Chapter 1

Legal, Strategic or Legal Strategy: Deciding to Decide during the Civil War and Reconstruction

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Judicial decisions determining the constitutionality of wartime policies exhibit a disturbing pattern. The Supreme Court during a declared or undeclared war has refused to challenge any wartime policy clearly endorsed by both elected branches of the national government.[1] Nevertheless, official court doctrine rejects claims that *inter arma silent leges* is the law of the constitution. "No doctrine, involving more pernicious consequences," Justice David Davis declared in *Ex parte Milligan*, "was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government."[2] Justice Frank Murphy's opinion in *Duncan v. Kahanamoku* proclaimed, "to retreat from [the] rule" of *Milligan* "is to open the door to rampant militarism and the glorification of war, which have destroyed so many nations in history."[3] These opinions were written after hostilities had ceased. The same judicial majorities that boldly asserted in peacetime that "the Constitution . . . is a law for rulers and people, equally in war and in peace"[4] consistently proved unwilling in wartime to protect fundamental civil liberties.[5] As Chief Justice Rehnquist succinctly observes, "courts are more prone to uphold wartime claims of civil liberties after the war is over."[6]

Supreme Court practice during the 1860s provides vivid examples of this judicial tendency to announce constitutional limits on military policy only after the need for military action is over. Many litigants during the Civil War urged federal justices to declare unconstitutional President Lincoln's decision to suspend habeas corpus, his decision to impose martial law in some northern communities, federal laws compelling creditors to take paper money in payment of existing debts, and other federal policies deemed necessary to support the Northern war effort. While Lee's army was in the field,

the Supreme Court either sustained the federal policy under constitutional attack,[7] ruled that no jurisdiction existed to resolve cases presenting constitutional attacks on Civil War measures,[8] or postponed adjudication.[9] When the war ended, the justices struck down several wartime measures ducked during hostilities.[10] At the same time that the Chase Court declared unconstitutional several of the late President Lincoln's wartime policies, judicial majorities avoided interfering with the living Congress's Reconstruction policies. The very justices who in *Milligan* had boldly declared unconstitutional martial law in the North after that policy had been abandoned ruled in *Ex parte McCardle* that no jurisdiction existed to resolve the constitutionality of martial law in the South.[11]

The Supreme Court's behavior during and immediately after the Civil War inspired contemporary scholars to sharpen the strategic model of judicial decision making. Lee Epstein and Thomas Walker, when asserting that justices on the Supreme Court engage in sophisticated voting, highlight the difference between judicial activism on martial law in the North and judicial restraint on martial law in the South.[12] The best historical evidence, they point out, suggests that Chase Court majorities during the 1860s believed that imposition of martial law in the South was as unconstitutional as the imposition of martial law in the North. Nevertheless, the justices handed down opinions consistent with their political and legal convictions only when doing so did not challenge popular majorities in Congress. Military or military-related policies were declared unconstitutional only after they had been abandoned or were broadly recognized as no longer necessary to support a military effort.

Closer examination complicates the seemingly obvious strategic explanation for crucial judicial decisions during the 1860s. Legal precedents on federal appellate jurisdiction were abandoned in response to external pressures during the Civil War, but not during Reconstruction. The Supreme Court's decision in *Roosevelt v. Meyer* (1863) that the court had no jurisdiction to adjudicate an appeal from a state court decision sustaining the constitutionality of the Legal Tender Acts miscited previous holdings and was overruled immediately when felt needs for paper money passed. The judicial decision in *Ex Parte McCardle* (1868) that the court could not legally adjudicate an appeal challenging the constitutionality of martial law in the South after Congress withdrew jurisdiction, by comparison, was a straightforward application of nineteenth-century case law. The strategic decision *Roosevelt* had subtle legal foundations. The decision to ignore the plain meaning of the Judiciary Act of 1789 may have been a legitimate use of what Alexander

Bickel would later label "the passive virtues."[13] The legal decision in *McCardle* had subtle strategic and attitudinal foundations. The precedents that Chief Justice Chase correctly cited in his majority opinion embodied the strategic and sincere policy preferences of his judicial ancestors.

This chapter revisits *Roosevelt* and *Ex parte McCardle* with an eye to improving explanations of judicial decision making. Judicial decisions during the 1860s illustrate many interactions between legal, strategic, and attitudinal considerations too often separated in social science analysis. The justices in *McCardle* felt legally obligated to follow precedents decided partly on nonlegal grounds. *Roosevelt* was an instance where, arguably, law compelled the justices to make a strategic choice. Justices during the 1860s were concerned with public policy and judicial power, but they expressed these concerns as justices limited by legal logics. The forms of legal reasoning, although permitting and possibly even compelling some strategic behavior, also constrained the policies justices could advance and the strategic means by which judicial policy preferences could be achieved.

Judicial decision making, *Roosevelt* and *McCardle* reveal, is a practice that mixes legal, strategic, and attitudinal considerations in ways that cannot be fully isolated by scientific investigation. Behavioralists maintain that no judicial decision can be explained entirely as a legal exercise, but they fail to acknowledge that no judicial decision can be explained entirely as a sincere or sophisticated effort to secure policy preferences. Although persons use rules to further goals, the goals they pursue and the means they choose are largely constituted by the rules of the game. The progressive takes on *McCardle* and *Roosevelt* in this essay demonstrate how law both enables and constrains strategic and value choices, and how sincere and sophisticated policy preferences embodied in precedents mold the path of the law. Both justices and those who explain judicial decisions cannot avoid legal, strategic, and attitudinal analysis. Whether *Roosevelt* and *McCardle* are legal, strategic, or attitudinal decisions depends on contested interpretations of what constitutes competent legal, strategic or attitudinal practice.

The ways in which legal, strategic, and attitudinal considerations structured the *Roosevelt* and *McCardle* decisions help explain *inter arma leges silent* and the durability of judicial review in the United States. Judicial review thrives in the United States partly because at crucial moments, some legal norms facilitated strategic choices to avoid challenging administrative policy and other legal norms prevented less strategically minded justices from reaching constitutional decisions likely to provoke severe legislative retaliation. Justice Miller in *Roosevelt* believed the courts should not decide the

constitutionality of wartime measures while hostilities were ongoing. Chief Justice Chase in *McCardle* hoped to have the opportunity to declare martial law in the South unconstitutional while Northern troops occupied the former slave states. Both justices refrained from acting. Legal norms permitted Justice Miller to interpret existing law as requiring a strategic denial of jurisdiction. Other legal norms explain why Chief Justice Chase interpreted existing law as forbidding an attitudinal decision on the merits of martial law. Both the precedents these justices followed and the precedents they created suggest the existence of a precedential spiral[14] or sequence in the United States evolving in ways that over time provides increased legal foundations for judicial decisions refraining from striking down military related policies and fewer legal grounds for judicial decisions declaring such policies unconstitutional.

Take One: The Legal *McCardle*

Ex Parte McCardle plays a central role in the strategic model of judicial decision making developed by Lee Epstein and her coauthors.[15] The Supreme Court in that case first delayed reaching a decision on the constitutionality of martial law in the South while legislation withdrawing jurisdiction was under legislative and executive consideration. The justices then denied jurisdiction immediately after Congress overrode a presidential veto and passed the Repealer Act of 1868. Epstein and Thomas Walker, in their seminal essay on judicial decision making, maintain that this exhibition of judicial restraint illustrates how judicial choices are "not merely the product of the individual policy preferences of the justices," but "also a function of the preferences of other political actors . . . and of the political context."[16] Epstein and Jack Knight, in their acclaimed book elaborating the strategic model of judicial decision making, similarly use *McCardle* when commenting on the judicial tendency to pursue personal policy preferences only in light of the political climate.[17] Both works assert that the attitudinal model associated with Harold Spaeth and Jeffrey Segal[18] does not explain why the Chase Court refused to use *McCardle* as a vehicle for declaring martial law unconstitutional. Spaeth and Segal regard Supreme Court decision making as unalloyed policy making.[19] Epstein and Walker declare, "*McCardle* did not reflect the sincere preferences of the Court." Epstein and Knight assert, "the justices acted in a sophisticated fashion; they acceded to the government's wishes and declined to hear the case."[20]

Proponents of the contemporary strategic model of judicial decision making assess whether the justices in *McCardle* engaged in sophisticated voting by examining judicial preferences on the underlying policy issue and determining probable legislative reactions to hostile judicial rulings. Their analysis begins by documenting that most Chase Court justices opposed martial law in the South. "The Court's sympathy," Epstein and Walker correctly observe, "lay with McCardle."[21] The justices had previously shown little sympathy toward military reconstruction. Political actors in the know thought the justices likely to free McCardle, and the private correspondence of the justices indicates that these suspicions were well founded.[22] Had the justices sincerely voted their policy preferences, they would have reached the merits in *McCardle* and struck down the offending government action. That decision declaring unconstitutional martial law might have provoked severe legislative retaliation. Epstein, Walker, and Knight point out that while *McCardle* was being litigated, Congress was debating the impeachment of President Johnson and proposals limiting judicial power. After oral argument, Congress passed the Repealer Act of 1868. This measure rescinded the Habeas Corpus Act of 1867, the statute under which McCardle claimed jurisdiction.[23] Given the evidence that the justices did not vote their policy preferences in *McCardle*, Epstein and others conclude that these legislative actions must have convinced the Chase Court that discretion was the better part of valor. The justices responded to changes in the external political environment by making the decision that best husbanded judicial power for the future, not the decision that best expressed immediate judicial policy preferences.

The justices were not completely obsequious in *McCardle*. The *McCardle* opinion, published the month after the ruling was announced, explicitly asserted that the legislation repealing the Habeas Corpus Act of 1867 did not affect the judicial power to hear habeas corpus appeals under the Judiciary Act of 1789. "The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867," the chief justice stated. "It does not affect the jurisdiction which was previously exercised."[24] *Ex parte Yerger*,[25] decided six months later, made clear that the Supreme Court retained jurisdiction under the Judiciary Act of 1789 to consider constitutional challenges to Reconstruction. Epstein and Walker regard the quoted passage in the *McCardle* opinion and the *Yerger* decision as additional examples of strategic thinking by the justices. The Chase Court was more willing to express policy preferences in *Yerger* than in *McCardle*, they

contend, because political enthusiasm for martial law had diminished considerably from the spring to the fall of 1868, "significantly reduc[ing] the probability of an adverse congressional response."[26]

Take Two: The Strategic *Roosevelt*

Roosevelt v. Meyer satisfies the criteria used to establish strategic decision making in *McCardle*. The justices did not vote their policy preferences when they rejected jurisdiction over an appeal from a New York decision sustaining the constitutionality of the Legal Tender Acts. Had the justices reached the merits, the eminent historian Charles Warren maintains, "it is probable that the Legal Tender Acts would have been held invalid by [a] large . . . majority of the Court."[27] The Jacksonian majority on the late Taney and early Chase Court abhorred paper money. Chief Justice Taney, who did not participate in the *Roosevelt* decision, wrote a draft opinion declaring the Legal Tender Acts unconstitutional. The principles stated in that draft became law shortly after Appomattox in *Hepburn v. Griswold* (1868).[28] A decision striking down legal tender laws during the Civil War, however, might not have been implemented and would have risked political retaliation. President Lincoln had previously refused to comply with a judicial order interfering with military concerns. "Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"[29] Lincoln asked Congress when defending his decision to ignore the writ of habeas corpus issued in *Ex parte Merryman*.[30] Congress during the Civil War was no friendlier to an independent judiciary. The Republican majority had already added an extra justice to the bench, partly to secure favorable judicial decisions.[31] Antislavery advocates were looking for an opportunity to take revenge on the tribunal responsible for *Dred Scott*. These external threats seemingly explain why the justices in *Roosevelt* did not vote their sincere policy preferences. David Silver's analysis of the Supreme Court during the Civil War notes, "the Court did not desire to interfere with a measure devised by the administration to aid the war effort" when reaching the merits "might have led to a decision adverse to the administration."[32]

Law provides an additional reason for thinking *Roosevelt* an instance of strategic decision making. The decision to deny jurisdiction is plainly inconsistent with the clear commands set out in the Judiciary Act of 1789, precedent, and subsequent judicial decisions. The five justices in the *Roosevelt* majority still on the court when the jurisdictional issue was next lit-

igated all confessed error. This unprecedented judicial reversal provides powerful evidence that legal logics neither permitted nor compelled the original decision to deny jurisdiction. Judicial decisions interpreting the Judiciary Act of 1789 responded to changes in the political environment, not the law of federal appellate jurisdiction.

The *Roosevelt* opinion is short, succinct, and superficially persuasive. Justice Wayne's two-sentence opus declared

> it to be the conclusion of their honors, upon an examination of the record, that as the validity of the act of February 25th, 1862, was drawn in question, and the judgment of the Court of Errors and Appeals of the State of New York was in favor of it, and of the right set up by the defendant, this court had no jurisdiction to reverse that judgment; that the dismissal of the case was accordingly to be directed. In support of the decision which he announced the learned Justice referred to various cases in this court which are mentioned in the note below.[33]

The four cases cited in that note all held that federal law did not permit the Supreme Court to exercise appellate jurisdiction whenever the final state court decision sustained an act of Congress.[34] These decisions relied on the clause in the Judiciary Act of 1789 that vests the Supreme Court with appellate jurisdiction over cases in which a state court declared a federal law unconstitutional. The New York court declared the Legal Tender Acts constitutional. Therefore, apparently, no basis for federal jurisdiction existed.

Justice Wayne's opinion is wrong and has been recognized as wrong by every prominent scholar who has commented on the case.[35] The Judiciary Act vests the Supreme Court with jurisdiction over state court decisions declaring federal laws unconstitutional and state court decisions rejecting claims of federal constitutional right. The relevant language in Section 25 declares, "any suit, . . . where is drawn in question the construction of any clause of the constitution . . . and the decision is against the . . . right . . . claimed by either party, . . . may be re-examined, and reversed or affirmed in the Supreme Court of the United States."[36] The plaintiff in *Roosevelt* asserted a constitutional right not to accept paper money as legal tender. The state court rejected that claim of constitutional right. Justices engaged in legal decision making would have taken jurisdiction under the Judiciary Act.

The justices recognized their mistake immediately after the Civil War. A unanimous Court in *Trebilcock v. Wilson* (1871) overruled *Roosevelt*. *Trebilcock* held that the Judiciary Act provided the Supreme Court with appellate jurisdiction to resolve a state court decision sustaining the Legal Tender Acts. Justice Field's opinion lamely asserted that the "court in [*Roosevelt*]

confined its attention to the first clause of the 25th section of the Judiciary Act, and, in its decision, appears to have overlooked the third clause."[37] Belatedly interpreting federal law correctly, Field concluded that "the decision of the court below being against the right of the plaintiff in error claimed under the clauses of the Constitution, . . . he was entitled to have the decision brought before this court for re-examination."[38] The five justices (Miller, Field, Swayne, Davis, Clifford) in *Trebilcock* who overruled a decision in which they were previously in the majority set a record for judicial recantation that has never been broken and that has only once been approached.[39]

The "overlooking" in *Roosevelt* seems intentional. The justices in 1863 were presented with the correct legal grounds for a decision. Counsel for the plaintiffs asserted that jurisdiction was based on the third clause of Section 25, the clause vesting the Supreme Court with jurisdiction over appeals from state cases rejecting claims of federal constitutional right.[40] Justice Nelson dissented without opinion, but a reasonable inference can be made that he communicated this jurisdictional concern to his colleagues.[41] No great outcry took place between 1864 and 1871 that might have better informed the justices that they had misread the Judiciary Act of 1789. The justices got the law right in *Trebilcock* because the political climate in 1871 was more supportive of a legal decision than the political climate in 1864.

Take Three: The Legal *McCardle*

The legal reasons for thinking *Roosevelt* an instance of strategic decision making provide grounds for thinking that *McCardle* is an instance of legal decision making. Nineteenth-century case law and judicial practice supported the judicial choice to first delay the decision until Congress passed the Repealer Act and then deny jurisdiction. Precedent in 1868 permitted the Supreme Court to adjudicate appeals only when Congress passed and maintained statutes authorizing appellate jurisdiction. Recently decided cases held that the Supreme Court could not adjudicate appeals already pending before the justices after Congress withdrew jurisdiction. Jurisdiction had to exist at the time of final decision. Supreme Court justices, as a matter of long-standing practice, consistently delayed reaching decisions whenever Congress was actively considering changing the relevant law governing jurisdiction or the merits of an appeal. *McCardle* neither created new law nor inaugurated new judicial procedure. The case was a straightforward application of precedent and practice.

Federalist justices during the early republic ruled that Article III authorized judicial review only when federal statutes conferred appellate jurisdiction on federal courts. The justices in *Wiscart v. Dauchy* (1796) held that the Supreme Court could not adjudicate any appeal without statutory permission. Chief Justice Ellsworth declared, "if Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction."[42] *Durousseau v. United States* (1810) agreed. The "affirmative description" of the jurisdiction laid out in the Judiciary Act of 1789, Chief Justice Marshall declared, "has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it."[43] Some antebellum nationalists, most notably Justice Joseph Story, thought the Constitution requires Congress to vest the federal courts with original or appellate jurisdiction over cases raising certain constitutional issues.[44] *Wiscart* and *Durousseau* do not rule out this possibility. Nevertheless, both decisions clearly held that the Supreme Court could exercise appellate jurisdiction only in those cases where Congress chose to vest the justices with appellate jurisdiction. Legislative obligations under Article III, these precedents maintain, are not subject to judicial review.

Wiscart and *Durousseau* were established law throughout the nineteenth century. After Justice Story left the bench, suggestions that some amount of appellate jurisdiction was mandatory were abandoned. Robert N. Clinton thoroughly documents how "federal judicial authority" under Taney and Chase "was more a fragile creature of statutory grace, owing its life-blood to the largess of Congress."[45] Taney Court justices consistently maintained that federal appellate jurisdiction was given by the national legislature and could be taken away by the national legislature. "The disposal of judicial power (except in a few specified instances)," Justice Robert Grier declared in *Sheldon v. Sill* (1850), "belongs to Congress: and Congress is not bound to enlarge the jurisdiction of the Federal courts to every subject, in every form which the Constitution might warrant."[46] Justice Peter Daniel similarly ruled that "the judicial power of the United States . . . is . . . dependent for its distribution . . . entirely upon the action of Congress." "Congress," his majority opinion in *Cary v. Curtis* (1845) concluded, could "[withhold] jurisdiction from [federal courts] in the exact degree and character which . . . may seem proper for the public good."[47] These cases were not strategic retreats in the face of political pressure. Congress responded to *Cary* by passing a statute vesting the justices with the jurisdiction necessary to resolve the dispute in question.[48]

The Chase Court during the years before *McCardle* frequently reaffirmed the statutory foundations of federal appellate jurisdiction. A unanimous

tribunal in *Daniels v. Railroad Company* held that "appellate jurisdiction . . . can be exercised only to the extent and in the manner prescribed by law." "It is wholly the creature of legislation," Justice Swayne's opinion asserted.[49] *Insurance Co. v. Ritchie* (1867) ruled that legislation withdrawing jurisdiction was valid even when the case was already pending before the Supreme Court. "When the jurisdiction of a cause depends upon a statute," every justice concluded, "the repeal of the statute takes away jurisdiction."[50]

Chief Justice Chase's unanimous opinion in *McCardle* relied heavily on these precedents. He began by citing *Wiscart* and *Durousseau* as establishing the rule that Congress determined the appellate jurisdiction of the Supreme Court.[51] He then cited *Ritchie* and *Norris v. Crocker*[52] as holding that courts could not decide a pending lawsuit after federal law removed the basis for jurisdiction.[53] Counsel for McCardle cited no contrary Supreme Court or federal precedent supporting jurisdiction.[54] Jeremiah Black, representing McCardle, demurred when the Chase Court offered him the opportunity to argue that the Repealer Act did not apply or could not constitutionally apply to cases after oral argument.

The precedential analysis in *McCardle* has largely escaped criticism for almost 150 years. The two justices who would have reached a decision before the Repealer Act became law, Justices Grier and Field, nevertheless acknowledged that no decision could be legally reached after the Repealer Act became law. Contemporary scholars agree. William Van Alstyne details "an unwavering line through five consecutive chief justices." He concludes, "the general position of the *McCardle* Court conforms entirely with virtually every other judicial construction previously and subsequently associated with the exceptions clause."[55] David Currie, who thinks "the issue was by no means so simple as Chase made it appear," regards *McCardle* as consistent with precedent.[56]

The judicial decision not to decide *McCardle* while the Repealer Act was before Congress was also consistent with past judicial practice. No statute or judicial opinion discussed what justices should do when Congress was considering legislation that might affect the outcome of a pending case. Still, this problem was not unprecedented. Supreme Court justices on several occasions had the opportunity to issue a decision while a change in the relevant law was being contemplated by the elected branches of the national government. On each occasion, the justices withheld judgment until proposed legal changes were adopted or abandoned.

Chief Justice Marshall in *United States v. Schooner Peggy*[57] refrained from making a final decision until the Senate had approved and President Jef-

ferson promulgated a treaty that changed the legal rules in prize cases.[58] Marshall's opinion in *Schooner Peggy* did not discuss the reasons for this restraint. The Supreme Court did hold, however, that when Congress changed the relevant law while a case was being appealed, the appellate court must decide the case according to the new law unless doing so violated the ex post facto clause. In Marshall's view, "if . . . before the decision of the appellant court, a law intervenes and changes the rule which governs that law must be obeyed."[59] The Chase Court followed the precedent set by *Schooner Peggy* and subsequent decisions[60] by deciding *McCardle* consistently with federal law of appellate jurisdiction at the time of final decision rather than federal law at the time of the initial trial.

The Chase Court in a politically inconsequential matter withheld final judgment when Congress was considering changing the relevant jurisdictional rules. *Freeborn v. Smith*[61] was an appeal from a territorial court taken after the territory became a state. The Supreme Court had previously ruled that no jurisdiction existed to resolve such appeals in the absence of a federal statute.[62] Enabling legislation was proposed when *Freeborn* was pending, but Congress had not yet acted. The justices delayed their final decision until the bill vesting jurisdiction became law,[63] then adjudicated the merits. That no jurisdiction existed when the case first came before the Supreme Court was deemed irrelevant. Justice Grier's unanimous opinion held that "where there is no direct constitutional prohibition, a State may pass retrospective laws, such as, in their operation, may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings."[64] The justices in *McCardle* did exactly what they did in *Freeborn*. They withheld judgment while Congress was changing the relevant law of jurisdiction, then applied the new law when determining whether they could adjudicate the merits of the case.[65]

Supreme Court and congressional decisions associated with *McCardle* were influenced by the *Freeborn* precedent. During the last days of the legislative debate over the Repealer Act, Reverdy Johnson informed the House that "the Supreme Court have come to that determination—that as long as this bill is pending it is not their purpose to dispose of a case which has already been argued." "It has . . . been urged upon them," he continued, "that they should disregard the pendency of this and proceed to announce whatever decision they may have formed . . . upon the case which is before them; but they have determined, as they have upon former occasions, not to pursue such a course."[66] *Freeborn* was the "former occasion."

Johnson detailed that case history when asserting that the justices would delay a decision until Congress had finished debating changes in the relevant law.[67] Congress may already have been persuaded. Lyman Trumbull proposed the Repealer Act on February 17, 1868, two weeks before oral argument was scheduled. The bill was not passed until March 12, 1868, the week after oral argument had concluded. The Repealer Act did not become law over President Johnson's anticipated veto until March 27, 1868. Given the power of the Republican majority in Congress, Trumbull probably could have ensured passage of the Repealer Act before oral argument in *McCardle* was completed. Such dispatch would have removed any judicial temptation "to run a race" with elected officials in an attempt to strike down martial law before jurisdiction was legally withdrawn. Republicans may have taken that risk in theory only because they knew that in practice justices did not engage in such contests.

Justice David Davis in his private correspondence provides additional reasons for thinking *McCardle* an instance of legal decision making. Davis observed that the justices made several controversial rulings during the *McCardle* litigation. The first favored *McCardle*. The last favored Congress. He complained to his brother-in-law, Julius Rockwell, that all sides wanted "some decision that will help them, rather than the law pronounced." Republicans in January condemned the justices for advancing the case on the docket even though, Davis pointed out, that was the practice for "all criminal cases . . . under the rules." Democrats complained in late March when the justices "thought it unjudicial to run a race with Congress and especially as the Bill might be signed at any moment by the President." Efforts to make such a decision on the merits at the judicial conference held on March 21, David declared, would have been pointless, "for an opinion could not have been written until the Presdt & Congress had acted."[68] Justice Davis alluded to no change in the external environment that explains the judicial reversal. Pressures for favorable decisions seem to have been constant. Davis also appears not to have changed his views on the merits of Reconstruction while *McCardle* was under consideration. Instead, Davis pointed to preexisting legal practices as explaining why the court first expedited resolution of McCardle's appeal and then refused to consider that appeal. Davis changed his support for McCardle's appeal in response to changes in the law, not changes in the external political environment.

Reconstruction politics during the first months of 1868 do not explain the pattern of judicial decisions in *McCardle* and other cases challenging the constitutionality of martial law in the South. Republican legislators in Jan-

uary 1868 proposed a number of bills limiting judicial power and threatened to impeach justices perceived as hostile to Reconstruction. A bill requiring a supermajority to strike down federal laws passed the House on January 13, 1868.[69] Eight days later, House Republicans urged the court to rule that the Habeas Corpus Act of 1867 did not vest the justices with jurisdiction in *McCardle*. These expressions of legislative concern had no legal significance under preexisting law. None influenced the Court. The justices responded to legislative pressures only when the national legislature, by enacting a statute withdrawing jurisdiction, acted in ways that previous law regarded as having legal significance. That judicial response, however, was strictly limited by preexisting law. The same week the justices announced that *McCardle* would not be resolved during the 1868 judicial term, the justices declared they would resolve *Ex parte Martin and Gill*, another case challenging the constitutionality of the Reconstruction laws at issue in *McCardle*.[70] No event took place in late March or early April that explains why the justices thought the political climate too hostile to adjudicate a challenge to Reconstruction arising under the Habeas Corpus Act of 1867, but friendly enough to consider a similar challenge arising under the Judiciary Act of 1789. Lacking access to the mental states of Chase Court justices, strategic motivations cannot be ruled out. Nevertheless, the pattern of judicial decisions is far more closely tied to events regarded as having legal significance than events thought to have strategic significance.

Legal and strategic explanations both rely as much on interpretation as logic. Any finite series of decisions can be described without logical contradiction as good faith efforts to interpret the law or as sophisticated efforts to realize policy preferences. One cannot completely rule out the possibility that congressional passage of the Repealer Act finally convinced the Chase Court that threatening Reconstruction was politically too risky. Maybe the voting alignment in *Gore v. Bush* would have been identical to the voting alignment in *Bush v. Gore*. The extent to which any judicial decision was motivated by legal or strategic factors, at bottom, depends on contestable theories about what constitutes good legal and strategic practice. The claim that *McCardle* was a legal decision relies on the legal argument that case law in 1868 clearly required courts to dismiss pending cases whenever the statute granting jurisdiction was repealed. The argument that *McCardle* was a strategic decision relies on the strategic argument that sophisticated voters would ignore the political pressures to dismiss *McCardle* in February 1868, respond to those pressures in March 1868, then become less responsive to political pressure in April 1868. Legal practice, I

have argued, explains why the justices responded to changes in the law of jurisdiction, but not to any other legislative threat leveled against the judiciary. Strategic practice provides no reason independent of law for thinking that justices would be responsive only to legislative decisions to change the relevant law. The crucial point, however, is less that the legal explanation of *McCardle* is better than the strategic explanation than that both at bottom depend on an interpretation of practices. Neither is more scientific than the other.

Take Four: The Legal, Strategic, and Attitudinal *McCardle*

From a different legal perspective, *McCardle* confounds any neat distinction between legal, strategic, and attitudinal decision making. The decision was a relatively straightforward application of precedents established in cases of no political consequence. Whether those previous precedents were instances of pure legal decision making is more doubtful. Prominent scholars using textual, historical, and structural legal logics conclude that federal appellate jurisdiction does not constitutionally exist wholly at the discretion of Congress. "If *Marbury* was right that the Framers provided for judicial review to keep legislatures in bounds," David Currie declares, "one may reasonably doubt that they meant to allow Congress to destroy that important check by the simple expedient of removing jurisdiction."[71] Even if the Chase Court in *McCardle* followed precedent, the decision to rely on precedent and the precedents relied on may not be entirely explainable within a legal framework.

Wiscart v. Dauchy, the case that provided the initial precedential foundations for congressional power over federal jurisdiction, may have been an instance of strategic judicial decision making. Anti-Federalists strongly objected to what they perceived to be the imperial federal court system laid out in Article III.[72] Partly to allay such concerns and increase support for the Constitution, members of the First Congress did not vest the Supreme Court with appellate jurisdiction over all federal questions. "The Judiciary Act," Maeva Marcus and Natalie Wexler detail, "was shaped by political forces rather than by the language of the Constitution."[73] Oliver Ellsworth, the person most responsible for the Judiciary Act, later penned the main judicial opinion in *Wiscart*. If Ellsworth acted strategically as a legislator in 1789 when he failed to provide the Supreme Court with jurisdiction over all cases and controversies mentioned in Article III, then he may have

acted strategically as a judge in 1796 when he declared that the Supreme Court could exercise appellate jurisdiction only with statutory permission.

Durousseau may be a similar instance of strategic decision making. Most Federalists in 1801 believed that federal courts should have complete federal questions jurisdiction and the power to declare laws unconstitutional. Jeffersonians opposed the first. Many had qualms about the latter. *Durousseau* and *Marbury v. Madison* were part of a series of cases in which Chief Justice John Marshall "sought to preserve the judicial authority to declare laws unconstitutional . . . partly by permitting Congress to determine what cases the Justices would resolve."[74] Fears that a Federalist judiciary would strike down Republican programs were allayed by judicial decisions making clear that judicial review would be exercised only with legislative permission. "Jurisdiction," I have elsewhere detailed, "was partly sacrificed to help maintain authority."[75] If *Marbury* was an instance of sophisticated voting, *Durousseau* is probably another instance where the justices sacrificed immediate law and policy preferences to preserve as much judicial power as possible in a threatening political environment.

The attitudinal model of judicial decision making helps explain subsequent judicial rulings on legislative control over federal appellate jurisdiction. Taney Court justices had two reasons for following and extending the *Wiscart* line of precedents. First, the justices may have thought *Wiscart*, *Durousseau*, and other cases provided sufficient legal grounds for decisions upholding congressional power to determine what appeals the Supreme Court could adjudicate. Second, such congressional power was consistent with Jacksonian commitments to popular democracy. Judicial decisions on federal jurisdiction during the Jacksonian era, Clinton notes, "nicely matched the state-oriented, non-nationalist political orientation of the Taney Court."[76] Whereas Federalist justices may have announced the rule in *Wiscart* to avoid political troubles, Jacksonian justices may have maintained that rule to secure policy preferences.

The precedential evolution from *Wiscart* to *McCardle* illustrates how judicial rules once best explained by strategy (or values) may over time become best explained by law. The early Supreme Court frequently engaged in strategic decision making.[77] Chief Justice Marshall admitted as much in his private correspondence. He found a statutory excuse to avoid resolving the constitutional issues raised by state laws banning free blacks, Marshall informed Justice Story, because he was "not fond of butting against a wall in sport."[78] Salmon Chase expressed different sentiments when explaining

his behavior in *McCardle*. He wrote John D. Van Buren that "it was especially desirable to me to have the case decided, for it is highly probable that I shall meet the question on the Circuit." Chase reluctantly concluded that because "Congress . . . had the undoubted right to except such cases as *McCardle* from its appellate jurisdiction," it was "an indecency to run a race in the exercise of that jurisdiction with the legislature."[79] This correspondence suggests that Chase did not think strategically or engage in sophisticated voting during Reconstruction. The chief justice was constrained by past legal practice, not present legislative threats. John Marshall's strategic decision in 1810 evolved into Salmon Chase's legal decision in 1868.

All judicial choices have legal, strategic, and attitudinal components. Even when the case law is clear at the time of a particular judicial decision, the relevant precedents may have foundations that cannot be entirely explained by law. The law of federal jurisdiction bequeathed to the Chase Court was rooted partly in the text of Article III and the original understanding of the framers, partly in Federalist efforts to forestall legislative attacks on judicial power, and partly in Jacksonian democratic commitments. The judicial decision to rely on precedent in *McCardle* was not based entirely on precedent. The Chase Court in *Trebilcock* and other cases proved willing to overrule past judicial rulings.[80] The justices probably adhered to precedent in *McCardle* because some justices thought past rulings a reasonable interpretation of the original text, some thought abandoning the *Wiscart/Durousseau* line of cases risked legislative retaliation, and some favored as a matter of public policy legislative control of the federal judicial docket. The justices may also have adhered to precedent in *McCardle* because they felt the policy and strategic stakes not sufficiently high to warrant abandoning clear law. Had the *McCardle* majority thought martial law in the South a gross violation of fundamental human rights, the Chase Court might have thrown law and strategy to the winds. Claims that justices vote consistently with their most cherished political commitments, however, differ significantly from claims that justices only vote their policy preferences. The line of cases from *Wiscart* to *Durousseau* indicate that precedent shapes and constrains normal judicial decision making, not that stare decisis never encompasses policy preferences and strategic considerations.

Take Five: The Legal, Strategic, and Attitudinal *Roosevelt*

Roosevelt v. Meyer also confounds neat distinctions between legal, strategic, and attitudinal decision making. Justice Miller's private conversation

suggests he did not recognize a strict separation between rule by law and sophisticated voting. According to a friend, Miller

> said that during the war the most strenuous efforts were made to use the Court in such a way as to embarrass the Government in its conduct of operations by endeavoring to get decisions upon such questions as the right of Mr. Seward to confine obnoxious persons in the forts, the right of Mr. Stanton to confiscate the property of citizens in the rebellious states, etc. . . . The Justice did more to prevent interference by the court than perhaps any other member of it.[81]

This effort to "prevent interference by the court" might be interpreted as pure strategic action. Miller forestalled a judicial decision striking down policies he favored and husbanded scarce judicial resources for more favorable circumstances. The better reading may be that Justice Miller did not believe courts should interfere with wartime policies, even when he thought the policy wrong and the probability of political retaliation low. Justice Davis made a similarly ambiguous assertion in *Ex parte Milligan* when he declared,

> 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.[82]

Perhaps Justices Miller and Davis thought law permitted or even required a strategic decision in the circumstances before the *Roosevelt* Court. *Inter arma leges silent* might be a legal rule, not simply a description of judicial practice.

Some prominent twentieth-century judicial opinions and constitutional commentators agree that strategic concerns ought to guide legal reasoning. Justice Robert Jackson, Alexander Bickel, and others maintain that justices must consider political circumstances when exercising judicial power. Law, their analyses claim, simultaneously permits and constrains strategic judicial choices. Prudential legal logics legitimate sophisticated voting while ruling out certain options that a differently located strategic actor might think the best means for securing desirable public policy. The crucial explanatory question in *Roosevelt* and related rulings is whether such decisions are instances when justices made a legal use of strategic (or attitudinal) considerations, not whether strategic (or attitudinal) considerations influenced the legal decision.

Justice Robert Jackson's dissent in *Korematsu v. United States* is the most famous instance of explicit prudential reasoning by a member of the Supreme Court. Jackson preferred not ruling on the constitutionality of a controversial war-related measure, in this instance, the internment of Japanese Americans during World War II. Unlike Miller, Jackson publicly justified judicial restraint on war-related measures. His *Korematsu* dissent asserted that the Supreme Court should be guided by *inter arma leges silent* when confronted with constitutional challenges to military policy. "It would be impractical and dangerous idealism," Jackson declared, "to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful rather than legal."[83] Judicial capacity provided additional reasons for a hands-off stance. "Military decisions," the Justice from upstate New York wrote, "are not susceptible of intelligent judicial appraisal."[84] Such reasoning supports both Jackson's decision not to determine the constitutionality of the Japanese internment and Miller's decision not to review the Legal Tender Acts. The *Roosevelt* opinion, written by Justice Jackson, would probably have contended that wartime financial policies are "not susceptible of intelligent judicial appraisal."

Alexander Bickel's famed "Passive Virtues" essay celebrates Justice Jackson's opinion in *Korematsu* and similar judicial writings that "decline the exercise of jurisdiction which is given."[85] Good legal reasons, Bickel claimed, justify judicial decisions not to make constitutional rulings. "The Passive Virtues" urges justices to refrain from constitutional adjudication when "the anxiety [is] not so much that judicial judgment will be ignored, as that perhaps it should be, but won't," when political circumstances highlight "the inner vulnerability of an institution which is electorally irresponsible," and when the justices conclude "on principle that there ought to be discretion free of principled rules."[86] These considerations specifically caution against judicial activism when the United States is at war. Bickel quoted with great enthusiasm Justice Jackson's rationale for thinking the federal judiciary should not have ruled on the constitutionality of the Japanese American internment.[87] *Roosevelt* decided by Bickel would have been simultaneously legal and strategic. A proper legal understanding of the judicial function, he would have concluded, required the justices to make a strategic decision declining jurisdiction.

Other scholars agree that justices may legally take political circumstances into account when resolving constitutional issues. Philip Bobbitt's

analysis of legal logics insists that "prudential argument is constitutional argument." Of particular relevance to *Roosevelt*, Bobbitt notes, "prudentialists generally hold that in times of national emergency even the plainest of constitutional limitations can be ignored. Perhaps others share this belief; but the prudentialist makes it a legitimate, legal argument, fits it into opinions, and uses it as the purpose for doctrines."[88] Bobbitt regards strategy as more than a legitimate means for choosing between constitutional options justifiable by other legal logics. He thinks justices may examine the political climate, including the possibility of political backlash, when determining whether a possible judicial choice is constitutionally legitimate. Justice Jackson's assertion, "there is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact,"[89] Bobbitt believes, is a legal argument, a legal reason for discounting plain language in constitutional or statutory texts when simple textualism would trench too closely on vital government functions or entangle the justices too deeply in a political thicket.[90]

Legal strategies differ from nonlegal strategic behavior. Constitutionalists who urge justices to avoid making constitutional decisions on war-related policies and similar matters assert that justices must behave as justices when engaged in sophisticated voting or when using the passive virtues. "The antithesis of principle in an institution that represents decency and reason," Bickel declared, "is prudence,"[91] not arbitrary action. He maintained that prudent justices act consistently with their judicial obligations when manipulating jurisdictional rules, but violate their oaths of office when declaring a statute constitutional they believe unconstitutional.[92] Strategy was confined to the decision to decide, not decisions on the merits. Justice Jackson's *Korematsu* dissent anticipated Bickel's prudential guidelines. "If we cannot confine military expedience by the Constitution," the former wrote, "neither would I distort the Constitution to approve all that the military may deem expedient."[93] Jackson's opinion emphasized that when justices conclude that constitutional policy questions are not amenable to legal standards, the proper legal ruling is a refusal to adjudicate, not judicial approval of governmental actions. "A military order, however unconstitutional, is not apt to last longer than the military emergency," he declared, "but once a judicial opinion rationalizes such an order, . . . the Court for all time has validated the principle of racial discrimination in criminal procedure."[94] Jackson when condemning the majority opinion sustaining the internment policy did "not suggest that the courts should have

attempted to interfere with the Army in carrying out its task." He simply rejected claims that justices "may be asked to execute a military expedient that has no place in law under the Constitution."[95]

The judicial decision in *Roosevelt* was consistent with the standards for prudential legal logics articulated by Jackson and Bickel. The opinion for the Court did not declare the Legal Tender Acts constitutional or give any judicial support to administration policy. Justices opposed to Lincoln's wartime policy did not make an effort to curry administration favor by sustaining some wartime policies they thought unconstitutional.[96] Justice Miller's private comments suggest he thought denying jurisdiction the appropriate legal strategy for not interfering with administration policy in war time. His understanding of the judicial function justified strategic action in the circumstances presented by *Roosevelt*, but limited the strategic choices open to the Court.

Strategic decision making (almost?) always takes place in the context of a practice whose norms sanction sophisticated choices under some circumstances while restricting the strategic options that may be chosen. In law, baseball, poker, and tag, some moves are permitted, others are questionable, and others are illegal. Assertions that persons engaged in any of these activities behaved strategically rarely suffice to explain their actions. Complete explanations explore the extent to which the actor felt permitted or perhaps even compelled to take strategic action, as well as what strategic actions that actor thought could legitimately by taken by a person engaged in that practice. Poker players bluff rather than peek. The former is strategic behavior within the rules. The latter is cheating. Although some bluffers refrain from peeking for fear of being caught, most limit sophisticated betting to bluffing because that is how poker is played. Norms similarly constrain legal practice. Legal considerations influence both judicial decisions to make a strategic choice and the particular strategic option selected. A justice who makes a strategic choice between two legitimate legal alternatives is behaving differently than a justice who for strategic reasons makes a decision that cannot be justified by prudential or any other legal logic.

Roosevelt occupies contested turf on the border between strategy and cheating. Bickel, Bobbitt, and others insist that justices are legally authorized to act prudentially. Prominent constitutionalists disagree. Gerald Gunther regarded the passive virtues as "100% insistence on principle, 20% of the time."[97] Nevertheless, even if the passive virtues are bad law, bad law differs from no law. Game theory recognizes a distinction between a con-

tested interpretation of the rules, stretching the rules, or taking advantage of the rules, on the one hand, and outright cheating on the other. Unlike cheaters, interpreters are constrained by law, even as they advance contested understandings of what constitutes legitimate law. The strike zone in baseball is contested, but a pitch that bounces before reaching home plate is a ball.[98] Constitutional rules admit of similar degrees of certainty. Sanford Levinson observes that although many things are sayable in the language of American constitutional law, not every policy preference can be defended by legal logics.[99] One can argue in good faith that precedent sanctions presidential wars, but not that Article I mandates a parliamentary system of government.

Determining whether Justice Miller in *Roosevelt* used a contested legal strategy or cheated is difficult. Some indicia point to cheating. The *Roosevelt* opinion, unlike Jackson's *Korematsu* dissent, fails to make public the reasons that actually motivated the judicial decision to deny jurisdiction. Such subterfuge is more typical of cheating than interpreting. Other indicia point to law. Statutory misinterpretation was a common nineteenth-century practice.[100] The *Roosevelt* opinion may simply have respected a legal trope and not have been a self-conscious effort to deceive. Justice Miller claimed that he voted to sustain federal law in *Ex parte Garland*[101] even though he abhorred test oaths.[102] This is suggestive of a more general tendency to place law above policy concerns. Perhaps, however, Justice Miller felt compelled to rationalize his efforts to secure policy preferences.

Two reasons support claims that at least some justices in *Roosevelt* thought they were using a legal strategy to avoid resolving whether the Legal Tender Acts were constitutional. First, statutory misconstruction was sufficiently common to support the inference that justices regarded that practice as a legitimate means for not resolving constitutional questions. Second, justices engaged in pure strategic calculations would have considered sustaining such Civil War measures as the Legal Tender Acts in order to build up political capital that could be used to strike down Lincoln's suspension of habeas corpus, a constitutionally and politically more vulnerable Civil War measure. These claims involve evaluative as well as descriptive analysis. My argument that the justices thought statutory misconstruction to be legitimate rests on claims that the practice was sufficiently widespread as to be deemed legitimate legal behavior by competent lawyers. My argument about judicial trade-offs rests on claims that trading approval for the Legal Tender Acts in return for striking down habeas corpus was good strategy. Neither my legal nor my strategic analysis is written

in stone. The crucial point is that any explanation of *Roosevelt* cannot take a purely external viewpoint. Claims about whether justices were influenced by a legal strategy inevitably encompass contestable claims about good law and efficacious strategy. Legal and strategic explanations require legal and strategic analysis.

Take Six: The Legal, Strategic, and Attitudinal *Roosevelt* and *McCardle*

Combining legal, strategic, and attitudinal factors with an evolutionary perspective yields further insights into *Roosevelt* and *McCardle*. Path dependence theory highlights how particular actions are often explained largely by their place in a larger sequence. Random choices or decisions between available alternatives made at one moment in time typically limit or change the alternatives that may be selected at later moments in time.[103] *Wiscart* and *Durousseau* were decided early in Supreme Court history. Chief Justices Ellsworth and Marshall made their choices at a time when no clear law existed on whether the Supreme Court needed statutory authorization to exercise appellate jurisdiction under Article III. Both justices chose not to exercise judicial power. Salmon Chase probably would have chosen differently had he been the first decision maker. Chase's opinion in *Ex parte Yerger* intimated that had he been chief justice in 1803, the Supreme Court in *Marbury* would have exercised jurisdiction and awarded the writ of mandamus.[104] Chase, however, was not the first chief justice, or even the first great chief justice. His opportunity to choose came later in the precedential sequence. Legal options open to Marshall had been closed, partly because of the strategic choices Marshall made. The Supreme Court voted to deny jurisdiction in *McCardle*, a path dependence perspective suggests, because Chief Justice Chase decided after, not before, Chief Justices Ellsworth and Marshall.

A more complicated evolutionary perspective emphasizes how standard features of most judicial systems have strong tendencies to generate precedential sequences favoring restraint whenever policies favored by most elected officials are challenged in court. The processes by which courts are staffed in constitutional democracies normally yield justices who favor administration policies. Robert Dahl observes, "it would appear . . . somewhat unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court Justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite."[105] Justices

who oppose administration policies often elect for strategic reasons not to challenge elected officials. John Marshall spent his first decade on the bench finding ways not to antagonize the Jeffersonian majority.[106] Courts whose initial precedents favor government action are more likely to survive than courts whose initial precedents strike down popular measures. Ran Hirschl details numerous instances when elected officials responded to adverse judicial decisions by reconstituting the legal system.[107] This combination of attitudes, strategy, and backlash typically generates precedential sequences that yield strategic results and rules, even when few justices engage in sophisticated voting.

A simple hypothetical highlights how over time "survival of the passive" produces increased tendencies toward judicial restraint. Imagine a judicial system with three justices, Justice Law, Justice Strategy, and Justice Attitude, who are randomly selected to determine the constitutionality of martial law. Justice Law decides exclusively on precedent, flipping a coin when precedents are evenly balanced. Justice Strategy never strikes down martial law when troops are in the field. Justice Attitude is guided exclusively by policy preferences. On the less realistic version of this hypothetical, Justice Attitude is as likely to favor as oppose martial law. On a more realistic version, Justice Attitude, appointed by members of the dominant national coalition, favors martial law three-quarters of the time. A 50% probability exists that elected officials will respond to a decision striking down martial law by abolishing courts. The first judicial decision under these conditions is either twice (less realistic Justice Attitude) or three times (realistic Justice Attitude) more likely to refrain from declaring martial law unconstitutional. The next judicial decision is four or nine times more likely to refrain from declaring martial law unconstitutional. By the sixth and seventh decision, a strong precedent sequence favoring judicial restraint will almost always be in place in every surviving court system. The later the decision in the precedential sequence, the more likely Justice Law either denies jurisdiction (following precedents set by Justice Strategy) or sustains administration policy (following precedents set by Justice Attitude's votes favoring martial law). Justice Law exhibits the same deferential tendencies over time even when Justice Strategy's role is reduced or eliminated. Strategic rules are established, but not necessarily by strategic decisions.

"Survival of the passive" explains *McCardle* as the expected outcome of a mature judiciary. The later a judicial opportunity to strike down measures favored by powerful political actors occurs in the life of a court system, the more likely existing precedents will support either denying jurisdiction or

sustaining regime policy. Chief Justices Ellsworth and Marshall were legally free to decide whether the Supreme Court needed statutory authorization to exercise appellate jurisdiction because they made the initial decisions in a precedential sequence. They were not equally free politically to establish either a precedential sequence favoring activism or a precedential sequence favoring restraint. Had Marshall in the wake of the election of 1800 boldly asserted a judicial right to decide cases without legislative permission, he probably would have been impeached and his activist precedents abandoned. Chief Justice Chase inherited a legal doctrine compelling restraint in *McCardle* partly because the Supreme Court probably would not have survived had previous chief justices attempted to hand down a different legacy.

Strategic Legislatures, Legal Courts

The interplay between legal, strategic, and attitudinal factors structured the way elected officials prevented the Supreme Court from declaring martial law and other military-related policies unconstitutional. *Merryman* aside, Republican presidents and Republican legislators acted within accepted legal frameworks when seeking to forestall adverse judicial decisions. On pure strategic grounds, assassination, abolition of judicial review, impeachment, and refusal to obey judicial decrees might have been superior means for ensuring that the justices did not strike down Civil War and Reconstruction measures. Nevertheless, elected officials consistently selected only means nineteenth-century constitutional norms clearly legitimated for influencing the course of judicial decision making. The strategies that executive and legislative actors chose for preventing judicial interference with martial law cannot be explained without reference to existing legal practices.

Republican presidents avoided judicial decisions declaring martial law unconstitutional by abandoning cases in which the Supreme Court had the necessary jurisdiction to strike down administration policies. Lincoln's attorney general, Edward Bates, ordered subordinates not to appeal adverse rulings in the lower federal courts.[108] Edward Yerger was freed after the Chase Court ruled that the justices would determine the constitutionality of his confinement.[109] These executive decisions were strategic. Republicans regarded releasing some persons less harmful than a Supreme Court decision declaring the entire confinement policy unconstitutional. Bates informed cabinet members that his failure to appeal adverse lower court decisions was based on his belief that "the Union could be furthered better without the Supreme Court decision than 'with decision *against* the power assumed by

the President.'"[110] The strategy was also legal. Both the Constitution and long-standing legal practice recognized the right of the national executive to settle cases rather than risk an adverse Supreme Court decision.

The Repealer Act of 1868 was another legal strategy. The national legislature during Reconstruction considered various measures that might prevent the Supreme Court from striking down important Reconstruction policies. Means deemed illegitimate by existing practice were proposed, but did not become law. Imposing supermajoritarian voting requirements for decisions declaring laws unconstitutional was inconsistent with long-standing judicial precedent dating from 1791. Removing Supreme Court justices on political grounds was inconsistent with long-standing legislative precedent dating from the failed Chase impeachment.[111] Withdrawing appellate jurisdiction, by comparison, had been sanctioned by judicial rulings and federal law for more than seventy years. Previous Taney and Chase Court decisions established that Congress had the constitutional power to withdraw appellate jurisdiction, even when a case was pending before the Supreme Court. As did the national executive, the national legislature during the 1860s chose means that were simultaneously legal and strategic for preventing a Supreme Court decision on martial law.

The Repealer Act of 1868 was a legal strategy adopted by legislators interested in both limiting and expanding judicial power. Many political scientists and some law professors observe that elected officials often favor judicial review as a means for achieving cherished policies and for partly removing contentious issues from partisan politics.[112] Most, not all, Republicans during Reconstruction favored a strong judiciary for these reasons. Courts were considered good vehicles for carrying out Reconstruction policies and even better vehicles for rationalizing the emerging industrial order.[113] The challenge mainstream Republicans faced during the Johnson and early Grant administrations was how to prevent the Chase Court from making decisions on martial law that might obstruct desired congressional policies and weaken the political support necessary for more desirable judicial activism in the future. The Repealer Act secured both Republican ends. That measure ensured that the justices in 1868 would not rule on the constitutionality of martial law, but had no impact on federal jurisdiction in those areas of the law in which Republicans favored judicial intervention. Broader attacks on the federal judiciary were forestalled by laws preventing the Supreme Court from making decisions that probably would have increased the ranks of those committed to curtailing the judicial power to declare any law unconstitutional.

Elected officials were the strategic actors in *McCardle*. Given the legal opportunity, Chase would have declared martial law unconstitutional regardless of the consequences for the future exercise of judicial power. Republicans in the national legislature and national executive with long-term goals in mind exhibited more concern for husbanding judicial power than Republicans on the national bench. Lincoln, Trumbull, and other elected officials chose to prevent an adverse judicial ruling by making sophisticated decisions to release prisoners and withdraw jurisdiction. The Chase Court merely followed existing law.

Elected officials during the 1860s adopted legal strategies that assumed judicial officials would act legally. Releasing detainees seeking writs of habeas corpus prevented judicial decisions because the "case or controversy" requirement of Article III requires petitioners before the Court to demonstrate an actual injury. The Repealer Act of 1868 was based on a legislative expectation that the justices, guided by precedent, would refrain from deciding a pending case after appellate jurisdiction was withdrawn. These legal practices, in turn, served a vital strategic function for the Court. When judicial decisions to decide were based on clear legal rules, elected officials knew what had to be done politically to facilitate or prevent judicial decisions on constitutionally controversial policies. Elected officials could express their will clearly and narrowly. No need existed to impeach federal justices if everyone was confident that repealing a particular grant of jurisdiction would prevent adverse rulings on policies cherished by elected officials.

American constitutional politics by the Civil War had evolved in ways that gave a national majority substantial power to control the federal judicial docket. When most elected officials wanted the Supreme Court to resolve a contentious policy issue, as was the case with slavery in the territories, the national government possessed legal means for inviting judicial action.[114] When most elected officials preferred the Supreme Court not interfere with national policy, as was the case for martial law, legal means usually existed for securing judicial restraint. Exceptions existed, partly because the means by which elected officials could influence the Court were as much the result of evolution as a conscious choice by all branches of the national government at a specific point in time. *Roosevelt* was the product of one such loophole. The Judiciary Act of 1789 was primarily intended to allow federal courts to supervise state court decisions striking down federal law.[115] Until *Roosevelt*, both lawyers and elected officials seem to have forgotten the language in Section 25 permitting appeals when state courts sustained a federal law that a petitioner claimed violated federal constitutional

rights. The decision, therefore, might be an instance where justices were guided by general constitutional principles manifested throughout the law rather than a statutory accident. Structuralist legal logics based on the constitutional relationships between governing institutions trumped legal reasoning based on long ignored language in a relatively ancient text.

More Takes?

Inter arma silent leges and judicial decision making are more complex than the simple strategic takes on *Roosevelt* and *McCardle* suggest. Law was not silent during the Civil War and Reconstruction. The Supreme Court gave legal reasons for not ruling on whether martial law in the South was constitutional. Legal reasons can be given for the judicial decision to refrain from determining whether the Legal Tender Acts were constitutional. The justices did not speak about the constitutional limits on federal legislative and executive power laid out in Articles I and II because they believed that conversation legally proscribed by the constitutional limits on federal judicial power laid out in Article III.

Law played different roles in *Roosevelt* and *McCardle*. Legal norms explain how Justice Miller avoided declaring the Legal Tender Acts unconstitutional. The *Roosevelt* Court ignored clear language in the Judiciary Act of 1789 when denying jurisdiction partly because statutory misconstruction in the nineteenth century was considered an appropriate legal strategy for avoiding delicate constitutional issues.[116] Legal norms help explain why Chief Justice Chase avoided declaring martial law unconstitutional. Unlike Justice Miller, Chase was eager to express his constitutional opinions officially on military related policies. The chief justice refrained from reaching the merits of *McCardle* because he believed law forbade justices from adjudicating appeals after Congress repealed the statutory basis for jurisdiction.

Had Justice Miller or Chief Justice Chase been in the executive or legislative branches of the national government, they probably would have behaved differently. Many legislators and cabinet members, most notably Treasury Secretary Salmon Chase, swallowed their constitutional scruples and supported the Legal Tender Acts.[117] No justice during the 1860s took that route. Justices voted to sustain only those laws they believed to be constitutional. The appropriate means by which justices avoided challenging wartime policies differed from appropriate means open to other political actors.

Simple legal explanations of *Roosevelt* and *McCardle* are no more accurate than simple strategic explanations. Jacksonian judicial appointees were

far more eager than Lincoln's judicial appointees to adjudicate the constitutional merits of Civil War measures. The *McCardle* opinion relied heavily on precedents best explained by a combination of legal, strategic, and attitudinal factors. The legal roads to *Roosevelt* and *McCardle*, as well as the actual judicial decisions in those cases, were paved by a legal, strategic, and attitudinal mixture. No element of that compound can easily be isolated. The strategic aspects of *Roosevelt* are intertwined with legal norms concerned with when justices may behave strategically and what strategic considerations they may take into account when making legal decisions. The legal aspects of *McCardle* are intertwined with the strategic and attitudinal concerns that structured nineteenth-century case law on federal appellate jurisdiction.

Future research will develop new perspectives on legal strategies and strategic rules. An eighth take on *Roosevelt* and *McCardle* might explore the judicial practice during the 1860s of first deciding jurisdictional questions before entertaining oral argument on the merits. This procedure, which may not have had strategic origins, nevertheless facilitated strategic action on the part of elected officials. Republicans in 1868 could wait for the judicial decision on jurisdiction before settling *McCardle* or passing the Repealer Act. The various takes on *Roosevelt* and *McCardle* may help explain other judicial decisions or precedential sequences. The process by which judicial policy preferences and sophisticated votes harden into legal rules is likely to occur in many doctrinal areas. The evolution of the actual malice rule in libel cases from *New York Times Co. v. Sullivan*[118] to *Hustler Magazine v. Falwell*[119] is a possible example. Justice Brennan's attitudinal decision may have become Chief Justice Rehnquist's legal decision.[120] Whatever areas of law scholars consider, the most fruitful investigations will explore the ways in which legal, strategic, and attitudinal factors interact when justices make decisions, and not engage in fruitless contests to determine which single factor explains the most.

Notes

1. In *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), the justices sided with the national legislature against the national executive. The judicial majority in *Ex parte Endo*, 323 U.S. 283 (1944), held that the executive orders issued during World War II authorizing the evacuation of Japanese American citizens from the West Coast did not authorize the military to hold citizens whose loyalty had been established in detention camps. *Endo*, 323 U.S., at 300–304. Justice Douglas's majority opinion began by declar-

ing that the justices would not resolve "the underlying constitutional issues which have been argued" (*Endo*, 323 U.S., 297). His opinion did adopt that interpretation of existing executive orders that had "the greater chance of surviving the test of constitutionality." *Endo*, 323 U.S., at 299. Justices Murphy and Roberts would have declared the detention practice unconstitutional, with Roberts explicitly stating that both branches of government had clearly authorized the detention policy. *Endo*, 323 U.S., at 307 (Murphy, J., concurring); *Endo*, 323 U.S., at 309–310 (Roberts, J., concurring).

2. *Ex parte Milligan*, 71 U.S. 2, 120–121 (1866).

3. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), 334–335 (Murphy, J., concurring).

4. *Ex parte Milligan*, at 120–121.

5. *Milligan* was handed down the year after the Civil War ended. The year before the Civil War ended, the justices in *Ex parte Vallandigham*, 68 U.S. 243 (1863), unanimously held that the Court did not have the jurisdiction necessary to determine whether the Lincoln administration had the power to suspend martial law in the North. *Duncan* was handed down the year after V-J Day. While hostilities were ongoing, the Supreme Court sustained executive orders banning Japanese Americans from living in the West Coast. See *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayshi v. United States*, 320 U.S. 81 (1943).

6. William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (New York: Alfred A. Knopf, 1998), 222.

7. *The Prize Cases*, 67 U.S. 635 (1862).

8. *Ex parte Vallandigham*, 68 U.S. 243 (1863); *Roosevelt v. Meyer*, 68 U.S. 512 (1863).

9. See Charles Fairman, *Reconstruction and Reunion*, part 1 (New York: Macmillan, 1971), 55–58 (discussing *Ex parte Dugan*).

10. *Ex Parte Milligan*, 71 U.S. 2 (1866); *Hepburn v. Griswold*, 343 U.S. 579 (1869).

11. *Ex Parte McCardle*, 74 U.S. 506 (1869).

12. The seminal works in the strategic tradition are Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, D.C.: CQ Press, 1998); Jack Knight and Lee Epstein, "On the Struggle for Judicial Supremacy," *Law and Society Review* 30 (1996): 87; Lee Epstein and Jack Knight, "Mapping Out the Strategic Terrain: The Informational Role of *Amici Curiae*," in *Supreme Court Decision-making: New Institutional Approaches* (Chicago: University of Chicago Press, 1999); Lee Epstein and Thomas G. Walker, "The Role of the Supreme Court in American Society: Playing the Reconstruction Game," in *Contemplating Courts*, ed. Lee Epstein (Washington, D.C.: CQ Press 1995), 338–342. See also Frank B. Cross, "The Justices of Strategy," *Duke Law Journal* 48 (1900): 511, 513nn8–10 (citing numerous articles on judicial strategy published by positive political theorists).

13. Alexander M. Bickel, "Foreword: The Passive Virtues," *Harvard Law Review* 75 (1961): 40.

14. Gordon Silverstein and Dion Farganis, "Bridging the Gap: Precedent, Political Science and Law," paper presented at the 2001 American Political Science Association meeting.

15. Epstein and coauthors acknowledge the seminal work of Walter Murphy on justices as strategic decision makers. See Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964).

16. Epstein and Walker, "Role of the Supreme Court," 317.

17. Epstein and Knight, *Choices Justices Make*, 154.

18. Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002).

19. See Segal and Spaeth, Supreme Court and the Attitudinal Model Revisited, 2–3.

20. Epstein and Knight, *Choices Justices Make*, 153.

21. Ibid.

22. Epstein and Walker, "Role of the Supreme Court," 340. See Fairman, *Reconstruction*, 460–461, 465–467.

23. 15 Stat. 44 (1868).

24. *Ex parte McCardle*, 74 U.S. 506, 515 (1868); Epstein and Walker, "Role of the Supreme Court," 341–342.

25. 75 U.S. 85 (1868).

26. Epstein and Walker, "Role of the Supreme Court," 343.

27. Charles Warren, *The Supreme Court in United States History*, vol. 2, rev. ed. (Boston: Little, Brown, 1947), 387.

28. 75 U.S. 603 (1868).

29. Abraham Lincoln, *The Collected Works of Abraham Lincoln*, vol. 4, ed. Roy P. Basler (New Brunswick, N.J.: Rutgers University Press, 1953), 430.

30. 17 F. Cas. 144 (C.C.D. Mary. 1861).

31. See Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton*, new and rev. ed. (Lanham, Md.: Rowman & Littlefield, 1999), 90.

32. David M. Silver, *Lincoln's Supreme Court* (Urbana: University of Illinois Press, 1956), 145.

33. *Roosevelt*, at 517.

34. *Roosevelt*, at 517n5. The cases were *Gordon v. Caldcleugh*, 7 U.S. 268, 269–270 (1806); *Fulton v. M'Affee*, 41 U.S. 149, 152 (1842); *Linton v. Stanton* 53 U.S. 423, 425–426 (1852); *Strader v. Baldwin*, 50 U.S. 261, 262 (1850).

35. See Warren, *Supreme Court*, 387; Daniel Meltzer, "The History and Structure of Article III," *University of Pennsylvania Law Review* 138 (1990): 1569, 1590n75.

36. 1 Stat 85, 86 (1789).

37. *Trebilcock v. Wilson*, 79 U.S. 687, 692 (1871).

38. *Trebilcock*, 79 U.S., at 693.

39. Three justices (Black, Douglas, Murphy) in *West Virginia State Board of Education v. Barnett*, 319 U.S. 624 (1943) voted to overrule a case, *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), in which they were in the majority.

40. See Silver, *Lincoln's Supreme Court*, 145.

41. See Meltzer, "The History of Structure and Article III," 1590n75.

42. *Wiscart v. Dauchy*, 3 U.S. 321, 327 (1796).

43. *Durousseau v. United States*, 10 U.S. 307, 314 (1810). See *United States v. Goodwin*, 11 U.S. 108 (1812) (Supreme Court has no appellate jurisdiction in the absence of legislation).

44. Justice Story insisted that the Constitution required that Congress vest at least one federal court with the power to decide federal questions, but he nevertheless believed that courts could not legally take this jurisdiction in the absence of a statute. *Martin v. Hunter's Lessee*, 14 U.S. 304, 328–335 (1816); *White v. Fenner*, 29 F. Cas. 1015 (C.C.D.R.I. 1818).

45. Robert N. Clinton, "A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan," *Columbia Law Review* 86 (1986): 1515, 1608.

46. *Sheldon v. Sill*, 49 U.S. 441, 449 (1850).

47. *Cary v. Curtis*, 44 U.S. 236, 245 (1845). See Clinton, "Mandatory View," 1589–1592.

48. 5 Stat. 726 (1845).

49. *Daniels v. Railroad Company*, 70 U.S. 250, 254 (1865).

50. *Insurance Co. v. Ritchie*, 72 U.S. 541, 544 (1867).

51. *McCardle*, 74 U.S., at 513.

52. 54 U.S. 429 (1851).

53. *McCardle*, 74 U.S., at 514. See *Norris*, 54 U.S., at 440.

54. McCardle's attorney relied solely on several state cases which held that pending cases were not affected by subsequent changes in the substantive law. This was both a misstatement of federal law and irrelevant to the jurisdictional issue. Regardless of any change in the legal rights of parties as a result of new laws, courts had jurisdiction to decide cases only when they had jurisdiction at the time of decision.

55. William W. Van Alstyne, "A Critical Guide to *Ex parte McCardle*," *Arizona Law Review* 15 (1973): 229, 255, 233. See Van Alstyne, "Critical Guide," 255–258; Fairman, *Reconstruction*, 1395. David Currie questions only the constitutional soundness of the precedents underlying *McCardle*. See David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888* (Chicago: University of Chicago Press, 1985), 25–28.

56. Currie, *Constitution*, 305–306.

57. 5 U.S. 103, 110 (1801).

58. See Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt, 1996), 298.

59. *Schooner Peggy*, 5 U.S. 103, at 110 (1801).

60. See especially, *Bell v. Maryland*, 378 U.S. 226, 231 n.2 (1964) ("the rule [of *Schooner Peggy*] has . . . been consistently followed and applied by this Court"); *Gulf, Colorado & Santa Fe Railroad Commission v. Dennis*, 224 U.S. 503, 505–506 (1912) (citing

numerous cases); *United States v. Tynen*, 78 U.S. 88, 94–95 (1871); *United States v. Preston*, 28 U.S. 57, 66–67 (1830); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603, 632 (Johnson, J., dissenting) (agreeing with majority that "a treaty ratified subsequent to the decision of the Court appealed from, becomes a part of the law of the case and must control our decision").

61. *Freeborn v. Smith*, 69 U.S. 160 (1865).

62. See, i.e., *Benner v. Porter*, 50 U.S. 235 (1850); *Freeborn v. Smith*, 69 U.S. 160 (1865).

63. *Freeborn*, 69 U.S., at 174.

64. *Freeborn*, at 174–175. For a discussion of this case, see Fairman, *Reconstruction*, 468.

65. Chief Justice Chase withheld making an authoritative decision for similar reasons in very different circumstances the year before *McCardle* was decided. During the winter of 1867, Congress passed a bill requiring the chief justice to appoint registrars to assist bankruptcy justices. In part because of the Chief Justice's concerns about the constitutionality of the act, Congress during March of 1867 debated repealing the offending provision. Chase refused either to make appointments or publicly declare the bill unconstitutional while repeal was under serious legislative consideration. When Congress adjourned in late March without changing the law, Chase within a week determined that the law was constitutional and made the appointments. See Fairman, *Reconstruction*, 355–365.

66. Congressional Globe, 40th Cong., 2nd Sess., 2095.

67. Ibid.

68. Fairman, *Reconstruction*, 484 (quoting Davis to Rockwell).

69. See Epstein and Walker, "Role of the Supreme Court," 336–337.

70. Fairman, *Reconstruction*, 1394–1395.

71. Currie, *Constitution*, 27.

72. See especially Robert Yates, "Essays of Brutus," *The Complete Anti-Federalist*, vol. 2, ed. Herbert Storing (Chicago: University of Chicago Press, 1981), 422–442.

73. Maeva Marcus and Natalie Wexler, "The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?," in *Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789*, ed. Maeva Marcus (New York: Oxford University Press, 1992), 29.

74. Mark A. Graber, "Establishing Judicial Review: *Marbury* and the Judiciary Act of 1789," *Tulsa Law Review* 38 (2003): 609, 641.

75. Ibid.

76. Clinton, "Mandatory View," 1592.

77. See Knight and Epstein, "Struggle"; Mark A. Graber, "Establishing Judicial Review?: *Schooner Peggy* and the Early Marshall Court," *Political Research Quarterly* 51 (1998): 221; Mark A. Graber, "The Passive-Aggressive Virtues: *Cohens v. Virginia* and the Problematic Establishment of Judicial Review," *Constitutional Commentary* 12 (1995): 67.

78. John Marshall, *The Papers of John Marshall: Correspondence, Papers, and Selected Judicial Opinions*, vol. 9, ed. Herbert Alan Johnson, Charles T. Cullen, and Charles F. Hobson (Chapel Hill: University of North Carolina Press, 1998), 338.

79. Fairman, *Reconstruction*, 486 (quoting Chase).

80. See *Mason v. Eldred*, 73 U.S. 231 (1868) (overruling *Sheehy v. Mandeville*, 10 U.S. 253 (1810)); *The Belfast*, 74 U.S. 624 (1869) (overruling *Allen v. Newberry*, 62 U.S. 244 (1858)); *Knox v. Lee*, 79 U.S. 457 (1871) (overruling *Hepburn v. Griswold*, 75 U.S. 603 (1870)).

81. Charles Fairman, *Mr. Justice Miller and the Supreme Court 1862–1890* (Cambridge, Mass.: Harvard University Press, 1939), 88–89.

82. *Ex parte Milligan*, 71 U.S. 2, 109 (1866).

83. *Korematsu*, 323 U.S., at 244 (Jackson, J., dissenting).

84. *Korematsu*, 323 U.S., at 245 (Jackson, J., dissenting).

85. Alexander M. Bickel, "Foreword: The Passive Virtues," 40; see also 43–46.

86. Bickel, "Foreword: Passive Virtues," 75.

87. Ibid., 49.

88. Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982), 61.

89. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

90. Owen Fiss advances a similar understanding of constitutional prudentialism when he insists that judges remedying constitutional wrongs should emphasize what is feasible as much as what was required by other legal logics. "Instrumentalism," he writes, "may not only call for a departure from the interpretive paradigm, [but] may actually interfere with the interpretive process. It may make the judge settle for something less than he perceives to be the correct interpretation." Owen M. Fiss, "Objectivity and Interpretation," *Stanford Law Review* 34 (1982): 739.

91. Bickel, "Foreword: Passive Virtues," 51; see also 79.

92. Ibid., 48–49, 51, 74.

93. *Korematsu*, at 244 (Jackson, J., dissenting).

94. Ibid., at 246.

95. Ibid., at 248.

96. A judicial majority did, however, sustain the blockade. Justice Grier, the crucial fifth vote on the measure, fully supported the Civil War effort and does not appear to have voted strategically.

97. Gerald Gunther, "The Subtle Vices of the 'Passive Virtues'—A Comment on Principle and Expediency in Judicial Review," *Columbia Law Review* 64 (1964): 1, 3.

98. See Mark A. Graber, "Law and Sports Officiating: A Misunderstood and Justly Neglected Relationship," *Constitutional Commentary* 16 (1999): 293, 299–301.

99. Sanford Levinson and J. M. Balkin, "Law, Music and Other Performing Arts," *University of Pennsylvania Law Review* 139 (1991): 1597, 1603n25.

100. See Mark A. Graber, "Naked Land Transfers and American Constitutional Development," *Vanderbilt Law Review* 53 (2000): 73, 107.

101. 71 U.S. 333 (1867).

102. Charles Fairman, *Mr. Justice Miller*, 134.

103. Paul Pierson, "Not Just What, but *When*: Timing and Sequence in Political Processes," *Studies in American Political Development* 14 (2000): 72.

104. 75 U.S. 85, 97 (1868).

105. Robert A. Dahl, "Decision-making in a Democracy: The Supreme Court as a National Policy-Maker," *Emory Law Journal* 50 (2001): 563, 578.

106. See sources cited in footnote 77, above.

107. Ran Hirschl, "Beyond the American Experience: The Global Expansion of Judicial Review," in *Marbury v. Madison: Documents and Commentary*, ed. Mark A. Graber and Michael Perhac (Washington, D.C.: CQ Press 2002), 142–144.

108. Silver, *Lincoln's Supreme Court*, 123–125.

109. Fairman, *Reconstruction*, 584–585.

110. Silver, *Lincoln's Supreme Court*, 124 (quoting Edward Bates to Edwin M. Stanton, January 31, 1863).

111. See Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Princeton, N.J.: Princeton University Press, 1999), 20–71.

112. See Mark A. Graber, "The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7 (1993): 35; Mark Silverstein and Benjamin Ginsberg, "The Supreme Court and the New Politics of Judicial Power," *Political Science Quarterly* 102 (1987): 371; Keith E. Whittington, "The Political Foundations of Judicial Supremacy," in *Constitutional Politics: Essays on Constitution Making, Maintenance and Change*, ed. Sotirios A. Barber and Robert P. George (Princeton, N.J.: Princeton University Press, 2001); Lucas A. Powe Jr., *The Warren Court and American Politics* (Cambridge, Mass.: Harvard University Press, 2000); Jack M. Balkin and Sanford Levinson, "Understanding the Constitutional Revolution," *Virginia Law Review* 87 (2001): 1045.

113. Howard Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891," *American Political Science Review* 96 (2002): 511.

114. See Wallace Mendelson, "Dred Scott's Case—Reconsidered," *Minnesota Law Review* 38 (1953): 16; Graber, "Nonmajoritarian Difficulty," 35, 46–50.

115. See Jack N. Rakove, "The Origins of Judicial Review: A Plea for New Contexts," *Stanford Law Review* 49 (1997): 1031.

116. See note 100 above.

117. See Fairman, *Reconstruction*, 683–685.

118. 376 U.S. 254 (1964).

119. 485 U.S. 46 (1988).

120. Thomas Keck's study of the evolution of conservative activism in the United States similarly highlights path dependent influences of judicial decision making. Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago: University of Chicago Press, 2004).