

14 The Role of the Supreme Court in American Society: Playing the Reconstruction Game

Lee Epstein and Thomas G. Walker

The historian of the Court should keep his watch in the halls of Congress, not linger within the chamber of the Court.

—Charles Fairman, *History of the Supreme Court of the United States:
Reconstruction and Reunion*

During the American Civil War, Abraham Lincoln had his hands full. Not only did he have to stave off the Confederate army, but he also had to concern himself with the presence of Confederate supporters in the northern and border states.¹ Particularly worrisome to Lincoln were the large numbers of Southern sympathizers, known as Copperheads, active in Indiana, Illinois, Ohio, and Missouri. Because they were located so close to enemy lines, Lincoln knew that the Copperheads could provide substantial support to Southern forces without actually joining the Confederate army. But combating these civilian enemies posed a difficult problem for Lincoln. Military action provided the most efficient method of dealing with them, yet the army had no legal authority to arrest and try civilians where no hostilities were occurring. The regular state and federal courts were in full operation and capable of trying civilians charged with treason or other crimes.

To resolve this problem, Lincoln issued orders expanding military control over civilian areas, permitting military arrests and trials of civilians, and suspending habeas corpus.² As a result, arrests of suspected traitors and conspirators became common and often were based on little evidence. But were Lincoln's actions constitutional? In *Ex parte Milligan* (1866) the U.S. Supreme Court said they were not. The justices held that Lambdin P. Milligan, a Confederate sympathizer living in Indiana, could not be arrested and tried by

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the military when civilian courts were in full operation and the area was not a combat zone. As a general principle, according to the Court's majority, neither the president nor the Congress, acting separately or in agreement, could suspend the writ of habeas corpus under such circumstances.

Just three years later, though, the Court *seemed* to have a change of heart. In the case of *Ex parte McCardle* (1869), the Court turned down the claims of William McCardle, a Southern journalist who was charged with writing "incendiary and libelous articles" about the Republican-led Congress. When he was arrested and held for a trial before a military tribunal, McCardle—like Milligan—asserted that he was being illegally detained, and—again like Milligan—petitioned for a writ of habeas corpus. But the Court dismissed McCardle's case, refusing to provide the requested relief.

The disparity between the Court's treatment of Lambdin Milligan and William McCardle raises many questions, some of which we shall consider later in this chapter. For now, it is enough to note that these decisions support two versions of the role the judiciary plays in our society. On the one side are those analysts who argue that the Supreme Court should and usually does act to protect minority interests, as it did in *Milligan*. Under this school of thought, the Court is the only institution that can act on behalf of disaffected interests because it lacks an electoral connection. Members of Congress and the president must respond to majority interests to retain their jobs; the Court is not so hindered. On the other side are those scholars who assert that the Court could play the role of minority-protector but that it usually chooses to legitimate the interests of the ruling regime—the elected institutions—as it did in *McCardle*. The predominant explanation for the Court's presumed behavior, as we shall soon see, centers on the appointment process, which—it is argued—ensures that Court decisions will never be far removed from majority preferences.

Despite these differences, the two schools rest on a common assumption about the nature of judicial decision making: Justices do not decide a priori to protect minority rights or to legitimate the ruling regime. Rather, they base their votes on their political ideologies, with a consequence being that liberal justices *tend* to protect minority interests, whereas conservative ones *tend* to legitimate the ruling regime. Under this thinking, *Milligan* came out the way it did because the Court was composed of civil liberties-minded jurists—and not because the justices were purposefully playing the role of minority protectors. Likewise, theorists of both schools would argue that *McCardle* did not reflect a belief on the part of the justices that they should go along with the interests of elected institutions; rather it represented the Court's political attitudes toward the issues raised in the case. In other words, these two approaches assume that the role the Court carves out for itself—be it minority protector or regime supporter—rests with the justices and that it is merely a byproduct of their political ideologies. A liberal court, for example, will usually

protect the oppressed; a court of the law-and-order-minded, conversely, will generally sustain government assertions (although exceptions to this rule have occurred).

Our argument is that this assumption is inadequate or, at the very least, incomplete. We believe that the role the Court plays in a democratic society is not merely the product of the individual political preferences of the justices; it is also a function of the preferences of other political actors, particularly Congress and the president, and of the political context. To put it in different terms, we agree with the sentiment of Charles Fairman (1971): to understand the role the Court plays in American society it is important to consider events occurring outside of the Marble Palace. As we shall see, *Milligan* came out the way it did not only because the justices sincerely preferred the derived outcome but because they thought that the president and Congress would not overturn their decision. In contrast, *McCardle* did not reflect the sincere preferences of the Court; instead it represented the best course of action the justices thought they could take in the face of a threatening political environment.

We develop our argument in the following steps. First, we review some of the traditional literature on the Court's role in a democratic society. Second, we present a theory in response to this literature, which takes into account the strategic context of judicial decision making. Third, we explore the model's predictions by examining a crucial series of post-Civil War Supreme Court decisions, from *Milligan* to *McCardle* and beyond. Finally, we consider ways that future researchers could put our argument to more general tests. Along the way, we hope to quell a traditional concern about the Court: that when it acts to protect minority interests, it necessarily does so in ways that subvert majority will, that it is a counter-majoritarian institution. We argue that the Court would rarely take this path for fear that its decisions would be overturned or its institutional integrity impeded by the elected institutions.

The Role of the Supreme Court in a Democratic Society

In resolving the *Milligan* and *McCardle* cases the Supreme Court took two very different actions. In the first, the justices opposed Lincoln's congressionally supported military policies and upheld the rights of an individual who espoused a particularly unpopular cause. In the second, the justices turned down William McCardle's petition, thereby reaffirming the pro-military policies of the Reconstruction Congress. As we noted earlier, these decisions illustrate two differing views of the Supreme Court's role in our society. One claims that the Court is part of *the ruling regime* and generally reinforces the policies of the legislative and executive branches. The other holds that the Court is an independent actor capable of playing a unique role as *a protector of individual and minority rights*.

The Ruling Regime Thesis

In his classic study of the Supreme Court's role, Robert Dahl (1957) advanced the ruling regime thesis. At the core of Dahl's argument is the assertion that the policy decisions of the Supreme Court will never be substantially out of line with those of the existing law-making majorities. Accordingly, the justices will usually reach decisions consistent with the preferences of the elected branches. The primary reason for this, Dahl argues, is quite simple. On average, presidents have the opportunity to appoint two new justices during the course of a four-year term. Presidents usually nominate justices with philosophies similar to their own, and the Senate generally confirms only nominees who have views consistent with the contemporary political mainstream. As a result of this regular turnover, the Court's majority rarely represents a political ideology in conflict with the president and Congress. That is why, Dahl explains, the Supreme Court does not often strike down federal legislation. Such laws reflect the positions of Congress, the president, and—by virtue of the regularity and nature of the appointment process—the Court as well. Under this logic, the Court almost never assumes an antimajoritarian role. Rather, it will typically represent and, therefore, legitimate the interests of the ruling regime.

The data Dahl invokes seem to support his argument. They show that between the 1780s and the 1950s the Court struck down relatively few federal laws and, when it did exert judicial review in this way, the action tended to come more than four years after the particular laws were passed. To Dahl this indicates that the Court is much more likely to strike down legislation passed by congressional majorities that are no longer in power than it is to void the acts of current legislative majorities. By striking down legislation more than four years after enactment, the Court may be reflecting the will of the new political majority that no longer desires the legislation enacted in earlier years (see Epstein and Walker 1993b, chap. 7).

Dahl renders moot any normative debate about what the role of the Court should be in a democratic society. Analysts no longer need worry about whether the Court should or should not act as a counter-majoritarian body because, at least according to Dahl, it will almost never take on this role. Rather, it will typically represent and, therefore, legitimate the interests of the ruling regime.

The Court's decision in *Ex parte McCardle* appears consistent with Dahl's thesis. The justices allowed the military policies of the incumbent Congress to stand against pleas made by an individual that the policy was violative of his constitutional rights. The Court supported the ruling regime.

The Minority-Protector Thesis

However persuasive Dahl's argument might be, it was not the last word on the subject. Some political observers view the Court in much different terms. Rather than subscribe to

Dahl's thesis that the Court inevitably falls into line with the elected branches of government, they argue that the Court is essentially an independent actor capable of challenging the political majorities and defending the rights of individuals and minorities. The Court's ability to play such a role flows from those constitutional provisions designed to ensure judicial independence, especially the life tenure without electoral accountability that federal judges enjoy.

Jonathan Casper, a political scientist, is one of the most prominent advocates of the independent actor thesis. Casper argues that Dahl's conclusions reflect an earlier era and cannot be generalized to the modern period. In an influential article published in 1976, Casper contends that the years immediately following the period Dahl studied gave witness to an entirely different court role. The Warren Court (1953-1969) hardly acted to protect the interests of the ruling regime; rather, in numerous decisions it served as a protector of minority interests. As Casper explains,

Dahl's article was published in 1957, appearing at the end of a decade that had seen one of our periodic episodes of national political repression. . . . The rulings of the Supreme Court in this period did not mark it as a bastion of individual rights standing against a fearful and repressive national majority. . . .

Since then, we have witnessed the work of the Warren Court. . . . The Warren Court, by general reputation at least, was quite different than most of its predecessors. Indeed, one associates with it precisely the characteristics that Dahl found lacking in the Supreme Court—activism and influence in national policy making and protection of fundamental rights of minorities. (Casper 1976, 52)

Surely, Warren Court decisions on such matters as school desegregation, obscenity, the rights of the criminally accused, school prayer, and reapportionment were often inconsistent with the preferences of the legislative and executive branches as well as the majority of the public. By the same token, the Burger (1969-1986) and Rehnquist (1986-) Courts that followed the Warren era handed down decisions on busing, abortion, flag burning, and affirmative action that *may* have generated social change but were often not supported by political majorities. Finally, members of the Burger and Rehnquist Courts were much more prone to strike down laws recently passed than were justices of earlier periods. It is just this kind of evidence that leads Casper and others to conclude that, contrary to Dahl's thesis, the Court does not inevitably act as a legitimator of the ruling regime. Rather, it is quite capable of protecting individuals and minorities against the actions of those in power.

Turning back to the Civil War era, we find that the justices' decision in *Ex parte Milligan* appears consistent with Casper's view of the Court. Here the justices behaved as independent actors, ruling against the preferences of Congress while protecting the rights of an individual representing a political minority.

Common Assumptions about the Role of Ideology

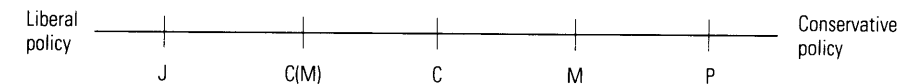
Dahl and Casper make diametrically opposed claims about the Court's role in American society. To Dahl, the nomination and confirmation process guarantees that the Court will operate as a majoritarian institution—one that reflects prevailing political preferences. To Casper, the selection process guarantees no such thing; rather, the Court is an important and independent actor, one that can protect minority interests against majority tyranny.

Despite these differences, Dahl and Casper operate under a common assumption about the nature of Court decision making: judicial decisions are a function of the political attitudes of the justices. That is, the justices do not make an a priori decision to legitimate the policies of the other branches or to assume the role of protector of minorities; rather, the role played by the Court is merely a byproduct of the ideologies of its members. For Dahl, the Court tends to reinforce prevailing political majorities because the selection process is biased in favor of choosing justices who have political attitudes consistent with those of incumbent presidents and legislators. For Casper, the justices are capable of defending the rights of minorities because they are free to act in accordance with their own political ideologies and need not respond to the views of other officeholders or of public opinion.

That Dahl and Casper agree about the nature of judicial decision making and its effect on the Court's role is not too surprising. Their views are based on a movement of the 1950s—behavioralism—that has had an enormous influence in political science and that has been transported to the study of courts in the form of the attitudinal model.³ In this model, cases raise issues on which the justices have established political attitudes. Those attitudes, in turn, trigger a behavior—a judicial vote. In other words, justices base their decisions solely on the facts of cases in light of their ideological attitudes and values. They are “single-minded seekers of legal policy” whose ideologies dictate their votes (George and Epstein 1992, 325). Or, as two leading proponents of the attitudinal model put it, “Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal” (Segal and Spaeth 1993, 65). Thus, this “attitudinal” approach focuses exclusively on the ideologies of the justices. It leaves no room for the role of other institutions, such as Congress or the president; Rehnquist will take the conservative position and Marshall will take the liberal one, regardless of where Congress or the president stand on a particular issue.

Taken along with the perspectives of Dahl and Casper, then, the traditional argument about the Court's role in society comes together in the following way: whether the Supreme Court acts to protect minorities or supports the ruling regime depends exclusively on the political attitudes of the Court's majority. In short, ideological attitudes drive the role the Court will play, and not vice versa. Or, as Segal and Spaeth (1993, 332) assert, “not only judicial restraint, but also judicial activism, serve only to cloak the individual justices' policy preferences.”

Figure 14-1 Hypothetical Distribution of Preferences



Source: Adapted from Eskridge 1991a, 1991b.

Note: J=majority of Supreme Court; C(M)=committees' indifference point; C=relevant congressional committees; M=median member of Congress; P=president.

To see the implications of the attitudinal approach to the Court's role, consider Figure 14-1.⁴ On the horizontal line—which represents possible interpretations the Court could give to, say, a civil rights statute ordered from most liberal to most conservative—we place the preferences of several key political actors. We denote the Court's and the president's most preferred positions as “J” and “P,” respectively. “M” signifies the preferred position of the median member of Congress and “C” of the congressional committees with jurisdiction over civil rights bills.⁵ “C(M)” represents the committee's indifference point “where the Court can set policy which the committee likes no more and no less than the opposite policy that could be chosen by the full chamber” (Eskridge 1991a, 378; see also Eskridge 1991b). To put it another way, because C(M) and M are equidistant from C, the committee likes C(M) as much as it likes M; it is indifferent between the two.

As we can see, the Supreme Court is to the left of Congress, the key committees, and the president. This means, in this illustration, that the Court favors more liberal policy than do the other institutions. Now suppose that the Court has a civil rights case before it, one involving the claim of a woman who says that she has been sexually harassed at her place of employment in violation of federal law. How would the Court decide this case? In Dahl's and Casper's “attitudinal” approach the justices would vote exactly the position shown on the line; they would set the policy at J. They would vote their “attitudes,” even though they would know that the threat of congressional reaction loomed large. That is because the policy articulated by the attitudinally driven Court would be to the left of the indifference point of the relevant committees, giving them every incentive to introduce legislation lying at their preferred point of C. Congress would support such legislation because it would prefer C to J, and the president would sign it because he too likes C better than J.

If the Court risked congressional reversal and merely voted its attitudes, as Casper, Dahl, and Segal and Spaeth predict, it would be (at least in this example) supporting Casper's version of the Court's role in our society: the Court would be protecting the woman—a minority interest—in a civil rights case. In response, scholars like Dahl would simply argue that the Court is temporarily out of step with the majoritarian institutions because of some fluke—such as an unusually long period of time without a presidential

appointment to the Court, a realigning election, and so forth. In such a situation, Dahl might argue, the justices will continue to vote their attitudes, fully aware that Congress could and probably would reverse the Court's position. In time, however, the periodic replacement of justices would bring the Court back into line with the elected branches.

A Rational Choice View of the Court's Role in American Society

A natural question emerges from our portrait of the attitudinal approach to the judicial role: Why would the Court take a position that Congress would overturn? The answer that attitudinalists provide is a simple one: justices are "single-minded seekers of legal policy" whose ideology dictates their votes. They will always vote their sincere preferences regardless of the positions of their colleagues or pressure from outside forces.

Our argument is that this perspective often fails to capture the realities of Supreme Court decision making and, accordingly, of the Court's role in American society. If justices are "single-minded seekers of legal policy," would those justices not care about the ultimate state of that policy? To rephrase the question, why would justices who are policy-maximizers take a position they know Congress would overturn? To argue that justices would do this—merely vote their attitudes—is to argue that the Court is full of myopic thinkers, who consider only the shape of policy in the short term. It is also to argue that justices do not consider the preferences of other political actors and the actions they expect others to take when they make their decisions and simply respond to stimuli before them. Such a picture does not square with much important writing about the Court (Eskridge 1991a, 1991b; Howard 1968; Murphy 1964; Pritchett 1961; Rodriguez 1994) or with the way many social scientists now believe that political actors make decisions (see, for example, Ordeshook 1992).

We thus reject this attitudinal vision and propose a rational choice one in its stead. Many rational choice theories of judicial decision making begin with the same assumption as that of the attitudinal model—that justices are goal-directed, single-minded seekers of legal policy (Eskridge 1991a and 1991b).⁶ But, from there, the two approaches veer away from each other dramatically (see Knight and Epstein 1994). Unlike the attitudinal approach, choice theories of judicial decisions emphasize that these goal-directed actors operate in a *strategic* or interdependent decision-making context. The justices know that their "fates" depend on the preferences of other actors—such as Congress, the president, and their colleagues on the Court—and the choices they expect these other actors to make, not just on their own preferences (see Ordeshook 1992, chap. 1).⁷

This notion of interdependent choice is important for the following reason. If justices really are single-minded seekers of legal policy, then they necessarily care about the "law" broadly defined. And if they care about the ultimate state of the law—about generating

legal policy that other institutions will not overturn—then they must act strategically, taking into account the preferences of others and the actions they expect others to take. Occasionally, such calculations will lead them to act in a sophisticated fashion (that is, in a way that does not reflect the justices' sincere or true preferences) so as to avoid the possibility of seeing their most preferred policy being rejected by their colleagues in favor of their least preferred one, of Congress replacing the justices' preference with its own, of political non-compliance, and so forth (Murphy 1964; Rodriguez 1994).⁸ In short, goal-oriented justices must—as Fairman (1971) put it—keep their watch in the halls of Congress and sometimes in the Oval Office of the White House.

In the final analysis, then, the rational choice theories of judicial decisions suggest that the Court will decide cases "with reference to the likelihood that its decisions will be reversed by another political institution."⁹ They highlight the fact that under a government system of checks and balances, goal-directed public officials, including Supreme Court justices, act strategically; they make their choices with some attention to the policy preferences of the other key political actors and the actions they expect those other actors to take. If they truly care about policy, in other words, they cannot—as the attitudinal school would argue—operate as if they were in a vacuum.

To see the implications of the rational choice theory of judicial decisions, return to Figure 14-1. Given the distribution of the most preferred positions of the actors in this figure, strategic justices—unlike attitudinal justices—would not be willing to take the risk and vote their sincere preferences: they would see that Congress could easily override the Court's position and that the president would support Congress. In fact, in this instance the rational course of action—the best choice for justices interested in policy—is to place the policy near C(M).¹⁰ The reason is simple: since the committees are indifferent between C(M) and M, they would have no incentive to introduce legislation to overturn a policy set at C(M). Thus, the Court would end up with a policy close to, but not exactly on, their ideal point without risking adverse congressional reaction.

Accordingly, rational choice arguments have an important implication for empirical and normative debates about the role of the Court in American society. They suggest that the Court will not often be significantly out of step with the other branches, but for reasons different from those offered by Dahl. Recall that Dahl argues that the Court will rarely strike down congressional legislation because the majority of the Court, the median member of Congress, and the president generally share the same values. Choice perspectives, in contrast, argue that because justices take into account the preferences of the ruling regime (even if they do not necessarily share those preferences) and of the actions they expect the regime to take, the Court's decisions typically will never be far removed from what contemporary institutions desire. (For circumstances under which this would not hold, see Eskridge 1991a, 1991b.)

Figure 14-2 Hypothetical Distribution of Preferences



Note: C(M)=committees' indifference point; J=majority of Supreme Court; C=relevant congressional committees; M=median member of Congress; P=president.

This does not mean, however, that the Court will never play the role of minority protector or that it will never strike down federal laws. Indeed, if the preferences of the contemporary regime and of the Court support those weapons, the Court will feel free to deploy them. Nor does it suggest that the Court can never vote its sincere preferences. An example of how both these possibilities could occur is shown in Figure 14-2. Given the displayed distribution of preferences, the Court would be free to set policy in a way that protects minority interests and that reflects its raw preferences. For if it voted its preferences (which are comparatively liberal) and set the policy at J, the relevant congressional committees would have no incentive to waste precious legislative resources to override the Court. Since $C(M) = J$, they would be indifferent between the policy preferred by the Court and that preferred by the median member of Congress.

To summarize, rational choice accounts of judicial decisions suggest that the role of the Court in American society is not simply a function of the preferences of the Court but also of the other relevant institutions and of the actions the Court expects them to take. The Court—comprised of strategic “single-minded seekers of legal policy”—prefers to avoid reaching decisions considerably outside the range acceptable to the legislature and the president. As strategic actors the justices realize that by doing so the ultimate state of the law could end up farther away from their ideal points than is necessary.

The Reconstruction Game

To illustrate the explanatory power of the rational choice approach, we consider two U.S. Supreme Court decisions—*Ex parte Milligan* (1866) and *Ex parte McCardle* (1869)—reached in the wake of the Civil War. This was a critical period in American history, one marked by a dramatic series of events involving all three branches of government. It began in April of 1865, with the South—represented by General Robert E. Lee—surrendering to General Ulysses Grant at the Appomattox court house. And it ended just a few years later in 1870, when all the Southern states were readmitted into the Union. In between, a president was impeached, the Southern states were put under military authority, and the Constitution was amended three times.

These events were dramatic indeed. But for our purposes, the most important of all the Reconstruction activities centered on and occurred within the Supreme Court of the United States. A political struggle was waged there over a policy issue of enormous importance: the extent to which the Constitution allows military jurisdiction over civilians in noncombat areas. With their 1866 decision in *Milligan*, the justices provided a sign of hope to the defeated Southern states; they indicated that they would be willing to protect individuals against congressionally approved military control. But in the 1869 *McCardle* case, the justices switched course and failed to block tough congressional Reconstruction measures; in other words, they served as legitimizers of the ruling regime.

How can we explain this turnabout? In what follows, we invoke the logic of rational choice theory to show that in *Milligan*, the justices were—given the configuration of the key political actors—able to vote their sincere or raw preferences (the J point in the figures). By the time of *McCardle*, however, those configurations had changed markedly, enough so that the justices could not vote sincerely without facing severe consequences. Hence, they acted in a sophisticated fashion in *McCardle*, reaching a decision that reflected political realities, rather than their raw preferences.

The Milligan Decision

The Court's decision in *Ex parte Milligan* came at the onset of the Reconstruction period, although the case itself started even before the Civil War had ended (see Table 14-1). In October 1864, military authorities in Indiana, acting under the presidential proclamation of 1863 (which, pursuant to the Habeas Corpus Act of 1863, permitted the president to suspend the writ of habeas corpus in certain areas), arrested Milligan for inciting insurrection and assisting the enemy. A military commission found him guilty and sentenced him to be hanged on May 19, 1865 (for more details see Nevins 1987). In the meantime, events of great moment were occurring. The Civil War ended and, with Lincoln's assassination, the nation saw the ascension of a new president, Andrew Johnson.

At first, it seemed that Johnson would take a hard line on the sort of treasonous activity Milligan committed (Fairman 1971, 197-199). Indeed, he had been in office less than a month when he sustained Milligan's execution order. But that did not stop Milligan's lawyers from seeking further recourse. Eight days after Johnson's action, they sought a writ of habeas corpus in a federal court in Indianapolis, grounding their request in the 1863 Habeas Corpus Act. This law, as we noted above, permitted the president to suspend the writ of habeas corpus during times of rebellion, but, at the same time, it had a provision that allowed for the release of prisoners (like Milligan) if a grand jury did not issue an indictment (see Hughes 1965, 585). Since no indictment was returned against Milligan, his lawyers argued that he should be tried in a civilian court. The lawyers also suggested that the federal government could not try Milligan before a military tribunal when the civil

Table 14-1 Key Events Leading Up to *Ex parte Milligan*

Date	Event
Mar. 3, 1863	Congress passes the Habeas Corpus Act of 1863, which serves as the basis for <i>Milligan</i> .
Sept. 15, 1863	Pursuant to the 1863 Habeas Corpus Act, Lincoln suspends the writ and declares martial law in effect throughout the United States. Milligan arrested.
Oct. 5, 1864	Milligan is tried before a military commission and sentenced to be hanged on May 19, 1865.
Oct. 21, 1864	Lee surrenders to Grant at Appomattox Court House.
Apr. 9, 1865	Lincoln dies; Andrew Johnson becomes president.
Apr. 15, 1865	Johnson sustains order that Milligan be executed.
May 2, 1865	Milligan's attorneys seek a writ of habeas corpus in a federal circuit court.
May 10, 1865	Circuit court judges certify questions in <i>Milligan</i> to the U.S. Supreme Court.
May 16, 1865	Johnson begins his "restoration" policy.
May 29, 1865	Justice John Catron dies.
May 30, 1865	Start of the Thirty-ninth Congress. With the exception of Mississippi, all Southern states have met Johnson's requirements for readmission into the Union; they send delegations to Congress, but Congress refuses to seat them.
Dec. 4, 1865	Congress establishes the Joint Committee on Reconstruction, with Radical Republican Thaddeus Stevens named as head.
Dec. 14, 1865	Lyman Trumbull, chair of the Senate Judiciary Committee, introduces the Freedmen's Bill and the Civil Rights Bill.
Jan. 15, 1866	Freedmen's Bill passes in Senate and House on straight party votes.
Feb. 4, 1866	Johnson vetoes Freedmen's Bill.
Feb. 19, 1866	Senate cannot override Johnson's veto of Freedmen's Bill, Johnson's last major legislative victory.
Feb. 20, 1866	Court hears arguments in <i>Milligan</i> .
Mar. 5-13, 1866	Congress passes Civil Rights Bill.
Mar. 13, 1866	Johnson vetoes Civil Rights Bill.
Mar. 27, 1866	Court announces, without reasons, its decision in <i>Milligan</i> .
Apr. 3, 1866	Congress overrides Johnson's veto of the Civil Rights Bill.
Apr. 9, 1866	Report of the Joint Committee on Reconstruction issued.
June 20, 1866	Congress passes revised Freedmen's Bill.
June 26, 1866	Johnson vetoes new Freedmen's Bill, and Congress overrides Johnson's veto.
July 16, 1866	Congress reduces size of Supreme Court; Johnson will be unable to replace Catron or James Wayne, when he dies on July 5, 1867.
July 23, 1866	Johnson organizes National Union party to offset Radical Republicans in Congress.
Aug. 14, 1866	Radical Republicans are big winners in 1866 elections; they now have sufficient votes to ensure successful veto overrides.
Fall 1866	Start of second session of the Thirty-ninth Congress, which debates numerous Reconstruction proposals.
Dec. 3, 1866	First motion to attempt to impeach Johnson is made; it fails. Court issues formal opinions in <i>Milligan</i> .
Dec. 17, 1866	

courts were open and functioning, as they were in Indiana.

The particular circuit court that heard Milligan's dispute was composed of District Judge David McDonald and U.S. Supreme Court Justice David Davis.¹¹ Both were obviously upset by the case; they went so far as to send a letter to President Johnson, begging him to intercede and stop the execution (Fairman 1971, 197-199). Whether or not they received a response is unclear;¹² what we do know is that Davis, in particular, had such "hatred" of the "arbitrary arrests" at issue in *Milligan* that he was "determine[d] to rid the land of them forever." To this end, he sought to ensure that the case would reach the Supreme Court (Hughes 1965, 585-586) by asking it to resolve the three key questions *Milligan* raised:

1. On the facts stated in the petition and exhibits, ought the writ of habeas corpus to be issued?
2. Ought Milligan to be discharged?
3. Did the military commission have jurisdiction legally to try and sentence Milligan?

While Milligan awaited Supreme Court action, the political environment was undergoing substantial change: President Johnson began to lose political support. His downfall began when, at the time the circuit court was considering the charges against Milligan, he proposed a plan for the defeated states (see Table 14-1). Called "restoration," the proposal involved a series of measures designed to bring the South back into the Union swiftly and graciously. "[I]n broad outline," Johnson's call for "restoration" was similar to the plan Lincoln was contemplating at the time of his assassination (Kelly, Harbison, and Belz 1991, 324).

Perhaps that is why, at least initially, restoration received a warm reception in Congress (see Fairman, 1971, 105), despite the fact that Johnson was a Democrat and Congress Republican. As historians now tell it, "[p]olitical circumstances favored Andrew Johnson on his accession to the executive office in April 1865." At the time,

[m]ost Republicans were moderates who wanted to secure the results of the war by guaranteeing genuine freedom to emancipated slaves and by excluding leading Confederates from reconstruction politics. Convinced of the soundness and virtue of their party's free-labor, free-speech, and equality-before-the-law principles, they wanted to extend these principles to the South. Their purposes were to republicanize the region, unite the nation, and secure political control of federal and state governments for their party. But the main body of Republicans was averse to political, social, and economic revolution in the South, and was prepared to accept the leadership of the new president in the initial stages of reconstruction (Kelly, Harbison, and Belz, 1991, 324).

By the end of 1865, however, relations between the president and Congress began to sour. Apparently believing that they had met Johnson's criteria for readmission into the

...k, a close friend of Justice Davis) (1887, 159) later called a “very good” under question. As Rehnquist (1987,

...f Kentucky, surely one of the nation’s ...ar the president was “the sole judge of ...t the war his power must be without ...h as the right to jury trial, “these, in ...e silence amidst arms.”

...vernment opened the door for the ...s of congressional power in Re- ...*Milligan* the justices simply were ...try civilians living in states where ...esented them the opportunity— ...nd of Reconstruction by military ...all eyes in Washington, D.C., were

...pproach to judicial decision mak- ...in regard to military involvement ...ation we collected to locate those ...at the Court would go along with ...es had been appointed by Lincoln, ...s, at least during the war. But that ...nson’s restoration plan was quite ...sidents, unlike the Radical Repub- ...ever-loyal Unionists” in the South ...03). Apparently, two of Lincoln’s ...views (see Table 14-2). They were ...paired—but not at the expense of ...a the Court four holdovers from ...ments of the Radical Republicans ...k with certainty the attitudes of all ...seems clear that a majority of six ...Nelson, and James M. Wayne) or ...ilitary involvement in states where ...had been part of the Confederacy. ...t stop with identifying the prefer-

Table 14-2 Background Information of the Justices: Preferences before *Ex parte Milligan*

Justice (party)	Appointing president	Position before <i>Milligan</i>
Chase (Rep.)	Lincoln	Even members of the Lincoln administration were "apprehensive [that] Chase will fail . . . on the question of habeas corpus and State arrests" (Warren 1926, 420). Also, in a December 11, 1865, diary entry, Chase writes that he had dinner with Thaddeus Stevens and could "not adopt Stevens view about holding States as Territories . . ." (Fairman 1971, 118-119). Still, because there was "no man with more fierce aspirations than Chase," who was perceived to use the Court "to promote his personal ends," his vote was unpredictable (Warren 1926, 420).
Clifford (Dem.)	Buchanan	A "holdover appointee of pro-Southern Democratic President" (Hughes 1965, 582); his "adherence to Democratic fundamentalism was beyond question" (Fairman 1971, 509).
Davis (Rep.)	Lincoln	His "hatred of such 'arbitrary' arrests [as the one at issue in <i>Milligan</i>] led him to determine to rid the land of them forever. As Circuit Judge [in <i>Milligan</i>] he made certain that the case would come to the Supreme Court" (Hughes 1965, 585-586; see also Fairman 1971, 61, for a letter Davis wrote in which he "comments disapprovingly" on restoration plans for the South).
Field (Dem.)	Lincoln	He "made no attempt to conceal his narrow view of the powers which he felt the Constitution allowed the national government in peacetime" (Hughes 1965, 582-583). In his view, "recreminatory acts against the South—such as . . . governing them by arbitrary military tribunals . . . were to be deplored and to be checked wherever possible" (Swisher 1963, 165).
Grier (Dem.)	Polk	A "holdover appointee of pro-Southern Democratic President"; he "was closely attached to the pro-Southern wing of the Democratic Party and its pre-war leader . . . former President James Buchanan" (Hughes 1965, 582).
Miller (Rep.)	Lincoln	Although Miller's correspondence shows disdain of some Radical Republican plans (see Fairman 1971, 124-125), he was considered a "safe" vote for congressional authorization of military reconstruction.
Nelson (Dem.)	Tyler	A "holdover appointee of pro-Southern Democratic President"; "Even during the war [he] actively opposed the Republican's conception of the extent of the national government's legitimate area of power" (Hughes, 1965, 582).
Swayne (Rep.)	Lincoln	A "safe" vote for the Radical Republicans; his son was an agent of the Freedmen's Bureau; and he "maintained political connections . . . with the radicals" (Hughes 1965, 583).
Wayne (Dem.)	Jackson	Although he was "somewhat of a nationalist," he was also a strong States Rights Democrat. He "could scarcely be expected to view with pleasure any stern measures imposed upon his native South in peacetime" (Hughes 1965, 582).

ences of the Court; we must also consider those of the other involved political actors. For what good would it do the Court to rule in favor of *Milligan* if Congress had the desire and the ability to override (or alter) it and the president would sustain congressional action? This was a particularly important consideration given the context of the times—a period during which the Court was trying to regain its credibility. As Hughes (1965, 581) put it, "Not only was the Court's influence probably at an all time low during the period from its ill-fated 1857 decision in the *Dred Scott* case through the Civil War, but the Court was widely distrusted even by moderate Republicans."¹³

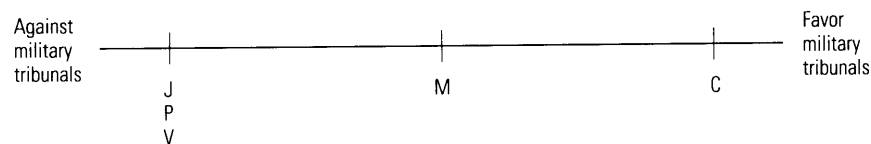
To locate the preferences of the other key relevant actors, we begin with the policy space depicted in Figure 14-3, one centering on military jurisdiction over civilians.¹⁴ Based on the above discussion, we place the president quite close to the Court (he vetoed the Freedmen's Bill on the ground that military tribunals violate the Constitution), the median member of Congress to the right of the president (Congress passed the Freedmen's Bill),¹⁵ and the relevant committee chairs (for example, Trumbull and Stevens) farthest to the right (they were the ones who pushed for Reconstruction legislation). Finally, "when the president is aligned with the Court [as he is in our Figure 14-3], a new point becomes relevant—"the pivotal veto member," namely, that point in each chamber for which one-third of the legislators are on one side, and two-thirds on the other" (Eskridge 1991a, 381). Given the political environment under which the Court heard *Milligan*, we place the pivotal veto member close to the president and the Court (recall that the Senate could not override Johnson's veto of the Freedmen's Bill).

In this version of the Reconstruction game, the Court is free to vote its sincere preferences. The committee chairs obviously will not like the decision, but they will not propose legislation to override it (or otherwise to impinge on the institutional integrity of the Court), for Johnson would veto it. And, given the point of the pivotal veto member, the key congressional players would be unable to obtain a successful override.

Hence, the model predicts that the Court will vote its unconstrained preference and the key committee chairs will not attempt to override its decision. This, at least initially, is what happened. On the last day of its term (April 3, 1866), the Court announced its holding in *Milligan*: "the writ of habeas corpus should be issued; petitioners ought to be discharged according to the Act of March 3, 1863; the military commissions had been without jurisdiction." In other words, it handed *Milligan* a rather complete victory. But, at the time, the Court provided no justification for its decision. Chief Justice Chase announced that the opinions would be issued next term "when such of the dissenting judges as see fit to do so will state their grounds of dissent" (Fairman 1971, 143-144).

The full opinions did follow in December 1866, but no dissents were issued. Instead, four of the justices filed a concurring (or, at most, a partial dissenting) opinion, disagreeing only with the breadth of the decision and not the result.¹⁶ As Urofsky (1988, 464) put it,

Figure 14-3 Distribution of Preferences at the Time the Court Heard *Ex parte Milligan*



Note: J=majority of Supreme Court; P=president; V=pivotal veto member; M=median member of Congress; C=relevant congressional committees.

All the justices agreed that the military court had failed to live up to the terms of the 1863 act. While the President certainly had a right and a duty to suspend habeas corpus where the civil courts were closed, he could not do so where they remained opened. . . . The justices divided, however, over who had the power to decide when a crisis justified the expediency of imposing martial law. [For the majority] Justice Davis . . . noted that a military commission did not meet the constitutional description of a court created by Congress, and he doubted that Congress had the power to create such tribunals.

The separate opinion, written by Chief Justice Chase “claimed Congress did have the power to determine when military justice should be established in areas remote from the actual theater of war” (Urofsky 1988, 464).

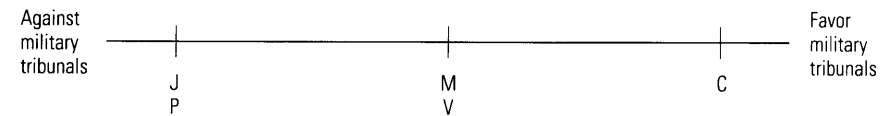
Of course, the content of these opinions was unknown in April 1866; only the Court’s short order had been made public. Did Congress or other relevant actors respond to this order? Our model predicts that they would not—or, more pointedly, that Congress would not attempt to override it. And that, at least in the spring of 1866, was the case. As Fairman (1971, 144) writes, the Court’s order in *Milligan* “occasioned little notice at the moment.” He posited two explanations for the lack of attention. First, “[t]here was no knowing what ground the opinion would take, or what might be said in dissent.” Second, the Radicals had managed to pass the Civil Rights Bill (described above), but Johnson had vetoed it. The attention of Congress was focused on efforts to override the veto.

By issuing the orders it did, the Court took the rational course of action in the spring of 1866. It voted its preferences believing that Congress would not enact legislation to override *Milligan*. Key to this reasoning was the fact that President Johnson generally supported the Court’s position and the Radicals had yet to demonstrate that they had sufficient strength to override any presidential veto. Consequently the president’s ever-growing opposition to Radical initiatives provided a measure of protection for the justices.

From Milligan to McCardle

Between the spring and summer of 1866, before the Court issued its full opinions in *Milligan*, the political situation worsened considerably for President Johnson and, ulti-

Figure 14-4 Distribution of Preferences after the Fall Elections of 1866



Note: J=majority of Supreme Court; P=president; M=median member of Congress; V=pivotal veto member; C=relevant congressional committees.

mately, for the Court. As shown in Table 14-1, the Radical Republicans were beginning to show some muscle: they overrode Johnson’s veto of the Civil Rights Bill and passed a revised version of the Freedmen’s Bill, again over Johnson’s veto. So, too, they managed to enact a bill reducing the size of the Court so that Johnson would be unable to replace Justice John Catron (who had died before *Milligan*) and would be unlikely to make any future appointments.¹⁷ Finally, and most important, in the fall elections of 1866 Johnson’s supporters lost a substantial number of seats, despite the president’s attempts to garner votes for members of the newly formed National Union Party (a vehicle designed to counter the Radical Republicans). Indeed, the results for the Republicans in the autumn elections represented to that time “the most decisive and complete victory ever won in American politics” (Fairman 1971, 133). In each house of the Fortieth Congress the ability to override presidential vetoes would no longer be hit or miss: the two-thirds majority required to override a veto was clear and convincing.

The importance of this election cannot be sufficiently stressed. As we note in Figure 14-4, it changed the preference configuration. No longer would Johnson have any chance of successfully vetoing congressional legislation. Reconstruction would now lie in the hands of the Congress, not the president. This became apparent immediately. Although the Fortieth Congress would not meet until March 1867, the Radicals—buoyed by their electoral success—in December devised numerous measures to “reconstruct” the South in accordance with the state suicide theory. In other words, most of the contemplated proposals centered on imposing military authority over the defeated region.

It was in the midst of these congressional debates that the Court handed down its formal opinions in *Milligan*. Of course, given the distribution of preferences revealed in Figure 14-4, it is tempting to say that the Court never would have reached the decision it did had it not issued the order in April 1866. The political environment had changed that much. What looked to be a rational course of action in April 1866 was, by December of that year, one that begged for congressional response. For, “[i]n the context of the moment, the opinion came as a shock, a breach of the comity between the Court and Congress. It gave warning that as Congress was about to deal with intransigent Southern States

supported by the president, it must reckon with an unfriendly Court” (Fairman 1971, 236). Radicals asserted that the Court had now “joined hands with President Johnson in an effort to destroy the Congressional plans for Reconstruction” (Warren 1926, 447).

President Johnson continued to oppose the Congress with unprecedented vigor, but also with a spectacular lack of success. During his four years in office, Johnson vetoed twenty-one bills; fifteen of those vetoes were overridden by the Radicals. The overrides included all of Johnson’s vetoes of important legislation: the Civil Rights Act, the revised Freedmen’s Bill, the Tenure of Office Act, the Reconstruction Act and all the Supplemental Reconstruction Acts, and various state admission laws. By comparison, the sixteen presidents serving before Johnson had cast only thirty-six regular vetoes and had experienced only six congressional overrides (and five of those were suffered by a single president, John Tyler). The consequences for the Court were disastrous. No longer could the president be considered a protector, or even a viable ally. His veto power was not a realistic buffer against congressional reaction.

Worse yet, with the issuance of the *Milligan* decision, the Radicals saw the Court as being in league with Johnson. The opinions unleashed a furor of Republican emotions, with the Radical Republican press predicting the worst for the justices. As one editor noted, “Every Republican member of Congress with whom I have conferred on the subject is out and out for abolishing the Supreme Court at once, upon the ground that if Congress does not abolish it, it will abolish Congress, for the president stands ready to execute its nefarious decision with an iron hand” (Fairman 1971, 221-222).¹⁸ “These accounts,” according to Warren (1926, 445-446) “were not exaggerated; for the reports of statements made by the president that the Supreme Court was prepared to follow its *Milligan* decision to its logical consequences and to hold unconstitutional any legislation which contemplated the government of the Southern States by military force, aroused the Republican leaders to a consideration of means of curbing the Court.” This was so even though *Milligan* dealt only with the use of military tribunals in states where the civilian courts were functioning, not in the defeated region—and only with executive power at that. But members of Congress thought it denied their institution the power to authorize military commissions in the South (see Fairman 1971). Given this interpretation, Congress was more than a bit concerned that the Court would strike down the Reconstruction proposals it was in the process of considering—many of which called for military authority in the Southern states.¹⁹

Accordingly, as Warren (1926) indicates, legislators considered numerous proposals to curb the Court.²⁰ For example, on January 21, 1867, one member of Congress introduced a bill to require a unanimous vote by the Court to invalidate a federal law; the next day a proposal was offered that would have excluded from the federal bar those guilty of a felony or who helped in the rebellion.

Although Congress did not immediately take any of these steps, it may have been attempting to signal the justices of its displeasure with the *Milligan* ruling and to show them the necessity of voting strategically (not sincerely) should the issue arise again. If this was the case, the signal was picked up clearly by members of the Court. For during the spring of 1867 the Court “transformed its stance from one of belligerent assertiveness to one of retiring prudence” (Hughes 1965, 588).²¹ For example, in April the Court handed down *Mississippi v. Johnson* (1867), followed in May by *Georgia v. Stanton* and *Mississippi v. Stanton* (1868).²² In these decisions the Court held that it had no jurisdiction to rule on the constitutionality of Reconstruction Act enforcement.

With these signals apparently sent and received, Congress turned to the real business at hand: dealing with the Southern states. To this end the first months of 1867 saw a wave of legislation passed—all of which Johnson vetoed and Congress overrode. The most important piece was the Military Reconstruction Act of 1867. This act divided the Southern states into five military districts, each governed by a military general. These military governments were given the authority to hold trials and punish offenders.

At the time this act was passed, many observers and members of Congress thought that it overrode *Milligan*. In the wake of its passage, one editor wrote that “[t]he Supreme Court is literally dead. So dead—and so proved to be by numerous events of late—that it is utterly impotent against Congress. . . . Congress does not intend that the Supreme Court shall obstruct its policy. The impotency of that tribunal alone protects it from an act for its reorganization” (Fairman 1971, 314). That Congress took this step, again, is hardly surprising, given the configuration of preferences displayed in Figure 14-4; in fact, it is exactly what rational choice accounts would predict. Congress had the desire and the wherewithal to overcome the Court, and it did.

Ex parte McCardle

As indicated in Table 14-3, about the time Congress passed the Military Reconstruction Act, it also enacted the Habeas Corpus Act of 1867. Seemingly trivial in comparison to the Military Reconstruction Act, this piece of legislation actually served as the catalyst to *Ex parte McCardle*, one of history’s most important showdowns between Congress and the Court.

As its name suggests, the Habeas Corpus Act of 1867 centered on writs of habeas corpus, a subject of some familiarity to Congress. In fact, in one of its first major acts—the 1789 Judiciary Act—Congress sought to codify the writ, as guaranteed in the U.S. Constitution (Article I, Section 9).²³ Under the 1789 act and subsequent legislation, however, access to the federal courts on habeas corpus grounds was very limited, especially for those persons incarcerated by state officials (see Van Alstyne 1973). No explicit appellate jurisdiction had been granted to the Supreme Court to hear habeas corpus cases, but the Court

Table 14-3 Key Events Leading Up to *Ex parte McCardle*

Feb. 5, 1867	Congress passes the Habeas Corpus Act of 1867.
Feb. 20, 1867	Both Houses pass the Military Reconstruction Act of 1867.
Mar. 2, 1867	Johnson vetoes the Military Reconstruction Act; Congress overrides Johnson's veto. Thirty-ninth Congress adjourns.
Mar. 4, 1867	The Fortieth Congress convenes nine months ahead of schedule to continue to control Reconstruction and weaken Johnson's control; passes several laws designed to curb presidential power.
Mar. 11, 1867	Johnson acquiesces to Congress and appoints commanders for the five military districts specified in the Military Reconstruction Act.
Apr. 15, 1867	In <i>Mississippi v. Johnson</i> , Court dismisses a challenge to presidential enforcement of the Reconstruction Act.
May 13, 1867	In <i>Georgia v. Stanton</i> , Court dismisses a second challenge to enforcement of the Reconstruction Act.
Spring 1867	House begins to investigate Johnson to see if grounds for impeachment exist.
July 5, 1867	Justice Wayne dies; under the terms of a judicial act of July 23, 1866, the Court remains at eight members.
Nov. 8, 1867	McCardle arrested; a military commission is directed to convene and try him on November 20, 1867.
Nov. 11, 1867	McCardle's counsel seek writ of habeas corpus in circuit court under Habeas Corpus Act of 1867.
Nov. 25, 1867	Circuit court rules against McCordle; he is released on bail pending his direct appeal to the U.S. Supreme Court.
Dec. 23, 1867	McCardle's attorneys file case in U.S. Supreme Court.
Jan. 1868	Various Court-curbing bills proposed in Congress by Trumbull and others.
Jan. 13, 1868	House passes bill that would have required a two-thirds majority on the Court to strike congressional legislation.
Jan. 21, 1868	Trumbull files motion in Court that justices should dismiss <i>McCardle</i> for lack of jurisdiction.
Jan. 31, 1868	Court hears arguments on whether <i>McCardle</i> should be dismissed for lack of jurisdiction.
Feb. 17, 1868	Court rejects Trumbull's motion; <i>McCardle</i> will advance. Trumbull proposes bill in Congress to remove Court's jurisdiction over Reconstruction cases.
Feb. 24, 1868	House votes to impeach Johnson.
Mar. 1868	Senate prepares for Johnson impeachment trial with Chief Justice Chase presiding. The case is heard from March 30, 1868 to May 16, 1868.
Mar. 2-9, 1868	Court hears arguments in <i>McCardle</i> .
Mar. 12, 1868	Congress passes bill to repeal the section of the Habeas Corpus Act of 1867 that permits appeals to the Supreme Court (the repealer bill).
<hr/>	
Mar. 21, 1868	Court meets in conference to discuss <i>McCardle</i> ; over the dissents of Grier and Field it votes to postpone deciding the case until Johnson acts on the repealer bill.
Mar. 25, 1868	Johnson vetoes the repealer bill.
Mar. 27, 1868	Congress overrides Johnson's veto of the repealer bill.
Apr. 6, 1867	Supreme Court adjourns, announcing its decision to hold <i>McCardle</i> over until next term.
May 16-26, 1868	Senate fails to convict Johnson.
Summer 1868	Seven states readmitted to the Union.
Nov. 3, 1868	Republicans are big winners in 1868 elections; Ulysses S. Grant elected president by a landslide.
December 1868	Court sets rearguments in <i>McCardle</i> for March 19, 1869.
February 1869	Trumbull proposes and Senate passes bill to increase the Court's size and to relieve the justices of circuit court duty; passed by House on March 3, 1869.
Mar. 4, 1869	Grant sworn in as president.
Mar. 19, 1869	Court hears rearguments in <i>McCardle</i> .
Apr. 10, 1869	Bill to increase size of court and relieve justices of circuit duty is augmented with pension provision for the justices. Becomes law on this date.
Apr. 12, 1869	Court issues opinions in <i>McCardle</i> .

had occasionally decided such appeals using certiorari jurisdiction. The 1867 act expanded the habeas corpus role of the federal judiciary by stipulating that the federal courts had the power to grant writs of habeas corpus in *all cases* where *any person* may be restrained of his or her liberty in violation of the Constitution, laws, or treaties of the United States. Furthermore, the act conferred appellate jurisdiction in such cases on the U.S. Supreme Court.

Why would the Congress expand the Court's authority at a time when it was considering many pieces of legislation to curb it? The answer is simple:

The immediate concern was to enforce the grant Congress had made by a resolution to encourage enlistments, in 1865: where a slave volunteered, his wife and children should be forever free. But it was discovered that if the master still held them to service, the federal judiciary had no authority to issue habeas corpus. [In other words, this legislation was meant to help North, not South.] Accordingly, the House instructed its Judiciary Committee to report a bill, which it did . . . whose broad effect was "to enlarge the privilege of the writ of habeas corpus, and to make the jurisdiction of the courts and judges of the United States co-extensive with all the powers that can be conferred upon them." If the detention was in violation of some federal right, the writ was now available. Moreover, there was a direct line of "appeal" to the Supreme Court. (Fairman 1971, 448)

But, as Fairman notes (1971, 448): "Like the rain, the law impartially blesses the just and unjust. Congress had set out to protect the wife and children of the Negro soldier—and within the year 1867 counsel for ex-Confederate *McCardle* would grasp the statute in an effort to prostrate Congressional Reconstruction, and preserve white supremacy." In other words, the act was passed to protect blacks, but one of the first to take advantage of it was William *McCardle*, who was arrested in November 1867 by military authorities in Mississippi for publishing "incendiary and libelous" articles about Congress and Reconstruction. Under the Reconstruction legislation, a military commission was supposed to hear his case. But, using the 1867 Habeas Corpus Act, *McCardle* sought a writ of habeas corpus in circuit court, arguing that the Reconstruction Acts were unconstitutional. That court ruled against *McCardle*, so, under the terms of the 1867 act, his attorney sought relief in the U.S. Supreme Court. Congressional lawyers—including Trumbull, the chair of the Judiciary Committee and a Radical Republican—immediately countered that the Court should not hear the case for want of jurisdiction (see Table 14-3). Their particular argument was that the 1867 act did not "apply to this case, because that statute was intended to apply to prisoners of *state* officials; *McCardle* had committed a 'military offence,' and therefore fell" within an exceptional category. They further suggested that if the 1867 act "did not apply . . . the Court had no jurisdiction otherwise to review the case, since no such appellate authority was conferred by the Judiciary Act of 1789" (Schubert 1960, 279).

Unconvinced by Trumbull's argument, the Court agreed to hear the oral arguments in the case, setting the date for March 2, 1868. As Chief Justice Chase wrote, "Prior to the

passage of [the Habeas Corpus Act of 1867] this court exercised appellate jurisdiction over the action of inferior court by *habeas corpus* . . . aided by a writ of certiorari." He went on to provide examples of cases in which the Court had taken that very step.

The decision on the part of the justices just to hear arguments in *McCardle* once again unleashed a furor in Congress (see Table 14-3). On the very day the Court refused to dismiss *McCardle* for lack of jurisdiction, Trumbull proposed a bill that would, in essence, remove the Court's jurisdiction to hear cases growing out of reconstruction measures. This move was akin to the "cocking of a gun, audible in the nearby Supreme Court chamber" (Fairman 1971, 464). Moreover, talk of impeachment abounded (see Swisher 1963, 162, for an interesting story concerning Justice Field), and not just of Supreme Court justices. Shortly after the Court agreed to hear arguments in *McCardle*, the House voted to impeach President Johnson (see Table 14-3).

It was amidst this incredibly charged political environment that the Court heard arguments in *McCardle*. All in Washington recognized the importance of the case. To the Radicals, it provided the justices with a vehicle to eradicate their entire Reconstruction program; to President Johnson, whose impeachment proceedings were getting under way in the Senate at the very time the Court was hearing arguments (in fact, Chase had to leave in the middle of arguments to help the Senate prepare for the trial), it represented a potential source of vindication of his policies. The Court obviously understood these hopes and fears: it allowed six hours for each side to present its case (twice the normal amount).

Not surprisingly, then, the oral arguments were an extraordinary event. The several attorneys representing *McCardle* (including, once again, Justice Field's brother David Dudley Field) "professed to be 'extremely embarrassed' . . . because the case was so very simple, and the law [for example, *Milligan*] was all on his [*McCardle*'s] side!" (Fairman, 1971, 452). But their strategy "was nothing less than to free the Old South from the grasp of Congress: they did not aim merely to free *McCardle* from the general" (Fairman 1971, 456). More specifically, they presented the following arguments on behalf of *McCardle*:

1. Trial by court-martial infringed on his Fifth and Sixth Amendment rights.
2. Exigent circumstances did not warrant the use of martial rule and the suspension of the right to trial by jury.
3. Application of the Reconstruction Act to *McCardle*'s editorials would violate the First Amendment.
4. Much of the act of Congress of March 2, 1867, which placed the ten states under military jurisdiction, was itself unconstitutional (see Van Alstyne 1973, 238).

The government, represented again by Trumbull and others, found that the "Bench was not friendly." Trumbull's "main effort was to induce the Court to acknowledge that Congress in reconstructing the rebel States was exercising a power not subject to judicial con-

trol" (Fairman 1971, 454). Along these lines, the government reiterated its jurisdictional concerns.

In all of this, one might have expected a lively exchange between the attorneys and the justices. But this was not the case: "counsel arguing *McCardle* were not interrupted by questions from the bench. The issues were clear and familiar. One supposes that no Justice was still making up his mind" (Fairman 1971, 456). To push the observation one step farther, it is clear that the Court's preferences lay with *McCardle* (see Figure 14-4).²⁴

Congress, as well as the informed public, sensed that the Court was leaning toward a ruling for *McCardle*. One contemporary writer (a good friend of Chief Justice Chase) laid out the situation after oral argument this way:

The apprehension has been almost universal, among Republicans, that the decision [in *McCardle*] would pronounce the Reconstruction laws unconstitutional, and that, on the strength of this, Mr. Johnson would at once withdraw the troops from the Southern States. The current belief has been that five out of the eight Judges would so decide—Nelson . . . Grier . . . Clifford . . . Field, and Davis. Mr. Davis is known to have expressed disapproval of some of the reconstruction legislation; but it is not certain that he will go to the length of pronouncing it all unconstitutional. . . .

On the other hand, Justices [Noah H.] Swayne . . . and [Samuel F.] Miller . . . are believed to regard the reconstruction legislation as constitutional, and to be certain so to decide. Mr. Chief Justice Chase's position has been much questioned. . . . [I]t may be considered certain that he will take counsel . . . solely of his judgment and his conscience. But he is known to have said that the most ardent desire of his life was to see the Southern States restored to their normal relations to the Union, under the reconstruction policy of Congress. And in the decision in [*Milligan*], he has put on record his opposition to the trial of citizens before military courts, in time of peace. From these two facts it might perhaps be inferred that his decision would be adverse to the right of military trials, but not to the general reconstruction policy (Fairman 1971, 465)

Given this assessment, coupled with the preference distribution displayed in Figure 14-4 (which remained the same throughout this period), we should not be surprised that Congress reached the conclusion that the "Court must be curbed" (Fairman 1971, 461). To this end, it returned to Trumbull's proposal to take away the Court's jurisdiction in all Reconstruction cases. But instead of enacting it, in a "bit of craftiness" the Republicans proposed just to repeal the 1867 Habeas Corpus Act. Because they put the repealer in an otherwise "harmless and unimportant Senate bill to extend to the Court's appellate jurisdiction in cases involving customs and revenue officers" (Warren 1926, 474), the move flew through the Senate and House on March 12 virtually unnoticed.

But that invisibility did not last long. The Radical Republican press was giddy with delight: "The passage of that little bill which put a knife to the throat of the *McCardle Case* was a splendid performance. . . . Congress will not abandon its Reconstruction policy to please any Court, because it sincerely believes that the welfare of the Nation depends upon

the success of that policy" (Warren 1926, 476). Supporters of President Johnson were nervous. They suspected that he would veto the legislation, and that the timing would hardly be auspicious: the bill had passed the day before his Senate impeachment trial would commence. Moreover, they felt that it undermined the Court's authority. As one supporter had written in his diary: "By trick, imposition and breach of courtesy, an Act was slipped through both houses, repealing the [1867 Habeas Corpus Act], the effect of which is to take from the Supreme Court certain powers and which is designed to prevent a decision in the *McCardle Case*. Should the Court in that case, as it is supposed they will, pronounce the Reconstruction Laws unconstitutional, the military government will fall and the whole Radical fabric will tumble with it" (Warren 1926, 476).

Most important, for our purposes, was that the Court knew precisely what was happening; by March 21, 1868, when it was to decide *McCardle*, the justices were well aware of Trumbull's proposals to curb the Court, of the repealer bill, and of the fact that Johnson had not yet acted on it. What would the Court do? The answer to that question depends on one's perspective of judicial decision making. The attitudinal model would predict that the Court would merely decide the case in accord with the raw preferences displayed in Figure 14-4 and rule in *McCardle's* favor. Approaches grounded in assumptions of rationality, however, suggest that the Court would act in a way to avoid congressional override (or, as in this case, to avoid the severe institutional consequences of the sort Trumbull proposed).

In this particular instance, the choice approach yields the more accurate prediction. Despite the fact that Justices Field and Chase told intimates that all of the justices (except Swayne) wanted to decide the case in *McCardle's* favor at the March 21 conference (see Fairman 1971, 467-474),²⁵ the Court voted to postpone its final decision until the next term. The justices must have known, as did virtually all of Washington, that Johnson would veto the repealer bill (which he did, on March 25) and that Congress would override his veto (which it did on March 27). Had the Court decided the case *before* Johnson acted, they knew they would face a congressional override or, worse yet, legislation to curb the Court, proposals to impeach members, and so forth.

Thus, despite the existence of other options, the Court took the rational, not attitudinal, course of action (see, especially, Hughes 1965; Murphy 1964; Van Alstyne 1973, 244-247).²⁶ Of course, the move helped to avoid a collision with Congress (see Figure 14-4), but it also had an additional virtue: the Court knew that it would eventually obtain another case in which it could invoke its appellate jurisdiction, under the 1789 act and previous precedent, over habeas corpus cases. It made this quite clear when it eventually (in April 1869) issued a formal opinion in *McCardle*. Although the justices dismissed the case for lack of jurisdiction (and therefore conceded the constitutionality of the repealer act), the last paragraph of the opinion is instructive on this point:

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

In other words, the Court was attempting to have its cake and eat it too. It knew that it would lose to Congress in a battle over Reconstruction by military imposition. What's more, by the time the Court decided the case, the Reconstruction era was coming to an end; virtually all the Southern states had been readmitted to the Union and, thus, were no longer under military authority. So, in *McCardle*, it voted in a sophisticated fashion—with Congress. Still, the above paragraph shows that it had hope of reading its sincere preferences over habeas corpus into law in future cases. All it would take was a case grounded in the 1789 Judiciary Act, rather than the repealed 1867 law.

If that was the case, the Court did not have to wait very long. Just two months after the Court dismissed *McCardle*'s suit for lack of jurisdiction, Edward M. Yerger stabbed and killed Major Joseph Crane, an army officer assigned to act as mayor of Jackson, Mississippi. Since Mississippi was still under military rule, Yerger was tried by a military commission. His lawyers objected to this and sought a writ of habeas corpus in a federal circuit court. When that court denied their request, they appealed to the U.S. Supreme Court. There, "Yerger's lawyers picked up on Chase's suggestion in [the last paragraph of] *McCardle* and argued that the Supreme Court's appellate jurisdiction over habeas corpus derived not from the 1867 act, but from the Judiciary Act of 1789. The 1867 law merely amended and augmented the Court's power, and consequently, the 1868 repeal did no more than reduce the Court's authority to the 1789 limits" (Urofsky 1988, 468). In October 1869 the justices agreed. They made it clear that the "repealing statute took away only the jurisdiction conferred in 1867, not that which had been confirmed in 1789" (see Currie 1988, 306). In the final analysis, then, *Ex parte Yerger* (1869) provided the Court with the vehicle to etch its preferences in regard to habeas corpus into law while avoiding a battle with Congress about Reconstruction.

A reasonable question is why the Court would act this way, given the preferences of Congress. Did it not fear a congressional backlash? While it is true that members of Congress proposed several Court-curbing bills in the wake of *Yerger*, it was clear that their chances of passage were minimal, and the justices probably knew this. Why? What had changed between 1868 and 1869? For one thing, *McCardle* had shown the legislature that the Court would hardly make a contest with Congress. Even the Radicals no longer viewed the Court as a threat. Second, the Court's decision in *Yerger* had virtually no adverse effect on Reconstruction, since by then almost all the Confederate states had been readmitted

(see Warren 1926, 496). This significantly reduced the probability of an adverse congressional response. After all, Congress had engaged in battle with President Johnson and the Supreme Court in order to preserve Reconstruction policy—not because of any particular concern over appellate jurisdiction in habeas corpus cases (see Currie, 1985, 307; Kutler 1968, chap. 5).

Discussion

At the time the Court agreed to postpone a decision in *Ex parte McCardle*, anti-Radicals lambasted it. One member of Johnson's administration wrote: "The judges of the Supreme Court have caved in, fallen through, failed, in the *McCardle* case" (Schwartz 1994, 141). The former Supreme Court justice Benjamin R. Curtis agreed: "Congress, with the acquiescence of the country, has subdued the Supreme Court" (Schwartz 1994, 141). Even scholars have tended to concur with this view. As Schwartz notes (1994, 154): "The traditional view of the Supreme Court during the Civil War and Reconstruction has been that it played a more subdued role than at any time in its history—that it had been weakened, if not impotent, ever since the *Dred Scott* decision." As a result, "[b]iting criticism has been reaped on the Justices over the years for [their] refusal to meet the Radicals head-on in constitutional combat" (Murphy 1964, 194).²⁷

Here, we present a different view, one more in line with contemporary thinking about *McCardle* (for example, Currie 1985; Kutler 1968). By acting strategically, not attitudinally, the Court "performed like an expert, if aged, escape artist" (Hughes 1965, 595). It was able to stave off a major attack on its legitimacy while giving up—in light of *Yerger*—little. Or, as Murphy (1964, 194) put it:

Whatever doubts one might have about the courage or the ethics of *McCardle*, its prudence is not open to question. The Court emerged from this conflict somewhat battered but with its power basically intact. Although the justices submitted to temporary legislative domination, by maintaining their power potential they had helped insure that this domination would be short-lived. The Justices turned what threatened to be a battle of annihilation into a stinging and humiliating but still not disastrous defeat.

The Court's decisions in *Milligan* and *McCardle* illustrate that there are occasions when, in order to accomplish long-term policy goals and preserve the integrity of their institution, the justices must abandon the practice of deciding cases consistent with their political ideologies. This may be especially true in times of political crisis, when the legislative and executive branches are sufficiently aroused to use their constitutional powers to check the Court. Under such conditions the justices may act strategically, taking a step backward in order to preserve the ability of attaining long-term objectives. To be sure, as Murphy

(1964, 193-195) concluded, “[a]doption of this ‘passive’ alternative is hardly the sort of choice a Justice would make if he were free to act as he would prefer, but it may be the best choice available under particular circumstances.”

Notes

1. We derive this account from Epstein and Walker 1992, 199-200.
2. Habeas corpus is a legal procedure with roots extending back into English legal history. It permits an arrested person to have a judge determine whether the detention is legal. If the court concludes that there are no legal grounds for the arrest, it may order the release of the detained individual. Habeas corpus is essential to the doctrine of checks and balances because it gives the judiciary the right to intervene if the executive branch abuses the law enforcement power.
3. For more on the Supreme Court and the attitudinal model, see Chapter 13.
4. See also Ferejohn and Shipan 1989.
5. In denoting these preferred points of J, M, P, and C, we assume that the actors prefer an outcome that is nearer to that point than one that is further away. Or, to put it more technically, “beginning at [an actor’s] ideal point, utility always declines monotonically in any direction. This . . . is known as single-peakedness of preferences” (Krehbiel 1988, 263).
6. Accordingly, these rational choice accounts would concur with the assumption made by Dahl and Casper, namely, political preferences lead justices to act as restraintists or activists, and not vice versa.
7. In rational choice models of judicial decisions, thus, it is not enough to say, as the attitudinal mode does, that Justice X chose action 1 over action 2 because X preferred 1 to 2. Rather, the strategic assumption suggests the following proposition: Justice X chose 1 because X believed that the other relevant actors—perhaps Justice Y or Senator Z—would choose 2, 3, and so forth, and given these choices, action 1 led to a better outcome for Justice X than did alternative actions (see Ordeshook 1992, 8).
8. Not only can political actors pass legislation or propose constitutional amendments to negate Court decisions, but they also can take out their frustrations in other ways: alter the jurisdiction of the Court, reduce its budget, change its size, and even threaten to impeach (Murphy 1964). Justices who are concerned with policy obviously are in no position to make it if they are impeached or if their decisions are being overturned.
9. To be more precise and technical about it, rational choice approaches to judicial decision making assume that decision making is interdependent (see note 7), that institutions (or rules) influence individual actions, that actors are goal directed, and that actors make decisions that reflect their beliefs about the political context in which they operate—whether it favors, in their estimation, achievement of their goals or not (Eskridge 1991a and 1991b; Knight and Epstein 1994; see generally, Ordeshook 1992, 8-11).
10. Alternatively, the Court could try to persuade the committee to shift its preferences to the left. See Eskridge 1991a, 380.
11. The circuit courts did not have judges of their own. Instead, cases were decided by combinations of district court judges and Supreme Court justices. Consequently, it was a normal occurrence for a Supreme Court justice to hear a case in the lower courts. This practice ended in 1891 with the creation of the courts of appeals.
12. Weeks later, however, the president reduced the sentence to life at hard labor.
13. In *Scott v. Sandford* (1857), the Court struck down the Missouri Compromise (which had

been repealed by Congress prior to the Court’s decision), ruling that Congress did not have the constitutional power to regulate slavery in the territories. In so doing, the justices claimed that blacks could not be considered in a legal sense to be citizens of the United States. Not only do some scholars suggest that *Scott* was a cause of the Civil War but that it also severely strained the credibility of the Supreme Court for decades to come.

14. We assume that the key actors viewed this issue as separate from the one concerning the treatment of blacks. Evidence to support this comes from various sources, including this passage from a letter Chase wrote on September 1, 1868: “I hold my old faith in universal suffrage, in Reconstruction upon that basis, in universal amnesty, and in inviolate public faith; but I do not believe in military government for American States, nor in military commission for the trial of American citizens, nor in the subversion of the Executive and Judicial Departments of the General Government by Congress.”

15. To simplify matters, we treat the houses of Congress as one.

16. Justice Davis’s opinion for the majority was signed by four of the Court’s five Democrats (Clifford, Field, Grier, Nelson). Only Wayne broke party lines to sign Chase’s concurrence. For more on this point, see Currie 1985, 288-292.

17. In 1863 Congress increased the size of the Court to ten justices. The 1866 legislation reduced the size to seven, to be implemented by the future deaths or resignations of justices. The law was specifically enacted by the Republicans to deprive President Johnson of any influence over the Court’s membership. The Court never reached seven justices because in 1869, shortly after Ulysses S. Grant was elected to replace Johnson in the White House, Congress raised the size of the Court to nine, where it has remained.

18. Johnson, as indicated in Figures 14-3 and 14-4, was in full accord with the Court’s opinion. Right after the formal opinions came down, he issued an order dismissing all trials against civilians by the military “in Virginia and in other States in which the Republicans were claiming that a condition of war still existed” (Warren 1926, 442).

19. Indeed, just two days after the opinion came down, the Radical Thaddeus Stevens said that *Milligan* “showed that prompt legislation on the government of the rebel States was ‘absolutely indispensable.’” He also noted that *Milligan* “might appear ‘not as infamous as the *Dred Scott* decision,’ but in truth it was ‘far more dangerous’ by reason of ‘its operation upon the lives and liberties of the loyal men,’ black and white, in the South.” He then declared Congress to be “‘the sole guardian’ of the sovereignty of the people; no officer, from the President and the Chief Justice down, could do any act save as directed by the legislative power” (Fairman 1971, 267-68).

20. They also sought to curb the president. In January 1867 a resolution was put forth to investigate Johnson, with the eventual goal of impeaching him. Although this resolution failed, later efforts to accomplish the same end succeeded.

21. By the same token, several members of the Court were extremely distraught by congressional reaction to *Milligan*. See, in particular, Davis’s letter of February 24, 1867 (Fairman 1971, 231-234), and Field’s comments recorded in Swisher (1963, 152).

22. Although the Court announced its decisions in *Georgia v. Stanton* and *Mississippi v. Stanton* in May 1867, formal opinions were not issued until February 1868.

23. “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”

24. Furthermore, Fairman (1971, 467-474) reports that both Field and Chase told friends that the Court wanted to vote in favor of McCardle. See also Warren 1926, 480.

25. Again, these preferences seemed widely known in and outside of Washington. About the time of the Court’s conference, the *Boston Post*, for example, wrote that “[i]t is well ascertained that Justices Chase, Nelson, Grier, Clifford and Field believe the Reconstruction Acts to be unconstitu-

tional. . . . The decision is made up, and they have the power and the right to deliver it. Whether they have the nerve to be an independent Judiciary remains to be seen” (Warren 1926, 480 n. 2).

26. As Van Alstyne (1973, 244-247) and Fairman (1971, 449) point out, the Court could have (1) held that the provision for military trials was inconsistent with specific constitutional guarantees, without condemning the entire [congressional Reconstruction] scheme; (2) held that the repealer act was irrelevant, since it already had established its jurisdiction over the case; (3) held that the repealer act did not apply to *McCardle*, since it became effective only after the case had been heard on the merits. All these options, as Fairman and Van Alstyne acknowledge, would have provoked a congressional reaction.

27. *McCardle* has also generated an extensive scholarly literature on whether Congress can remove the Court’s appellate jurisdiction (see Berger 1969; Hart 1953; Ratner 1960; Sager 1981), and even debate among the justices (compare Harlan’s and Douglas’s opinions in *Glidden Co. v. Zdanok* [1962], where Harlan says that “Congress has consistently [with Article III] withdrawn the jurisdiction of the Court to proceed with a case then sub judice, *Ex parte McCardle*,” and Douglas asserts that “there is serious question whether *McCardle* could command a majority view today.”).