The Supreme Court and the Struggle for Judicial Independence, 1860-1873

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THE SUPREME COURT AND THE STRUGGLE FOR JUDICIAL INDEPENDENCE

1860-1873

By

JOHN FAY PHILBIN

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VITA

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CHAPTER I

THE COURT AND THE CIVIL WAR

The American Civil War and its aftermath was one of the great maturing processes in the history of the United States. This was, in a great part, due to the shocks and stresses it applied to our federal system of checks and balances. During the period from 1861 to 1873 these latter were strained to the furthest bounds of their flexibility.

The best known historical examples of this situation were the assumption of unparalleled executive power by President Lincoln during the war, and, of course, the celebrated "rule of Congress" in the Reconstruction period following.

During both these periods we have the third arm of government, the judicial, subjected in turn to the pressure of the other two. It was certainly the most difficult time in the history of the Supreme Court. For that body it was a period of almost continual censure from one group or another, and, most particularly, from the people themselves.

It devolved on the Court during this time to interpret and regulate the political changes wrought by the tremendous social upheaval of the war and its aftermath. To do this it had no choice but to follow its accepted judicial function, and use as its "yardstick" the Constitution and the body of precedent built upon it.
It was fortunate for the country that, except for a few notable exceptions, the Supreme Court did just this, for in so doing it remained the only group dispassionate enough to resist the political excesses of the period. Because of this, as has been stated, it was maligned even by those whom it was most trying to protect. The majority of the people very often were swept along in the passions of war and recrimination, and considered, as did its chief opponents, that the Court was a reactionary roadblock to progress that should be removed.

All of this had its effect on the Court. While our body of law came out of the conflict relatively unscathed, the Supreme Court itself became somewhat tarnished in the process. This, as we shall see, was due, in the main, to its own "enforced prudence" and to its occasional attempts to decide issues on their political rather than judicial merit.

In the period immediately prior to the Civil War the Court had its first taste of the whips of public sentiment that were to come. Since the Dred Scott Decision in 1857 it had been unceasingly castigated by the northern press as a "southern court."¹ In point of fact, it could be so considered as five of its nine justices were of southern antecedents; Chief Justice Roger Taney and Associate Justices John Catron, Peter Daniel, James Wayne, and John Campbell.² Considering the population trends this was an

The unfair situation made particularly repugnant because of the rampant sectionalism of the pre-war years.

The situation had developed through the practice of making new appointments to the Court from the same locale—even from the same state—as the appointee's predecessor. The states involved jealously guarded this privilege, and this, naturally, allowed no opportunity for newer sections of the country to be represented. Because of this, somewhat of an injustice was worked on the judges of the northern circuit who were forced to administer much larger areas than their southern colleagues. It was not until 1863 that this situation was partially remedied with the erection of a new circuit and the appointment of Stephen J. Field as a tenth justice.

The situation was eased shortly before hostilities began. Justice Daniel died in 1860 and Justice Campbell resigned the following year to cast his lot with the Confederacy. Although these vacancies were certain to be filled by northern men there were still murmurings against the Court as constituted. Catron of Tennessee and Wayne of Georgia together with Chief Justice Taney remained loyal to the Union, but their presence, particularly that of the Chief Justice, was viewed with suspicion in the North. As late as 1861 the New York Courier was commenting acridly on the make-up of the Court: "The Court, as now arranged, is scandalously sectional, grossly partial, a mockery of the Constitution, a serf of the slave power, and a disgrace to the country."

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The appointments of President Lincoln, however, changed the Court to such an extent as to lay to rest the cry of sectionalism. During his term of office, Lincoln was in the unusual position of being able to appoint five men to the Court; Noah Swayne, Samuel J. Miller, David Davis, Stephen Field, and Taney's successor as Chief Justice, Salmon P. Chase. In ordinary times, this would be tantamount to a President appointing his own Supreme Court but the critical period following the war nullified any unity of ideas that the appointments made by one man might be presumed to have. Lincoln's appointees never voted as a unit except, of course, in unanimous rulings. Field, and later Chase, proved to be of independent and somewhat volatile natures, and generally went their own unpredictable ways.

The regretful and regretted departure of Justice Campbell coupled with another death, that of Justice McLean, left two more vacancies for Lincoln to fill, and increased the muddle the Court found itself in due to the war. The seceding states had taken with them two judicial circuits, and the Court was in need of thorough re-organization. The President held off the appointments of Miller and Davis until this should be accomplished, but was forced to appoint Swayne immediately because, in addition to the vacancies, Catron and Taney were in ill health and the Court was practically decimated for business purposes. Swayne's appointment was to be a unifying measure as well. President Buchanan had tried to appoint as successor for Justice

4 See Appendix, i.
5 Warren, II, 378.
Daniel, a prominent attorney, Jeremiah S. Black, but was defeated by the now dominant Republicans who had gained control of Congress after the departure of its southern members. Any nominee of Buchanan's was distasteful to the Republicans per se, and they reasoned, as well, that their own successful candidate should make the appointment. After Lincoln's inauguration it was rumored he favored Senator John J. Crittenden for the position. This created a flurry among the Republicans for although Crittenden was an eminent and respected legislator, his compromise proposal to the South did not please the more extreme party members, particularly in view of the southern "flavor" of the Court.6

The death of Justice McLean enabled Lincoln to appoint a new justice without upsetting the vested privileges of the states in the Court, Swayne being from Ohio as was his predecessor. The redistribution of the Court circuits was finally accomplished in 1862 although it took Congress practically the whole session to complete it. The House and the Senate had adopted different plans and were not reconciled until the Act of Reorganization was finally passed on July 15th. The delay was caused chiefly by rivalries in the Senate over the vacant positions in the Court. Attempts were made to frame the circuits in such a way as to increase (or decrease) the chances of a particular Senator to obtain appointment. For example, Senators Browning of Illinois and Doolittle of Wisconsin were bitter rivals for a justiceship. As there was opposition to both men, the Eighth Circuit

6 Ibid., 364.
was re-organized so as to include the states of both. This created a stand-off as each was strong enough to block the other, and the position was finally filled by an outsider, David Davis of Illinois who was a personal friend of the President. In like manner, the ambitions of Secretary of the Interior Caleb Smith of Ohio were stymied by giving the newly appointed Justice Swayne the circuit including Ohio, thus precluding Smith's appointment.

Something should be said of Lincoln's appointments. In addition to being notable as far as their number, they set a precedent for future chief executives to follow, in that they were primarily political and personal. This is not to say that no President prior to Lincoln had never done the same. Certainly a man's politics had always been important in considering his appointment and confirmation. The chief point is that Lincoln apparently put personal loyalty ahead of judicial ability and experience. Three of his five appointments, Swayne, Miller, and Chase, had never sat in a court. Swayne had been a United States District Attorney and Chase a governor and cabinet officer. Miller in great measure owed his appointment to his part in organizing the Republican party in Iowa. Trained as a physician, he ended up being a highly successful lawyer but had never held a public office other than as a Justice of the Peace in Kentucky.

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Possibly the critical national situation played a great part in Lincoln's choice of men. During the Civil War loyalty to the government and political sympathies would seem to be more important than great judicial ability and independence. In searching for a successor to Taney in 1864, the President frankly stated, "We wish for a Chief Justice who will sustain what has been done in regard to emancipation and the legal tenders..."\(^9\) Obviously, the Supreme Court was expected to uphold the actions of the government.

This new interpretation of judicial function was, of course, not favorably received by the older justices. At the beginning of the war they still constituted a majority, numbering Taney, Catron, Wayne, Samuel Nelson, Nathan Clifford, and Robert Grier. Taney and Grier, in particular, were loath to let the legislative and executive branches of the government take over constitutional interpretation, which seemed to be the trend. Taney died during the war after "fighting windmills" in the person of Lincoln, but Grier continued through the Reconstruction period and became one of the bitterest opponents of Congress.

At the opening of the Civil War, the Court was surveyed uneasily by the country. The still undecided status of slavery was one cause. The infamous Dred Scott Case was still well remembered and concern was expressed over future decisions on slavery. It was even suggested that the Court consider slavery as a political question and thus outside their scope. It never went

\(^9\) Warren, 400.
any further than the suggestion stage but it is interesting to note how early developed a technique that was used constantly during the Reconstruction period to check the Court. At the time the issue was settled in the case of Freeman vs. Howe, 24 Howard 450, the Supreme Court decided it must be the judge of its own jurisdiction. 10

In the main, the Court upheld the "executive acts" of the President in the conduct of the war. Undoubtedly, the fact of war, actual and quite apparent at all times, made the Court realize the folly of quibbling too much over constitutional interpretation. The early successes of the Confederates impressed on everyone the need for drastic action, and, wherever possible, the Court gave the President the broadest possible latitude. The Court theory behind this was expressed in Bank of Commerce vs. New York, 2 Black 620, in 1863. In this case the Court ruled that state taxing of bank capital consisting of United States bonds was illegal, that it was "a derogation of power to borrow money, a vital function and means of supplying resources for peace and war exigencies." 11 This "derogation of power" idea was the basis of all the decisions upholding the actions of the government.

One of the most interesting applications of practicality and expediency ruling over the theoretical came in the so-called Prize Cases. These grew out of the Federal blockade of Southern ports and called on the Supreme Court to decide on aspects of international law. The situation had been

10 Ibid., 361, 367-8.
complicated by the proclamation of Secretary of State Seward that no war existed; that the actions of the Confederacy constituted merely an insurrection. His position is easily understood. As long as the United States considered it that, any intervention by a foreign power to aid the rebels would be considered an act of war against our government. While there was sympathy in England and France for the South, even to the extent of furnishing them assistance, neither country particularly wished to risk a war with the United States to do it. This was not out of fear of the Union government as much as it was out of respect for the feelings of their own people. In England, especially, the bulk of the common people favored the democratic North against the aristocratic South and its institution of slavery. In France this feeling was not as pronounced but that country would not act without England.

This policy was excellent on paper but when Seward issued the blockade proclamation, it collapsed legally. In the proclamation Seward stated that neutral ships, attempting to violate the blockade, would be seized and confiscated. The neutrals protested strenuously. If there was no war, as Seward had stated, he had no right to set up a blockade, and if he did, neutral shipping had a perfect right to ignore it.

Under these circumstances, a number of these cases came before the Supreme Court. That body found itself in a difficult position. If it decided that there was no war, as Seward had stated, then, according to the rules of international law, neutrals were free to come and go, and the Union blockade would be rendered ineffective. If, on the other hand, it
upheld the blockade, it would be deciding that a state of war existed, and would be laying the Confederacy open to recognition by the European powers.

Richard Dana, counsel for the government, very effectively presented the Court with a fait accompli. He summed the situation up thus:

So the Judiciary is actually, after a war of twenty-three months duration, to decide whether the Government has the legal capacity to exert these war powers....Contemplate...the possibility of a Supreme Court, deciding that this blockade is illegal! What a position it would put us in before the world whose commerce we have been illegally prohibiting, whom we have unlawfully subjected to a cotton famine, and domestic dangers and distress for two years! It would end the war, and how it would leave us with neutral powers is fearful to contemplate.12

The Court accepted this reasoning but only by a slim five to four vote, Taney, Catron, Clifford, and Nelson dissenting. The majority based their opinion on the fact that wars can and often do exist even if one power claims sovereignty over another, or even in cases where a declaration of war is unilateral.

That the decision was a popular one with the country there is no doubt. It was a case of "having your cake and eating it as well." The Court majority had seemingly upheld international law yet at the same time had vindicated the blockade.

Criticism of the Court during these early years of the war seems to have been at a minimum. It is certainly a credit to the Court's prudence.

and adaptability that this was the case, but not, as is often claimed, any particular credit to its judicial ability. The Court was in favor with the country because it was in step with the country. When, later in the period, the Court refuses to stretch the Constitution any further, we find it in disrepute with large and influential sections of the nation. The only instance in this early period that the Court refused to uphold the government is significant. In the wartime income tax law instituted by Congress, it rejected the provision wherein salaries of judges were to be taxed, on the grounds that it destroyed judicial independence. The Court might accept and bow to conditions on occasion but it would never accept the fact that it must bow.

In one field, however, the Court stood adamant. Not once in the period from 1861 to 1873 did that body decide a case involving civil rights in any but the strictest sense. The importance of this cannot be overestimated. It has been a source of much conjecture as to what the state of civil rights would be today if the Court had given in at this time. While we are not prepared to study this problem here, we may say that the exposition of our body of civil rights to date stems in a great part from those precedents set and those theories rejected during this era.

It is true that the Supreme Court did not win all its battles involving civil rights. On some occasions it was ignominiously crushed. It is equally true that in many instances the Court obviously avoided the issues

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13 Warren, II, 387.
at hand in order to maintain its existence as a purposeful body. What is important to remember, however, is, that in spite of its defeats, its failures, and its omissions, the Court did not add an iota to our body of law and precedent that would endanger future rights in more peaceful times. In a somewhat limping analogy it could be compared to a soldier crossing a stream and holding his rifle over his head. When he reaches the other side he may be somewhat bedraggled but he still possesses the wherewithal to fulfill his job. In like manner, the Court was submerged during this time, but the law itself remained untarnished.

The first controversy over civil rights came in the early days of the war in a case known as *ex parte Merryman*. We have not included it in the previous discussion of court decisions because, in actual fact, it involved not the whole Court, but only one man, Chief Justice Taney, and the repercussions following affected the Court only indirectly.

Merryman was a Southern sympathizer residing in Maryland. His conduct and utterances had become notably odious to the military authorities who considered them a hindrance to Northern success. He was, as a consequence, arrested and jailed in Fort McHenry. Merryman promptly petitioned Taney, who was "on circuit" in Maryland, for a writ of *habeas corpus*. Taney issued the writ, directed to the commander of the fort, but the latter refused to honor it, saying he had been authorized by the President to suspend it. The Chief Justice then counteracted by issuing a writ of contempt against the commander and sent the United States Marshal to serve it. When the marshal reached the fort he was not permitted entrance. Taney then excused the
marshal but protested that he had a perfect right to form a *posse comitatus* and storm the fort.

The Chief Justice immediately sent a full account of the incident to Lincoln, concluding that it remained for the President "in fulfillment of the solemn oath of office, to enforce the law, execute the judgment of the Court, and release the prisoner."¹⁴ Lincoln never sent an answer but Merriman was later released and turned over to the civil authorities.¹⁵ At a later date, Lincoln made a general defense of all such cases when he stated:

I concede that the class of arrests complained of can be constitutional only when in cases of rebellion or invasion the public safety may require them; and I insist that in such cases they are constitutional wherever the public safety does require them, as well as in places in which they may prevent the rebellion extending as in those where it may already be prevailing.¹⁶

Taney observed to his son on the morning of his opinion to the President that he would probably be in Fort McHenry himself by nightfall. If the newspapers of the time had their way he probably would have been. The majority of them showered him with criticism of the very harshest nature. The *New York Tribune* bluntly stated, "When treason stalks abroad in arms, let decrepit judges give place to men capable of detecting and crushing it."


₁⁵ Ibid.

₁⁶ Alfange, 75.
As far as the Tribune was concerned, said writ was appropriate "in courts but not in camps," and the country had more to fear from judicial tyranny than military despotism.

The Tribune's reaction was mild compared to that of the New York Times which practically accused Taney of out-and-out treason: "Too feeble to wield the sword against the Constitution, too old and palsied and weak to march in the ranks of rebellion and fight against the Union, he used the powers of his office to serve the cause of the traitors." 18

Condemnation of Taney was not universal, however. Newspapers from cities like Washington, Baltimore, and Cincinnati, where there were some Southern tendencies, commended his action, admitting that although wartime exigencies sometimes overruled legal aspects, it was right and proper that Taney take notice of this situation in order to prevent encroachment in peaceful times.

Taney's actions in the Merryman case have generally been upheld. Although the right to suspend the writ of habeas corpus has never been decided, the right and duty of the judiciary to issue the writ and consider the legal question involved has been universally admitted. One biographer in particular has eulogized Taney for his stand, stating, "There is nothing more sublime in the acts of great magistrates that give dignity to Governments than this attempt of Chief Justice Taney to uphold the supremacy of the Constitution and civil authority in the midst of arms." 19

In spite of Taney's opposition, President Lincoln continued his policy, which culminated in the Act of March 3, 1863, officially suspending the writ of habeas corpus in cases involving persons suspected of disaffection. Military arrest and military trials continued, along with strict censorship. Taney was much saddened by these events, doubting that the Court would "ever be again restored to the authority and rank which the Constitution intended to confer on it." 21

There seems to have been only scattered opposition to Lincoln's assumption of extraordinary powers. Some legal luminaries like ex-Justice Curtis, who published a pamphlet denouncing the President's "usurpation of power," objected, but, generally, Lincoln's actions were upheld. The only discussion generated was on the theoretical point as to who had the power, Congress or the President, to suspend habeas corpus. The right of suspension was tacitly admitted by most. 22

The case of ex parte Vallandigham, 24 Wallace 243, brought the issue before the whole Court in 1863. Clement Laird Vallandigham had been a Democratic Member of Congress who had been defeated for re-election in 1862. He was the leader of the "Butternut" or "Copperhead" element of the Democratic party, and had a notorious record of opposition to the Republicans

20 Woodrow Wilson, Division and Reunion, 1829-1889, 2nd ed., (Epochs of American History), Longmans, Green, New York, 1929, 239.
21 Warren, II, 375.
22 It is interesting to note that future Chief Justice Chase, while still Secretary of the Treasury in Lincoln's cabinet, claimed that the President had the right to suspend the writ of habeas corpus, but advised him to let it be done by an Act of Congress. The Diary of Gideon Welles, I, September 15, 1863, cited in Warren, II, 375.
and the war government. He had violently opposed military arrest and had gone as far as to declare that Lincoln, Secretary of War Stanton, and General Halleck, should be themselves arrested for their activities. In running for Governor of Ohio after his congressional defeat, he was arrested by General Burnside for making incendiary speeches against the government.

Vallandigham was tried by a military court, at which he refused to plead, stating that they had no jurisdiction. He was, nevertheless, convicted on a charge of "declaring disloyal sentiments," and was sentenced to confinement for the duration of the war. Lincoln commuted this to banishment to the Confederacy with the stipulation that the sentence would be carried out should he return.

The Democrats protested vigorously. A great mass meeting was held by the party in Albany, and resolutions were sent to the President demanding reversal of the decision, which Lincoln refused to do. 23

The decision was appealed to the Supreme Court and the outcome was watched with great expectation as the whole fabric of executive arrests and military trials was involved. The Court, however, sidestepped the whole issue, ruling that it had no jurisdiction on petitions of habeas corpus issued to military commissions.

The Supreme Court was obviously derelict in its duty. From the legal standpoint, such a ruling, if allowed to stand, would be pure travesty and would make the judiciary a puppet of the military. This must have been apparent to the Court, for three years later in the celebrated Milligan Case

it took jurisdiction on almost the identical issues. 24

At the time of the Vallandigham decision, however, the Court was unwilling to be put "on the spot." It realized that a decision favorable to the plaintiff would play havoc with all previous and all future executive actions, and, furthermore, would probably not be respected by the war government. In a situation such as that, the Court would not only be in disfavor with the majority of the people, but also its prestige as an independent and respected tribunal would be seriously curtailed. On the other hand, a decision favorable to the government would introduce a very dangerous precedent to our body of law, a thing the Court certainly did not wish to do.

For the Court then, there was the only course left open, that of refusing to hear the case. It would bring censure from a number of sources and a temporary decline in public confidence, but no permanent stigma. This technique was to be used a number of times in the dark days of Reconstruction. Its soundness as a Court policy seems to have been proven, up to a point. Certainly the Court has regained, in the course of its later history, any prestige that was lost during this period. Whether outspoken and forthright action on the part of the Court at this time would have changed the history of the era, or shortened the troubled times, is debatable. It is certainly possible that the Court might have lost every vestige of independence.

Chief Justice Taney died in October, 1864. Even in death the Dred Scott decision followed him. While some admitted him a just man of

unblemished private life, his epitaphs still pilloried him for his judicial record. It was unfortunate that he died in such violent times. As it was, his most famous decision was considered by many as the source of all the present woes.

There was the usual sparring for the vacant Chief Justice ship but Salmon Chase was generally expected to get it. Long before Taney's death, Lincoln had stated, "There is not one man in the Union who would make as good a Chief Justice as Chase, and, if I have the opportunity, I will make him Chief Justice of the United States." In addition to presidential approval for the post, he was backed by four of the most influential men in the country, Secretary Stanton and Senators Sumner, Wilson, and Fessenden.

That Chase was an able man had never been questioned. Even his lack of qualifications for such a post were expected to be overcome by his natural ability. His chief fault was consuming ambition, particularly for the presidency, which, as Lincoln put it, amounted to a form of insanity. Lincoln had made him a cabinet member because of his recognized ability but was constantly plagued by his Secretary's "under-cutting." In 1864 a letter was brought to Lincoln's attention, written by Chase to Senator Pomeroy, in which the former stated that Lincoln was neither the party's nor the people's choice in the coming election, and, by inference, that he would be willing to accept the nomination; this while a member of the President's cabinet.

Lincoln ignored this as he did other imperfections, and although Chase

25 Warren, II, 400.

tendered his resignation regularly, the President never accepted it. Though Chase managed to perform adequately as Chief Justice, he never fully recovered from the "presidential bug." Shortly after the close of the war, and as Chief Justice of the Supreme Court, he made a historic junket through the South, making political capital with statements such as, "If all the people feel as I do, you will not have to wait long for equal rights at the ballot box; no longer than it would take to pass the necessary law." 27 Aside from the political sentiments involved, which, presumably, would not be too popular in the newly victorious North, the fact that they were political in character was enough to bring invective down on Chase. The New York World failed to perceive

...how it either comports with the dignity, or is consistent with the proprieties of that great position to be perambulating a disquieted portion of the country making harangues on a disturbing question which the authorities have not yet decided. 28

Comments like these apparently did not subdue Chase. As late as 1872, he was still angling for the Republican nomination for President. Although his activities in this line never influenced his decisions as a justice—rather, his decisions as a justice often militated against his chances for the Presidency—they did contribute to the impairment of popular confidence in him and in the Court.

28 Ibid., 56.
With the appointment of Chase, the membership of the Court that was to grapple with the judicial problems of Reconstruction was complete. It was still relatively untested, exactly one-half of the Court being Lincoln appointments. It had compiled no judicial record of note during the war, and was now to enter on an even more difficult period. In its favor was one thing. It had tread cautiously and prudently through the political morass generated by the late conflict. In entering the coming struggle for power, it was still an unknown quantity.
CHAPTER II
RECONSTRUCTION

With the end of the Civil War, the powerful Reconstruction Congress took over the reins of national control. Their attitude and program soon became quite clear to all interested parties. The South was to be made to pay heavily for the rebellion, and Reconstruction was to be accomplished by treating that area as conquered provinces with little or no voice in their eventual restoration to the Union. Moreover, the means that Congress intended to use became equally clear. The legislative branch made it quite apparent from the very beginning that it would brook no interference from any quarter, and, if such were attempted, would use every legal and extra-legal means at its command to prevent it.

Such an incisive definition of policy quickly divided the victorious North into two political camps. President Johnson had, with equal fervor, announced his intention of carrying out the "mild" policy laid down by his predecessor. Around him gathered the moderate Republicans and the remains of the Democrats. On the other side were the Radical Republicans, the controlling group, supported by the bulk of the press and the people.

The fierce struggle between President Johnson and Congress is well-known, and it is not within the scope, nor is it the purpose of this paper, to delineate it fully, except where it converges on the Supreme Court.
We mention it particularly, however, as it is of prime importance to keep constantly in mind, during this period, the sharp and intense cleavage that existed between the executive and the legislative branches.

While the Court had done nothing during the war to antagonize Congress, it, nevertheless, entered the Reconstruction period under a veil of legislative suspicion rather than an aura of legislative approbation. For one thing, it consisted of five Democrats, four of whom were pre-war appointees, and two of those Southerners. While Lincoln's appointments were relatively unencumbered by their previous judicial records, they might conceivably be expected to support the Lincoln program of Reconstruction, now being championed by Johnson.

Because of the Court's innocuous war record, there were no open threats made by Congress, such as were made to the President. At the same time, there were no eulogies proclaimed; rather, it was an attitude of doubt tinged with casual contempt, well expressed by Stanton when he suggested that Lincoln's accused assassins be sent to someplace like the Dry Tortugas "where old Nelson or any other Judge would not try to make difficulty by habeas corpus."\(^1\)

The death of Justice Catron in May, 1865 made the Court an unwilling party to the battle between Johnson and Congress. The President had nominated his friend and adviser, Attorney-General Henry Stanbery to the vacant post. Congress was not prepared to put a Johnson man on the Court, at this

\(^1\) Warren, II, 421.
or any other time, and solved the problem by passing a bill introduced by Senator Trumbull, cutting the number of Associate Justices to seven. While the status of the sitting Court would not be affected, it would, in all probability, prevent Johnson from making any appointments during his term of office. The death of Justice Wayne in 1867 was, likewise, not followed by an appointment. 2

The American Law Review, at this time, claimed there was no serious opposition to the reduction except for the hardship it worked on the remaining justices as far as distribution of duties. It further claimed, in all simplicity, that the passage of the law was not a result of politics, but a genuine attempt to improve the flexibility of the Court. 3 Whether this view was commonly held at the time of enactment of the law is questionable. Certainly later events proved the political aspects of it, when four years after, in Grant's administration, the membership of the Court was increased.

The Supreme Court entered the Reconstruction picture more actively in the attempts to bring Jefferson Davis to trial. As in the Merryman Case earlier, it was through its Chief Justice that the Court acted. Johnson and his cabinet had decided on a civil rather than military trial for Davis, feeling it would be easier to obtain a conviction on charges of high treason than for complicity in Lincoln's assassination, the latter trial being heard by a military tribunal. An indictment returned in the District of Columbia

2 Ibid., 423.
was quashed as the act of treason had not been committed there. Virginia had to be the locale, but that state was under the control of the military.

In view of the complicated situation, President Johnson asked Chase to confer with him in August 1865 on ways and means of conducting the trial. Extraordinarily, Chase declined to meet with the President. Gideon Welles, one of Johnson's most loyal associates, accused Chase of wishing to dodge any responsibility in case of acquittal by this action, describing him as "...cowardly and aspiring, shirking and presumptuous, forward and evasive... an ambitious politician; possessed of mental resources, yet afraid to use them, irresolute as well as ambitious." Chase himself stated he had declined until "all possibility of claim that the judicial is subordinate to the military power is removed, by express declaration of the President." To appearances, Chase was passing the ball right back to Johnson. On October 2nd of the same year, however, Johnson addressed a formal note to the Chief Justice, stating that "It may become necessary that the government prosecute some of the crimes and misdemeanors committed against the United States within the district of Virginia." He asked whether the circuit courts were so far organized that Chase or an associate could hold court there during autumn or early winter.

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6 Warren, II, 421.
7 Milton, 246.
After a delay of ten days, Chase replied in the negative, doubting the propriety of holding court in a state which had been declared in a state of rebellion, and therefore subject to martial law. He reiterated his previous view that the military must be superseded by the civil authorities. 8

A letter written by George Brown, one of Davis’ counsel, to Franklin Pierce, somewhat deflates Chase’s line of reasoning. Brown comments bitterly that the Chief Justice refuses to sit in Virginia because it is under martial law. He points out, however, that Chase is perfectly willing to hold circuit, and, in fact, is holding circuit in Maryland, although that state is also under martial law. His conclusion is that Chase’s reluctance results from not wishing to recognize Virginia as legally in the Union. 9

What Chase’s motives were is difficult to fathom. The point taken by Brown is a tenable one. If, as Chase stated, he refused to hold court where martial law existed, his argument on that basis is nullified by his actions in the loyal but militarily ruled state of Maryland. Theoretically, the federal courts sitting in that state were as much subservient to the military, by Chase’s own definition, as they would be in Virginia.

A modified form of Welles’ comments is probably closest to the facts. It appears most likely that Chase did not wish to become embroiled with the defeated states in any way until the situation was clarified.

In the spring of the following year the subject of the trial again came up, but thinking on it had changed. It was felt by many that the trial would

8 Ibid.
9 Warren, II, 421.
unnecessarily endanger the validity of the Reconstruction program which had been initiated. Davis was the chief symbol of the Confederacy to Northern eyes, and, as Attorney Henry Nicoll put it in a letter to Johnson, "If Davis should be acquitted, he would be purged of all crime, and all the Rebels would be adjudged innocent."  

It was decided to indict Davis for a more minor crime, and in May of 1866 an indictment was returned that Davis

...owing allegiance and fidelity to the United States of America...on the 15th day of June, in the year of our Lord, 1864, in the city of Richmond...with a great multitude...most wickedly, maliciously, and traitorously did ordain, prepare, levy and carry on war against the United States.  

When Davis' counsel went to Chase to find out if he would admit the former to bail, they found that the Chief Justice was still unwilling to hold court. Although the peace proclamation had been issued by Johnson—which the Court had recognized as binding—Chase claimed that subsequent actions on the part of the President and the Secretary of War were inconsistent with the interpretation that the writ of habeas corpus had been fully restored.  

Chase has occasionally been acclaimed for his steadfast refusal to admit Davis to trial while the locale of the trial was still under military domination, in spite of the threats of the Radical Congress. This acclaim

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10 Milton, 324.  
11 Ibid.  
12 Ibid. Davis was eventually released in February, 1869 largely through the efforts of Horace Greeley.
is not completely justified. It must be remembered that it was the President more so than Congress who pressed for the trial, so that Chase was putting himself as much against a weak Johnson as against a strong Congress. There were, in fact, a few radicals in Congress who did not favor the trial. Senator Sumner openly stated he was sorry that Davis was captured alive. 13 Whatever Chase's justification, he gained no favor with either faction. The issue was taken out of his hands in July, 1866 when Congress removed circuit jurisdiction in the reconstructed states from the Court's hands, although eventually restoring it when those areas became more settled. 14

In 1866, the Supreme Court made its first prominent entrance into the Reconstruction picture in deciding the Milligan Case. 15 From then on, it was to be continually involved in and affected by the Congressional program. The Milligan Case stands out like a beacon in the history of the Court at this time, and certainly was the pinnacle of judicial independence in an era that saw very little of it. With the possible exception of the Test Oath Cases, which we shall take up later, it was the only positive, judicially sound, and politically uninfluenced action that the Court took and stood by in the whole decade.

As has been mentioned earlier, the case involved fundamentally the same issues evident in the Vallandigham Case three years previous. However, the details in the present case were such that the Court could not easily

13 Ibid., 246.
14 Warren, II, 421.
15 ex parte Milligan, 4 Wallace 2.
ignore it. Milligan, a resident of Indiana, had been arrested late in the war by General Hovey, commanding the Military District of Indiana. He had been tried by a military court and found guilty of inciting insurrection, and of treasonable and disloyal practices. He was sentenced to be hanged on May 19, 1865, President Johnson having refused to alter the court's decision.

Nine days prior to the execution of the sentence, Milligan sued out a writ of habeas corpus to the United States Circuit Court in Indiana. The Supreme Court was forced to take jurisdiction because, unlike Vallandigham, Milligan had applied for relief through a civil court rather than a military commission, the latter being the Supreme Court's stated reason for denying itself jurisdiction in the earlier case. Thus, for the first time the Court was to rule on the suspension of habeas corpus.

Formidable counsel represented Milligan; David Dudley Field, James Garfield, and Jeremiah Black. The government was represented by Attorney-General Stanbery and Senator Ben Butler. The case was argued on two points: whether the President could set up a judicial body in opposition to the civil courts, as was the case with the executive appointed military commissions, and whether, if justified in time of war, such authority would extend to a state not in the actual theatre of war.

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16 Cushman, 61-2.
17 Warren, II, 425.
18 Cushman, 61-3.
On April 3, 1866, three weeks after the arguments were heard, the Court announced, without comment, its unanimous decision in favor of the plaintiff. It created little stir, being only casually reported in the press. Presumably, both Johnson and the Radicals realized its importance but there were no public utterances until the opinions were given out. It is sometimes considered significant that the Court membership was reduced shortly after the decision. It is doubtful, however, if the decision had any effect on the passage of the act. Congressional reasons for the reduction already existed, and cutting the membership would hardly offset any like decisions in the future.

The opinion of the Court was delivered on December 17, 1866. Complete unanimity was declared in rejecting the right of the President to set up military commissions. Five of the justices went further, holding that the Constitution could not be suspended under any conditions. Because of this, the remaining four justices, Chase, Miller, Swayne, and Wayne, filed a dissenting opinion on that portion of it. They felt that this statement was an unnecessary interjection not arising out of the facts of the case, and they refused to regard the power of Congress, if not the power of the President, subject to such limitations. 19

Justice David Davis, speaking also for Field, Grier, Clifford, and Nelson, delivered a masterful opinion. He said in part:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of

19 Warren, II, 426.
men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its authority.... Martial law can never exist where the courts are open, and with the proper and unobstructed exercise of their jurisdiction.20

The Radicals were bitterly against the ruling of the Court. Their leader, Thaddeus Stevens, considered it

...though in terms not so infamous perhaps as the Dred Scott decision, (it) is yet far more dangerous in its operation upon the lives and liberties of loyal men....That decision has unsheathed the dagger of the assassin and places the knife of the rebel at the breast of every man who does proclaim himself...a Union man.21

Cries of judicial tyranny and restoration of southern domination were raised promptly. The Radical organ, The Independent called it the most dangerous opinion ever pronounced by the Court. John Forney's Washington Chronicle

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20 Cushman, 63-4.

21 Bowers, 153.
was the most scathing in its criticism, stating that "The hearts of traitors will be glad by the announcement that treason, vanquished upon the battle-
field and hunted from every other retreat, has at last found a secure shelter in the bosom of the Supreme Court." Forney proceeded to publish a series of editorials, continuing through December and January, vilifying the judges in the worst possible way.

Generally, the opponents of the decision based their opinions on the idea that the safety of the union is more important in critical times than rigid adherence to the law. The accusation was also made that the Court was more particularly aiding Johnson than it was enforcing the law by the decision.

All the comment was not unfavorable, however. The National Intelligencer defended the Court, stating:

It is not the crime of treason which is shielded by this memorable decision, but the sacred rights of the citizen that is vindicated against the arbitrary decisions of military authority. Above the might of the sword, the majesty of the law is thus raised supreme.

And, on another occasion, that paper lashed out against the critics of the Court:

They are disloyal, who, under the pretense of preserving the liberties of the citizen, have disregarded the

22 Milton, 402.
24 Milton, 402.
obligations of the organic law. They are disunionists, who, claiming to fight for the Union, have trampled upon its fundamental bond.25

The Springfield Republican took the moderate Republican view. Reviewing the criticism of the decision, that paper considered it "strangely misunderstood and perverted." It could see no great danger to the Reconstruction program, as, although the President had proclaimed peace, and civil law was theoretically restored, conditions might well warrant otherwise and the call would continue for military courts.26

History has generally upheld the view of the moderate press. The decision was certainly just and proper although many historians are inclined to side with the minority on the portion of the decision concerning Congressional power. The Court has been criticized for expressing an opinion on this facet of the case when none was called for. It was the opinion of the American Law Review that the potency of the decision was partially nullified by this addenda.

Instead of approaching the subject of the powers of the coordinate branches of the government as one of great delicacy, which they were loath to consider but which they felt bound to pass upon because it was involved in the righteous decision of the case before them...they have seemed eager to go beyond the record, and not only to state the reason of their present judgment, but to lay down the principles on which they would decide other questions,


26 Springfield (Mass.) Republican, January 2, 1867.
not now before them, involving the gravest and highest powers of Congress.27

The country quickly realized that the decision could easily upset the whole Reconstruction program. If, as the Court stated, military tribunals had no authority except in actual theatre of war where civil courts were not functioning, it was reasonable to assume that what had applied to Indiana in 1864 could also be applied to the Southern states in 1866.

This was apparent to the Congressional leaders, and they were decidedly angry and concerned over the possibilities presented. 1866 had been a banner year for the Radicals in Congress. They had completely and successfully repudiated Johnson's plan of reconstruction, and had capped that with a resounding victory over the President in the November elections.28 This they considered a mandate from the country to go ahead with their own plans. Now they were faced with a Supreme Court, if not openly hostile, at least unsympathetic toward Congressional activities.

Congress contemptuously disregarded the decision in the Milligan case, however, and continued with its plans in spite of their doubtful legality. In February 1867, two months after full announcement of the Court's decision, Thaddeus Stevens introduced his "Great Reconstruction Act." The Supreme Court was openly warned against any obstructionist tendencies, even to talk of impeaching the justices should they stand in the way.

The Radicals had good reason to fear the Milligan decision. Johnson and his associates were jubilant, and the President immediately issued orders

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27 American Law Review, April 1867, I, 572.
28 Elson, 759-64.
dismissing all trials of civilians by the military in those states where Congress had claimed a condition of war still existed. Even more unsettling to Congress was the effect it would have on the trial of Lincoln's "assassins." Within a week of the decision, one of the convicted men, Dr. Samuel Mudd, applied to Chase for a writ of **habeas corpus**. The latter denied the application but only because it was out of his circuit. The effect of this reasoning, then, would be to make those executed as a result of the trial, victims of a legalized lynching. This would redound on Congress, as the leaders of that body had pushed the trial.

There was heated debate in Congress over the possibilities resulting from Mudd's writ. A resolution was offered that the Judiciary Committee report the advisability of repealing the Habeas Corpus Act of 1863 "to prevent the Supreme Court from releasing and discharging the assassins of Mr. Lincoln."29

As all these ramifications of the Milligan decision began to dawn on the country, agitation grew for reorganization of the Court. There was a call for increasing the membership of the Court but this was rejected as President Johnson would still make the appointments. During the December and January following the decision, Congress debated steps to curb the Court. Rep. Bingham of Ohio urged immediate removal of the Court's appellate jurisdiction, and, if necessary, abolition of the Court by constitutional amendment. Williams of Pennsylvania presented a bill demanding concurrence

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of all justices in any opinion involving a constitutional question. These suggestions never jelled, but it is a salient example of the passions of the time that such suggestions, so repugnant today, could be seriously offered and seriously considered.

It was during these debates that the Court managed to enrage the Radicals further by its decision in the Test Oath Cases of January 1867. These cases had grown out of the attempts by the national and state governments to demand an oath of loyalty from those suspected of aiding the rebellion before allowing them to engage in a number of professions. In Missouri, for example, unless the oath had been taken, a person could not vote, hold office in a public or private corporation, teach, practice law, or officiate at religious services. In this way, all influential and lucrative positions were denied the ex-rebels unless they took the oath, and that covered such a multitude of sins that there were probably many Northerners who could not have conscientiously taken it.

The Congressional Test Oath followed the same general principle in that it excluded lawyers from practicing in Federal courts unless they had first taken an oath that they had in no way aided the rebellion. In the Missouri case, a minister named Cummings brought the appeal, and in the Federal case, Alexander Garland, a noted Confederate leader, was the petitioner. 31

30 Cummings vs. Missouri, ex parte Garland, 4 Wallace 277, 333.

The cases had been argued early in 1866 and, in the interim between the argument and the decision, were a source of much loose conversation. For one thing, Justice Field's brother was counsel for Cummings, and Field himself had pressed the Court for early disposition of that case. This started rumors that the law was certain to be held unconstitutional. When the decision in the Milligan case was announced, this talk grew, as Field had decided in that case for his brother's client.

Possibly as a result of this, developments in Missouri started a flurry of invective and furious correspondence. According to a letter to Chief Justice Chase from a friend in Missouri, two Democratic politicians named Blair and Hogan had spread the story throughout the state that the cases were already decided and the Test Oaths would be ruled unconstitutional. In attempting to make political capital, they further stated that one of the judges had so informed them. Shortly after this became known, Chase received a letter from Justice Miller sternly denying any such thing and stating that some justices had not even expressed opinions as yet on the cases involved. Field followed with a stinging rebuke to the Democrats, and particularly Senator Reverdy Johnson, whom, he told Chase, he considered responsible for the whole tale.32

It is certainly doubtful whether there was any advance information given out. It was definitely not the practice of the Court to come to a decision among its own members and then hold it off for six months to a year. If opinions were not published at once, it was at least the practice to hand

down the decision promptly. More probably, it was purely a political maneuver
on the part of the minority to gain enough adherents to upset the Republican
party in Missouri. At any rate, it contributed greatly to the ill feeling
generated when the decision was eventually announced.

The Court split five to four on the decision, with the pre-war justices,
Grier, Nelson, Wayne, and Clifford supporting Field in the majority opinion.

In reading his opinion, Field stated that the oaths reflected not only
against overt enmity, but against thoughts, words, sympathies, and desires.
They reflected not only against inimical acts but those based on charity,
affection, and relationship. As far as he could see there was no precedent
for the oaths. These various acts did not indicate unfitness for a particu-
lar calling; rather, because of these acts, and as a punishment for them, the
people involved were to be prevented from following that calling. To Field,
this was punishment of a past act not punishable at the time, such as leaving
the state to avoid the draft. Other acts of enmity covered in the oath, if
offenses at the time of commission, had already been punished in other ways.
In supporting this thesis, Field cited the *ex post facto* and bill of
attainder clauses in the Constitution.

The justice brought in another telling point in the exposition of the
case. Because certain of the people were forced to take these oaths, and
could not assume their full rights as citizens until they did, they were, for
all practical purposes, considered guilty until proved innocent; i.e., by
taking the Test Oath. This, Field pointed out, was in opposition to the
fundamental principles of common law, as well as the spirit of our own
particular law.
The four minority justices disagreed with Field’s reasoning holding that the legislation was desirable as a protection against disloyalty. They further pointed out, citing the Garland case particularly, that the opportunity to practice law was not an absolute right but a privilege granted by law, and as such, it was the duty of Congress to prescribe its qualifications, of which loyalty was one.33

Coming on top of the decision in the Milligan case, it showed the Supreme Court as sublimely unaffected by the tumult. Less than a month apart the Court had given opinions on two cases. In one it nullified an existing law, and in the other it threatened to do the same to the whole Congressional program.

Congress was prodded to action by these decisions and a number of serious attempts were made to curtail the power of the Court. As a result of the Test Oath Cases, George Boutwell introduced a bill in Congress which would provide a rule in all courts that no ex-rebel could act as an attorney until the rebellion was suppressed, and, of course, it was the Radical contention that, as yet, it had not been.34 It was not warmly supported, however, as many considered it an “attempt to neutralize the decision of the Court.... Congress is not the final judge of the validity of its own acts, and cannot make itself so, while there is a Constitution and a Supreme Court.”35

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33 Swisher, 146-50.
34 Warren, II, 453.
35 Springfield Republican, January 26, 1867.
More stringent legislation was attempted later in 1868, which, if passed, would have made a mockery of the Court. It would have required six judges to declare an Act of Congress unconstitutional but only the usual five in other cases. It was further proposed that Congress should have the right of recall over any Court decision. This, of course, would have been a death blow to judicial independence, as a strong Congress such as the Thirty-Eighth could run rampant, with the knowledge that it could easily overrule any Court action.

The Court was saved from this dismal future chiefly by public opinion. Because of the prestige of the tribunal many felt that if the situation warranted it, Congress should ignore the honest opinion of the Court, but certainly not debase that body in order to get favorable decisions. Speeches were made and articles appeared defending the existing arrangement of the Court. Some apologists attempted to show, by previous Court decisions, that it was actually in agreement with Congress in wishing to extend national authority. Others flayed the six man majority proposal as a ridiculous idea that would accomplish nothing. As the Nation sarcastically put it "...it affirms that as long as five judges might declare a law unconstitutional the inalienable rights of man were in danger of violation but when six are made necessary for the job the court becomes quite harmless."36

The reason for the commotion, was, of course, the validity of the newly passed Reconstruction Acts. As things stood, all indications pointed to their nullification by the Court, which Congress meant to prevent by any means possible. Concerning this phase of the struggle, the Nation took the stand

36 Nation (New York), January 30, February 20, 1868.
which the Court itself was ultimately to accept:

But are we, then, in favor of allowing the Supreme Court to set aside the Reconstruction Acts? By no means. We think the Court has nothing to do with the process of reconstruction and ought not to meddle with it. The majority in Congress however does not go as far as we do; it acknowledges that the Court may set aside the Reconstruction Act, but it says it cannot do it by less than six votes. For ourselves, we confess we are unable to see the value of this distinction. If six judges can undo... all that Congress has done and is doing...we are neither reassured nor consoled by the reflection that it cannot be done by five.37

The bill in question failed, and serious talk of reorganization ended until 1869, when another justice was added and nine new circuit judges were created.38 The Court itself was apparently affected deeply by the critical situation it found itself in. During the remainder of the period it evinced a willingness to bend in order not to break.

The act of bending was to involve the Reconstruction Acts. The original act had been passed on March 2, 1867 over the veto of President Johnson, who had quoted the Supreme Court decision in the Milligan case as a partial reason for his action. It stated that no legal governments existed in the ten unreconstructed states, and no adequate protection for life and property. The governments of Lincoln and Johnson were declared to have no legal status, and were subject to the authority of the United States to modify or abolish

37 Ibid., January 30, 1868.
38 Ibid., December 12, 1869.
them as it pleased. The act divided the South into five military districts, with military tribunals to supersede civil courts wherever necessary. It left the impetus for actual reconstruction to the states themselves. The latter, however, took no action, apparently preferring military rule to the type of reconstruction ordered by Congress. Consequently, a supplementary act was passed on March 23rd which forced reconstruction proceedings by directing the military commanders to register the freed-men and franchised whites, hold elections for state conventions, and for ratification or rejection of state constitutions.

Approximately a month after the passage of the act three prominent southerners, Governor William Sharkey of Mississippi, Alexander Garland, and Robert Walker asked leave of the Supreme Court to file a plea enjoining the President from enforcing the Reconstruction Acts. It was a bold move on their part and, naturally, created quite a furor, many people feeling that the rebels were trying to win back in the courtroom what they had lost on the battlefield. Johnson was accused by the radicals of organizing the attempt to subvert the acts. Sharkey denied this and claimed when the President was notified he expressed neither approval nor disapproval. Johnson had in fact instructed Attorney-General Stanberry to object to the motion on the grounds that the President could not be sued, in spite of the fact that

40 Springfield Republican, April 13, 1867.
he personally considered the acts illegal, and had previously vetoed them.41

A week after the petition was filed, the right of the Supreme Court to hear the case was argued. The petitioners based their claim to be heard on the Aaron Burr treason trial for which President Jefferson was subpoenaed by Chief Justice Marshall. Stanbery, on the other hand, warned against allowing the judiciary to control the executive.

The results of the argument were watched carefully and debated ceaselessly in the three days following, before the Court gave its decision. Sharkey and Walker were attacked by a Radical press tinged with both venom and fear. The tension was increased by the fact that a majority of five justices were considered to be against the Reconstruction Acts.42 If these voted for taking jurisdiction, invalidation of the acts would come soon thereafter. The Independent commented clairvoyantly on the Court’s probable action:

There is but one opinion here among men of all parties, as to the result; the Court will refuse to grant leave; this tribunal, already suspecting that, as now constituted, it is regarded as a deceased member of the body politic, will not run the risk of amputation by touching the edged tools of Sharkey and Walker.43

As predicted, the Court avoided any clash by refusing jurisdiction on the grounds that it had no authority to control the President. As the petitioners had cited the Burr trial to show that the Court had a precedent for

41 Milton, 437.
controlling presidential actions, so the Court used the same example, citing Jefferson's disregard of the subpoena to prove the point of the Court. The opinion was unanimous, with Chief Justice Chase giving the opinion. No mention was made of the supposedly significant decision in the Milligan case. As a matter of fact, counsel for the plaintiff, Charles O'Conor had not even used it in his argument.

Chase's opinion put much more stress on precedent and results than on reason and logic, a possible indication that the Court realized the weakness of its legal position. He cited the controversy over the annexation of Texas, declaring that though the constitutionality of annexation proceedings was questioned, no one sought to enjoin the President from carrying it out. He then presented the unenviable position of the Court. If, by any chance, it should uphold the injunction and the President refused to comply with it, the Court was without power to enforce its decision. If, on the other hand, the President should submit to the injunction, in direct violation of an Act of Congress, he might be subject to impeachment. He neglected, of course, to mention that it was the duty of the Court to decide on the constitutionality of the law involved, so that if the President refrained from enforcing it he would not be subject to impeachment.

In the opinion, however, the Court left an opening for the South. Although stating that the President could not be enjoined, it admitted that

44 Mississippi vs. Johnson, 4 Wallace 475.
45 Milton, 734.
46 Cushman, 164-7.
his subordinates might be, citing, as one example, the famous case of Marbury vs. Madison. An even more applicable case mentioned was Little vs. Barreme, 2 Cranch 170 (1804), in which an American naval commander was held liable for damages involving injury to property, as a result of carrying out the provisions of a proclamation issued by President Adams.

The South took quick advantage of this possibility. Governor Jenkins of Georgia filed a similar application with the Court but avoided Mississippi's error by directing it at Secretary of War Stanton, General of the Army Grant, and the commander of the military district of which Georgia was a part. At the same time he issued a proclamation to the people of Georgia, stating that the constitutionality of the Reconstruction Acts devolved solely on the Supreme Court to decide, as the issue had placed the other two branches of government in direct antagonism to each other. Inasmuch as the Court had not yet spoken, and inasmuch as its decrees were above veto, he hoped that this decision would arrest Congressional usurpation.

Although the country might not agree with Jenkins point of view, there was general approval of the Court's decision to admit the application against Stanton and Grant. This was based on the hope that the Supreme Court would say at once whether it would rule on Reconstruction, and thus, give the program some measure of certitude concerning its continued existence. The

47 1 Cranch 137.
48 Cushman, 165-7.
radical Independent, in voicing this hope, practically admitted the unconstitutionality of the Reconstruction Acts:

The whole South will understand at once that the Court will not step in between Congress and rebels, not at present certainly, and not early enough in any event to do any good or harm. As a matter of course, in due time, a case can be made up in one of the inferior courts against the Military Act; but a decision of the Supreme Court could not be reasonably expected before 1869. By that time the rebellious states will be thoroughly reconstructed.50

In spite of the legal loopholes offered in Mississippi vs. Johnson, the Supreme Court unanimously dismissed the suits against Stanton and Grant as being purely political in character. Chief Justice Chase, speaking for the Court, ruled that jurisdiction could not be accepted because the suit involved no question concerning person or property; merely the rights of a questionable government. Mississippi then made a last desperate attempt to bring the Acts before the Court, by asking permission to amend their application so as to involve person or property. A reargument was heard on this, but the amendment was finally disallowed by an equally divided court, Wayne, Clifford, Nelson, and Field favoring, and Chase, Davis, Swayne, and Miller opposed. As in the Milligan case, the same split prevailed between pre-war and wartime appointments.

Justice Grier was absent from this hearing because of illness, and thus did not vote. His presence might well have changed the whole picture, as he

50 Independent, April 25, 1867; cited in Warren, II, 461.
was believed to be in favor of admitting the plea. In addition, he had voted consistently with the other pre-war justices in all previous decisions.

The Nation exhaustively summarized the likely results stemming from the decisions on the Reconstruction Acts:

Undoubtedly, it is no light matter that the highest Court in the land should thus disclaim the power of inquiring into the constitutionality of an Act of Congress destroying the government of ten states. For it must be observed that every word of Mr. Stanbery's argument would be just as applicable if Massachusetts, instead of Georgia, were the complainant, and if Congress had undertaken to overthrow a State government which it at the same time admitted to be perfectly legitimate. No State in the Union, therefore, can rely upon the Supreme Court for protection against the usurpation of Congress. This is a grave fact which deserves serious consideration, and yet, notwithstanding all the perils of such a decision, it is clear that it is justified by reason and experience.

Purely political controversies are ... the least amenable to the jurisdiction of a Court. The origin and existence of a State, the existence and justice of a war, or the validity of a revolutionary change in the form of government are ... questions which no nation ever allowed Courts to determine.

The immediate results of the decision... are unqualifiedly beneficial. Even if the suit had been merely entertained without a decision upon its merits, the effect upon the South must have been injurious, while it is difficult to estimate the

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mischief that might have been wrought by the entire success of the complainant. It could not have saved the State from the ultimate control of Congress, and it would have introduced elements of evil into the conflict. We think that every intelligent Southerner — certainly every shrewd lawyer or politician — feels relieved by the decision. Certainly it is a cause for congratulation among all friends of regulated liberty.52

Any relief or rejoicing was to be short-lived, however. Obviously, nothing lasting had been accomplished by the legal gyrations of the Court. By denying leave to file, that body had only saved itself from making an immediate decision. In spite of its accepted political nature, the actual validity of the Reconstruction Acts had not yet been legally determined. It had only been made safe from injunction. There had been no abatement of feeling between the opposing factions as a result of the Mississippi vs. Johnson and Georgia vs. Stanton cases. The opponents of the Congressional program could still be expected to block it, if possible.

On the basis of its previous decisions, the Court was finally pushed into accepting jurisdiction in a case that would test the constitutionality of the Reconstruction Acts, that of *ex parte McCord*, 6 Wallace 318. Paradoxically, the case came before the Court through another Act of Congress that certainly was not passed with such an intent in mind. In order to protect federal officials and other loyal persons in the South against actions of the state courts, Congress had passed the Act of February 5, 1867.

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52 *Nation*, May 23, 1867.
allowing appeals from lesser court to the Supreme Court in cases involving
the writ of habeas corpus. This right of appeal had, previously, been very
limited, but now extended to "all cases where any person may be restrained
of his or her liberty, in violation of the Constitution or of any treaty or
law of the United States." Although designed to enforce Reconstruction,
ironically enough, the act was used to test its validity.

The case came about through the actions of an ex-Confederate colonel
named McCardle. After the war he had become editor of a newspaper in Vicks-
burg, through which medium he had vigorously attacked Congress, the recon-
struction policy, and the district commander, General Ord. The latter grew
weary of this in November 1867 and locked up McCardle, refusing him bail and
privileges. McCardle sought relief from the Circuit Court of Mississippi
but was unsuccessful. While awaiting the decision of the military court by
whom he was tried, his lawyer discovered the previous mentioned Act of Con-
gress, and took the case to the Supreme Court in January 1868.

The Radicals were alarmed by the move and tried to persuade Attorney-
General Stanbery to resist the suit. The latter, however, tossed a bomb-
shell into the proceedings by flatly refusing to represent the government as
he had advised the President that he considered the Reconstruction Acts
unconstitutional. The War Department, at whom the case was directed, then
engaged Senator Lyman Trumbull, Matthew Carpenter, and James Hughes. To
McCardle's defense came Jeremiah Black, David Dudley Field, and the now

notorious William Sharkey. The hearing was speedily set for the first Monday in March. 54

The intervening month and a half was very busy. Although the Indianapolis Journal stated that the outcome of the trial was unimportant as, by the time it was decided, Reconstruction would be so far advanced that it would make no difference, Congress apparently thought differently. 55 It had been variously reported that the judges had divided on the question of a hearing for the case; Grier, Clifford, Nelson, Davis, and Field favoring one, with Chase, Swayne, and Miller opposed. It was consequently assumed that the case would be decided by the same margin.

As a result, Congress went to work and the House promptly prepared the previously mentioned bill that would require two-thirds of the Court to decide a question of constitutionality, or in this case, six justices - one more than the majority was presumed to have. Thaddeus Stevens then introduced a more stringent one that would refuse the Court jurisdiction in any cases involving the Reconstruction Acts. Stevens’ bill failed but the “two-thirds bill” passed the House, 116 to 39, in spite of the accusations of its opponents that it was a subversion of the Court and an open admission of guilt. 56

The bill failed to pass the Senate, however, in spite of the efforts of the government counsel, Senator Trumbull. Senator Doolittle of Wisconsin

54 Milton, 541-2.


56 Warren, II, 463-4, 471.
called the bill an outrageous effort to prevent voiding of the Acts which
certain justices were reportedly against, to which Trumbull replied, "If it be
true, then I say these five judges are infamous and should be impeached
tomorrow." 57 Trumbull also introduced Stevens' House bill in the Senate
but it again failed.

The Court at this time gave out the full opinions in the Georgia vs.
Stanton case which may have, in part, caused Congress to temporarily drop
legislative action. The Radicals were exultant, assuming that the Court
would certainly consider the case at hand as being political in scope.
Nation soberly pointed out that there was no reason to expect such an
action, as the Court had already taken jurisdiction by setting a hearing.
The Court was then, of course, already cognizant of its reasoning in Georgia
vs. Stanton, and would have squelched the McCordle case there had it fol-
lowed that line. 58

The forthcoming case was well aired by the press. Justice Field has
stated in his memoirs that the subject was thoroughly exhausted by the time
the case was heard. All the arguments were widely published and the general
impression was that the Acts could not be upheld, as they were "revolution-
ary and destructive of a Republican form of government in the states." 59

On January 31st and February 1st, a preliminary hearing had been held

57 Milton, 543.

58 Nation, February 13, 1868.

59 Stephen J. Field, Personal Reminiscences of Early Days in California
with Other Sketches, unpublished but printed for a few friends, dated
1893, 208.
to decide whether the Court should take jurisdiction. As expected, jurisdiction had been assumed in spite of violent arguments against it at the hearing, and on March 2nd the actual arguments on the case itself began. These were continued on the 3rd, 4th, and 9th of March, at which time the Court took the case under advisement. According to Justice Field, the decision should have been handed down on the 21st. Three days after the arguments, however, Congress intervened.

Although Trumbull and his colleagues had confidently boasted that they had "rattled the bones" of the Justices, the Radicals were fearful of the outcome. Their paper, the Independent, had predicted a five to three vote holding the Acts invalid.

As a consequence, it was determined by Congressional leaders to remove the case from the jurisdiction of the Court although by the time the bill was prepared the case had been received, argued, and briefed. At the time, the House had before it a bill that would extend the appellate jurisdiction of the Supreme Court to include cases involving customs and revenue officials. Representative Schenk of Ohio, chairman of the Republican Congressional committee, had informed the House that its consideration and passage were purely a matter of routine. As a result, the Democrats were off guard when Representative Wilson offered an amendment to the bill, repealing appellate jurisdiction of the Court under the Habeas Corpus Act of 1867, "and to prohibit the court from exercising any jurisdiction on any appeals

60 Ibid., 209.
which had been or might be taken under its terms.\textsuperscript{61} This, of course, was
the act by which the McCordle case had been brought before the Supreme Court.

The bill was passed without objection or comment and went to the Senate
for concurrence. There, for the first time, the full import of the bill
was realized. Schenk was bitterly accused of deceit and fraud by the Demo-
crats for using his position to commit such trickery.

Schenk boldly avowed his action, saying of the Court,

\ldots they usurp power whenever they dare
to undertake to settle questions purely
political in regard to the status of the
states. If I find them\ldots attempting to
arrogate to themselves jurisdiction under
a statute that happens to be on the record
from which they claim to derive that juris-
diction, and I can take it away from them
by a repeal of that statute, I will do it\ldots.
I hold it to be not only my right, but my
duty as a representative of the people, to
clip the wings of that Court.\textsuperscript{62}

It is difficult to see what was gained by this performance in the House.
Although the bill passed the Senate, it was rejected in a sizzling veto by
Johnson just prior to his impeachment. Naturally, it had to make its way
through Congress again, this time with the stigma of deception on it. The
Congressional leaders must certainly have known that Johnson would veto it,
unless they gambled that he might approve it to save himself from impeach-
ment.

If so, they misjudged the President, who, if nothing else, had the

\textsuperscript{61} Milton, 543.
\textsuperscript{62} Ibid., 544.
unbounded courage of his convictions. In vetoing the bill, he pointed out that it established a precedent that would sweep aside all checks on unconsti-
tutional legislation, and further stated that the Court

...has been viewed by the people as the true expounder of their Constitution, and in the most violent party conflicts, its judgments and decrees have always been sought and deferred to with confidence and respect.

...Any act which may be construed into, or mistaken for, an attempt to pre-
vent or evade its decisions on a question which affects the liberties of the citizens and agitates the country, cannot fail to be attended with unpropitious consequences. It will be justly held by a large portion of the people, as an admission of the unconsti-
tutionality of any act on which its judg-
ment may be forbidden or forestalled. 63

The bill was argued bitterly the second time through, particularly in the Senate. There the hopelessly outnumbered Democrats, led by Doolittle, Buckalew, Reverdy Johnson, and Hendricks, taunted the Radicals mercilessly. Senator Trumbull, who was largely responsible for the enactment of the bill, commented in the course of the debate that all this uproar was unnecessary. The bill was a minor one, no cases were pending, and we had gotten along very well before the passage of the act now up for repeal. Doolittle then scorched the Radicals by asking if, as Trumbull stated, there were no bills pending, why the amendment specifically repealed jurisdiction in pending cases. In spite of all efforts, however, the bill easily carried the Senate by a vote of 33 to 9, and the next day squeezed through the House over the

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63 Ibid.
While the legislative branch was acting, the Court stood quietly by. Arguments on the McCordle case had been concluded eighteen days before the final passage of the limiting act and there was much talk as to whether the Court would hand down a decision while the bill was still pending. The New York Tribune stated that they must in order to preserve their own dignity; that all except Swayne and Miller would hold the Reconstruction Acts unconstitutional, concluding with the statement, "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." Some advocates of the Court claimed that the new law was ex post facto in this situation as the case had already been argued.

The Court, however, decided to wait on the Congress, and voted to postpone the decision, Grier and Field dissenting. Immediately, Jeremiah Black, counsel for McCordle, moved for a hearing on the question of the right of Congress to abolish jurisdiction in pending cases. The Court agreed to hear the question on April 2nd but as this did not give Black sufficient time to prepare his brief, the case was postponed until the next term. In the

64 Ibid., 544-5.
65 New York Tribune, March 9, 1868.
66 Springfield Republican, March 28, 1868.
meanwhile, the Court refused to hear any cases involving the same issues.

The Court itself was torn asunder by its action of postponement. Justice Grier, in particular, was very bitter, and issued a public statement of his feelings on the matter, in which Justice Field concurred. He said:

This case was fully argued in the beginning of this month. It is a case which involves the liberty and rights, not only of the appellant, but of millions of our fellow citizens. The country and the parties had a right to expect that it would receive the immediate and solemn attention of the Court. By the postponement of this case, we shall subject ourselves, whether justly or unjustly, to the imputation that we have evaded the performance of a duty imposed on us by the Constitution, and waited for Legislative interposition to supersede our action and relieve us from responsibility. I am not willing to be a partaker of the eulogy or opprobrium that may follow. I can only say... I am ashamed that such opprobrium should be cast upon the Court, and that it cannot be refuted.67

The Republicans received Grier's comments sourly, calling them an "unseemly exhibition... an extra-judicial opinion... tantamount to accusing his Associates on the Bench of malversion in office." Gideon Welles, speaking for the anti-Radical forces called Grier and Field the only "men, patriots, judges of nerve and honest independence" in the Court. The others he accused either of fear of the Radicals in Congress or, in the case of those with Democratic leanings, "they are willing their party should triumph

67 Warren, II. 482.
through Radical folly and wickedness." 68

In the interim, pending announcement of the decision, feeling ran high. An example of the passions that could be aroused concerned a ludicrous story involving Justice Field. Field had been invited to a dinner given by Secretary of the Treasury McCulloch. He was forced to leave early, however, and his place was taken by a latecomer, ex-Governor Rodman Price of New Jersey. In the course of the evening, the latter, commenting on the current judicial situation, said that the "whole reconstruction measures would soon be 'smashed up' and sent to kingdom come." A reporter present questioned a waiter as to the identity of the speaker, and was informed from the place card that it was Justice Field. He naturally hurried out with what he considered a choice scoop.

Upon publication of the incident, there were great repercussions, even to an investigation ordered by the House of Representatives to see if impeachment proceedings were warranted. The case of mistaken identity finally came out, however, and the affair was dropped quietly. 69

It was during this time that impeachment proceedings were brought against Andrew Johnson. The factors creating this situation had been building up for about a year, since the passage of the Tenure of Office Act in March 1867. By this act the President was refused the right of removing his cabinet officers without the consent of Congress, and particularly, was forced to re-

68 Welles, Diary, March 20, 1868; cited in Warren, II, 483.
69 Field, 211-7.
tain Secretary Stanton in his cabinet because Congress would not sanction his removal. In August of 1867, the President had fired Stanton because the latter had refused to resign, and had appointed General Grant as Secretary to resign, and had appointed General Grant as Secretary ad interim. In appointing Grant, Johnson made an understanding with him that he would hold the position regardless of Congressional approval or rejection. In this way, Stanton would be forced to go to the courts to regain his position. This was entirely satisfactory with Johnson who felt that the Supreme Court would certainly rule the Tenure of Office Act invalid.

The plan failed because Grant failed to keep the bargain, giving up the office to Stanton when Congress demanded his reinstatement. In February 1868, Johnson defied Congress by again removing Stanton. This action resulted in his impeachment the following month.70

The validity of the Tenure of Office Act never came before the Supreme Court at this time. As a result, Johnson was impeached for defying a law that he believed to be unconstitutional without having a chance to test its constitutionality. It is doubtful whether a court decision on the Tenure of Office Act would have saved the President from impeachment, however. As early as December 1866, resolutions had been introduced in Congress for that purpose.71 The legislature was obviously bent on removing Johnson.

On the other hand, it must be remembered that the violation of the Tenure of Office Act by the President was the overt act around which the whole fabric

70 Bowers, 471-2.
71 Milton, 401.
of impeachment was woven. The accompanying charges were notably nebulous. Without the former, impeachment might not have resulted.

The Court can hardly be blamed in this instance, however. It had no opportunity to test the law, and certainly had no intention of hunting for an opportunity. This would have been a questionable practice in normal times and possibly suicidal in this period.72

Aside from the defection of Grant, Johnson had one other opportunity to test the act. When he had removed Stanton for the second time, he had appointed General Lorenzo Thomas in his stead. In the eyes of Congress and Stanton, the President's action had no legal effect, but fearing that Thomas might forcibly attempt to remove him, as Thomas had threatened, Stanton issued a warrant for his arrest.

In this instance, it was Attorney-General Stanbery who missed the opportunity. When informed of Thomas' arrest, he did not offer to represent him but told the general to go along to court. Thomas was promptly released on bail and the chance to obtain a writ of habeas corpus to test the law was lost.

Johnson did not give up. He immediately retained Walter S. Cox to bring the case before the Supreme Court. When Thomas' case came up for trial, he

72 As a matter of record, it was not until 1926 in the case of Myers vs. United States, 272 U.S. 52, that the Supreme Court vindicated President Johnson's contention that the Tenure of Office Act was unconstitutional; Morrison and Commager, 44.
was surrendered into the custody of the District Court from which the warrant had been obtained, and his attorney refused to renew bail.

District Judge David K. Carter, a staunch Republican, was frightened by this turn of events and refused to accept Thomas into custody but instantly dismissed the case, preventing any further action. 73

The impeachment trial began on March 5, 1868, during the arguments on the McCordle case. Chief Justice Chase was forced to leave the hearing to officiate at the trial, another factor in the postponement of the Court's decision on that case.

It was in this trial that Chase reached the height of his career. Prior to this time, his judicial record had not been one of notable opposition to Congress, having taken their side in the Milligan, Test Oath, and Reconstruction Cases. In the impeachment proceedings, however, the Chief Justice stood out for his just, impartial, and fearless handling of the trial. His right to preside was immediately attacked by some, as he had often acted as an adviser to the President. To check on his actions during the trial, and to be sure that he was not in collusion with Johnson, the Congressional leaders went so far as to assign detectives to the Chief Justice to report on him. 74

Chase and Congress first clashed on his right to vote in the trial. The Chief Justice felt he was entitled to at least a "tie-breaker" as accorded the Vice President, but Congress ruled otherwise, inasmuch as the issue of impeachment was still in doubt. While still sitting as a legislative body,

73 Milton, 522.
74 Bowers, 179-80.
the Senate fixed the rules under which it would operate as a Court of Impeachment. Chase infuriated Congress by rejecting this action and ordering that a new body of rules be adopted when they finally sat as a Court.

When the trial commenced, Chase gave notice that the trial would follow accepted legal procedure, by taking the oath of the Supreme Court before initiating the proceedings. In the course of the trial he finally defeated the Senate on his right to vote. He had ruled as admissible a minor question raised by Stanbery. The radicals objected, not on the question, but on Chase's right to rule on it. The problem was debated for several hours without result and finally a motion was made that the Senate retire for a conference. The voting on the motion resulted in a tie whereupon Chase calmly announced the verdict, voted for the motion, and majestically strode into the conference room. In conference, a motion to take away Chase's vote lost, the first break in the Radical front.

These were very trying times for the Chief Justice, even excluding the trial itself. Inventive, abusive letters, spies, threats of political oblivion, social ostracism, and denunciation as an apostate to the party all converged on him. He defended his actions stoutly, calling talk of his alliance with Johnson absurd, and stating:

My duties are judicial. What I honestly believe the Constitution and laws to sanction or condemn, that I must, fearless, sanction or condemn. I am of no party on the Bench. If I believe an act, or part of an act, of a Republican Congress to be unconstitutional, I must say so. If a man whom Republicans would gladly see
condemned has rights, and I must judge, the rights shall be respected. And so of the Democrats. I expect to please neither at all times. But, God helping me, I will do my duty, sorry only that limited powers do not allow me to do it better.75

On three occasions during the trial Chase attempted to have testimony admitted that was necessary for a defense of Johnson; first, a declaration that all the cabinet members considered the Tenure of Office Act unconstitutional, and that Seward and Stanton were to write the veto; second, that it was agreed on by the cabinet that no appointees of Lincoln would come under the law; and third, that the cabinet agreed to test its legality by dismissing Stanton. The Senate refused to accept any of these as evidence, and it was here that the tide definitely turned in Johnson's favor as enough Radicals were disgusted by the patent unfairness of the trial that acquittal became a distinct possibility. Chase himself was greatly disappointed by the Senate's action, conceiving of no evidence more proper for admission. In a letter to Garrett Smith the next day he wrote:

Nothing is clearer to my mind than that Acts of Congress, not warranted by the Constitution, are not laws. In case a law believed by the President to be unwarranted by the Constitution, is passed, notwithstanding his veto, it seems to me that it is his duty to execute it precisely as if he had held it to be constitutional, except in the case where it directly attacks and impairs the executive power confided in him by that

75 Milton, 551.
76 Elson, 774.
instrument. In that case it appears to me to be the clear duty of the President to disregard the law, so far at least as it may be necessary to bring the question of its constitutionality before the judiciary tribunals.

How can the President fulfill his oath to preserve, protect and defend the Constitution, if he has no right to defend it against an Act of Congress sincerely believed by him to have been passed in violation of it? To me, therefore, it seems perfectly clear that the President had a perfect right, and indeed, was under the highest obligation, to remove Mr. Stanton, if he made the removal not in wanton disregard of a Constitutional law, but with a sincere belief that the Tenure of Office Act was unconstitutional, and for the purpose of bringing the question before the Supreme Court.77

The trial ended on May 26, 1868, with the President's acquittal by a single vote, and Chase returned to the Supreme Court a more honored man.

Early the following year, the Court made final disposition of the McCordle case. On April 12, 1869 a unanimous verdict was rendered rejecting jurisdiction as a result of the recently passed prohibitive law. The law itself was upheld in the decision by Chase who stated for the Court that although this jurisdiction had been conferred on the Supreme Court by the Constitution, it was conferred "with such exceptions and under such regulations as Congress shall make." The submission of the Court to legislative authority resolved the problem and, as one author has stated, "...what might have become a cause celebre went down in the records as a judicial abortion."78

77 Milton, 564-5.
78 Alfange, 79.
The last important attempt to test the Reconstruction Acts was the case of *ex parte Yerger*, 8 Wallace 85, in October 1869. Like McCordle, Yerger had been an editor who had been denied a writ of habeas corpus and had appealed. The latter, however, based his appeal on the original Judiciary Act of 1789, and jurisdiction was accepted by the Court.

Congress then went into action again. Senator Trumbull reported a bill "to define jurisdiction of the Supreme Court in certain cases." The bill observed that judicial power does not embrace political power, nor does the judiciary have any authority to question political decisions of the other branches of the government; therefore, it demanded that the courts be bound by any decisions of the political departments. The Reconstruction laws were, of course, declared political in character, and would be completely removed from any court jurisdiction, including those cases involving habeas corpus.

The bill was attacked quite generally, for placing Congress above the Constitution, and for refusing to allow the Supreme Court to be the judge of its own jurisdiction. The *Nation* whimsically asked, "If a majority of Congress is sure not to do wrong, why have any Constitution at all? Why restrain this body of sages by any restrictions whatever? Why not let them make their own Constitution, every session?"  

The *New York Herald* delved into political theory and decided that the founding fathers visualized Congress as a heterogeneous group conceivably not

80 *Nation*, December 2, 1869.
learned in law, and had thus created a court of experts to guard the people's rights. Any diminution of court power, therefore, was dangerous to the liberty of the people. Even the arch-Republican Independent felt the bill was needless as the Supreme Court had already bowed to Congress' will in the McCardle case.

Before any action was taken, however, the case was settled by agreement of both counsel. Yerger was turned over to the civil authorities, thus fulfilling the purpose of the petition.

The willingness of both sides to settle the case reflected the feeling at the time. In this case, there was less desire to test the Reconstruction Acts, and more to obtain relief for the particular individual before the bar. As a result of the decision in the McCardle case, this became more and more the tendency. Pressure on the Court diminished and the Reconstruction Acts never did come up for another test, mainly because there was very little ground left on which to test them. As time passed, the need for a test diminished as well, as the Southern states were well along the road to reconstruction.

One other case was decided in 1869 which, although not primarily connected with reconstruction, was a reflection of the spirit of it. This was Texas vs. White, 7 Wallace 700, in which the doctrine of secession was

81 New York Herald, December 12, 1869.
82 Independent, December 16, 1869; cited in Warren, II, 495.
83 Warren, II, 496.
forever laid to rest.

The case had its antecedents in 1850 when the United States gave Texas ten million dollars in bonds, redeemable after December 31, 1864, in settlement of boundary claims. Texas itself passed a law that the bonds were not to be made available until endorsed by the governor. After Texas had seceded the law was repealed and the bonds were used to defray war expenses. In 1865, the military board charged with obtaining necessary material, made a contract with the defendant, White, giving him bonds in return for military supplies, although none of the bonds were endorsed by the governor. After the war but before Texas had been reconstructed, the new governor brought suit to regain the bonds and to prevent White from receiving payment for them.

The case was brought to the Supreme Court as an original action because the Constitution gave that body jurisdiction wherever one or more states were litigants. It was the claim of the defendant that the Court should not take jurisdiction inasmuch as Texas was not a member of the Union at the time of transfer of the bonds. Even at this time Texas was not represented in Congress, and Radicals like Thaddeus Stevens and Charles Sumner still claimed she was not a member of the Union.

The Supreme Court held differently, however, stating that Texas had never been out of the Union; that although she had given up her rights and privileges, she had never severed her constitutional ties. Speaking for the majority, Chief Justice Chase declared that the Articles of Confederation had set up a perpetual union and the Constitution had perfected this union.

The result of the case was not startling inasmuch as the North had fought
and won a civil war against the principle of secession, and the Supreme Court could be expected to confirm it legally. The decision is more notable for the line of reasoning used by the Court to reach its conclusions. It was Chase's belief that the country as an entity, was older than the Constitution, and at least as old as the individual states, by virtue of the first unification of the colonies during the Revolutionary War. With this doctrine he exploded the theory that the sovereign states, and not the people, had created the federal government. Apparently, then, a citizen had as much reason and precedent to be considered a citizen of the United States as he had to be considered a citizen of his own particular state. It was a revolutionary doctrine and was destined to play an important part in later civil rights controversies.\footnote{84}{Cushman, 30-1.}

Justices Grier, Swayne, and Miller dissented, agreeing with the Congressional viewpoint. Grier declared that the case should be decided by "political fact" and not "legal fiction" and stated:

> If I regard the truth of history for the last eight years, I cannot discover the State of Texas to be a State of the Union, when Congress have decided she is not.... Politically Texas is not a state in this Union. Whether rightfully out of it or not is a question not before the Court.\footnote{85}{Warren, II, 489-90.}

The dissenting opinion seems somewhat narrow. Admitting the value of "political fact", a ruling on the right of secession had to come out of the decision. If \textit{White} had been upheld it would mean that the Supreme Court

\footnote{84}{Cushman, 30-1.}
\footnote{85}{Warren, II, 489-90.}
recognized that Texas was out of the Union at the time of the bond transfer, and, by implication, recognized the right of secession. It was obviously better, in this instance, to gloss over existing conditions in order to destroy a dangerous principle.

As far as the Supreme Court was involved, the reconstruction period ended with the end of the decade. Though the South was to be under military rule until 1876, normal conditions returned more quickly and civil authority expanded. As the power of the military lessened, so did petitions for relief addressed to the Court. By 1870, even the South had accepted reconstruction as an ineluctable fact.

In retrospect, the Court escaped serious damage during the reconstruction period but only by invoking petty technicalities in order to avoid dangerous issues. It certainly resisted Congress much less resolutely than President Johnson, but, at the same time, incurred less of Congressional wrath. In so acting, it retained practically all the power that it possessed when the period opened, but discreetly chose to bridle those powers, lest they be forcibly removed.

Moreover, as a result of the turbulent decade it was now bringing to a close, the Court was subtly affected by the trend of the times. Though the cases involving reconstruction stand out in boldest relief, there were numerous other cases involving taxation, banking, and state and federal jurisdiction that were decided in favor of the national government. As one author has described the transition:
The militancy of the Reconstruction Congress, however, represents merely the most virulent aspect of the profound change which the outcome of the Civil War brought about in American politics. This change, which can adequately be described as the triumph of nationalism, was reflected in the course of judicial statecraft quite as clearly as the more obvious pressures of the radical majority in Congress. 86

Although the decline of Radical Republicanism would cause a temporary reaction to set in, the Reconstruction era definitely established nationalism as a judicial as well as political policy.

86 Alfange, 80-1.
CHAPTER III

THE LEGAL TENDER CASES

As we have seen, the bulk of Court business over this period concerned the pressing problem of reconstruction. Practically every political act and its aftermath affected some facet of this great program, and the Supreme Court was kept extremely active attempting to solve the judicial problems that were constantly arising.

There were, however, occasional instances where the Supreme Court was asked to rule on legislation not directly connected with the problem of reconstruction but still of great national importance. The legislation so involved was usually financial in scope, and the most important of this type evoked a series of decisions, commencing in 1869, that are generally known as the Legal Tender Cases.

Because of the importance of these decisions, because of the singular manner in which they were decided, and because of the controversial facts surrounding them, these cases have been treated as a separate entity. Certainly the results of these cases were more national in character and more far-reaching in point of time than even the decisions stemming from the Reconstruction Acts.

The Legal Tender Act had been passed in 1862 as a war measure. It provided that paper currency, or "greenbacks", would be circulated in lieu
of gold and silver, and would be redeemable in either of those species. The new currency was to be accepted as legal tender for all private debts and public dues, except impost taxes and interest on the national debt, including those transactions predating the act except where gold or silver was particularly specified.\(^1\)

At the time of passage there was much protest against the act as being destructive of our national economy. Even Secretary of the Treasury Chase, at whose suggestion it was enacted, urged it very reluctantly, and only as a wartime necessity. Nor did his attitude change with the passage of the act. Two years later, in 1864, he still declared:

\[
\text{My whole plan has been that of a bullionist and not that of a mere paper money man. I have been obliged by necessity to substitute paper for specie for a time, but I have never lost sight of the necessity for resumption.}^2
\]

In the period immediately after the war, however, Congress had neither the time nor the desire to repeal the legislation, being engrossed in rebuilding the Southern states and in fighting the President. In a like manner, more pressing problems prevented the Supreme Court from reviewing the act until nearly the end of the decade, except for one abortive case in 1863. At that time, the height of the war, the Court refused to risk a clash with the war government, and denied itself jurisdiction.\(^3\)

\[^{1}\text{Cushman, 222.}\]
\[^{3}\text{Roosevelt vs. Meyer, 1 Wallace 512.}\]
Six years later it was obliged to admit its error on that point, and hear a similar case. This, of course, has raised the question as to whether the Court, realizing that it could not conscientiously validate the Legal Tender Act in 1863, did not use the "no jurisdiction" excuse to avoid the issue.

This seems to have been the case, but it appears to have made little difference in the final outcome. Warren has stated, "Had the case been decided in 1863, instead of in 1870, it is probable that the Legal Tender Acts would have been held invalid by so large a majority that no attempt would have been made to reverse the decision." While this may be true, there was certainly no guarantee that the wartime government would have respected any such decision, a fact which the Supreme Court realized when it prudently refused to hear the case.

During this span of time between passage and review of the act, a new factor entered the picture. Although at first unpopular, the greenbacks came to be accepted and grew in popularity among a large segment of the population. More important, they became an integral part of the American financial system, to such an extent that a condemnation of them would likely result in great financial disturbance to the country.

The first of the post-war Legal Tender Cases, Hepburn vs. Griswold, 8 Wallace 603, came up in 1865 and was argued before the Supreme Court in 1867 on a writ of error from the Kentucky Court of Appeals. It involved a contract entered into prior to the Legal Tender Act, on which the defendant

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4 Warren, II, 387.
had at first defaulted and then offered to pay in greenbacks. The plaintiff had rejected the offer and held out for gold.\(^5\)

Because of the national importance of the issue, a reargument was ordered for the next term at the request of Attorney-General Stanbery, in order that the government might be represented. Nothing, however, was done about the case in the 1868 term, partially because the Court had now been reduced to eight with the death of Wayne, and there was fear that an even split might result.\(^6\) As it eventually turned out, this was to make no difference as the case was finally decided by eight justices.

A number of associated cases were, nevertheless, decided in 1868. \textbf{Bank vs. Supervisors}, 74 U.S. 21, held that the greenbacks were exempt from state taxation without ruling on them as legal tender. \textbf{Lane County vs. Oregon}, 7 Wallace 71, ruled that paper money was not legal tender for payment of state taxes. Decisions on these two cases were unanimous. In \textbf{Bronson vs. Rodes}, 7 Wallace 229, however, the Court began to split. It was held in this decision, with Justice Miller dissenting, that the Legal Tender Act did not apply to contracts predating its passage that called for silver and gold, and that contract stipulations could not be fulfilled by payment of United States notes. Justices Swayne and Davis, while agreeing with the majority, filed a concurrent opinion in which they refused to be bound by any implications that might be drawn from the text of the opinion, or, speaking plainly, although this decision pointed to invalidation of the Legal

\(^5\) Alfange, 82-3, 253.

\(^6\) Warren, II, 501.
Tender Act, they refused to be considered as prepared to vote against the act. It is significant of Chase's feelings on the subject that he wrote all three of these more or less restrictive decisions.\(^7\)

On November 27, 1869, *Hepburn vs. Griswold*, was decided, nearly a year after the final argument. A minority of justices had asked for postponement of the decision as a new justice was due to be appointed under the Act of April 10, 1869 which had increased the membership of the Court to nine. The majority, led by Chase, and possibly fearing a different decision, overruled them although the case had already had waited eighteen months without pressure.

According to a statement signed by Justices Swayne, Miller, and Davis, published some years after the decision, the actual vote on *Hepburn vs. Griswold* was hardly an example of judicial excellence. When the vote was taken the result was an even split, thus upholding the act. Justice Grier had voted to uphold, in spite of his known belief in the unconstitutionality of the law. Some of his colleagues believed he was voting against what he really wanted and tried to persuade him to change his vote, but without success. The Court then went on to the case of *Broderick's Executor vs. McGraw*, 74 U.S. 639, dealing with the same subject. Here Grier reversed himself and voted against the act. His colleagues pointed out his inconsistency whereupon he changed his vote in the previous decision. This made the vote five to three against, and voided the Legal Tender Act. The three dissenting

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7 Swisher, 174-5.
justices later commented on the decision:

...these are the facts. We make no comment. We do not say that he did not agree to the opinion. We only ask of what value was his concurrence, and of what value is the judgment under such circumstances. 8

A week later a delegation of the Court approached Grier, who was obviously feeble and growing unclear of mind, and asked him to resign. The latter at length acquiesced, to take effect February 1, 1870.

The decision, however, was not made public yet, waiting on the appointment and confirmation of the new justices. It is likely that the majority hoped to gain the appointment of moderate men to the Court, whereas an announcement of the decision might lead Congress to confirm only an avowed Radical who would uphold the legislation.

How well the decision was kept secret is debatable. Noted journals such as the New York Times and Tribune predicted the act would be upheld, the latter only a week before the actual decision. 9 The New York World, on the other hand, said that it was not an incomplete court that cause these decisions to take so long, but fear of Congress. It cited three cases specifically, the Cotton Tax Case, the State Test Oath Case, and the Legal Tender Case, and said that the Court was willing to "sleep" on them but if pushed to a decision would give adverse opinions in all of them. Any claim of the World to an "inside line" was nullified however, when the Court


upheld the government in the first two cases.

The action of the Court in the case of Veazie Bank vs. Fenno, 8 Wallace 51, tended to mislead the prognosticators of Hepburn vs. Griswold. This case involved the right of Congress to tax state bank notes. That body, in order to reduce that type of currency, had put a ten per cent tax on them. The banks declared this was destructive taxation and therefore illegal. The Supreme Court, however, ruled in favor of Congress. It agreed that it was a type of destructive taxation but asserted that Congress had received the right to regulate currency from the Constitution, and, if it wished, could have immediately and completely outlawed all forms of state currency. In adopting a bank note tax it merely chose an indirect means.

Chief Justice Chase, in reading the opinion of the Court, had given a broad construction to the "necessary and proper" clause of the Constitution, and it was the common assumption that the yet to be announced Legal Tender decision would be validated by the same reasoning.

Congress, in the meanwhile, was acting on the Court vacancies. If the majority of the tribunal hoped for moderate men, they were not encouraged by the actions of the legislature. President Grant had nominated his Attorney-General, Ebenezer Hoar, to fill the newly created justiceship. The appointment was well received everywhere but in the Senate. Hoar, notable for his urbane and independent manner, had alienated that body on a number of occasions.

New York World, January 21, 1870.

1 Fushan, 332.
counts. He favored civil service, he had opposed impeachment, and, worst of all, he had played a major part in appointing new circuit judges without Senatorial aid or advice. His nomination was not confirmed, the avowed reason being that the appointment was for a Southern circuit and the Senate wished a Southerner for the job, although the eventual appointee, Joseph Bradley, was also a Northern man.

While the Senate was discussing the merits of Hoar, Grier's retirement plans were announced. It was obvious that the latter was not popular with the Republicans, but Grant and Congress acted with unflattering haste in appointing his eventual successor. Upon announcement of the Justice's plans Congress presented a petition to the President, asking that Edwin M. Stanton be appointed to the post. Grant acceded to their wishes and less than three weeks after Grier's announcement of retirement, Stanton was confirmed by the Senate.

How this virulent and potent Radical might have affected the Court was never discovered, as four days after his appointment Stanton died. The country thus witnessed the unique spectacle of the nomination, appointment, and death of a judge who was to replace one that had not even retired yet.

In Stanton's place Grant appointed William Strong of Pennsylvania, a circuit judge of eleven years experience, and considered generally to be well qualified. For the new judgeship, he appointed Joseph P. Bradley of New Jersey, who elicited mixed comment. Though an eminent and respected lawyer, he was without judicial experience. Furthermore, his clients, as a

lawyer, numbered a few railroads, whose staunch support of the Legal Tender Act was well known. On the other hand, he had been recommended in December 1869, by no less a personage than Justice Grier, who was even of the opposite political party.

We mention the qualifications of these men particularly for, by an unfortunate coincidence, the nominations of these two men were sent to Congress the same day that the decision in Hepburn vs. Griswold was handed down. While not critically observed at the time, they were the source of much unfavorable comment at a later period.

On January 29, 1870 the Supreme Court adopted the final form of the opinion in the Hepburn case. It was planned to announce it on January 31st as Grier would still be a member of the Court but owing to a minority request for more time to prepare its opinion, the decision was not announced until February 7, 1870, nearly a week after Grier's retirement.

It seems more than likely that the minority asked for the postponement in order to weaken the force of the decision. For although Grier had taken part in the proceedings, he was not a member of the Court when the decision was handed down, and thus it was decided by a slim four to three when made public. We also know that the minority justices strongly disapproved of the value of Grier's vote and, possibly, felt no qualms about neutralizing it.

The decision, to all intents, invalidated the Legal Tender Act. Chase's opinion is a rather loose conglomeration of a number of ideas. In it he

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13 Ewing, 106.
14 Warren, II, 509-10, 516.
stated that the act was void on three counts; first, that it exceeded the
powers of Congress, delegated or implied; second, that it violated the spirit
of the Constitution; and third, that it deprived creditors of property with­
out due process of law. 15 In discussing the doctrine of "implied powers",
Chase did not deny their existence, but qualified their use as dependent on
"appropriate means." According to Chase, it was up to the Court, not Con­
gress, to decide what means were appropriate, and, in the case of the Legal
Tender Act, that means was not so considered.

In explaining his own part in the passage of the act, he frankly stated:

It is not surprising that amid the
tumult of the late civil war, and under
the influence of apprehensions for the
safety of the Republic almost universal,
different views, never before entertained
by American statesmen or jurists, were
adopted by many. The time was not favor­
able to considerate reflection upon the
constitutional limits of Legislative or
Executive authority. If power was assumed
from patriotic motives, the assumption
found ready justification in patriotic
hearts. Many who doubted, yielded their
doubts; many who did not doubt were
silent....Not a few who then insisted upon
its necessity, or acquiesced in that view,
have, since the return of peace, and under
the influence of the calmer time, recon­
sidered their conclusion. 16

Chase further attempted to justify invalidation of the act by attempting
to prove that the paper currency provided for by it was not essential to the
winning of the war. He cited examples of other paper money that were not
legal tender, circulating freely through the war without depreciating in

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15 Cushman, 222.
value. If paper currency could so circulate without benefit of Congress-
ional approval, then the Legal Tender Act was not essential. If not essen-
tial, it could not be considered as a justifiable war power.

This point must have been argued among the justices themselves, as
Justice Miller's dissent covers the same ground. In the minority opinion,
he defends the essential nature of the greenbacks. Without the law, they
and the other paper money might well have depreciated considerably, but
"when by law they were made to discharge the function of paying debts, they
had a perpetual credit or value, equal to the amount of all debts, public or
private, in the country."17 Generally, the tone of the minority opinion was
that the Supreme Court was taking too much on itself when it undertook to
tell Congress what legislative means were necessary and proper.

Theoretically, the decision only applied to contracts prior to passage
of the act. The first reaction, then, was only slight interest. The
Independent stated, "This decision is of much less consequence than it would
have been if it had been rendered five years sooner. In 1870, it is not a
means of protection or redress, but only a message of condolence." The
Washington Chronicle averred that confidence in the greenback was too great
to be shaken by any such judicial decision.18 Most of the press seemed to
assume that the decision had no effect on the validity of the act for other
than prior contracts, and further assumed that no such decision would be made.

17 Swisher, 178-9.

18 Independent, February 10, 1870, Washington Chronicle, February 12, 1870;
There were some, however, who realized that the position taken by the Court applied to all contracts equally, whether prior to or after passage of the act. The decision had not stressed the prior nature of the contract involved in this case, but had discussed a body of principles applicable in any case. The Boston Advertiser promptly accused the Court of studying the effects of this decision before taking the "final plunge" and declaring the whole act unconstitutional in all its aspects, and that they, for one, did not care to stand meekly by while the Supreme Court experimented with the laws of currency. Nor did Congress apparently. Two days after the decision, Senator Wilson introduced a bill that would increase the membership of the Court to ten and insure a healthier regard for the greenbacks in the Court.

As the significance of the decision dawned on the country, demands for a re-hearing immediately began. These demands, however, crystallized public opinion on paper money and strong forces appeared on both sides. Favoring the action of the Court were the banks and creditor classes in general for whom the Legal Tender Act was "legalized cheating." Among the more intellectual groups there was also agreement with the Court for preventing the continuance of an unsound economic system.

On the other side was a much vaster group, or, as Miller put it in his opinion, the masses to whom the greenback was an "economic panacea." Strong disapproval was voiced by the farmers, the railroads, municipalities with

19 Boston Daily Advertiser, February 9, 1870.
20 Swisher, 181.
heavy bonded indebtedness, and debtor groups of all types. 21

The Nation, one of the few leading periodicals to side with the Court, claimed that the commotion against the decision was not the result of the opposition of the people in general, but was motivated through the efforts of moneved corporations who wished to escape their burden of debt. It unequivocally stated, "So far as the public is concerned, there has not been a breath of popular discontent to justify any political movement." 22 While this may have been true to some extent, it is a fact that public opinion moves slowly. The groups that favored greenbacks still possessed them, and, unaware of the niceties of constitutional law, may easily have assumed they would continue to possess them. There would probably have been no great public furore until a court decision forced Congress to begin contracting the currency.

The Nation, nevertheless, did present the best and soundest argument against the paper currency. To that medium it ascribed the "prevailing laxity of commercial morals" and blamed it for the spirit of speculation then rife throughout the country. While there were other factors involved, that view was undoubtedly sound as far as it went. The country was embroiled in an "easy money" economy that was to culminate in a number of financial scandals that could originally be traced to the advent of paper money. 23

Four days after the confirmation of the new justices, and the day after Bradley took his seat, Attorney-General Hoar asked that two pending Legal

21 Warren, II, 499.
22 Nation, March 24, 1870.
23 Ibid., February 10, 1869.
Tender Cases be taken up in spite of the previous decision, on the grounds that they involved contracts made after the passage of the act. 24 This created a mild sensation for even opponents of Hepburn vs. Griswold considered it as settling the Legal Tender Cases. What proved to be even more surprising was the announcement of the Court on April 1, 1870 that it would hear the cases in question. The Court had split five to four on reconsideration, Chase, Nelson, Clifford, and Field dissenting. It was the same grouping that had decided Hepburn vs. Griswold with Strong and Bradley added to the previous minority. Chase declared that the reconsideration was in violation of a court rule that no cases, previously decided, should be heard again unless the justices who formed the majority should agree to a rehearing. 25 Justice Strong, speaking for the majority, stressed the derangement of national economy as well as the inherent rights of Congress as being important enough in these cases to warrant further consideration. The tone of Strong's remarks was such that the previous decision was practically reversed in the rehearing opinion itself. 26

The continuance of legal tender as a judicial problem came as a surprise to the country, particularly as the supposedly final decision had been given only two months previous. In spite of public support of paper currency, the new turn of events was not viewed with complete favor. It came as a shock to see the Supreme Court vacillate so easily and reject so quickly one of its

26 Warren, II, 520.
own solemn decisions, even if the decision might be untenable. Harpers
Weekly, although admitting that the action of the Court might have merit,
upbraided that body for its lack of caution in taking said action. 27 It was
felt by many that the Court acted too quickly in granting opportunities for
a possible reversal. The greenbacks were in no immediate danger; in fact,
many believed them to be unaffected by Hepburn vs. Griswold.

The greatest calamity, thought the Nation, was the loss of popular res-
pect for the Court, and, as a result, refusal by parties affected to be bound
by Court decision. Coming at the end of a particularly difficult era for
the Court as it was, it was certain to be particularly harmful to the tribu-
nal's prestige. Warren states that

Whatever may have been the popular
view in 1870, there is no doubt that ever
since that era the Court's action in
reopening its first decision has been
regarded as a very grave mistake—and a
mistake which for many years impaired the
people's confidence, not in the honesty,
but in the impartiality and good sense of
the Court. 29

The Latham and Deming cases were heard in an atmosphere of judicial
strife. During the hearing the question came up as to whether an agreement
had been made after the Hepburn case, binding all pending cases to the
decision of that one. Attorney-General Hoar denied that his predecessor had
ever been aware of such an order. Chase recollected that such an agreement

27 Harpers Weekly, New York, April 16, 1870.
28 Nation, April 7, 1870.
29 Warren, II, 522.
had been made—which Justice Miller promptly denied. Nelson then concurred with Chase but Davis sided with Miller, after which Chase very heatedly reaffirmed the point. As this took place in open court, it was widely reported and gave rise to numerous discussions as to whether an agreement was or was not made.

The five justices who favored hearing the Latham and Deming cases strongly denied any explicit agreement, saying:

We do not doubt that counsel for appellants and counsel for the United States believed...that the judgment of the Supreme Court in Hepburn vs. Griswold and other legal tender cases argued at the same time, would establish principles on that subject that would govern the cases now under consideration, and all other cases in which the same questions might arise.

This understanding was no more than the expectation, usual and generally well founded, that a principle decided by this Court will govern all cases falling within it. But this expectation must be subordinated to the possibility, fortunately rare; that the Court may reconsider the questions so decided; and confers no absolute right.

In addition, they took particular exception to the fact that Chase made such a statement at all, as it invaded "the sanctity of the conference room", as well as being without substance.

According to the majority, after Hepburn vs. Griswold was heard, the counsel for Latham moved for an early hearing of his case. Chase was about

30 Boston Daily Advertiser, April 12, 1870.
31 Bradley, 66.
to grant this when Miller asked the Chief Justice to take it into conference. There Miller asked that the hearing be postponed until the two pending appointments to the Court were made. Chase agreed to this, although stating that as far as he was concerned, the legal tender issue was settled. Nothing, however, was said to the effect that the Legal Tender Act could not be argued again. It was pointed out that if there had been any commitment made, there would have been no reason to postpone the Latham case for a full Court as nothing could have been done anyway.32

As it happened, nothing came of the hearing. Counsel for Latham and Deming moved for dismissal of their appeals and were so granted by the Court on April 18th. Although Radical Republicans and greenback men continued to clamor for further action, the bulk of the country was relieved by what seemed to be final and definite action. The American Law Review considered dismissal the only reasonable move, stating that so many minor courts, adhering to the previous decision, has ruled out great numbers of cases, that it would be judicially upsetting as well as judicially embarrassing if a reversal were handed down.34

Within two weeks, however, the Court had raised the problem again by ordering a rehearing of Knox vs. Lee, 12 Wallace 457, which had been argued the previous November. The reargument was not scheduled until the next term and was heard on February 23, 1871. The case primarily involved a confiscation law passed by one of the Confederate states and whether such a law

32 Ibid., 69-70.
33 Warren, II, 523.
34 American Law Review, April 18, 1870.
could be considered a legitimate exercise of war power. The Legal Tender Act, cited as an example of this power, was tacitly admitted to be valid, insofar as this case was concerned, by both counsel, and so did not become a point of issue. At the close of the argument, however, Clarkson Potter, counsel for the plaintiff, asked to be heard on the constitutional question. Another reargument was therefore ordered for the 18th of April. On that day and the following one arguments were heard, and on May 1, 1871, fifteen months after Hepburn vs. Griswold, the ruling on the Legal Tender Act was reversed, and the act was upheld in the broadest possible manner. 35

Justice Strong's majority opinion was somewhat vague in character. As with the decisions regarding the Reconstruction Acts, the emphasis was placed on results rather than legal interpretation, the majority frankly admitting that "the court cannot disregard economic realities." 36 The legal basis for the reversal was the aggregation of a number of constitutional clauses to validate a particular power. It was stated that implied power "...may be deduced fairly from more than one of the substantive powers expressly defined, or from all of them combined. It is permissible to group together any number of them and infer from them all that the power claimed has been conferred." 37 The legality of the Legal Tender Act was thus deduced from the power to coin money and the power to wage war.

While we may decry the methods used by the Supreme Court we can hardly

35 Warren, II, 524.
36 Alfange, 84.
37 Cushman, 223-4.
blame that body for its action. Although the phrase "economic realities" often looks weak when brought face to face with the cold reasoning of constitutional law, it was decidedly the more powerful in this case. Greenbacks were a reality, not to a few, but to a whole nation.

Congress must shoulder part of the blame for the Court's action. The act in question was passed as a war measure only. When peace was restored it was the duty of the legislative branch to perform the necessary function of repealing it, or else validate it as a peacetime law. It was certainly not the place of the Supreme Court to manipulate the financial structure of the country. As Harpers Weekly stated, "It is a great error to suppose that we can with safety rely upon a court to employ a legislative function and restore the country to specie payments. 38 As a consequence of assuming said legislative function, the Court was forced to decide the validity of the law on its financial rather than legal and judicial merits, and a somewhat "unjudicial" opinion could well be expected.

The general feeling generated by the opinion was that the Court had not helped itself as far as prestige was concerned. Even Justice's Strong's defense of the decision on the grounds that the previous decision had only been decided by a majority of four was not enough to quiet all reproach. It is ironic that, while apparently conforming to the will of the majority, the Court should suffer a loss of prestige from that same majority. The criticism of the Court for Knox vs. Lee gives rise to the question of whether the demand for paper money was as strong among the people as the Radical Republicans and various pressure groups made it out to be. Certainly the

38 Harpers Weekly, April 16, 1870.
Court was remembered, for a long period, more for the fact of reversal than
for what was involved in the reversal.

Those who opposed the Legal Tender Act on its own merits were more
vociferous in their criticism, particularly of the two new justices. It was
felt that neither Strong nor Bradley should have participated in the decision,
particularly in view of their previous connections with agencies that favored
retention of the Legal Tender Act. Bradley was the target of the most
abuse. It was noted that the Camden and Amboy Railroad, which had retained
Bradley prior to his appointment, had agreed to pay in gold, interest due on
bonds, but had made a reservation on future payments, looking toward a pos-
sible reversal of Hepburn vs. Griswold. Dissemination of information such
as this immediately led to the charge that the Court was packed.

This charge has been made quite regularly ever since the decision and
has been the source of much controversy. In the light of what is known now
the charge seems to have been unfounded. Obviously President Grant and the
Radicals favored retention of the greenbacks and, if they had the opportuni-
ity, and there was a necessity for it, they would probably have made the
attempt to fix the Court. The attempt by Senator Wilson to add a tenth jus-
tice to the Court after the first Legal Tender decision reflects this atti-
tude, but it also reflected an uncertainty on the part of the Radicals. If
a reversal were assured in their minds by the appointment of Strong and
Bradley, there would have been no need for Wilson's bill.

Whether the Court was packed or not seems to hinge largely on how well
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the Hepburn vs. Griswold decision was kept secret between the time of its adoption on November 27, 1869, and its eventual publication on February 7, 1870. It was during this period that the new justices were added and, conceivably, the period in which the Court could have been packed.

Everybody seems to have tried to find out what the Court decided but very few admit to having found out. Those newspapers who claimed to have the decision figured out were more often wrong than right. In fact, the more responsible publications almost universally predicted the outcome incorrectly—one indication that the secret was well kept.

Whether any leak came from the justices themselves is possible, but doubtful. There has never been a hint of such an occurrence in any Court case, and no accusations were made during this period that such might be the case. Even in the vitriolic counter charges made by Chase on one hand, and Swayne, Miller, and Davis on the other concerning the justice of rehearing the first case, nothing was said on either side to the effect that the decision might have been known before its publication.

The only person who has admitted knowing anything of the decision before its release was George Boutwell, then Secretary of the Treasury. He states that Chase informed him of the decision two weeks in advance because the latter feared it would bring serious financial disturbance and wished Boutwell to be prepared. Whether this gave Boutwell time enough to "fix" the appointments of Bradley and Strong is debatable. Chase apparently thought it did for Boutwell says the former berated him after the Knox vs. Lee decision for allowing two justices to be added to the Court to overrule a previous
If Chase told Boutwell of the impending decision he must have assumed that the latter was, at the worst, indifferent as to the result. It would have shown great naivete on the part of the Chief Justice to tell an avowed Radical like Boutwell of the decision, and not expect repercussions. Whatever the Secretary's views, it is doubtful whether he had any effect on the appointments. Chase's revelation must have taken place near the end of January and by that time, the appointments seem to have been unofficially decided. On that latter subject, Senator Hoar states:

The decision of the Supreme Court in Hepburn vs. Griswold was made and entered when the judges had finished reading their opinions on Monday, February 7th, 1870, after the nominations of Justice Strong and Bradley had been laid upon the table of the Senate. It was some hours after they had been signed by the President. It was some days after they had been agreed on in Cabinet meeting. It was weeks after the probable appointment of Judge Strong... had been announced in the newspapers....

It will be remembered also that Bradley had been suggested for the vacancy as early as December 1869. As a matter of fact, Bradley's reception by Congress was somewhat lukewarm and, although a Republican, his most flattering praise came from the Democratic New York World which stated:

...the Democratic Senators, have, from the first, hailed the nomination of Mr. Bradley as that of one so respectable


41 Senator George F. Hoar to the Worcester Spy, December 12, 1896; cited in Bradley, 51.
and worthy, though a Republican, that the wonder grew how Grant ever came to pick him out.... We confidently look to him and to Judge Strong as active allies with the Chief Justice and his conservative brethren....

With credentials such as these it seems that Grant could have picked a more innocuous prospect if he wished to control the Court.

The President, particularly, has been assailed for his part in the alleged packing. It is true that he made the appointments but the record points to him as less involved in some respects than Congress. Grant’s first appointment, that of Attorney-General Hoar, was hailed as the nomination of a moderate, conservative man; a type that would have been welcomed by the majority of the Court. Hoar was, however, rejected by Congress, and the next appointment was made as a result of a petition by Congress to the President; that of Edwin M. Stanton, of whom it is much more likely to believe as being appointed to serve a special interest. No doubt Grant favored retention of the Legal Tender Act and would certainly not appoint anyone to the Supreme Court who was openly against it, but the character of his appointments as well as the time element refute any charge levelled at him.

Finally, it would have been difficult for the President to appoint any outstanding jurist to the bench who did not favor the Legal Tender Act. Sixteen lesser courts had ruled on legal tender cases and fifteen of them had upheld the law. Such unanimity of opinion also militates against the court

42 New York World, March 3, 1870.
43 Schuckers, 258.
packing charge. On the basis of this overwhelming evidence the country could reasonably expect the Court to do likewise.

After Knox vs. Lee the issue was settled and paper money became an accepted part of our financial structure. The following year the Court handed down a decision in Trebilcock vs. Wilson, 79 U.S. 607, stating that contracts demanding payment in specie could not be enforced. Twelve years later in the case of Juilliard vs. Greenman, 110 U.S. 421, the issuance of paper money was sweepingly upheld as a peacetime as well as wartime power of Congress. 44

44 Swisher, 195.
CHAPTER IV

THE COURT AND THE FOURTEENTH AMENDMENT

The process of Reconstruction did not confine itself to political rights alone. In the wake of the Civil War there came a rash of legislation dealing with federal and state relations, particularly in the field of civil rights. Of all the results of the Civil War and Reconstruction this type of legislation was to have the most profound and lasting affect. The political phases of Reconstruction had embittered the South but they passed after 1876 and, except for the more unregenerate, became merely unhappy memories. The new order involving civil rights, however, was not to pass as easily, but was to become an integral part of the national scene.

The basis of the change was the termination of slavery. Under the existing structure of the Constitution, there was no provision for such an eventuality so three new amendments to that document were speedily passed by the Radical Congress, the first in over sixty years. These amendments, the Thirteenth, Fourteenth, and Fifteenth, were designed to help the "freedman" assume a place in society, and were to guarantee that his place alongside the other citizens would be respected. Roughly defined, these three amendments freed the slave, made him a citizen, and gave him the right to vote.

The Thirteenth and Fifteenth Amendments, passed in 1865 and 1870 respectively, afforded little controversy. They were short, concise, and

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self-explanatory. Though they might not be popular in the South, at least they were easily understood.

The Fourteenth Amendment, however, consisted of four lengthy sections, whose interpretations were to be the source of interminable debate. In point of fact, there have been more cases involving this amendment than any other phase of constitutional law, since its passage in 1868.

Section One of the amendment conferred citizenship on all native born or naturalized citizens. Section Two explained how representation in Congress shall be calculated, with the admonition that if any citizens were denied their right to vote said representation would be reduced in proportion to the number so denied. Section Three prohibited from Federal service any ex-Confederates who had previously held positions of importance in the government prior to the war; and Section Four repudiated the debt contracted by the states in rebellion.

The first section was to prove the focal point of the amendment. It read:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\(^1\)

\(^1\) Constitution of the United States, Amendment XIV, Section 1.
This was the first mention of rights of citizens of the United States over and above their rights as citizens of a particular state. Whether these national rights were superior to, concurrent with, or inferior to state citizenship rights remained to be seen.

The first case that was to have any bearing on the subject was the previously mentioned case of Texas vs. White. Primarily a decision involving Reconstruction, it defined the legal status of the rebellious states, and ruled that they had never left the Union. Chase's opinion, however, was built on the thesis that the national government had as much right to claim priority of existence as the states and, as a consequence, added substance to the undeveloped words of the amendment.

As a result of the doctrine promulgated in Texas vs. White, with its basis in the Fourteenth Amendment, it seemed that a citizen could appeal to the national government for protection of his rights although they were expressly protected by the individual states.

A political idea so startling in nature, with its obvious rejection of state guaranty of civil rights, could only have entered the American scene through a constitutional amendment. No court in the land, in its most national moments, would have ruled favorably on such a theory. As a matter of fact, even in the form of a constitutional amendment, it was questioned. At the time of the passage of the Fourteenth Amendment, Chief Justice Chase wrote to Justice Field, stating that he considered the amendment too broad in scope, and particularly disapproved of the clauses regarding disfranchisement and national guaranty of civil rights.  

2 Milton, 315.
Five years elapsed, however, before the Fourteenth Amendment was fully interpreted. It came before the Supreme Court in the famous Slaughterhouse Cases, 16 Wallace 36. The case came about through the "carpetbag" government of Louisiana. That body of worthies had set up a slaughterhouse monopoly in New Orleans by granting privileges to one picked company, to the exclusion of all others. The latter, with their livelihood taken away, asked relief from the Supreme Court on the grounds that they were deprived of their rights under the Fourteenth Amendment without due process of law.3

The case was originally set down in 1870 but was not argued until January 1872. However, at the time of the argument Justice Nelson was absent and, as the Court had divided equally, a reargument was ordered for February 1873.4

The problem confronting the Court was to decide what this new national citizenship entailed, and how far it could legally go. The amendment was most obviously instituted for the protection of the freedman against unfriendly state governments who might curtail his civil rights. There were other possibilities, however. One author has credited the insertion of the "due process" clause in the amendment to Representative John A. Bingham, an influential railroad lawyer, who was thinking of corporations as the "person" involved.5 Ten years later, in the hearing of San Mateo Cy. vs. Southern

3 Cushman, 40-2.
Railroad Co., 116 U.S. 138, Roscoe Conkling, a former member of the Committee on Reconstruction that had drafted the amendment, appeared and presented the proceedings of that committee. These purported to show that the amendment was not intended for the exclusive protection of the freedman, but was to protect "vested" as well as civil rights.

As to how far the framers of the amendment intended to go, one author has stated:

There seems no doubt that as a matter of historical fact the framers of the amendment meant by 'privileges or immunities of citizens of the United States' the whole body of ordinary civil rights and especially those enumerated in the Bill of Rights of the federal Constitution. They intended to place in the hands of Congress the broadest possible power to prevent the impairment of these rights.... Instead of looking to the state legislature for legislative protection of his civil liberty, the citizen...would henceforth look to Congress or to the Federal Courts.6

Congress proposed but the Court disposed. On April 14, 1873, it rendered a verdict upholding the government of Louisiana and ruled that the slaughterhouse monopoly did not constitute a violation of the Fourteenth Amendment. The decision was handed down on a five to four vote, Miller, Davis, Strong, Clifford, and Ward Hunt comprising the majority, the latter having succeeded Nelson early that year. It is very doubtful whether the vote would have been different if Nelson had not died. The majority opinion was a check on Congressional power and centralization of government, both of which Nelson had consistently voted against.

6 Cushman, 41.
The division of the Court on the decision is interesting, however. The previous alignments were considerably upset. The decision was certainly conservative in tendency, rejecting the extension of the idea of nationalism which had pervaded the whole Reconstruction period, yet three of the five justices who made up the majority, Davis, Miller, and Strong, had generally accepted the Congressional program. In contrast, of the minority of Chase, Field, Swayne, and Bradley, the first two named were usually opposed to any form of extension of national power such as was upheld in the minority opinion.

In giving the decision, the Court arbitrarily decided that the Fourteenth Amendment was not intended to bring the domain of civil rights, heretofore belonging exclusively to the states, under the jurisdiction of the national government, nor did the amendment anticipate the Court as a "perpetual censor" of state activities. As far as the slaughterhouse monopoly was concerned, it was a legitimate exercise of state police power. Warren calls Miller's majority opinion "one of the glorious landmarks of American law." In one sense he is correct. It is possible that, but for the decision in the Slaughterhouse Cases, our government would be much more centralized than it is today, and when we realize how far the centralizing tendency has gone in spite of such a decision, we can visualize what it might have been had not such a decision been given. On the other hand, if we consider a "landmark" to be a notable and reasonably absolute principle of law formulated and presented, Miller's opinion falls far short. Certainly his comments on "due process" no longer state the law as it exists today.  

7 Warren, II, 546.  
8 Cushman, 41.
It was Miller's contention that the new and exalted category of "citizen of the United States" was not as superior as was claimed. He pointed out that anyone under the jurisdiction of the United States can be a citizen of the United States whereas to be a citizen of a state a person had to be a resident of said state. This, he claimed, was a tacit admission that there were two kinds of citizenship. If there were two different types of citizenship, the privileges and immunities of each must also be different.

He then takes the phrase, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Because the words "citizen of the United States" appear instead of "citizen of the state," he reasons that the provision is not attempting to protect the citizen against his own state insofar as state citizenship privileges and immunities are concerned, but only as far as national citizenship privileges and immunities are concerned. Thus the latter type, whatever they were, would be the only ones protected by the Fourteenth Amendment.

He then proceeded to view the consequences resulting from an opposite decision, admitting that although an argument of this type is not the most conclusive, when

...These consequences are so serious, so far reaching and pervading, so great a departure from the structure and the spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and federal governments to each other and of both these governments to the people; the argument has a force
that is irresistible in the absence of
language which expresses such a purpose
too clearly to admit of doubt.9

The opinion of the majority in this case was tantamount to rejection of
the Fourteenth Amendment. The Court could not declare it unconstitutional as
it was now part of the Constitution, but it could and did interpret the
amendment in such a manner that its effect would be nullified. What important
rights were left to a citizen of the United States when those in the Bill of
Rights were excluded? The Court had ruled that those were to be protected
solely by the states. In the case of the freedman particularly, practically
every guarantee that he was in danger of losing was enumerated in the first
ten amendments, forcing him to appeal to a hostile state for protection, and
neutralizing the prime purpose of the law.

These were the sentiments of the minority justices who called the
decision a "vain and idle enactment accomplishing nothing." Justice Swayne
in delivering the dissenting opinion, said in part:

By the Constitution, as it stood
before the war, ample protection was
given against oppression by the Union,
but little was given against wrong and
oppression by the States. That want was
intended to be supplied by this Amend-
ment. Against the former this Court has
been called upon more than once to inter-
pose. Authority of the same amplitude
was intended to be conferred as to the
latter. But this arm of our jurisdiction
is, in these cases, stricken down by the
judgment just given.10

Criticism of the decision was confined chiefly to the Radical
Republicans, however, who claimed that their efforts were twisted and dis-

9 Ibid., 44-6.
torted beyond all hope of successful application. The press, in general, was favorable. Nation expressed pleasure that the Court was finally recovering from "war fever," and re-asserting its independence.\textsuperscript{11} The \textit{New York World} applauded the decision, regretting only that it had not been stated more strongly.\textsuperscript{12} The only complaints were that, in spite of the justice of the principle, the decision allowed monopolies a dangerous amount of freedom, giving, as the \textit{Cincinnati Inquirer} stated, "...legal sanction to the consummation of an outrage on individual rights that is almost unparralleled."\textsuperscript{13}

The generally favorable reception of the decision seems somewhat strange today. It must be remembered, however, that the large corporations had hardly made themselves felt in 1873, and fear of monopoly was not too prevalent. It seemed more important to the country that state police power be protected than that potential monopoly be checked. Then too, there was a natural reaction bound to set in after the excesses of the Radical Congresses. For many people, even staunch Union men, nationalism had grown too quickly, and they were happy to see an assault on state powers repelled.

In any case, it was certainly a reversal of the previous trend. But for the decision in the Slaughterhouse Cases, the theory of state's rights would have been interred with the Civil War. As it was, it was not until the decade of the "eighties" that the issue permanently ceased to be a major factor in American life.

For the states themselves, the decision was a bonanza. They were to use the police power deduced from it to control the growing strength of the large

\begin{itemize}
\item \textsuperscript{11} \textit{Nation}, April 24, 1873.
\item \textsuperscript{12} \textit{New York World}, April 16, 1873.
\item \textsuperscript{13} \textit{Cincinnati Inquirer}, April 16, 1873; cited in Warren, II, 540.
\end{itemize}
corporations. Within fifteen years, however, the position of the Court on police power was to prove untenable when confronted with the mushrooming of vast interstate commercial interests.

Although state police power was thus limited, the narrow interpretation of citizenship rights was to remain for a much longer period. As late as 1900 the Court still held that privileges and immunities of citizens of the United States do not include the rights contained in the first eight amendments to the Constitution, and as late as 1940 that decision was still the rule of the Court. 14

The only group that did not gain by the decision in the Slaughterhouse Cases was the freedmen for whom the Fourteenth Amendment had originally been written. Later attempts by Congress to restore some virility to the amendment were emasculated by the promulgation by the Supreme Court of the doctrine that the Federal government could not protect the citizens from each other but only from discriminatory state legislation. 15 Also, this protection was not to extend to social but only to civil rights. In the Slaughterhouse Cases the Court decided that as the Fourteenth Amendment had grown out of the Negro question, it should be interpreted as dealing almost solely with that problem. However, in spite of this seemingly favorable ruling, the direction of this interpretation was toward limiting and restricting the protection offered in the amendment. Furthermore, this view of the amendment taken by the Court is in direct opposition to the interpretation prevalent today which recognizes the amendment as a broad base for all state, civil, and property rights.

15 Morison & Commager, 51-2.
The case and its aftermath present a very strange picture. The Fourteenth Amendment was passed for one purpose; to transfer the immunities in the Bill of Rights to the jurisdiction of the Federal government. When the test case comes up it is tried, not on the obvious purpose of the amendment, but on the side issue of state police power; and without ever hearing a case involving citizenship immunities, the Court concludes an interpretation on those immunities differing completely from that of the framers of the amendment. The ruling on the side issue, on which the case was tried, vanishes in a decade. The ruling on the main, on which the case was not tried, persists for three quarters of a century.

As late as 1908, the decision was defended by the Supreme Court. In Twining vs. New Jersey, 211 U.S. 78, Justice Moody lauded the ruling in the Slaughterhouse Cases, stating:

...if the views of the minority had prevailed, it is easy to see how far the authority and independence of the States would have been diminished, by subjecting all their legislative and judicial acts to correction by the legislative and review by the judicial branch of the National government.16

On the other hand, the opinion remains that the Court, by that decision, threw out notable gains in civil liberties that are still slowly and arduously being won back. It is claimed that had the Fourteenth Amendment been interpreted as it had been written, the nation would be much more advanced in the sphere of civil rights. Professor Burgess, writing in 1890, spoke critically of the decision:

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16 Warren, II, 547.
Coming at the time when the reaction had begun to set in against the pronounced Nationalism of the preceding decade, it partook of the same, and set the direction towards the restoration of that particularism in the domain of civil liberty, from which we suffered so severely before 1861, and from which we are again suffering now.17

While possibly not a landmark in the sense that Professor Warren meant, the Slaughterhouse Cases are certainly a beacon in the history of the Supreme Court. They ruled upon a major amendment to the American Constitution, an important action in itself. In making that ruling they reversed a pronounced and powerful national trend and made a profound impression on state and federal relations. Finally, the decision restored to the Supreme Court a judicial independence that had been wanting in the previous decade, and opened the way for eventual reclamation of the tribunal's former prestige. The Slaughterhouse Cases were the first of the post-Civil War cases that rebuilt the Court into a formidable and authoritative branch of the Federal government.

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CHAPTER V
THE RESTORATION OF JUDICIAL INDEPENDENCE

The decision in the Slaughterhouse Cases was both the climax and the turning point in the Court's struggle to regain its former position of authority in the American scene. Although it was not to succeed completely until the Radical Republicans lost control of Congress, that body, after 1870, leaned more and more toward conservative construction of the legal changes wrought in the previous decade. As has been stated, a reaction was setting in against the nationalistic spirit and the Court used it to its fullest extent.

In the same year as the Slaughterhouse decision, the case of Horn vs. Lockhart, 17 Wallace 570, was heard, involving legislative acts of the various states of the Confederacy. In 1870 the Court had ruled that the Confederacy was merely an "armed resistance to the rightful authority of the sovereign," and that its acts were invalid insofar as they aided said resistance. In Horn vs. Lockhart, however, the Court modified its previous ruling, stating that the acts of the several Confederate states, "so far as they did not impair or tend to impair the supremacy of the National authority or the just rights of the citizens under the Constitution, are, in general, to be treated as valid and binding." 2

1 Hickman vs. Jones, 9 Wallace 197.
2 Warren, II, 417.
This decision, of course, was greeted unfavorably by the Radicals, as it was their contention that all the acts of the rebellious states were invalid. The pendulum was swinging back, however, and the decision, which if given five years earlier would have been completely unacceptable, now elicited little critical comment. Although the decision might be interpreted as favorable to the Confederacy, the implied idea that the individual state had certain unalienable legislative rights, made it acceptable to the majority of the people.

Between the years 1870 and 1873 a number of decisions were handed down that elevated state at the expense of national authority. Thomson vs. Union Pacific R.R., 9 Wallace 574, upheld the right of a state to tax a railroad although built with government funds and acting as a government agent. Collector vs. Day, 19 Wallace 113, in 1871, nullified a federal law that taxed the salaries of state officials in wartime. In 1873, Bradwell vs. The State, 16, Wallace 130, further limited the privileges and immunities of national citizenship, and Osborne vs. Mobile 16, Wallace 479, upheld a state tax on a company doing business partly outside of the state. Only in two decisions did the Court uphold the power of the national government, one denying the right of a state court to issue a writ of habeas corpus for a prisoner held

3 Warren, II, 534-6, 550-1
held by national authorities, and the other rejecting repudiation of contracts and bonds by state courts.4

This rebirth of Court independence is best illustrated by decisions in regard to national legislation. Up to 1869, only four Acts of Congress had been declared invalid in the whole history of the Court. From 1870 to 1873 no less than six were so nullified. As Warren states:

With the year 1873...there came a distinct reaction from...extreme nationalism. That the Court from 1870 to 1873 was receding somewhat from the almost unvaried support which it had theretofore given to Congressional power had been seen in the increased instances in which it had exercised its function of declaring Federal legislation to be violative of the Constitution.5

After 1873 the trend toward independence remained. Within ten years, three of the most important Acts of Congress concerning Federal and state relations were ruled unconstitutional, the Enforcement Act of 1870, the Ku Klux Act, and the Civil Rights Act. Thus the Court re-established itself.

Co-incident with the end of the era was the death of Chief Justice Chase. He passed away May 7, 1873, having lived long enough to see the Court begin to restore itself to its former eminence. His epitaphs were a review of the whole period. The Nation spoke of him: "He brought to the Court no store of

4 U.S. vs. Tarble, 13 Wallace 397 (1872), Olcott vs. Supervisors, 16 Wallace 678 (1873). This latter case came about through the practice of various states to authorize money and bond issues for municipalities. These authorizations were generally upheld by the state courts, but were often reversed at a later date by the courts when, because of fraud or non-performance, there was a public demand for repudiation.

5 Warren, II, 533.
legal learning, but he brought comprehensive views, considerable power of
generalization and a just sense of Constitutional rights and judicial
responsibility. 6 His constant enemy, the Independent, gave grudging praise:
Mr. Chase was an ambitious man; he wished to please people and gain their
support, but he would not sacrifice to this one jot of his convictions. 7

In retrospect, the period from 1860 to 1873 was undoubtedly the most
difficult in the history of the Supreme Court. Even during the early period
of Court organization, the problems were not as acute, as the tribunal had
not as yet been recognized as the important arm it was eventually to become,
and could thus work out its difficulties with a minimum of interference.

Furthermore, while it is true that the Court experienced setbacks under
Jefferson and Jackson, and as late as 1937 was under executive fire for re-
organization, all of these instances were disconnected and isolated problems.
In the thirteen years of civil war and reconstruction, however, the Court was
constantly beset by legal and legislative difficulties, without respite. It
had continually to weigh its actions, deciding whether a legal problem or Act
of Congress would be more harmful to the country and to the body of law if
accepted, or more harmful to the independent existence of the Court if
rejected.

In the opinion of this writer, the Supreme Court picked its way admirably
through the turbulent era, using its powers with discretion when necessary,

6 Nation, May 15, 1873.
7 Independent, May 15, 1873; cited in Warren, II, 552.
and holding them in abeyance when they might have endangered the judicial character of the tribunal. The actions of the Court were not always fearless and undaunted but they accomplished their purpose. When the difficult times had passed, the judiciary was still able to resume its former stature and continue to be "the bulwark of the Republic."
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### APPENDIX

**JUSTICES OF THE UNITED STATES SUPREME COURT**

**1860-1873**

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<th>Name</th>
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<td>Joseph P. Bradley</td>
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APPROVAL SHEET

The thesis submitted by John Fay Philbin has been read and approved by three members of the Department of History.

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated, and that the thesis is now given final approval with reference to content, form, and mechanical accuracy.

The thesis is therefore accepted in partial fulfillment of the requirements for the degree of Master of Arts.

July 20, 1949

Signature of Adviser
"THE WRECK OF THE DEUTSCHLAND" AND

THE SPIRITUAL EXERCISES OF ST.

IGNATIUS: A COMPARISON.

by

JOHN J. POWELL, S.J., A.B.

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF

THE REQUIREMENTS FOR THE DEGREE OF MASTER

OF ARTS IN LOYOLA UNIVERSITY.

OCTOBER

1949
VITA AUCTORIS

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