of postponing a decision for three years in a case of such transcendent importance." *Id.* (quoting the DAILY NAT'L INTELLIGENCER, Jan. 18, 1868). Graber argues that advancing criminal cases was the usual practice. See Mark Graber, Legal Strategies 40 (unpublished manuscript, on file with author).

164. See FAIRMAN, *supra* note 22, at 449–51; KUTLER, *supra* note 20, at 102; Van Alstyne, *supra* note 157, at 237–39.

165. See *supra* note 94 and accompanying text.

166. On December 4, 1867, Senator Trumbull introduced a bill that would allow five Justices, rather than the former six, to suffice for a quorum. Because the Court was comprised of eight Justices, one or two of whom were usually unwell, it seemed unreasonable to require six for a quorum. Representative Johnson stated, "It is very desirable it should pass. The Court was very near being without a quorum to-day, and the probability is . . . that it may often be without a quorum during the session." CONG. GLOBE, 39th Cong., 2d Sess. 19 (1867).

167. See CONG. GLOBE, 40th Cong., 2d Sess. 478 (1868); FAIRMAN, *supra* note 22, at 463.

168. See CONG. GLOBE, 40th Cong., 2d Sess. 478 (1868); FAIRMAN, *supra* note 22, at 463. Representative Thomas Williams, a radical Republican lawyer from Pittsburgh, had made the same proposal a year before, after the Court's decision in *Ex Parte Garland*. *Id.* At the time, however, it garnered little support. *Id.*

failed, the two-thirds provision actually passed the House of Representatives before dying quietly in the Senate.¹⁶⁹

The solution that Congress ultimately adopted was a bill stripping the Court's statutory jurisdiction to hear *McCardle's* case. The bill initially was whisked through Congress—some would claim snuck through—as a rider to a noncontroversial bill.¹⁷⁰ On March 21, the Court voted, over the objection of Justices Grier and Field,¹⁷¹ to pass on ruling in *McCardle* while the legislation was sitting on the President's desk. On March 25, in the middle of his trial on the impeachment, the President vetoed the legislation. After Johnson vetoed the bill,¹⁷² great attention was focused on the matter and there was full and lengthy

169. See FAIRMAN, *supra* note 22, at 463–64. The bill was lost in the wake of two other Court-curbing bills. S. 363, introduced by Senator Trumbull, would declare that the Reconstruction Acts were inherently political and, therefore, not suitable for judicial review. *Id.* at 464. S. 213, stripping the Court's jurisdiction, eventually passed. See *id.* at 464–65.

170. Actually, there was no little irony here. The legislation to which the jurisdiction-stripping measure was appended was an act making possible appeals to the Supreme Court in revenue collection cases. See CONG. GLOBE, 40th Cong., 2d Sess. 1859 (1868); FAIRMAN, *supra* note 22, at 464. Much was made of this in the debates, and opponents of the jurisdiction-stripping matter noted the irony that an appeal was being taken away in cases involving personal liberty, just as one was added in cases involving money. President Johnson explained in his veto message:

The first section of the bill meets my approbation, as, for the purpose of protecting the rights of property from erroneous decisions of inferior judicial tribunals, it provides means for obtaining uniformity by appeal to the Supreme Court of the United States in cases which have now become very numerous and of much public interest, and in which such remedy is not now allowed. The second section, however, takes away the right of appeal to that [C]ourt in cases which involve the life and liberty of the citizen, and leaves them exposed to the judgment of numerous inferior tribunals. It is apparent that the two sections were conceived in a very different spirit

CONG. GLOBE, 40th Cong., 2d Sess. 2094 (1868). There was virtually no debate of the matter in the House, *id.* at 1859–60, until the next day when attention was drawn to the measure “which was passed without any objection solely because it was introduced in a manner calculated to deceive and disarm suspicion” *Id.* at 1881 (statement of Rep. Boyer). There then ensued an extremely unpleasant debate, with opponents of the measure suggesting there was a more “manly” way to have proceeded, and Republicans responding it was not their fault if a Representative was “asleep at his post.” *Id.* at 1882. Yet, one Democrat, Niblack of Indiana, conceded that he had been aware of what was going on, “but a moment's reflection convinced me that an objection from me would be of no avail.” *Id.* at 1885.

There was no recorded debate in the Senate. See CONG. GLOBE, 40th Cong., 2d Sess. 2098 (1868) (statement of Sen. Buckalew) (“[A] bill that was gotten through the Senate . . . without an opportunity to debate the measure not explained . . . we had not opportunity to discuss it upon its passage”). The terms of its passage were described by Senator Buckalew:

I asked for an explanation of it from the honorable Senator who had the bill in charge. He made none, except simply to state that it was an amendment repealing the act of 1867 and restoring or leaving the law to stand on the act of 1789. I asked for time, that the law which it was proposed to repeal might be read. That opportunity or that time was not afforded me The effect of the amendment upon the great case pending in the Supreme Court I did not fully understand, although I supposed it had application to it.

Id. at 2095; see also FAIRMAN, *supra* note 22, at 464–65 (explaining that Senator Buckalew did not know effect of amendment; but understanding that it must be important, he sought delay in consideration of bill, which ultimately was denied).

171. See FAIRMAN, *supra* note 22, at 467.

172. The veto message is recorded at CONG. GLOBE, 40th Cong., 2d Sess. 2095 (1868).

debate in both Houses.¹⁷³ It appears the Court further determined to do nothing while Congress debated the override. As Reverdy Johnson informed the Congress, “I speak knowingly when I say—and I do not regret, for one, that the Supreme Court has come to that determination, as long as this bill is pending it is not their purpose to dispose of a case which has already been argued”¹⁷⁴

Following the debate, Congress overrode the President’s veto and the bill became law.¹⁷⁵ The date was March 27, 1868. The statute simply provided:

That so much of the act approved February 5, 1867 . . . as authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter by taken, be, and the same is, hereby repealed.¹⁷⁶

Following enactment of the repealer, the Court decided to put the *McCardle* case over until the next Term. On March 30, the Court sat to hear motions. Although invited to do so, the government declined to argue the validity of the repealer, no motion challenging it having been made.¹⁷⁷ At that point, the Court’s delay during congressional debates caused judicial tempers to flare in public. When Justice Nelson (presiding, as Chase was at the impeachment trial) asked counsel if he would like to argue the impact of the repealer, Justice Grier intervened “with a manifestation of much emotion,” regretting the opprobrium the Court had brought on itself and wanting to vindicate himself in the face of expected criticism.¹⁷⁸ He subsequently issued a formal “protest” in this regard.¹⁷⁹

173. See *id.* at 2115; WARREN, *supra* note 39, at 478–80.

174. CONG. GLOBE, 40th Cong., 2d Sess. 2095 (1868) (statement of Rep. Johnson). *But see id.* at 2095–96 (statement of Rep. Williams) (proposing a time for extended debate, but indicating “I do not make this proposition with reference to any action by the Supreme Court. I am not advised particularly as to what the Supreme Court do or do not intend to do; and, of course, I shall not be governed in my action by that consideration.”).

175. See FAIRMAN, *supra* note 22, at 459.

176. Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44; see also Van Alstyne, *supra* note 157 at 239–40 (stating the veto was “predictably overridden in the Senate on March 26 and in the House on March 27” and claiming that the “brief discussions in both Houses fully confirmed the President’s specification of the Amendment design: to deny the Supreme Court authority to exercise its power of substantive Constitutional review.”).

177. See FAIRMAN, *supra* note 22, at 473.

178. *Id.*

179. These events behind the controversy were recorded in the DAILY NATIONAL INTELLIGENCER. See FAIRMAN, *supra* note 22, at 473. Judge Black notified the Court of a report that the *McCardle* decision was to be delayed until the jurisdiction-stripping act was passed in Congress. Justice Nelson inquired whether Black would like to argue the point. Judge Black was ready and willing to argue the effect of the repeal of jurisdiction would have on the case, but Mr. Carpenter, counsel for the War Department refused on grounds that no specific motion was before the Court. Justice Grier was indignant at this exchange, accusing the Court of delaying the decision to avoid performing an unpleasant duty. Later, Justice Grier released a statement denouncing the proposed delay. See *id.* at 474.

The case was dismissed on April 12, 1868. See *id.* at 492. This allayed Congress’s fears about their Reconstruction plan and relieved some of the pressure to remove President Johnson. See FONER, *supra* note 17, at 336. The Senate voted not guilty on the articles of impeachment on May 16 and May 26. See FAIRMAN, *supra* note 22, at 460.

The Court that day ordered the case held over.¹⁸⁰

With the Court's determination to withhold decision in *McCardle*, the South's strategy of obtaining judicial invalidation of Reconstruction was effectively dead.¹⁸¹ The Court's last sitting of the Term was on April 6 (although Chase apparently had suggested meeting in June).¹⁸² On that day, the Court continued *McCardle*—and *Georgia v. Grant*—to the next Term.¹⁸³

The Fourteenth Amendment was ratified on July 9, 1868.¹⁸⁴ The next Term, the Court dismissed *McCardle*'s case completely in a famous opinion holding that it had no jurisdiction.¹⁸⁵ The language of the opinion was quite direct:

It is quite true . . . that the appellate jurisdiction of this [C]ourt is not derived from Acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred 'with such exceptions and under such regulations as Congress shall make.'

The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this [C]ourt in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the Legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this [C]ourt is given by express words.

180. WARREN, *supra* note 39, at 481. There were reports that morning that the Court already had determined (evidently in conference) to postpone *McCardle* till the next Term. See FAIRMAN, *supra* note 22, at 472.

181. Judge Black, the South's legal strategist and *McCardle*'s counsel, requested that the Supreme Court hear argument as to the legality of the jurisdiction-stripping statute. Judge Black, however, failed to appear on the day the Court contemplated hearing the motion, and at the end of the day, the Court decided to put the issue over to the next Term. That postponement put a practical end to the South's strategy. See *id.* at 475–76.

182. See *id.* at 486 ("I had previously proposed an adjournment to June, but met no support." (quoting letter from Chief Justice Chase to John D. Van Buren (Apr. 5, 1868) (on file with the Hist. Soc. of Pa., at Chase Papers))).

183. *Georgia v. Grant* was held over due to the inability to deliver personal service of notice to the defendants. FAIRMAN, *supra* note 22, at 470–71. Meanwhile a third case, *Ex Parte Martin and Gill*, unreported, appeared on the Court's docket. Martin and Gill were prisoners brought before military commission in Florida for the murder of a black man. *Id.* at 471. The case had originally been brought more than six weeks earlier on an unrecorded jurisdictional basis (probably an appeal under the act of 1867), but leave to file was denied pending resolution of *McCardle*. *Id.* at 472 n.160. Once Congress had "doomed the *McCardle* appeal," however, the case came before the Court a second time. *Id.* at 472–75. The Court again denied the prisoners leave to file, but presaging for some a move towards consideration of the Reconstruction Act, "suggested" that Martin and Gill petition for habeas corpus and a writ of certiorari under the 1789 Act. *Id.* at 475. And on this basis, a writ of habeas corpus was indeed issued and held over until the next Term. *Id.* at 477.

184. COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, *THE CONSTITUTION OF THE UNITED STATES* 26 (1988).

185. The dismissal came on April 12, 1868, a full month before the Senate narrowly voted to acquit President Johnson on May 16 and May 26. See FAIRMAN, *supra* note 22, at 460, 492; FONER, *supra* note 17, at 336.

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the [C]ourt cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the [C]ourt is that of announcing the fact and dismissing the cause. . . .

. . . .

It is quite clear, therefore, that this [C]ourt cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.¹⁸⁶

The pertinent question—for which there likely is no certain answer—is whether the Court’s conduct throughout the South’s litigation campaign was motivated by law or by politics. Politics here refers not so much to the Justices’ ideological preferences,¹⁸⁷ but to the question of whether the Court acted in a manner different than the law would require out of concern for the short-term safety and long-term legitimacy of the institution itself. Did the Court back away from speaking to the legality of Reconstruction because it viewed itself at peril? Or did the law compel the Court’s resolution of the cases that came before it?

There is ample indication that, throughout the period, the Court was well aware of the jeopardy it faced, and acted accordingly. The Court’s and the Justices’ own words at the time certainly suggested such attention to the political environment. Thus, Justice Davis’s opinion for five Justices in *Milligan*, holding that the Constitution prohibited resort to military courts for the trial of civilians when civil courts were in operation,¹⁸⁸ began with an explicit nod to what he believed were changed circumstances:

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.¹⁸⁹

Despite Davis’s confidence in the rule of law, he could not have been further from the mark; his opinion in *Milligan* set off a firestorm.¹⁹⁰ From that point on,

186. *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 512–15 (1869).

187. For a review of the literature discussing ideological voting patterns of the Justices, see TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 100–32 (1999).

188. 71 U.S. (4 Wall.) 2 (1866).

189. *Id.* at 109 (emphasis in original).

190. On the reaction to the *Milligan* opinions, as opposed to the decision, see LASSER, *supra* note 19, at 70 (explaining why Republicans seemed indifferent to judgment, but became infuriated upon reading published opinion). See *supra* note 59 regarding the reason for the delay in reaction.

the Court seemed to move between caution and peril. It is possible that law was operating as much as politics, but the impression was certainly of a Court trying to play its role, without getting run over by political forces. At first the Court appeared to be acting cautiously: witness by its response to the initial litigation efforts of Georgia and Mississippi, in which it perhaps found political questions when they were not there.¹⁹¹ Then, the Court looked to be rushing ahead, advancing *McCardle* on the docket, only to turn back when it became clear congressional action was imminent. Even if moving criminal cases ahead on the docket was not uncommon,¹⁹² stalling them to wait for Congress had little legal precedent.

It is with regard to the *McCardle* opinion itself that there is the greatest interest in whether the Court acted as the law required, or whether politics determined the outcome. The question is important, for *McCardle* is treated as an important legal precedent bearing upon Congress's power to control the jurisdiction of the Supreme Court.¹⁹³ Anyone taking too strong a stance on the legal side has some difficulties with which to contend, but there are problems on the political side as well.

The first problem with the "law" interpretation of *McCardle* follows from some tantalizing language Chief Justice Chase dropped at the end of the decision—language that soon enough became relevant. After holding that the Court must dismiss the case because its jurisdiction had been stripped, the Court responded to claims that denying it all jurisdiction to hear habeas cases would be inappropriate. This was not a problem, the Court explained, because it had jurisdiction through another avenue:

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The [A]ct of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.¹⁹⁴

In other words, although the repealer had stripped the Court of the jurisdiction recently conferred by the Act of 1867, it still retained the jurisdiction it long had asserted to hear habeas claims pursuant to an original writ.

That there was jurisdiction remaining in the Court to decide such habeas cases was made plain shortly thereafter when *McCardle*'s fellow Vicksburg editor, Edward Yerger, was brought before a military commission on charges of

191. See *infra* notes 327–36 (discussing use of political question doctrine during this period).

192. Graber argues this was the case. Graber, *supra* note 163, at 40.

193. See *infra* notes 211–14 and accompanying text (discussing treatment of *McCardle* by courts and legal scholars).

194. *McCardle*, 74 U.S. at 515.

murder.¹⁹⁵ Yerger also took his case to the Supreme Court, which granted jurisdiction and held that the jurisdiction-stripping statute did not repeal by implication its preexisting appellate jurisdiction.¹⁹⁶ This decision was rendered only six months after the final decision dismissing McCordle's case.

Exercise of jurisdiction in Yerger's case legitimately raises the question—perhaps one with a legal answer, perhaps not—why the Court could not simply have exercised jurisdiction under the alternative grant to hear McCordle's case. As William van Alstyne points out, it hardly seems fair to have faulted McCordle for not invoking the more obscure jurisdictional means when a plain statutory grant was available:

Should not the Court have proceeded to reach the merits, acknowledging that the technical basis on which appeal had been perfected from the circuit court had been withdrawn by Congress, but declining to reject the case in view of the existing alternative basis for retaining jurisdiction as confirmed by section 14 of the Judiciary Act of 1789?¹⁹⁷

But although modern practice may be this forgiving, perhaps it was the case that such technicalities could and would have been determinative in 1868, even though individual liberty was at issue.

A further difficulty with a broad legal interpretation of the *McCordle* holding became obvious shortly thereafter when the Court decided the case of *United States v. Klein*.¹⁹⁸ In *Klein*, Congress again stripped the Supreme Court of jurisdiction, this time to hear cases involving the admissibility of presidential pardons to prove loyalty to obtain compensation for property confiscated by Union forces during the war.¹⁹⁹ When it became apparent that many claimants under the compensation laws were succeeding on the basis of pardons issued by Andrew Johnson, Congress passed legislation to the effect that any such pardon was conclusive proof of disloyalty and ordering such cases dismissed from court.²⁰⁰

Klein is sufficiently impenetrable that calling it opaque is a compliment;²⁰¹ it is difficult to make good sense of the statute at issue in *Klein* or the Court's decision, although readers of either surely can understand what was on the

195. Yerger, by all accounts a hot-tempered fellow, stabbed to death Major Joseph G. Crane, the army officer serving as Mayor of Jackson, Mississippi, because Crane had "caused a piano to be seized under a warrant of distress for city taxes." FAIRMAN, *supra* note 22, at 564 (footnote omitted).

196. 75 U.S. (8 Wall.) 85 (1868).

197. See Van Alstyne, *supra* note 157, at 247. Van Alstyne points out that under practice at the time, parties mistakenly "taking an 'appeal' are frequently treated as though they had petitioned for 'certiorari.'" *Id.* at 247 n.70. Today the Court's rules provide it can exercise jurisdiction under any existing grant. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE §§ 2.1, 3.1–3.2, 3.6 (6th ed. 1986).

198. 80 U.S. (13 Wall.) 128 (1871).

199. See *id.* at 133–34 (citing statute).

200. See *id.*

201. See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 368 (4th ed. 1996) ("The brief opinion . . . is hardly a model of clarity.").

minds of Congress and the Court. What is significant for present purposes is the Court's language in invalidating the jurisdictional limitation. Justifying its invalidation, the Court explained that "the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end."²⁰² This seems difficult to reconcile with the *McCardle* Court's statement: "We are not at liberty to inquire into the motives of the legislature."²⁰³ At least one commentator has suggested the difference is that the impermissible motive was evident on the face of the legislation in *Klein* but not in *McCardle*.²⁰⁴ Although this distinction does provide a legal principle of sorts, it is asking a lot to demand that the Court ignore—as it would have had to in *McCardle* if the *Klein* rule applied—what everyone in the country surely knew. *Klein* suggests that if motivated by attempts to influence the ultimate outcome of cases on the merits, denial of jurisdiction can be scrutinized and struck down.²⁰⁵ If so, *McCardle*'s case would have been a good candidate.

The decision to refuse jurisdiction in *McCardle* is all the more troubling—but also more perplexing—given suggestions from Chief Justice Chase in private correspondence as to what the Court would have done on the merits. Chase indicated that had the merits been reached, "the Court would doubtless have held that his imprisonment for trial before a military commission was illegal."²⁰⁶ If this is correct, avoiding jurisdiction that might have been exercised when a man's liberty was at peril is all the more disconcerting.²⁰⁷ On the other hand, other portions of Chase's letter suggest that the holding would not have invalidated use of the military to effectuate—in Charles Fairman's words—

202. 80 U.S. (13 Wall.) at 145.

203. *McCardle*, 74 U.S. (7 Wall.) at 514.

204. Robert Clinton suggests that the only plausible distinction between *McCardle* and *Klein* is that "the condemnatory motive was evident on the face of the statute in *Klein*." Robert N. Clinton, *A Mandatory View of Federal Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1611 (1986); cf. *id.* at 1611 n.348 (stating that there is patently weak distinction to be made on basis of presidential pardon power).

That *McCardle* constituted strategic behavior by the Court and against its belief as to the law is also demonstrated by its subsequent behavior in *Yerger*. Acting upon grounds at which it had hinted in *McCardle*, the Court claimed jurisdiction based on the 1789 Judiciary Act, jurisdiction it claimed had not been affected by the act of 1867. The Court may have felt empowered to act for several extra-legal, political reasons, including that it had demonstrated sufficient obeisance in *McCardle* to quiet congressional fears regarding the Court's intentions concerning Reconstruction. Further, because the Southern states had been readmitted by the time *Yerger* was issued, the Court knew that a strong adverse reaction by Congress was unlikely. Epstein & Walker, *supra* note 16, at 342–44.

205. See Eugene Gressman & Eric K. Gressman, *Necessary and Proper Roots of Exceptions to Federal Jurisdiction*, 51 GEO. WASH. L. REV. 495, 521–22 n.100 (1983) (relying on dubious language about motivation to minimize impact of *McCardle*, a "dated decision of dubious precedential value"); Lawrence G. Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress's Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 74–78 & n.77 (1981) (denying *McCardle* any weight on point about congressional motive).

206. FAIRMAN, *supra* note 22, at 494.

207. The Court was aware that *McCardle* was free on bail. See *supra* note 163 and accompanying text.

“reorganization of the ‘rebel States.’”²⁰⁸ If, in fact, the Court could have invalidated the use of a military tribunal in *McCardle*’s case without endangering Reconstruction—and Chase does not explain how this was so—then what was the worry about taking that case and simply resolving it?

Adding further curiosity to the entire episode is the fact that the *McCardle* opinion was released many months after the Fourteenth Amendment was ratified, suggesting that pressure was off the Court. Yet, *McCardle* reads as an obsequious nod toward Congress’s power to strip the Court of jurisdiction—at least on one reading.²⁰⁹ Here again, law could have been the explanation; there were Taney and Chase Court precedents that seemed to support this broad language.²¹⁰ On the other hand, the Court did add the caveat about alternative jurisdictional means, which suggests that perhaps it did not believe the exigency had passed and that it was biding its time until a safer moment arose.

Certainly there were those at the time who felt strongly that politics had had its way with the Court. Among them were two people quite close to the heart of the matter: Justices Grier and Nelson, who protested the Court’s delay in the face of congressional action. Grier’s public protest made quite clear what he felt was transpiring:

This case was fully argued in the beginning of the month. It is a case that involves the liberty and rights not only of the appellant, but of millions of our fellow-citizens. The country and the parties had a right to expect that it would receive the immediate and solemn attention of this court. By the postponement of the case we shall subject ourselves, whether justly or unjustly, to the imputation that we have evaded the performance of a duty imposed on us by the Constitution, and waited for legislation to interpose to supersede our action and relieve us from our responsibility. I am not willing to be a partaker of the eulogy or opprobrium that may follow; and can only say:

“Pudet haec opprobria nobis,
Et dici potuisse; et non potuisse refelli.”²¹¹

Given the odor of politics, it is somewhat surprising that the Court’s dismissal of *McCardle* frequently has been invoked as support for the proposition that Congress has broad power to remove cases from the jurisdiction of the Supreme Court.²¹² Of course, not everyone sees it this way. Some academics

208. FAIRMAN, *supra* note 22, at 494.

209. This ignores, as do too many who interpret *McCardle* to give Congress strong control over federal jurisdiction, the caveat at the end of the opinion about other jurisdictional avenues. See *supra* note 194 and accompanying text.

210. See Graber, *supra* note 163, at 11.

211. FAIRMAN, *supra* note 22, at 474. (“I am ashamed that such opprobrium should be cast upon the Court, and that it cannot be refuted.” (loosely translating OVID, *METAMORPHOSES*, BOOK I, lines 758–59)).

212. See, e.g., *Nat’l Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting) (“Congress . . . may withdraw appellate jurisdiction once conferred and it may do so even while a case is sub judice.”); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 898 (1984) (“A good

allude to the “circumstances” of the case in questioning its weight,²¹³ and in one instance two members of the Court did the same.²¹⁴ Yet, others take a much stronger position, firmly treating the jurisdiction-stripping holding of *McCardle* as law—and settled law at that²¹⁵—despite the fact that the entire chain of events from *Milligan*²¹⁶ through *McCardle* suggests that the Court was determined to speak, but realized it could not do so until the threat to its independence had faded. *Yerger* is perhaps the best evidence of this. It came to the Court largely after the storm had passed²¹⁷ and the Court was fully prepared to

many commentators (including myself) take a rather broad view of congressional power over the jurisdiction of federal courts in terms of sheer legal authority.”); David Allen Perry, *Ex Parte McCardle: The Power of Congress to Limit the Appellate Jurisdiction of the Supreme Court as Understood by the Congress, the President, and the Court*, 18 CAP. U. L. REV. 365, 382 (1989) (“When modern courts and scholars struggle over the question of congressional power under the Exceptions Clause, it is important to bear in mind that the only time the Court, the President, and the Congress were directly faced with the question, all parties to the conflict agreed that Congress has the power to limit and regulate the appellate jurisdiction of the United States Supreme Court.”); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965) (“Congress has the power by enactment of a statute to strike at what it deems judicial excess by delimitations of the jurisdiction of the lower courts and of the Supreme Court’s appellate jurisdiction. Under the *McCardle* case, even a pending case may be excepted from appellate jurisdiction.”). *But see, e.g.*, Sager, *supra* note 205, at 21–22 (“I am persuaded that, while Congress does enjoy great discretion in molding federal jurisdiction, serious restrictions nevertheless limit congressional authority to enact legislation . . .”). For a larger sampling of the enormous body of literature treating congressional capacity to curtail jurisdiction, see *id.* at 20 & n.7.

213. Among those who would deny *McCardle* strong precedential weight with regard to Congress’s power to strip the Supreme Court of jurisdiction, the main argument seems to be that the repealer did not deny the Court all jurisdiction to hear habeas appeals. See, for example, the following sources relying on the exercise of jurisdiction in *Yerger* to minimize the import of *McCardle*: GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 79–80 (4th ed. 2001); Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 179–80 (1960); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 906–07 (1981–82).

Much rarer are the observers who would rely upon the political pressure the Court was under as a means of denying *McCardle* the force of law. *But see* LEE EPSTEIN & THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES AND JUSTICE* 157 (3rd ed. 1998) (“According to many scholars, the Court had no choice but to acquiesce to Congress if it wanted to retain its legitimacy in post-Civil War America. The pressures of the day, rather than . . . the beliefs of the [J]ustices, may have led to the decision.”); Sager, *supra* note 205, at 77–78 & n.77 (explaining that in *McCardle*, the Court acted “in a highly unusual historical context” given Congress in “an angry and somewhat dangerous mood”); *but see also* Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L. J. 2589, 2635 (1998) (“Decisions like *McCardle* are often explained by reference to the risks attendant to the decision, given reconstruction and the fragility of the post-civil war union.”).

214. *Glidden Co. v. Zdank*, 370 U.S. 530, 606 n.11 (1962) (Douglas, J., dissenting). Justice Black joined the dissent.

215. See *supra* note 212.

216. The Court’s willingness to hear the *Milligan* case despite its seemingly contrary stance in *Ex Parte Vallandingham*, 68 U.S. (1 Wall.) 243 (1864), itself belies the passive interpretation. *Vallandingham*, concerning once again an appeal from trial by military commission, was disposed of on the ground that the Court lacked jurisdiction over such tribunals, either by habeas petition or by writ of certiorari. *Id.* at 253. Yet, *Milligan* was taken up soon after on a writ of habeas corpus. See FAIRMAN, *supra* note 22, at 491 n.202; WARREN, *supra* note 39, at 427.

217. At the time of the *Yerger* decision, the Fourteenth Amendment had been ratified, all of the Southern states except Virginia, Mississippi, and Texas had been readmitted to the Union, and Grant

hear the case. Decision was avoided only because the Executive found a way to discharge Yerger from custody.²¹⁸

It is ultimately impossible to know if politics influenced the Court during the Southern litigation campaign. As is often the case, there are legal explanations for things the Court did. Nonetheless, observers clearly believed politics was yanking the Court's chain, and there was plenty of support for this interpretation. Certainly, the decision to await congressional action on the repealer, and the cagey wording of the *McCardle* decision itself on jurisdiction-stripping, offers support that—although difficult to assess precisely how much—politics was affecting the way the Reconstruction Court did its job.

C. THE LEGAL TENDER CASES

Remaining on the Court's docket since 1865 was the constitutionality of the Legal Tender Acts; resolution of this issue unquestionably snarled the Court in ugly politics. Congress had turned to legal tender measures in 1862 to fund the war effort. Chief Justice Chase, then Secretary of the Treasury, had—despite initial hesitation—approved the legislation as constitutional, necessary, and expedient.²¹⁹ In 1865, *Hepburn v. Griswold*²²⁰ reached the Court, raising the question of the constitutionality of the acts as applied to preexisting debts (those incurred before the act's passage). Legalization of the greenbacks had diminished the worth of those debts.²²¹

It was the controversy over the *Hepburn* decision that brought to a head the other great threat to judicial independence commonly practiced during this period: manipulation of the Court's size and personnel. Between 1860 and 1870, Congress changed the size of the Court three times, with the final move unquestionably being the most controversial. The difficulty is in determining whether these instances constituted "packing,"²²² given that each change in size and membership also was supported by reasons unrelated to a desire to affect the outcome in cases coming before the Court.

In 1863, in the wake of *Dred Scott* and in the midst of the Civil War, the

had been elected President. See FAIRMAN, *supra* note 22, at 584; see also KUTLER, *supra* note 20, at 86 (explaining that Congress saw no pressing need to prevent Court from deciding *Yerger*).

218. Yerger's counsel made an agreement with the Attorney General to protect Yerger from the military and Yerger was transferred to civil authorities. See WARREN, *supra* note 39, at 496. This made his case moot.

219. One week before the Act was passed, Chase wrote to William Cullen Bryant, "I am convinced that, as a temporary measure, it is indispensably necessary." FAIRMAN, *supra* note 22, at 686–87 & n. 30 (quoting 2 GODWIN, BIOGRAPHY OF WILLIAM CULLEN BRYANT 165 (1884)). Two years later, upon the day of his resignation from the Treasury, Chase again wrote Bryant, "Looking back, I can see now no measure which my judgment condemns, except that . . . to issue legal tender coupons." See FAIRMAN, *supra* note 22, at 686–87 & n.30; J.W. SCHUCKERS, THE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE 404 (1874).

220. 75 U.S. (8 Wall.) 603 (1869).

221. WARREN, *supra* note 39, at 499.

222. Or "depacking," as Richard Friedman has suggested. Richard D. Friedman, *supra* note 16, at 22.

thirty-seventh Congress increased the size of the Court from nine to ten.²²³ This ostensibly was done to match a reorganization of the circuits.²²⁴ It had the convenient effect, however, of giving Abraham Lincoln an additional appointment to the Court at a time when the balance of power on the Court was quite important. Thus, this change to ten, which easily could have been done to ensure the loyalty of the Court to Republican and Union interests, could also be seen as part of a broader judicial reform effort. On the other hand, by the time the tenth Justice was added, Lincoln seemed already to have had enough appointments to protect his positions, raising the question whether the tenth Justice really was necessary for outcome-determinative reasons.²²⁵

In 1866, after the war was over and Andrew Johnson was in the White House, Congress reduced the size of the Court to seven, with the reduction to be accomplished through attrition.²²⁶ Many believe that the reduction in size to seven was enacted precisely to deprive Andrew Johnson of appointees who might oppose congressional measures.²²⁷ But this change also was supported by an apolitical rationale:²²⁸ Ten simply was an unwieldy number given the possibility of equally divided decisions. The change to seven was also peculiar in another respect: In one of the stranger stories from the period, it seems that the Chief Justice actually was an advocate of the planned reduction for purely economic reasons.²²⁹ Chase felt strongly that an increase in salaries was appropriate and the easiest way to accomplish this was to reduce the number of Justices while dividing up a similar-sized pie.²³⁰

223. FAIRMAN, *supra* note 22, at 4.

224. On March 3, 1863, Congress created the Tenth Circuit comprising Oregon and California, to which Lincoln appointed Justice Field. See WARREN, *supra* note 39, at 380.

225. See *id.* at 384–86 (noting that worries by Republicans that Court would undermine Lincoln had been largely unrealized by March of 1863). Richard Friedman also notes that “the one case of consequence decided by the full Court during the war,” the *Prize Cases*, saw “Lincoln’s blockade of the South upheld,” but by less than a “resounding” majority: five to four. See Richard D. Friedman, *supra* note 16, at 8.

226. See ACKERMAN, *supra* note 16, at 239; FAIRMAN, *supra* note 22, at 168–69; WARREN, *supra* note 39, at 423. For evidence on both sides of the motive question discussed in this paragraph, see Charles Gardner Geyh, *Customary Independence*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 172–73* (Stephen Burbank & Barry Friedman eds., 2002).

227. WARREN, *supra* note 39, at 422–23.

228. See LASSER, *supra* note 19, at 89–90 (arguing that Court-reducing measure did not evidence hostility toward Court); FAIRMAN, *supra* note 22, at 170 (noting that Republicans held such a majority that unsatisfactory candidate would never have been confirmed).

229. FAIRMAN, *supra* note 22, at 170.

230. *Id.* Fairman chronicles at length Chase’s involvement with judicial reform legislation. Among other provisions, Chase managed to obtain a change in the title of his job to Chief Justice of the United States, though given the circumstances under which the change was made, Chase got no particular benefit from it. *Id.* at 171. The first individual so commissioned was Melville Fuller. See *id.* One Senator discovered the change at a later point in time, but was unsuccessful in having it eliminated. *Id.* at 738. Fairman is quite critical of Chase’s involvement in this legislation, and particularly in the way he dealt with his colleagues. Chase used his political pull to implement changes to the size of the Court and salary without consulting them. *Id.* at 170. Fairman derides Chase for seeking a perhaps justified salary increase “covertly” and “at the expense of effective judicial organization.” *Id.* at 171. He also

In 1869, with Johnson's presidency over and Grant safely installed in the White House, Congress increased the size of the Court to nine, where it has remained ever since.²³¹ But again there was a judicial reform reason.²³² When the size of the Court was reduced to seven during Johnson's presidency, Congress also reduced the number of circuits back to nine.²³³ Once the number of Justices dropped below the number of circuits, there was a real logistical problem with the Justices still being required at that time to ride circuit.²³⁴ Thus, the move to nine matched the number of circuits.

However, there was no judicial reform "cover" when Court-packing became an issue in 1869 in the context of the *Legal Tender Cases*. In that year, in *Hepburn v. Griswold*,²³⁵ the Court invalidated the use of legal tender to pay debts predating passage of the act. The decision was by a vote of four to three.²³⁶

The *Hepburn* decision shared a number of undesirable parallels with *Milligan*. As with *Milligan*, the decision initially was met with some equanimity.²³⁷ This dissolved once it appeared from Chase's opinion for the majority that the reasoning might implicate not only the use of legal tender for preexisting debts, but also deny Congress authority to issue currency altogether.²³⁸ At that point,

brands Chase's plan to reduce the number of justices as "ill considered," not only because seven circuits were inadequate to the country's needs, but because of the inconvenience it would have caused. The circuits would have had to be redrawn, which would have interfered with litigation. *Id.* at 170.

231. See ACKERMAN, *supra* note 16, at 239; FAIRMAN, *supra* note 22, at 487; WARREN, *supra* note 39, at 501.

232. See FAIRMAN, *supra* note 22, at 487; KUTLER, *supra* note 20, at 57–59 (noting that proposal was considered practical reform and instigated before Johnson even left office); *id.* at 59 ("[T]he dominant Republicans were far more concerned with the realities of judicial needs."); LASSER, *supra* note 19, at 290 n.110 ("[T]he political motives behind the increase have been overstated."); WARREN, *supra* note 39, at 501–02 (explaining that press lauded Grant's nomination of Attorney General Hoar for its non-partisanship). The number of justices on the Court was increased to nine. See FAIRMAN, *supra* note 22, at 487; WARREN, *supra* note 39, at 501. At the time the bill was enacted, there were actually eight justices on the Court. See FAIRMAN, *supra* note 22, at 487; WARREN, *supra* note 39, at 501.

233. See FAIRMAN, *supra* note 22, at 168. The number of circuits would be adjusted as the number of justices fell. See *id.*

234. See WARREN, *supra* note 39, at 501. Though the Act of March, 1869, created a circuit court system with nine new circuit judges, the Supreme Court Justices still had some duty to ride circuit. See *id.*; KUTLER, *supra* note 20, at 56. To "ride circuit" meant that each Justice had to sit, with a fellow Justice and a District Judge, twice a year within each district in their assigned circuit. Eric J. Gribbin, Note, *California Split: A Plan to Divide the Ninth Circuit*, 47 DUKE L.J. 351, 359 (1997).

235. 75 U.S. (8 Wall.) 603 (1869).

236. See FAIRMAN, *supra* note 22, at 677, 713; WARREN, *supra* note 39, at 511.

237. WARREN, *supra* note 39, at 513.

238. See FAIRMAN, *supra* note 22, at 715 ("If the answer [to congressional power to make paper money legal tender] was No, that would be decisive as to transactions both before and after the enactment." (emphasis in original)). The sense of threat was made clear in the *New York Herald*: "[T]his opinion of the Chief Justice is of less importance in the decision given than in the decision withheld [I]f the Chief Justice had ventured an opinion . . . that the paper money of the United States cannot be made a legal tender by act of Congress, and that the act of 1862 is null and void, a financial revulsion would be precipitated upon the country, the consequences of which would be disastrous beyond all contemplation." *The Legal Tender Decision of the Supreme Court of the United States*, N.Y. HERALD, Feb. 8, 1870, at 6; see also *The Legal Tender Decision*, WORLD, Feb. 8, 1870, at 2

as with *Milligan*, the decision was condemned for dicta that went further than necessary to decide the case.²³⁹ Moreover, Chase was ridiculed because, as Secretary of the Treasury, he had supported the measure.²⁴⁰ On the merits, commentators argued that the Act surely was permissible as a war measure and many took the Court to task for meddling in Congress's choice of means to effectuate ends clearly within Congress's ken.²⁴¹ As the *American Law Review* (then edited by Oliver Wendell Holmes, Jr.) said, *Hepburn* "presented the curious spectacle of the Supreme Court reversing the determination of the Congress on a point of political economy."²⁴²

As with *Milligan*, the *Hepburn* decision stirred great controversy, none of which was helped by the odd circumstances surrounding it. When the Court voted to resolve the cases in November of 1869, its membership stood at eight.²⁴³ When the decisions were handed down, however, the membership had dropped to seven.²⁴⁴ The difference was Justice Grier: After he voted inconsistently at conference on two identical Legal Tender cases,²⁴⁵ his colleagues—long concerned about his failing acuity—determined it was time for him to resign. He did so on December 15, 1869, effective January

("[I]n spite of all their caution, much of their reasoning seems pertinent to the whole scope of the Legal-tender act.").

239. See *The Legal Tender Act*, DAILY MORNING CHRON., Feb. 8, 1870, at 2 ("[W]hatever may be said of the abstract merits of the opinion of the court . . . it was uncalled for, and being uncalled for, its utterance was improper. It is the function of the [C]ourt to decide cases which are brought before it, but it is not its function to teach the 'Government' its duty upon this or any other subject."); *The Legal Tender Opinion*, DAILY MORNING CHRON., Feb. 9, 1870, at 2 ("That the *letter* of the Constitution was against the majority of the court is sufficiently clear even from their own opinion. Their reliance upon the *spirit* of that instrument . . . To pronounce a law of Congress unconstitutional the [C]ourt should have had better warrant than an intangible something about which men may and do differ so widely as about the 'spirit of the Constitution.'" (emphasis in original); *The Supreme Court on Legal Tender*, N.Y. TIMES, Feb. 8, 1870, at 1 ("There are some people who argue that the tenor and scope of Chief Justice Chase's opinion is fatal to the constitutionality of the Act itself. But however that may be, this point, and this point only was decided, to wit: That gold may be demanded on contracts made prior to the passage of the act in February, 1862.").

240. See *The Legal Tender Decision of the Supreme Court of the United States*, *supra* note 238, at 6 ("We cannot believe that [Chase] would deliberately proceed to build up a paper money system which he believed to be unconstitutional."); Financial Affairs, N.Y. TIMES, Feb. 10, 1870, at 3 ("[T]here is something so very ungracious, as well as grossly inconsistent in the course of the Chief Justice, who was Secretary of the Treasury when the . . . principle of Legal Tender was adopted, *on his solicitation*, by Congress.") (emphasis in original). The *Daily Morning Chronicle* saw fit to publish, in full, an 1862 letter by Chase to support the issuance. See *Legal Tender: What the Chief Justice Thought of Greenbacks in 1862—An Interesting Letter from Secretary Chase to the Committee of Ways and Means*, DAILY MORNING CHRON., Feb. 12, 1870, at 1.

241. See WARREN, *supra* note 39, at 515 (quoting *Harper's Weekly* as writing, "It is dangerous to deprive ourselves of an essential means of warfare on such delusive grounds," (quoting HARPER'S WEEKLY, Mar. 19, 1870, at 179) and the *New York Times* as writing, "The effect of the decision . . . strips the Nation of one of its means of warfare and defense" (quoting N.Y. TIMES, Feb. 12, 1870, at 4)).

242. FAIRMAN, *supra* note 22, at 715.

243. WARREN, *supra* note 39, at 508.

244. *Id.* at 511.

245. The first case was *Hepburn*; the second, *Broderick's Executor v. Magraw*, 75 U.S. (8 Wall.) 639 (1869).

31, 1870.²⁴⁶

The majority of the Court had approved Chase's opinion in conference on December 29 and ordinarily it would have been read from the bench on Grier's last day. Due to delay in preparing the dissent, however, the opinions were not read until February 7.²⁴⁷ Chase's decision for the majority specifically stated that Grier, whose vote was not counted in the 4-3 decision, had concurred.²⁴⁸ The numbers would turn out to be significant in subsequent public reaction to the *Legal Tender* decisions, four votes not being at that time a majority of the authorized size of the Court.²⁴⁹

Given the two vacancies then existing on the Court, President Grant held the balance of power on the Court in his hands, and it was widely assumed he would use that power to "pack" it.²⁵⁰ Grant filled the vacancies with Justices Strong and Bradley²⁵¹ and matters turned ugly immediately. At the March 25 sitting of the Court, with the two new Justices on the bench, Attorney General Hoar moved the Court to hear two additional *Legal Tender Cases*.²⁵² The Chief Justice opposed this, maintaining that the Court had agreed that all other cases would abide by the decision in *Hepburn*. But the two new Justices joined the three *Hepburn* dissenters in setting the cases for argument. A vituperative dispute immediately broke out on the bench.²⁵³

After review was granted, counsel in the cases were convinced to withdraw them,²⁵⁴ but eventually the Court got its hands on a case it could hear, *Knox v.*

246. Chief Justice Chase's handling of Grier's health and the *Hepburn* decision has been for the most part condemned. See David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 1005 (2000) (noting that "[h]istory has not been kind" to the Chase Court's handling of Grier's condition).

An alternative path, not without its own difficulties, was followed by the Burger Court in the wake of William O. Douglas's 1974 stroke. See *id.* at 1052-56 (discussing how Court agreed to forestall cases which were likely to be resolved by narrow majorities until Douglas would retire; Justice White argued that although Douglas's condition was indeed a serious problem, it was within Congress's purview alone to decide to discount Justice's vote).

247. WARREN, *supra* note 39, at 511.

248. 75 U.S. at 626.

249. See FAIRMAN, *supra* note 22, at 719.

250. See *infra* notes 354-57 and accompanying text.

251. WARREN, *supra* note 39, at 516.

252. The cases were appeals from the Court of Claims, in which contractors sought the difference between the gold and the paper money value of their claims: *Deming v. U.S.*, 1 Ct. Cls. 190 (1866); *Latham v. U.S.*, 1 Ct. Cls. 149 (1866). See FAIRMAN, *supra* note 22, at 738 n.166.

253. FAIRMAN, *supra* note 22, at 740-43. The public dispute over the hearing of the case involved the sitting Justices interrupting one another "with evident feeling," causing "a very lively scene . . . the oldest lawyers practicing there having witnessed nothing like it." *Id.* at 742 (quoting *Boston Daily Advertiser*, Apr. 12, 1870). Chase's success in having the cases withdrawn, though less public, was no less lively: "We have had a desperate struggle in the secret conference of the Court for three weeks," wrote Justice Miller in a letter to his brother-in-law. "The Chief Justice has resorted to all the stratagems of the lowest political trickery to prevent their being heard . . . [Y]esterday, the Appellants dismissed their appeal. No doubt they had been paid to do it as their claims were not large and a decision in their favor hardly probable." *Id.* at 744.

254. WARREN, *supra* note 39, at 523.

Lee.²⁵⁵ *Knox* was decided on May 1, 1871, reversing *Hepburn* by a 5-4 vote.²⁵⁶

The question of whether Grant made appointments to reverse the result in *Hepburn* has been debated among historians, and several scholars have gone to great lengths to dispute the notion that the Court was “packed.”²⁵⁷ By “packed,” commentators seem to mean that Justices explicitly were chosen based on promises to decide those cases in a particular way.²⁵⁸ Fairman, for example, insists that Grant obtained no such promises, although he concedes that Grant likely could estimate the views of the Justices he appointed.²⁵⁹

What seems far more important, however, is that, at the time, everyone seemed to assume Court-packing was a viable option and called it such when the switches occurred.²⁶⁰ The decision in *Knox v. Lee* was met with disgust and condemnation. The *American Law Review* had warned that the Supreme Court could not reopen *Hepburn* “without degrading itself in the eyes of all intelligent men,” and called the reopening of the decision “a terrible blow at the independence and dignity of the profession.”²⁶¹ The *New York World*, commenting on the machinations to reopen, called the Court a “judicial comedy” and a “humiliating spectacle.”²⁶² The *New York World* also said the reversal “provokes the indignant contempt of all thinking men,” and noted, “[e]ven the *Tribune* is scandalized by this outrage upon judicial decorum.”²⁶³ The *Tribune* itself concluded that “it will not be as easy to restore the public respect and reverence for the tribunal which this decision has sacrificed.”²⁶⁴

Evidently, even those who approved of the Court’s change in direction in

255. 79 U.S. (12 Wall.) 457 (1870).

256. WARREN, *supra* note 39, at 525.

257. See, e.g., WARREN, *supra* note 39, at 517–18 (arguing that facts behind Bradley’s and Strong’s nominations disprove notion that Court was packed or that deals had been made with Executive); Charles Fairman, *Mr. Justice Bradley’s Appointment to the Supreme Court and the Legal Tender Cases*, 54 HARV. L. REV. 1034, 1128–55 (1941) (arguing that Bradley did not secure his position on Supreme Court by promising to vote in favor of constitutionality of Legal Tender Act); *id.* at 1131 (“That [Bradley] had made any agreement with the President is, in the author’s judgment, utterly untrue”); Geyh, *supra* note 226, at 27 (adopting view that Grant likely knew views of Justices he was appointing and that this is different than Court-packing); Graber, *supra* note 163, at 226 (making point that any Republicans Grant chose would have voted to reverse first *Legal Tender* decision).

258. See WARREN, *supra* note 39, at 517 (refuting contention that Grant packed Court by explaining that there was no deal); Fairman, *supra* note 257, at 1142 (“The word ‘pack’ had an evil connotation but no precise meaning. The specific charge that Grant and Bradley made a bargain has been supported by absolutely nothing more than . . . loose invective . . . and a semblance of plausibility . . .”).

259. See Fairman, *supra* note 257, at 1142 (“[T]he story that Grant ‘packed’ the Court made a sinister mystery out of what can be very simply explained . . . Bradley’s support of the Legal Tender Act had been publicly professed before Grant was in the White House.”).

260. See *infra* notes 347–62 and accompanying text regarding the general acceptance of Court-packing and its decline.

261. *The Legal Tender Question*, 5 AM. L. REV. 366, 367 (1870–71).

262. *The Legal Tender Decision*, *supra* note 238, at 4; *The Legal Tender Fiasco in the Supreme Court*, WORLD, Apr. 21, 1870, at 4.

263. “*Legal Tender*” in a *Packed Court*, WORLD, May 3, 1871, at 4.

264. N.Y. TRIB., May 2, 1871, at 4; see also *The Week*, *supra* note 127, at 281 (“The present action of the Court is to be deplored . . . because this sudden reversal of a former judgment . . . will weaken popular respect for all decisions of the Court, including this last one.”).

Knox felt compelled to find a justification for the turnabout other than the expedience of Court-packing. In a curious example of two wrongs evidently making a right, the defenders of *Knox* justified Court-packing only on the ground that the original *Hepburn* decision should not have been rendered in the absence of a "full bench."²⁶⁵ This point was part of the Attorney General's argument for reconsidering the question²⁶⁶ and the majority in *Knox* adverted to the argument expressly.²⁶⁷ From the time *Hepburn* was decided, Chase was taken to task for rushing to decide the case, knowing full well that Grant was about to make two more appointments,²⁶⁸ a point on which Chase felt compelled to defend himself as best he could.²⁶⁹

Harper's Weekly, after *Knox* was decided, nodded to those who "regret that the [C]ourt should so soon reverse its own action" and noted that "the presence of two judges who were not upon the bench when the first opinion was delivered, and who were then supposed to be professionally interested in the subject, also is to be regretted."²⁷⁰ *Harper's* explained that but for Chase's ambitions, the earlier decision likely would not have been rendered in the first place.²⁷¹ Or, as the *New York Herald* suggested, "The last decision must be final because it was made by a full bench, while the previous one was not . . ."²⁷²

Rather than avoiding controversy, the Court brought public opprobrium upon itself when it rushed to judgment in *Hepburn v. Griswold* and then switched direction in *Knox v. Lee*. Having the votes to strike down the legal tender laws as applied to preexisting debts, Chase was apparently eager to move forward in *Hepburn*. Surely he was aware that he soon might have two additional colleagues whose votes would shift the balance in the other direction. Perhaps he and the others in the majority sincerely believed the other members of the Court would abide by the alleged decision not to take any new cases in order to reconsider the issue. But the result in *Hepburn* was deemed untenable and

265. See NATION, Apr. 20, 1871, at 266.

266. See *The Legal Tender Question*, N.Y. HERALD, Apr. 1, 1870, at 3 (reporting Hoar's argument).

267. See 79 U.S. (12 Wall.) 457, 553 (1870) ("That [*Hepburn*] was decided by a divided [C]ourt, and by a [C]ourt having a less number of judges than the law then in existence provided this [C]ourt should have."); *id.* at 569-70 (Bradley, J., concurring) (explaining why he cannot acquiesce in *Hepburn*; reasons include "bare majority" of decision and "vacancies on the bench" subsequently filled).

268. See, e.g., N. Y. TIMES, Feb. 10, 1870, at 23 (asserting that decision "is likely to prove scarcely a nine days' wonder," as "abundant opportunity will no doubt be afforded for a review of the present opinion by the full Bench"); *The Legal Tender Act*, *supra* note 239, at 2 ("It is to be regretted that this important decision was not reserved until the case could be argued before the full [C]ourt, or at least until the new judges nominated by the President yesterday could have counseled with their associates.").

269. See FAIRMAN, *supra* note 22, at 716 (making argument that vote in effect was five to three on the question of preexisting contracts) (citing May 1, 1871 letter from Chief Justice Chase).

270. *The Supreme Court and Legal Tender*, HARPER'S WKLY., May 20, 1871, at 450.

271. *Id.* ("The circumstances of the case unmistakably indicate that except for certain political hopes and expectations that opinion would probably not have been rendered. Even the Supreme Bench is not free from the soliciting whispers of political ambition.").

272. *Legal Tender Decision and the National Bank Ring*, N.Y. HERALD, May 5, 1871, at 3 (continuing, "[B]esides, it will be approved by a majority of both political parties.").

politics provided an opportune way of changing it—especially in the face of the Court's indiscrete rush to decide the legal tender issue.

III. POLITICS' PROTECTION OF LAW

That politics sought to influence the Court seems clear. That it was perceived as doing so seems evident, as well. Whether, in fact, politics or law prevailed, is always open to question. But it seems fair to conclude, at least, that during Reconstruction law was under constant political pressure.

The point of this Part is to establish that although politics can threaten, and indeed, influence law and judicial independence, it also can protect it. Section A describes how the political economy of court-tampering usually will protect the courts during ordinary times from political interference. Section B explains that even when this is not the case, public views about the separation of law and politics will influence the success of political efforts to discipline the judiciary.

A. THE POLITICAL ECONOMY OF COURT-TAMPERING

It is more difficult to tamper with the courts than one may think upon casual observation. The reason is surprisingly simple: Most actions that can be taken against the courts require legislation. Some retributive measures—such as impeaching judges—may require even greater political effort.²⁷³ But jurisdiction-stripping and court-packing at least require success through the ordinary channels of lawmaking.

It is a commonplace understanding among students of the legislative process that it is more difficult to pass legislation than to prevent its passage. There are numerous “veto gates” through which legislation must pass—and at which it can be stopped—such as committee votes.²⁷⁴ Should key congressional players and committees succeed in getting legislation to the floor, there still must be majority support in both chambers, as well as either presidential support or the two-thirds vote needed to overcome an executive veto.

Seen in this light, it is clear why measures like those taken during Reconstruction are the exception, rather than the rule. This is particularly true because court-tampering tends to be a partisan sport. In almost every instance of famous conflict between the judiciary and the other branches, there was a partisan split as to what action (if any) should be taken. This was the case, for example, during the attacks on the judiciary in 1800²⁷⁵ and when the Court-packing plan was considered in 1937.²⁷⁶

273. See U.S. CONST. art. I, § 3 (stating that conviction of impeached judge requires two-thirds vote of Senate).

274. See Barry R. Weingest, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 720–21 (1992) (discussing veto gates in passage of legislation).

275. See Barry Friedman, *supra* note 117, at 357–59 (describing party politics that influenced attacks on judiciary).

276. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1030 (2000) (discussing partisan split and vote margins in Congress).

In addition, Congress often needs the very courts it wishes to discipline, as was true during Reconstruction.²⁷⁷ For this reason, congressional attacks largely were directed at the Supreme Court and not the lower federal courts. Indeed, one page of debate after his threat to annihilate the Supreme Court,²⁷⁸ Bingham himself said, "I would give remedy by law in United States courts in all cases if these State governments are not sufficient for the efficient protection of life and property therein."²⁷⁹ Reconstruction provided tremendous new grants of jurisdiction to the federal courts, Supreme and lower.²⁸⁰ Even the jurisdiction that Congress stripped to avoid the decision in *McCordle* was granted initially as an attempt to use the federal courts to assist with Reconstruction, a point one Democratic Representative made in the jurisdiction-stripping debate, reminding Republicans that the Act of 1867 "grew out of a necessity of your own creation."²⁸¹

It should be easy by now to see why the Court was in rare jeopardy throughout Reconstruction. During this extraordinary time, Congress was held firmly in Republican hands. Following the election of 1866, the two-thirds majority necessary to override President Johnson on the jurisdictional with-

277. See FONER, *supra* note 17, at 245 ("The Civil Rights bill, for example, placed an unprecedented—and unrealistic—burden of enforcement on the federal courts."); *id.* at 243 (The Civil Rights bill and bill extending the duration and expanding the powers of the Freedmen's Bureau depended upon the judiciary for enforcement); KUTLER, *supra* note 20, at 143 ("[T]he dominant Republicans regularly turned to the judicial system for protection and enforcement of particular legislation and for fulfillment of their nationalist impulses").

278. See *supra* note 6 and accompanying text.

279. CONG. GLOBE, 39th Cong., 2d Sess. 503 (1867). Bingham was commenting on a plan reported on by the Committee on Territories to defer protecting loyalists until the state governments were reconstructed.

280. See KUTLER, *supra* note 20, at 143–60. For descriptions of the new jurisdictional grants to the federal courts, see William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863–1875*, 13 AM. J. LEGAL HIST. 333, 333 (1969).

281. CONG. GLOBE, 40th Cong., 2d Sess. 2167 (1868) (statement of Democratic Rep. Woodward). In somewhat larger detail, Woodward said:

I have therefore no complaint to make of the act of 1867. It never would have been necessary, however, if your reconstruction laws and your Freedmen's Bureau acts had not been passed. It grew out of a necessity of your own creation; and when so violent measures as those were forced upon the people it was wise and salutary to accompany them by such an act as the act of 1867.

Id. Woodward was hardly alone in making this point; many who opposed the repeal of the Supreme Court's jurisdiction noted that Republicans had insisted on the measure. See *id.* at 2169 (statement of Rep. Eldridge) (remarking upon irony that Republicans conferred jurisdiction on Supreme Court to protect rights of former slaves, but are afraid to allow Supreme Court to exercise same jurisdiction over white man). And Republicans returned fire on attacks on the repealer by pointing out that Democrats had opposed the measure in the first place. Representative Wilson responded:

This jurisdiction never was conferred on that [C]ourt until the 5th of February, 1867. By whom conferred? By the Congress of the United States; and, if my memory does not mislead me, conferred after no little opposition made thereto by the members of the Democratic party on this floor.

Id. at 2168.

drawal existed.²⁸² Thus, the numbers plainly worked against the Court. Moreover, there also was a situation deemed sufficiently urgent to muster political will to curb the Court, as was evident in the rhetoric discussed in Part II. Therefore, the threat to national interests, combined with the political power to take action, added up to this rare instance in which Court-tampering measures actually were enacted.

The interesting question is why the Court was not in greater trouble. After all, there were more severe Court-tampering measures proposed, but they failed, as did a subsequent attempt to strip jurisdiction while the *Yerger* case was pending. Given the strong sentiments expressed against the Court, one might have expected stronger action. The following section explains how public opinion can serve to protect the Court, even in those rare times when political forces threaten it.

B. POPULAR AMBIVALENCE ABOUT JUDICIAL REVIEW

Interacting with the political economy of court-tampering is a factor—public sentiment—that is often overlooked, but which plays one of the most significant roles in the politics of judicial review. Those who would act against the courts because they are political actors obviously will be responsive to what their constituents believe to be the right course of action—hence, the importance of taking the public into account.

Social science literature on this point—what there is of it—suggests that public opinion regarding the Supreme Court has two aspects: specific and diffuse support.²⁸³ Specific support refers to whether the public agrees precisely with what the Court is doing. Diffuse support posits that there is a general regard for the courts—what lawyers might call rule of law values—that provides for a reluctance to discipline the courts even if specific support is lacking.²⁸⁴

Reconstruction is a good place to test this hypothesis, given the public passions of the day. Events suggest that there was diffuse support for the Court, and that at least up to a certain limit, the public was reluctant to see action taken against it. Although that reluctance obviously did not foreclose some action against the Court, it might have moderated the action that was taken. Such public support—or perhaps ambivalence about subjecting the Court to political pressure—was evident in three places: (1) in prevailing understandings about

282. See *supra* note 59 and accompanying text.

283. The primary piece on this is Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AMER. J. POL. SCI. 635 (1992) [hereinafter Caldeira & Gibson, *Etiology*]. See *id.* at 637 for a discussion of diffuse and specific support. See generally Charles H. Franklin & Liane C. Kosaki, *Media, Knowledge, and Public Evaluations of the Supreme Court*, in CONTEMPLATING COURTS 352 (Lee Epstein ed., 1995); James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AMER. POL. SCI. REV. 343 (1998); James L. Gibson & Gregory A. Caldeira, *Defenders of Democracy? Legitimacy, Popular Acceptance and The South African Constitutional Court* (2001) (unpublished manuscript, on file with author).

284. Caldeira & Gibson, *Etiology*, *supra* note 283, at 637.

judicial review; (2) in the arguments made in favor of disciplining the Court; and (3) in the aftermath of Court-tampering measures, when regret and concern about political action against the Court were expressed.

1. Ambivalence About Judicial Supremacy and Judicial Review

Reconstruction represented a midpoint in the gradual march throughout American history toward judicial supremacy. Even taking into account the Court's large stumbles from *Dred Scott* through Reconstruction, the rise of judicial supremacy was the product of a long period of gradual acquiescence. It is not entirely clear how judicial supremacy came to this point where it was accepted by the public, but come it did.²⁸⁵ By the Populist-Progressive era, it had become common to attribute the ascendancy of judicial review to acquiescence.²⁸⁶ Commentators often pointed out that the practice of judicial review was neither necessary nor intended in American democracy, but had simply come to be accepted.²⁸⁷ Often it was said that supremacy rested on the confidence of the people, who had vested this power in the courts, or at least

285. Mark Graber, in an examination of the Supreme Court's antebellum land transfer cases, concludes that "[b]y routinizing the process of judicial review in politically uninteresting matters, the Marshall and Taney Courts fostered beliefs that the judiciary was the appropriate forum for resolving all controversial constitutional issues." Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73, 78 (2000) (arguing that judicial supremacy partly was response to slow accretion of authority by Court in deciding uncontroversial land transfer cases, ostensibly on statutory grounds but relying on general or sub-constitutional rules of law). Graber elaborates on this theme elsewhere. See, e.g., Mark A. Graber, *The Emblematic Establishment of Judicial Review*, in *THE SUPREME COURT AND AMERICAN POLITICS: NEW INSTITUTIONALIST APPROACHES* 28 (Howard Gillman & Cornell W. Clayton eds., 1999); see generally Kramer, *supra* note 1, at 109–68 (detailing rise of judicial supremacy). Also valuable on this point is Michael G. Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1310–1320 (2000) (discussing development of general constitutional law in diversity cases in manner favored by pro-business and nationalizing interests).

286. See, e.g., James M. Ashley, *Should the Supreme Court Be Reorganized?*, ARENA, Oct. 1895, at 221 (referring to "power conceded by law and custom to the Supreme Court"); Thomas Speed Mosby, *The Court is King*, ARENA, Aug. 1906, at 118 ("[T]he thing which Lincoln feared has come . . . so quietly, so stealthily, that it is even now scarcely noticed."). Many observers agreed with the 1906 statement of Justice Walter Clark of the North Carolina Supreme Court that "[i]t may be that this power in the courts, however illegally grasped originally, has been too long acquiesced in to be now questioned." 47 CONG. REC. S3376 (July 31, 1911) (exhibit B, address by Walter Clark); see also James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 152 (1893) (recognizing Court as "ultimate arbiter for what is rational and permissible"); *Discussing Yesterday's Decision*, EVENING STAR, May 21, 1895, at 1 (quoting Senator Morgan as recognizing that Congress would accept Court's decision in income tax cases); Theodore Roosevelt, *Nationalism and the Judiciary*, OUTLOOK, Mar. 4, 1911, at 491 ("[T]he judges who by their power of interpretation are the final arbiters in deciding what shall be the law of the land.").

287. See Beulah Amidon Ratliff, *Shall We Remake the Supreme Court? III. May Congress Limit the Supreme Court?*, NATION, May 21, 1924, at 579, 580 (noting that Supreme Court "has had the tacit approval of the American people long enough to make any argument that is 'pure usurpation' academic and unwise"); J.C. Rosenberger, *The Supreme Court of the United States as Expounder of the Constitution*, 30 AM. L. REV. 55, 55 (1896) (noting that people have accepted Court's power).

acquiesced in it.²⁸⁸ Seen from the present-day perspective, Reconstruction was part of this natural progression and also partly a reaction to the particular events of the time.

During the antebellum period the solution to any threat posed by judicial decisions was often simply to ignore them. In several famous instances, and others less well-known, state officials simply defied judicial rulings that were problematic. Standing alone, the Supreme Court's enforcement capabilities are notoriously limited. It was during the Cherokee controversy that Andrew Jackson supposedly (but more probably apocryphally) said, "John Marshall has made his decree, now let him enforce it."²⁸⁹ Less well-known is that in another part of that same controversy, a case involving the Cherokee Corn Tassel, the state of Georgia ignored a Court order and actually executed the defendant.²⁹⁰ In other instances, states failed to attend arguments in cases in which they were parties, and once, Kentucky sent commissioners to negotiate the dismissal of a case, rather than treating the Court as having legal jurisdiction over it.²⁹¹

By the Populist-Progressive era, however, much of this had changed. Judicial supremacy was a widely accepted cultural norm as evidenced by the fact that even those most opposed to the notion conceded the point. William Meigs, writing in 1885, voiced skepticism regarding claims of judicial supremacy: "The very idea of a court's judgment in a suit between A. and B. finally and forever settling as to everybody and all departments of government the great questions of constitutional law, seems almost an absurdity."²⁹² Nonetheless, he realized he had an uphill task arguing against supremacy, for "this is the view ordinarily accepted. And we believe it to be so generally and so strongly held that an argument on the other side runs a very good chance of not even being listened to."²⁹³ James Weaver's 1892 diatribe, *A Call to Action*, acknowledged that "at present the power of the Court in this respect seems to be no longer questioned."²⁹⁴ When Governor Pennoyer argued against judicial supremacy and the power of judicial review in the *American Law Review*, the journal had to reassure its readers that "the views of Governor Pennoyer cannot be slighted as being merely erratic: some of the ablest lawyers entertained those views a

288. Rosenberger, *supra* note 287, at 58 ("[S]hould [the judges] at any time lose the respect and confidence of the people, their decisions would be as if written on empty air."); Robert von Moschzisker, *Judicial Review of Legislation by the Supreme Court*, 9 CONST. REV. 67, 71 (1925) (noting that powerful position of courts was due to confidence they commanded from people); *Power of the Judiciary to Nullify Acts of Congress*, 29 AM. L. REV. 594, 597 (1895) (noting that judicial review "remains operative alone through the tolerance of the American people . . .").

289. For a discussion of the context and apocryphal nature of the statement, see Barry Friedman, *supra* note 117, at 398–401.

290. For discussion, see *id.* at 394–96.

291. For discussion, see *id.* at 396–97.

292. William M. Meigs, *The Relation of the Judiciary to the Constitution*, 19 AM. L. REV. 177, 198 (1885).

293. *Id.* at 191.

294. JAMES WEAVER, *A CALL TO ACTION* (1892).

century ago, and some still entertain them.”²⁹⁵

In 1895, for example, the Supreme Court invalidated the income tax, holding it an unapportioned direct tax.²⁹⁶ The immediate reaction, even if one of frustration, was of acceptance of the Supreme Court’s role.²⁹⁷ Attackers of the decision made clear that views on judicial supremacy had evolved; although they might concede the judiciary’s prerogative not to assist with enforcement of a law it deemed unconstitutional, at least one insisted that Congress and the Executive could have ignored the decision and continued to collect the tax.²⁹⁸ Others argued the Senate simply should reenact the income tax, putting the matter again to the Supreme Court.²⁹⁹ Yet amid furious debate over constitutional propriety, the argument was not so much that Congress could ignore the Court, as it was that Congress could reenact the law simply to get the Court to reconsider.³⁰⁰ When all was said and done, supporters resorted to constitutional

295. *Power of the Judiciary to Nullify Acts of Congress*, *supra* note 288, at 595 (1895). Judicial supremacy was so well established that critics of the Court felt the need to adopt an apologetic stance, taking care to justify the practice of criticism. *See, e.g.*, WEAVER, *supra* note 294, at 67 (“[A]void all unnecessary criticism of the Federal Judiciary; but where, in our judgment, warning seems to be necessary, we shall endeavor to speak with proper temper, but nevertheless fearlessly and without reserve.”); Roosevelt, *supra* note 286, at 488 (stressing necessity of “intelligent criticism” of judges of Supreme Court). Moreover, there was remarkable agreement that judicial supremacy required individuals and other branches of government to adhere to judicial interpretations, even if they were not parties to the particular action in which judgment was rendered. Some writers tried to cabin the power of judicial review, arguing that a judicial decision did nothing more than resolve a dispute between parties before the Court. *See, e.g.*, Meigs, *supra* note 292, at 198. But for the most part, it was recognized that a decision as to specific parties had a much broader effect. *See, e.g.*, *Power of the Judiciary to Nullify Acts of Congress*, *supra* note 288, at 596 (criticizing Supreme Court hearing “moot cases, concocted to enable it to raise its voice before the public and repeal the legislation of Congress or of the states”); von Moschzisker, *supra* note 288, at 67 (“[T]he judicial announcement of invalidity serves as formal binding notice, which in practice is understood to rule all similar states of fact, and is generally accepted as disposing of the legislation at issue for all future purposes within the scope of the decision . . .”).

296. *Pollock v. Farmers’ Loan and Trust Co.*, 157 U.S. 429, 585–86 (1895) (holding unconstitutional an income tax derived from state, county, and municipal securities because tax would operate on power of states to borrow money).

297. *See, e.g.*, *By the People*, EVENING STAR, May 21, 1895, at 1 (counseling caution in criticizing Court and its decision); *Discussing Yesterday’s Decision*, *supra* note 286, at 1 (statement of Sen. Morgan) (“Of course, Congress will have to accept the decision, but an amendment to the constitution is always possible.”).

298. *See, e.g.*, Sylvester Pennoyer, *The Case of Marbury v. Madison*, 30 AM. L. REV. 188, 198 (1896) (noting that decision “could have been rendered nugatory if the President . . . had ignored the unfounded dogma of the [C]ourt that a law is not a law whenever it chooses to say so, and had obeyed the constitutional mandate to ‘take care that the laws shall be faithfully executed’”).

299. On the debate over forcing the Court to reconsider, see Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 33–35 (1999); Erik M. Jensen, *The Apportionment of “Direct Taxes”: Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2343 (1997).

300. Senator Borah went through lengthy historical and legal analysis to justify resubmitting a new income tax proposal to other Senators. *See* 44 CONG. REC. 1701 (1909). Senator Owen thought that Congress should ask the Court to reconsider the constitutional question and to submit a constitutional amendment if it was rejected again. *Id.* at 1820. Senator Hughes argued that “it has become almost a political principle in the history of this Government not to be content with one decision upon great constitutional disputes by the Supreme Court when that decision is by a divided [C]ourt.” *Id.* at 3445.

amendment to establish congressional authority to impose the tax.³⁰¹

The same was true with regard to the Supreme Court decision striking down federal child labor legislation. When the Court decided *Bailey v. Drexel Furniture*,³⁰² in which it struck down the Child Labor Tax Act, an *Atlanta Constitution* headline read: "Advocates of Anti-Child Labor Legislation Now See Only Remaining Hope In Constitutional Amendment."³⁰³ The Chair of the National Child Labor Committee expressed great frustration, saying the Court's decisions raised "important questions regarding the ability of the people of America to establish their will in legislation under the Constitution as it stands," and that "[t]wice the people of the United States have legislated against this nation-wide nation-weakening evil" and twice been rebuffed.³⁰⁴ The solution? "[T]hey must seriously consider the advisability of changing the Constitution."³⁰⁵ Judicial conduct of this sort posed a difficult question for the *New Republic*: "[T]he nation will be forced to consider whether the dangers of entrusting to the fallibilities of a handful of federal judges the destinies of more than one hundred million people may not outweigh the value of a Court as the ultimate law giver."³⁰⁶ But as the proposals of the period demonstrated, the only way around this was major structural change, and that was a road most did not want to travel. The country lived with the rulings until the Court changed its mind.³⁰⁷

During Reconstruction things were decidedly ambivalent. On one hand, there were numerous threats to discipline an unruly Court. On the other hand, the very fact that discipline rather than defiance was the watchword suggested a change had occurred since the Jacksonian era. True, there was tactical maneuvering, such as the disappearance of the defendants in *Georgia v. Ord* so that they could not be served.³⁰⁸ But tactics such as this and the jurisdiction-stripping measure seemed as much a concession to judicial authority as a denial of it.

Of course, this slow growth of supremacy rested in the belief that there were legal answers to questions that came before the Court and that the Court would dispose of such questions as a matter of law. Reconstruction-era commentary supports the idea that legal answers were available to resolve constitutional

Other senators were wary of disrespecting the Court's decisions. *Id.* at 3446 (statement of Sen. Sutherland) ("When the Congress of the United States has passed and put upon the statute books a law which has been declared to be unconstitutional by the Supreme Court, I do not think it is a seemly or a proper thing for the Congress of the United States to immediately turn about and reenact that same law."); *Id.* at 1569 (statement of Sen. Bailey) (indicating that Senate was bound by *Pollock* and its precedent, "any construction of the Constitution generally received and acquiesced in for a long time ought to be accepted").

301. U.S. CONST. amend. XVI.

302. 259 U.S. 20 (1922).

303. *Law Held Invasion of States' Rights*, ATLANTA CONST., May 16, 1922, at 1.

304. *Child Labor Legislation*, N.Y. TIMES, May 17, 1922, at 6.

305. *Id.*

306. *Comment*, NEW REPUBLIC, June 15, 1918, at 195 (commenting on Child Labor Act decision).

307. *See United States v. Darby*, 312 U.S. 100, 126 (1941) (upholding Fair Labor Standards Act of 1938).

308. *See supra* note 151 and accompanying text.

questions. There were some who suggested that law was whatever the judges said it was,³⁰⁹ but for the most part, newspapers and law review commentary indicated the belief that there were attainable answers to constitutional questions. It may come as little surprise that in response to *Milligan*, the *Little Rock Daily Gazette* would praise the courts for “confinin[ing] themselves exclusively to the interpretation of the law without regard to the effect which their decision will have upon the prospects of any political party”;³¹⁰ however, even Republican newspapers seemed to concede the difference between favored outcomes and constitutional meaning. Although it expressed unhappiness with the *Milligan* decision in the most extraordinary of terms, the *New York Herald* was willing to admit that “the decision in the Indiana case may be according to the strict letter of the [C]onstitution.”³¹¹ In the wake of the first *Legal Tender* decision,³¹² journalists and legal commentators debated the proper line between interpreting the Constitution according to “its letter,” as opposed to “its spirit.”³¹³ The more scholarly publications of the time joined Cooley in stressing that natural law was not an acceptable trump for constitutional meaning,³¹⁴ and both news reports and scholarship—including an early article by James Bradley Thayer—acknowledged the impropriety of interpreting the Constitution to achieve what was “wise” as opposed to what the document required.³¹⁵ Law review articles contained discussions regarding the methodology of constitutional inter-

309. The prize for earliest legal realism may go to William Meigs, who, in the course of arguing against what he saw as entrenched judicial supremacy, explained: “The view a judge takes in such cases, whatever we may say, depends as a matter of fact upon his pre-conceived views of the political history and tendency of his country; and these, again, have been enormously influenced by what may be his theory and belief as to the best and most advisable form of government.” Meigs, *supra* note 292, at 191. Of course, Meigs was writing late in the period. For a partisan voice in the heat of debate, see CONG. GLOBE, 40th Cong., 2d Sess. 488 (1868) (statement of Rep. Wilson) (“That body makes law when it decides a case.”).

310. *An Important Decision*, LITTLE ROCK DAILY GAZETTE, Dec. 20, 1866, at 2.

311. *The Late Decision of the Supreme Court on Military Trials During the War*, N.Y. HERALD, Dec. 20, 1866, at 4. See *infra* notes 343–45 regarding what else the *Herald* had to say on the subject.

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

313. See, e.g., *The Legal Tender Opinion*, *supra* note 239, at 2 (condemning use of “spirit” over “letter”).

314. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 164 (1st ed. 1868) (“[N]or can a court declare a statute unconstitutional and void, solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen”); see also C.A. Kent, *The Power of the Judiciary to Declare a Law Unconstitutional*, 11 AM. L. REG. 729, 732 (1872) (disagreeing with view of some that “there are restrictions upon it [the legislature] not contained in specific constitutional inhibitions, but derived from the principles of justice or the nature of free government”).

315. James B. Thayer, *Legal Tender*, 1 HARV. L. REV. 73, 73 (1887) (“The question whether Congress has the power . . . and the question whether under any circumstances it is wise or right that Congress should use it, are very different things.”); see also RICHARD C. MCMURTRIE, OBSERVATIONS ON MR. GEORGE BANCROFT’S PLEA FOR THE CONSTITUTION 5 (1886) (“The conception or notion [of constitutionality] is simply that of legal power. Its wisdom or prudence or folly does not enter into that question”); *The New Constitution*, CIN. DAILY ENQUIRER, May 2, 1871, at 4 (mocking view that constitutionality depends on answer to question, “Is it right?”).

pretation,³¹⁶ and to further mark the boundaries between law and politics, it was common to point to an adage later attributed to Thayer: that courts should not strike down legislative enactments unless clearly unconstitutional.³¹⁷

It is correct to say then that the Court could draw upon a measure of respect from the general public. Judicial supremacy might not have been fully established, but there nonetheless was a sense of the importance of the rule of law. This would temper nakedly political attacks on the Court in all but the most dire of circumstances and, as we will see, would also play out in the way the Court was criticized.

2. Denying the Court Was Acting Judicially

The way in which the public discusses the judiciary betrays sentiments about the separation of law and politics. Although threats against the Court were frequent, the rhetoric was toned down when it came to dealing with actual judicial decisions. Rather than denying judicial authority, those displeased by decisions formulated arguments as to why, in any particular instance, the rulings of courts were, or would be, inapplicable. These arguments themselves reflected an understanding that politics and law should be kept separate.

One of the most frequently heard arguments was that the troublesome part of a Supreme Court decision was dicta—outside the proper realm of judicial decisionmaking—and thus not binding. For example, in response to both *Milligan* and to the first of the *Legal Tender* decisions, detractors argued that the

316. The most meticulous may have been C. A. Kent's *The Power of the Judiciary to Declare a Law Unconstitutional*, *supra* note 314. Journals of the time debated the propriety of the Supreme Court's attention to means rather than ends in the *Legal Tender* decisions. See, e.g., *Book Notices: The Legal Tender Cases of 1871*, 7 AM. L. REV. 146 (1872–73) (remarking that crux of argument in *Legal Tender Cases* was whether Legal Tender Act was “necessary and proper” means for implementing Congress's constitutional powers and that “the case presented the curious spectacle of the Supreme Court reversing the determination of Congress on a point of political economy”); *The “Legal Tender” Decision of 1884*, 18 AM. L. REV. 410, 419 (1884) (“The vital, crucial test always is—is the end legitimate? Is it within the scope of the [C]onstitution?”); *id.* at 620 (“The [C]ourt considers the power to make legal tender an incidental, not a substantive power; a means, not an end.”); Harry Harmon Neill, *The Legal Tender Decisions of the U.S. Supreme Court*, 2 COLUM. JURIST 14, 19 (1885) (“What the Court has given us, therefore, is not a new conception of the powers of Congress, but a new manner of ascertaining what means Congress may use in exercising powers expressly granted to it.”); *Summary of Events*, 4 AM. L. REV. 608, 608 (1870) (criticizing Chase and Miller for examining whether legislation was “likely to be useful toward a lawful end” rather than whether it was “really calculated” and “plainly adapted” to lawful end).

317. See CONG. GLOBE, 40th Cong., 2d Sess. 479 (1868) (statement of Rep. Williams) (“[I]t is a well-settled principle that no act of the law-making power should ever be declared invalid upon constitutional grounds unless it be a clear case.”); *id.* at 488 (statement of Rep. Wilson) (“There is a rule of law that we are all perfectly familiar with, that whenever there is a doubt in the mind of the court as to the constitutionality of a law it is to be resolved in favor of the law”); see also *The Burden on the Supreme Court*, *supra* note 135, at 23 (“Is there not something positively awful in the thought of a statute . . . swaying backward and forward, from law to nonentity, on the enfeebled mind of a single aged man?”); cf. COOLEY, *supra* note 314, at 192 (“It must be evident to any one that the power to declare a legislative enactment void is one which the judge . . . will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility.”).

portions of the opinions that spoke to the future more than the case before the Court were dicta.³¹⁸ The *Nation* approved of the core of the *Milligan* decision, but felt the Court had exceeded its bounds in addressing the broader power of Congress to utilize military courts: "It is quite possible that their opinion upon this point is right, but it is no more law or authority than one of the Chief-Justice's speeches to the colored people in Charleston."³¹⁹

Law reviews and newspapers alike chastised the *Milligan* Court for its inflammatory dicta.³²⁰ The *Nation* explained: "The chief duty of the [C]ourt . . . is to confine itself strictly to the matter in hand, to decide the precise points before it, and to abstain rigidly from the slightest discussion of political questions not necessarily involved."³²¹ The *American Law Review* was of similar mind:

They divided on a point which was not before them for adjudication They have seemed to forget how all-important it is for the preservation of their influence that they should confine themselves to their duties as judges between the parties in a particular case; how certainly the jealousy of the co-ordinate departments of the government and of the people would be excited by any attempt on their part to exceed their constitutional functions³²²

Although the majority opinion in *Milligan* technically might have been dicta, this was no reason to deny the Court authority to decide the next case. In other words, although *Milligan's* case might have been resolved properly on the statutory grounds identified by the majority, this was not likely so with subse-

318. The *Daily Morning Chronicle* criticized Justice Davis's opinion in *Milligan* as being created in the "worst spirit," and it discounted the opinion's "offensive" language as being "wholly unnecessary—an *obiter dictum* legally uncalled for by the subject-matter before the [C]ourt or by any of the surrounding circumstances." *The Supreme Court*, DAILY MORNING CHRON., Jan. 4, 1867, at 2 (emphasis in original); see also *The New Dred Scott*, *supra* note 76, at 34 ("Like the substance of the *Dred Scott* opinion, it was *obiter dictum*, and its intent was similar."); *Milligan's Case*, 1 AM. L. REV. 572, 572 (1866-67) ("They divided on a point which was not before them for adjudication . . .").

Criticism of the *Legal Tender* decisions followed a similar vein. See *Summary of Events*, *supra* note 316, at 605 ("[T]he necessary effect of this is to compel us to consider this theory of election between two currencies . . . as *overruled* . . . and as mere *obiter dictum* . . ." (emphasis in original)); *The Legal Tender Act*, *supra* note 239, at 2 ("[W]hatever may be said of the abstract merits of the opinion of the [C]ourt on this particular point, we are constrained to say that it was uncalled for, and being uncalled for, its utterance was improper.").

319. *Political Questions in the Supreme Court*, NATION, Jan. 10, 1867, at 30.

320. See *The Decision in the Milligan Case*, *supra* note 62, at 2 ("[I]t was wholly unnecessary to bring in the question whether or not Congress possessed the power to legalize military tribunals under such circumstances as existed in *Milligan's* case."); *The New Dred Scott*, *supra* note 76, at 34; see also WARREN, *supra* note 39, at 432 (quoting the *Cleveland Herald* in characterizing the *Dred Scott* and *Milligan* decisions as "falling under the title of an *ipse dixit*, a mere extra-judicial assertion of the Judges"). Events that transpired on the heels of *Milligan* added fuel to the fire. The "first application" of the decision was to free a Dr. James L. Watson, who had been held for murder after "killing a negro, under circumstances which in any community in Christendom, outside of the late slave states, would make the act a deliberate murder." *The Decision on Military Commissions—The Chronicle Sustained*, DAILY MORNING CHRON., Dec. 25, 1866, at 2.

321. *Political Questions in the Supreme Court*, *supra* note 319, at 30.

322. *Milligan's Case*, *supra* note 318, at 573.

quent cases challenging the Reconstruction legislation. Inflammatory (and thus ill-advised), yes; a reason for Court-tampering, probably not. Other arguments against the force of the decision were required.

One such argument frequently relied upon to deny the interpretive force of judicial constitutional decisions was to claim that even if in theory the Constitution could be interpreted plainly, such a thing was unlikely to happen given rampant partisanship. Accusations of bias or partisanship on the part of judges fell regularly from the lips of those who disagreed with constitutional pronouncements. The *New York World* article commenting on the reopening of the first of the *Legal Tender Cases* gets points for venom, but otherwise is typical of the times; after reviewing the merits, the paper says:

It is idle to argue this question any farther, on one side or the other . . . especially idle for the conclusive reason that the Court has been *packed* The forms of argument will be gone through with for the sake of appearances, but the question was really decided by our ignomus of a President when he filled the vacancies on the supreme bench.³²³

Complaints of this sort infected the entire legal tender controversy, with papers regularly calling into question not only the party affiliation of the Justices, but their political ambition or personal stake, as well.³²⁴ Similarly, with regard to the *Milligan* decision, the *American Law Review* observed, “[t]he opinions of the majority and of the minority of the [C]ourt have been received, not as judicial opinions, but as party votes”³²⁵ And about *McCardle*: “Submission to the Court as the true voice of the Constitution presupposes an established confidence in the lofty disinterestedness of its members—something that at the time of *McCardle* the Court did not enjoy and did not deserve.”³²⁶

The most prominent reason given for tampering with the Court, however, was that the Court had crossed, or was about to cross, the line between questions

323. *The Legal Tender Decision to Be Reviewed*, WORLD, Apr. 2, 1870, at 4.

324. Chase's role was attacked as reflecting his presidential ambitions. See, e.g., *Politics upon the Bench*, HARPER'S WKLY., Apr. 16, 1870, at 242 (“Alas! The Chief Justice had been inflamed with the Presidential fever, and not the touch of the softest ermine can assuage that fire.”). Chase's aspirations were well-known. In fact, President Lincoln had reservations about appointing Chase as Chief Justice for this very reason. See WARREN, *supra* note 39, at 400 (“I have only one doubt about his appointment. He is a man of unbounded ambition and has been working all his life to become President.”).

325. *Milligan's Case*, *supra* note 318, at 572.

326. FAIRMAN, *supra* note 22, at 514. The *Nation* held a constant vigil against partisan appointments. At one time it condemned those who felt otherwise: “What they wanted at this time was not a wise judge, nor a learned judge, nor an upright judge, but a judge of their own kind.” *Why Judge Hoar Was Not Confirmed*, NATION, Dec. 30, 1869, at 582. At another it begged keeping politics out of the appointment and confirmation of new circuit judgeships: “We do not care whether they are Republicans or Democrats, or old-line Whigs, or annexers, or anti-annexers, or woman's rights men, or anti-woman's rights men—the first question is, are they judges?” *The New United States Judges*, NATION, Dec. 2, 1869, at 479; see also *Minority Representation in Illinois*, *id.* at 556 (“The judge as an independent institution, and not a Government functionary, is something of which other peoples only dream or sing, We have it: let us keep it.”).

political and questions legal.³²⁷ As Representative Schenck explained in supporting the jurisdiction-stripping bill passed prior to *McCardle*: Given that the Court had undertaken to decide “not merely judicial but political questions . . . I hold it to be not only my right but my duty, as a Representative of the people, to clip the wings of that [C]ourt.”³²⁸

This was not an entirely specious distinction; the political question doctrine has deep roots in American constitutional law³²⁹ and the Supreme Court itself relied on the doctrine in turning back challenges to Reconstruction brought by Georgia and Mississippi.³³⁰ That said, during Reconstruction invocation of the political question argument became something more of a slogan than a sharp assessment of the character of questions coming before the Court. Scholars such as Charles Fairman and Richard Friedman have recognized the “shadowy

327. See, e.g., CONG. GLOBE, 40th Cong., 2d Sess. 483 (1868) (statement of Rep. Bingham) (arguing that sanctity of Court was not challenged until “it dared to descend from its high place in the discussion and decision of purely judicial questions to the settlement of political questions which it has no more right to decide for the American people than has the Court of St. Petersburg”); CONG. GLOBE, 39th Cong., 2d Sess. 501 (1867) (statement of Rep. Bingham) (“That supreme tribunal of justice has no power in the premises. It is not a judicial question; it is a political question in the decision of which the Supreme Court can in nowise interfere.”); see also *Political Questions in the Supreme Court*, supra note 319, at 30 (stating that Court has duty to resolve imminent issue and “abstain rigidly from the slightest discussion of political questions not necessarily involved”); *The Late Decision of the Supreme Court on Military Trials During the War*, N.Y. HERALD, Dec. 20, 1866, at 4 (“[O]n political questions [Supreme Court judges] are apt, like other men, to shape their opinions of the law to their fixed political notions.”). But see CONG. GLOBE, 40th Cong., 2d Sess. 492 (1868) (arguing in reference to political question doctrine: “The Constitution makes no such discrimination, and the line separating the two classes, if drawn at all by the [C]ourt, has been done so vaguely as rather to bewilder than instruct.”); *Democrat on the Supreme Court Decision*, DAILY MORNING CHRON., Jan. 21, 1867, at 2 (quoting General Halpine, a Democrat, as conceding that although *Milligan* may have been “technically correct,” it was “a most unfortunate fact for the country” and berating Court for focusing on “the dry law of a case in which vast political issues are at stake”).

328. CONG. GLOBE, 40th Cong., 2d Sess. 1883–84 (1868).

329. An early case developing the political question doctrine was *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). In 1841, Rhode Island found itself in the predicament of having two opposing governments and the Court was asked to decide which one was legitimate.

330. In *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866), Mississippi attempted to stay the Reconstruction Acts by claiming that the legislative and executive branches lacked the power to dissolve a state’s government. Mississippi argued that the case was justiciable because the President’s role in Reconstruction was merely “ministerial.” *Id.* at 498. The Court, however, disagreed: “The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.” *Id.* at 499. In a similar case, *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867), Georgia attempted to circumvent the Mississippi ruling. Georgia sought an injunction against the implementation of the Reconstruction Acts on grounds that they would, among other things, unlawfully deprive the state of its property. *Id.* The court found that it did not have the jurisdiction to determine political rights:

That these matters, both as stated in the body of the bill, and, in the prayers for relief, call for the judgment of the [C]ourt upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the [C]ourt.

Id. at 77.

boundaries” that defined the term even in the Court’s decisions at the time.³³¹ Among the public at large, the boundaries wandered well beyond shadows.

The assertion that something was a political question was drawn to extraordinary, indeed improbable, lengths to justify action against the Court. A political question might be one in which there was any political interest. In the debate over the jurisdiction-stripping measure that subsequently came before the Court in *McCardle*, for example, Republicans maintained that the measure was appropriate because “[t]he question of making war or determining the political status of a State is as much beyond the power of the Supreme Court as it is beyond the power of the humblest individual.”³³² Opponents disagreed, charging that the question in the case was simply whether the Reconstruction acts under which *McCardle* was charged were constitutional: “It is a strictly judicial inquiry. Nobody can doubt that.”³³³ They disdained the notion that “a case involving the right of a citizen under the Constitution of the United States is a political question.”³³⁴ At which point the following remarkable colloquy occurred:

Mr. STEWART: Is it not the case of a public enemy?

Mr. JOHNSON: No.

Mr. STEWART: Whether he is a public enemy or not—that is not a political question?

Mr. JOHNSON: No; it is not.

Mr. STEWART: Is not the political department to determine who are public enemies?³³⁵

This reveals the tension inherent in a body politic generally committed to rule of law values, yet unhappy with them in an individual case.³³⁶ Somehow, even

331. See FAIRMAN, *supra* note 22, at 393–94 (charging that Court’s use of “political question” doctrine in *Stanton* failed to explain difference between political and legal questions; “[u]ndeservedly the case has always borne a semblance of mere expediency”); *id.* at 395–96 (continuing that even modern use of political question doctrine runs to “shadowy boundaries”); Richard D. Friedman, *supra* note 16, at 12 (calling standard for political question adopted in *Stanton* “an unconvincing one by today’s standards”).

332. CONG. GLOBE, 40th Cong., 2d Sess. 2118 (1868) (statement of Rep. Stewart).

333. *Id.* at 2120 (statement of Rep. Johnson).

334. *Id.* at 2121.

335. *Id.* Mr. Johnson is Reverdy Johnson, a Democrat Representative from Maryland and one of Congress’s then-leading constitutional lawyers. Similar in tone was the *New York Herald’s* conclusion that the *Legal Tender Cases* were “more a political than a judicial one—because the goal of the suit “seemed to be to drive the legal tender notes of the government out of existence.” *Attorney General Hoar on the Legal Tender Decision*, N.Y. HERALD, Apr. 1, 1870, at 6.

336. Robert Post makes this point with regard to Supreme Court adjudication, especially when it comes to overruling the Court’s own decisions. See ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, CONTINUITY, MANAGEMENT 31 (1995) (discussing effective overruling by Court of *Lemon v. Kurtzman* in *Marsh v. Chambers*; “the legal implications of *Chambers* depend upon the implicit and necessary expectations that the Court will in the future treat *Chambers* in a way that it declined in *Chambers* to treat *Lemon*”).

determining whether someone had violated the laws—and was therefore a public enemy—was a political question.

Thus, although the arguments to avoid judicial power would be taken to almost absurd lengths, the form of those arguments was such as to demonstrate some idea of a boundary line between law and politics. Law was to be nonpartisan, applicable to things other than political questions, and legal decisions were only to go so far as necessary to resolve pending controversies. Similar principles emerge when, after the fact, popular opinion chastised the breach of the boundary between law and politics.

3. Repenting and Recanting

Reconstruction-era debates illustrate an odd schizophrenia about subjugation of the Supreme Court to political will. This was apparent with regard to both jurisdiction-stripping and Court-packing. Before the fact there were strident assertions of power to utilize these tools to bend the judiciary to popular will. When each was used, or appeared to have been used, however, the nature of the arguments shifted, indicating discomfort with the general principle, even when its application seemed imperative.

Before the enactment of the repealer that determined the outcome in *McCardle* was an issue, assertions of power to strip jurisdiction were common. For example, in debate on January 16, 1867, Bingham argued that Congress had great control over the appellate (as distinguished from the original) jurisdiction of the Supreme Court:

If, therefore, gentlemen are at all apprehensive of any wrongful intervention of the Supreme Court in this behalf, sweep away at once their appellate jurisdiction in all cases, and leave the tribunal without even color or appearance of authority for their wrongful intervention. Do this, and let that [C]ourt hereafter sit to try only questions affecting ambassadors, other public ministers and consuls, and questions in which a state shall be a party, as that is the beginning and end of its original jurisdiction.³³⁷

When the Congress came to limiting the Court's power in the face of the threat posed by *McCardle*, however, there was a marked reluctance to continue the tone of legislative hegemony. Tellingly, more stringent measures offered in Congress at this time to deal with the Court failed to gain enactment.³³⁸

Most important, the debate over the jurisdiction repealer is remarkable for what it does not say. During the entire brouhaha over the jurisdiction-stripping

337. CONG. GLOBE, 40th Cong., 2d Sess. 502 (1867).

338. These included the two-thirds majority bill, which passed the House but went nowhere in the Senate. See *supra* note 164 and accompanying text, the unanimous decision rule; WARREN, *supra* note 39, at 492. Senator Trumbull's bill sought to take away any role for the Court in those states still under martial law by removing from its jurisdiction all cases arising from the Reconstruction Acts. See WARREN, *supra* note 39, at 492.

bill, there was virtually no defense of the measure made by Republicans on the ground that Congress was free to control jurisdiction to control judicial decisions. Only once was this defense offered, and then by Representative Schenck at a time when his integrity was being attacked for sneaking the measure through the House.³³⁹ Otherwise, it is as though Republican leaders had made a decision *not* to defend the action on the merits, but simply to force it through.

Instead of claiming power to control judicial decisions, most proponents of the repealer adopted disingenuous arguments about what they were up to, such as claiming that the measure was necessary to reduce workload or denying its importance to any particular pending case. Astonishing in this regard was Trumbull—counsel in *McCardle*, but claiming ignorance—who said:

It is a bill of very little importance, in my judgment; and I wish to say to the Senator from Maryland that the Supreme Court has not decided that any case is pending before it under the Act of February 5, 1867. No such decision has been made, nor do I believe any such decision ever would be made.³⁴⁰

Despite roaring declarations in other contexts that a recalcitrant Court would be brought to heel, in the specific debate over the jurisdiction-stripping measure, the lack of candor and unwillingness to engage on the part of Republican managers was stunning.³⁴¹ Indeed, one Republican insisted: “This is the protection to the [C]ourt quite as much as it is an assertion of a rightful power of Congress.”³⁴² Given the tenor of the time, it might well have been.

Moreover, the subsequent failed attempts to curb the Court in the context of the *Yerger* litigation³⁴³ suggest disapproval of the entire endeavor. In the face of

339. See CONG. GLOBE, 40th Cong., 2d Sess. 1883 (1868) (“[I]f I find them abusing that power by attempting to arrogate to themselves jurisdiction under any statute that happens to be upon the record, from which they claim to derive that jurisdiction, and I can take it away from them by a repeal of that statute, I will do it.”).

340. *Id.* at 2096. It seems that Trumbull could make this statement because, having explained that the original purpose of the measure was to provide jurisdiction to relieve custody in cases such as those involving the Black Codes, he could then say no such case was pending. Opponents were quick to call Trumbull on this; as Senator Doolittle pointed out: “We all know, the whole world knows, that his case of *McCardle* is pending in the Supreme Court . . . It is important because it involves the constitutionality of the [R]econstruction [A]cts . . . it is because men know that these acts will be decided to be unconstitutional.” *Id.* at 2097.

341. The closest they came was a final concession by Representative Wilson: “It may have entered into the consideration presented to my mind to endeavor to prevent any court, and especially the Supreme Court of the United States, from usurping a power, if there is any intention in the minds of any of the judges to do it, which has been denied to them by the Constitution of the United States, which denial has been recognized by decisions of that court from the earliest times.” *Id.* at 2169.

342. *Id.* (statement of Rep. Wilson).

343. Senator Drake of Missouri, declaring that Marshall’s decision in *Marbury v. Madison* was wrong, introduced a bill that would eliminate judicial review. See FAIRMAN, *supra* note 22, at 587. This bill did not meet public approval and was condemned in the papers as “Abolishing the Constitution.” See *id.* The bill was not taken very seriously and died in committee. See *id.* Senator Sumner introduced two bills to curb the Court. See *id.* S. 280, which later formed the basis for Senator Trumbull’s bill, would have completely abolished the Supreme Court’s jurisdiction over habeas corpus cases. See *id.* S.

the Court's hearing *Yerger*, Trumbull introduced a measure that, among other things, would have removed all habeas corpus jurisdiction over cases in the Supreme Court (again denying any such case was pending).³⁴⁴ That legislation went absolutely nowhere. In part, this likely was because the tempest had passed, although the reluctance to have the Reconstruction acts declared unconstitutional still was apparent in President Grant's decision to have Yerger released from military custody.³⁴⁵ But even Trumbull himself acknowledged that "the note of alarm that has been sounded in the country that the Judiciary Committee of the Senate of the United States had reported a bill calculated to break down the independence of the judiciary."³⁴⁶

Thus, a Congress determined to see its will followed, which had repeatedly asserted the power to strip the Court's jurisdiction, seems to have become abashed when it felt forced to do so. It did what little it needed to do, tried to do it quietly without setting precedent, and declined to do more.

There is a remarkably similar story that can be told about Court-packing. Before the legal tender controversy arose, talk of Court-packing was common and the practice was seen as a readily available, if not quite legitimate, method of addressing the countermajoritarian problem. In the face of the *Milligan* decision, the *New York Herald* was willing to concede that "[t]his decision is the law from the final judicial tribunal in the country, and it must be so recognized."³⁴⁷ At the same time, the *Herald* proclaimed that "the war, that last

341 would have required each branch of government to act only within its "appropriate sphere." *See id.* Sumner, however, neglected to elaborate on what the "appropriate spheres" were and by whom they should be determined. *See id.*

344. *See* CONG. GLOBE, 41st Cong., 2d Sess. 167 (1869). Trumbull's bill was similar to the Court-curbing bill he had introduced during the *McCardle* debate two years earlier. *See supra* note 165; FAIRMAN, *supra* note 22, at 588. The bill declared that the judicial branch had no authority over "political departments of the Government on political questions"; denied that any civil government existed in Virginia, Mississippi, or Texas; declared that it is Congress's duty alone to determine the status of state governments; and repealed all acts and statutes granting the Supreme Court jurisdiction over habeas cases. *See* CONG. GLOBE, 41st Cong., 2d Sess. 167 (1869); FAIRMAN, *supra* note 22, at 588; WARREN, *supra* note 39, at 492. All the while, Trumbull denied that the bill was relevant to the *Yerger* case, stating, "I wish to say that this bill is not framed with reference to any case that is now pending in the [C]ourt." CONG. GLOBE, 41st Cong., 2d Sess. 167 (1869). Instead, Trumbull reasoned that the bill was intended to combat the Court's habit of "going out of the record and giving a dissertation on the powers of Congress." *Id.*

345. *See* FAIRMAN, *supra* note 22, at 588; WARREN, *supra* note 39, at 496. The concern over the validity of the Reconstruction Acts was soon supplanted by more pressing matters. Debate on Trumbull's jurisdiction-stripping bill was suspended to allow for action on a bill that would restore Georgia to the Union. *See* FAIRMAN, *supra* note 22, at 588. Trumbull's bill was never voted on due to Democratic objections. *Id.* Yerger was to be protected from the military pursuant to a deal his lawyer had made with the Attorney General, which rendered his case moot. *See* WARREN, *supra* note 39, at 496. This alleviated the fear that the Reconstruction Acts would be invalidated by the Court. The *Yerger* question of December was soon lost as the *Legal Tender* question came to the forefront in February. *See id.* at 498.

346. *See* CONG. GLOBE, 41st Cong., 2d Sess. 169 (1869). Trumbull countered that the "bill . . . does no such thing." *Id.*

347. *The Last Decision of the Supreme Court on Military Trials During the War*, N.Y. HERALD, Dec. 20, 1866, at 4.

appeal of kings and peoples, has resulted in a great revolution, superseding the [C]onstitution as it was and demanding from the results of the war and from the sovereign voice of the people victorious in the war a new interpretation."³⁴⁸ If such was not forthcoming, the *Herald* suggested, "[R]econstruction of the Supreme Court . . . looms up into bold relief as a question of vital importance [B]y increasing or diminishing the number of the judges, the Court may be reconstructed in conformity with the supreme decisions of the war."³⁴⁹

The *Herald* was known for its quirky views, but on this issue it was hardly alone.³⁵⁰ *Harper's Weekly* also said that if "the Supreme Court undertakes to declare that the people . . . can do nothing to secure that Government from similar assaults . . . let the Supreme Court be swamped by a thorough reorganization and increased number of Judges."³⁵¹ Debating the jurisdiction-stripping measure, Senator Buckalew reviewed the various acts changing the size of the Supreme Court and asked, "Have we not sought to mold and to conform it, to some extent at least, to our own will?"³⁵² Even a Democratic publication like the *New York World*, after hypothesizing the replacement of Andrew Johnson by election or following impeachment, conceded the possibility: "[T]hey can, if they choose, increase the number of judges in the Supreme Court and their obsequious tool of a [P]resident would fill the new places with Radicals to out-vote the present conservative majority."³⁵³

Once *Hepburn* was decided, it was apparent that Court-packing would be the solution. Observers commonly assumed Grant would appoint Justices sympathetic to the *Hepburn* dissent, thus paving the way for a change in outcome.³⁵⁴ The *Daily Morning Chronicle* observed the "remarkable fact that but few of the public journals seem disposed to accept the legitimate results of the recent decision of the Chief Justice in the legal-tender case."³⁵⁵ The moderate *New York Times* was incessant in calling for appointments that would effectuate a reversal.³⁵⁶ Others held the opposite view as to the wisdom of Court-packing, but were no less aware of what was likely to happen. Typical among these was

348. *Id.*

349. *Id.*; accord *Congress and the Supreme Court—The Great Issue for the Next Presidency*, N.Y. HERALD, Jan. 5, 1867, at 4 ("Accordingly let Congress so shape its course as to make the great issue for the next Presidency a reconstruction of the Supreme Court, and any respectable reconstruction ticket will sweep the field.").

350. See *The Reconstruction Law and the Supreme Court*, WORLD, Apr. 4, 1868, at 4 (noting that "result [of finding the Reconstruction Acts unconstitutional] would probably be, that the Radicals would elect the next President, and the Supreme Court would then be increased by Radical judges enough to make a majority"); *Usurpation*, HARPER'S WKLY., Feb. 9, 1867, at 82 ("The Constitution, in giving Congress power to remove the President by impeachment, and to reorganize the Supreme Court by increasing the number of Judges, establishes the necessary final supremacy of the Legislature.").

351. *The New Dred Scott*, *supra* note 76, at 34.

352. CONG. GLOBE, 40th Cong., 2d Sess. 2127 (1868).

353. *Impeachment of the President*, *supra* note 77, at 4.

354. See FAIRMAN, *supra* note 22, at 732–38. But see WARREN, *supra* note 39, at 516–19 & nn.1–2.

355. *Effect of the Legal Tender Decision*, DAILY MORNING CHRON., Feb. 12, 1870, at 2.

356. The *New York Times* implored Congress to remedy the situation, stating:

the *Nation*, which conceded, "Considering that Congress has the right to increase the number of judges at pleasure, it is hardly short of suicidal for the Court to give any countenance to the notion that nine judges have the power which seven have not" ³⁵⁷

What is worthy of note is how quickly in the aftermath of *Knox* enthusiasm for the idea of Court-packing cooled. There were those who approved of the decision to rehear and of the reversal and those who disapproved. ³⁵⁸ Perhaps it is not surprising that, by and large, positions on these issues reflected underlying positions on the legal tender controversy itself. ³⁵⁹ But as it turned out, even those who favored reversal sought refuge in arguments that avoided their defending the practice of Court-packing writ large.

As was the case with jurisdiction-stripping, once the country confronted the practice, it apparently became much more wary of Court-packing as a solution to judicial woes. ³⁶⁰ Perhaps it was the *Nation*, ever pragmatic, which explained why. The *Nation's* view was that the "full bench" argument—that the rehearing was justified because there was not a full Court when *Hepburn* was decided—would have worked "if the number of judges was fixed by the Constitution," but because it was not, "the judgment of the Court can be overturned by the advent of two judges to fill vacancies already existing, it can also be overturned by the

We repeat, therefore, that no duty is more imperative upon the body which advises and consents to appointments, than to be certain that this necessary power in war shall be restored to the Government, and that the Court shall be constructed on a plan which . . . shall discourage personal ambition, and be in strict harmony with the loyalty of the Republic.

Legal Tender—The Supreme Court Decision, N.Y. TIMES, Feb. 12, 1870, at 4; see also N.Y. TIMES, Feb. 10, 1870, at 3 ("The vacancies on the Supreme Bench will soon be filled, and ably filled, and . . . abundant opportunity will no doubt be afforded for a review of the present Opinion by the full Bench."). The *New York Times* followed the subsequent appointment process closely. See *A Bitter Personal Debate*, N.Y. TIMES, Feb. 11, 1870, at 1 (reporting likelihood of Strong and Bradley being confirmed and speculating about their political leanings); N.Y. TIMES, Feb. 12, 1870, at 4 (applauding favorable report on nominations of Strong and Bradley and encouraging Senate to quickly confirm them).

357. NATION, Apr. 20, 1871, at 266. The *Nation* continues "or that a majority of three can give weight to a judgment which a majority of one could not give it. We therefore look on the reopening of the question of the applicability of the Legal Tender Act to contracts made before February, 1862, as a great misfortune." *Id.*

358. Those papers supporting the decision to reopen and/or reverse included the *New York Herald* and the *Cincinnati Daily Enquirer*; detractors included the *New York World*, the *Nation*, and the *New York Tribune*. See *infra* notes 258–59, 267.

359. See *id.*

360. None of this is to suggest Court-packing was ruled out at the time, a difficult assertion in light of the events of 1937. But when the Supreme Court confirmed the *Knox* holding some thirteen years later in *Julliard v. Greenman*, this time not even relying on the expediency of war, only a law review writer commented that (depending on elections and appointments to the Court) that decision "will be overruled." 410 U.S. 421 (1883). The Court held that Congress had the power to issue treasury notes as legal tender in times of peace as well as in times of war, and that whether there is a need to do so is a political question to be decided by Congress. *Id.* at 447, 450. Justice Field was the lone dissenter. *The Legal Tender Decision of the U.S. Supreme Court*, 2 COLUM. JUR. 14, 21 (1885).

advent of two, three, or four judges to fill vacancies created by Congress *ad hoc*.”³⁶¹ The Court-packing game was not illegitimate because the Constitution disallowed it, but because “popular reverence for, or confidence in, the Court cannot possibly survive the addition, subtraction, multiplication, and division which it has been undergoing the last five or six years.”³⁶²

Thus, we have again the same story: initial public acceptance of the idea of political control of the judiciary, followed by apparent exercise of that control at a critical moment, eventually resulting in public shame over the action and its appearance of conflict with notions of rule of law. Historians debate whether the Court was really packed, but what mattered is that the public perceived that it occurred. And as with jurisdiction-stripping, the measure seemed expedient at one time, but inappropriate shortly thereafter.

CONCLUSION: YESTERDAY'S COURT AND TODAY'S

The rule of law becomes inconvenient at times. When it does, political pressure is placed upon it. This was plain in the aftermath of *Milligan*. Democratic publications rejoiced in the idea of the rule of law, but Republican opinion was less favorable. In a column entitled *Reverence for Law*, the *Daily Morning Chronicle* highlighted the profound impatience with constitutional obstacles, reminding readers of President Johnson's views: “Whenever you find a man anywhere prating about the Constitution of the United States, spot him; he's a traitor.”³⁶³

Reconstruction involved a Court struggling to assert itself and protect its role at a time when the outcome of the struggle was far from certain. The Court was hardly humbled, as the historian's standard story would have it. A humbled Court would not have issued its *Milligan* decision, moved the *McCardle* case along so quickly (at least initially), or decided the first of the *Legal Tender Cases* as it did given the soon-to-be-filled seats on the Court—that is, not if the

361. *The Reopening of the Legal-Tender Case*, NATION, Apr. 7, 1870, at 218.

362. *Id.* The *Nation* consistently argued against the manipulation of the numbers on the Court. See NATION, Apr. 20, 1871, at 266 (“[I]t is hardly short of suicidal for the Court to give any countenance to the notion that nine judges have power which seven have not, or that a majority of three can give weight to a judgment which a majority of one could not give it.”); *The Senate and the Chief-Justice*, NATION, Mar. 24, 1870, at 188 (“The very suggestion of obtaining a new decision by the means proposed, was an outrage on all the national ideas of respect for the law, and the outrage was the greater because there seems to have been no popular uneasiness to justify or excuse it.”). Nevertheless, it also is true that the *Nation* agreed with the first *Legal Tender* decision. See *The Legal Tender Decision*, NATION, Feb. 17, 1870, at 100. Speaking of Chief Justice Chase's majority opinion, the *Nation* proclaimed: “the moral right was on his side.” *Id.* The *Nation* evidenced a great distaste for the *Legal Tender Acts*, stating that “a better device for loosening the bonds of social morality than the *Legal Tender Act* could hardly have been hit upon.” *Id.*

363. *Reverence for the Law*, DAILY MORNING CHRON., Dec. 25, 1866, at 2 (emphasis in original). The *Chronicle* was pointing out the disingenuous nature of reliance on constitutional guarantees by those who had sympathized with the rebellion. See KUTLER, *supra* note 20, at 30 (“The minority party, frustrated in its attempts to stem the tide of Republican Reconstruction, chose to rely on the rubrics of ‘constitutionality’ and judicial determination as a last-ditch defense.”).

members of the Court cared a whit for their institutional survival. But it was not a consistently strong and bold Court, or even a particularly clever one, as Kutler's revisionist description would suggest. Many of the moves just described were bold, but not clever. It was a chastened Court that ducked dealing with the Reconstruction question after the repealer was passed. It was a dubiously clever Court that decided *Knox v. Lee*.

Reconstruction's Court was a "political" Court. That is to say, it was a Court that—despite its struggling to retain its place as a "legal" institution—was enmeshed in the politics of the time in a way that made the interaction between it and the other branches appear almost inappropriate from our present-day understanding of the separation between law and politics. The partisan conduct of some of the Justices (such as Chase's perennial presidential ambitions), the doctrinally dubious decisions of when to proceed and when to stand mute, and the resort to dicta to reach beyond cases as happened in *Milligan* and *Hepburn*, are all signs of a Court very much in the fray. But so too are the actions taken against it: jurisdiction-stripping, Court-packing, and threats to "annihilate" it.

Even during the turbulent times of Reconstruction, the Court was sheltered by concerns about the respective spheres of law and politics. These concerns limited attacks on the judiciary to nothing more than what Congress felt essential at the time, and the record suggests Congress was not willing to be candid even about these attacks. Similarly, although Court-packing was thought to be fair game for much of the Civil War and Reconstruction, once it occurred in a manner intended to affect the result of a particular case, the result was universal condemnation. Indeed, Franklin Roosevelt might have saved himself great unhappiness had he looked beyond the precedents of Reconstruction, upon which he relied in support of the Court-packing plan, to the actual record of public reaction to Court-packing.

It may not be easy to see the parallels between Reconstruction's Court and our Court today, if only because judicial review now seems much more entrenched and sturdy. Yet, there are fundamentals about judicial review applicable even today that emerge from the Reconstruction period. First, the political economy of Court-tampering operates today, as it did then, to protect the Court. Congress possesses the same weapons, but, if anything, they have become more difficult to use. Historical precedents against Court-packing and jurisdiction-stripping pile up. Moreover, the present penchant for divided government serves to protect the Court from action being taken against it. Second, even a Congress that wanted to discipline the Court would have to overcome public opinion, which seems supportive of the Court even at this moment when there is great controversy about it. Thus, today's Court may be quite invulnerable. The contrast with Reconstruction helps us see why.

Reconstruction, however, also teaches that when the chips are down, the wall between law and politics will prove quite thin—that courts are in a sense still the "least dangerous branch," not because they cannot act alone, but because they can be silenced or ignored by the majority more easily than the other

branches. Today's Court seems impregnable because there is no crisis, no felt threat from the Court's authority.

The boundary between law and politics is likely to encounter the most slippage when external events place pressure on the boundary. It is ironic that when the real world stakes are high, legal rules may be most important; yet, there is at those times the greatest pressure on those rules to give way to political expediency. Today there is no particular pressure from external events. But to claim utter impregnability for the Court is to fail to see into the future.

