CONSTITUTIONAL ACCOUNTABILITY CENTER

Court Reform and the Promise of Justice: Lessons from Reconstruction

Forthcoming, Lewis and Clark Law Review, Vol. 27, No. 3, 2023

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NOVEMBER 2022

Introduction

Calls for court expansion are in the air. On the floor of Congress, speakers insist that the Supreme Court has disgraced itself, and that if the Court will not the respect the rights of the American people, Congress must intervene. The year is 1868, not 2022, but the parallels to today are hard to miss.

As the Supreme Court term that just concluded shows, this 6-3 conservative Court is no friend to our whole Constitution's promises of freedom, equal citizenship and a multiracial democracy open to all. Conservatives have cemented their supermajority on the Court by manipulating the confirmation process—announcing and then disavowing their own supposed rules regarding nominations in a presidential election year—in order to pack the Court and roll back decades of constitutional law that helped ensure a freer, more equal, and more democratic America.[1]

The Roberts Court's new 6-3 majority has moved aggressively to remake the law on multiple fronts, bringing the Supreme Court to a breaking point. In *Dobbs v. Jackson Women's Health Center*, conservatives voted to give states carte blanche to impose the most draconian bans on abortion, stripping away from millions of Americans the right to control their bodies and their lives.[2] The decision allows states to criminalize a constitutional right essential to bodily control and equal citizenship and provides a roadmap for taking away other fundamental rights the Supreme Court has protected for nearly a century. In other cases, the Roberts Court supercharged gun rights,[3] and rights

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[1] *See* Ruth Marcus, *The Rule of Six, A Newly Radicalized Supreme Court is Poised to Reshape the Nation*, Wash. Post, Nov. 28, 2021, https://www.washingtonpost.com/opinions/2021/11/28/supreme-court-decisions-abortion-guns-religious-freedom-loom/.

[2] Dobbs v. Jackson Women's Health Center, 142 S. Ct. 2228 (2022).

[3] New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

to free exercise of religion, while whittling down the Establishment Clause.[4] Next term, other rights are in the crosshairs. The Court's upcoming term threatens to gut what little remains of the Voting Rights Act,[5] give state legislatures the power to ignore state constitutional voting rights guarantees when regulating congressional elections,[6] strike down the modest use of race in college admissions,[7] and create a First Amendment right to discriminate.[8]

Precedent-shattering rulings like *Dobbs* deservedly get the lion's share of attention. But they are only part of the story. The Roberts Court has also transformed how the Supreme Court decides cases: it has weaponized the emergency application process—traditionally a tiny part of the Court's work—to move the law to the right as fast as possible, often without the transparency and deliberation that is essential to the judicial process.[9] The term that ended with *Dobbs* began with the shadow docket order in *Whole Women's Health v. Jackson*,[10] in which five conservative Justices, without full briefing or oral argument, nullified the right to abortion for Texans by permitting Texas to ban all abortions at six weeks of pregnancy. Time and again, the Court has used the shadow docket to find a way to rule for a favored set of repeat players, cutting the judicial process short in a manner that repeatedly shortchanges the most marginalized members of the populace.

Must the Court be left to its own devices as it moves to reverse rights, put accountability further out of reach, and cut short basic aspects of the judicial process? Certainly not. Our Constitution gives the political branches the power to reform the courts and ensure that we have a system of justice worthy of the name. Article III provides the broad outlines of our federal judicial system: it creates the Supreme Court, provides that the Justices, as well as judges serving on lower federal courts established by Congress, "shall hold their offices during good behaviour," and provides the federal courts with the power to hear nine categories of "Cases" and "Controversies," including "all Cases, in Law or Equity, arising under this Constitution, the Laws of the United States, and Treaties."[11] But other aspects of the federal judiciary are left to Congress. The Constitution leaves the size of the Supreme Court to be established by Congress, and gives Congress broad power to control the jurisdiction and proceedings of the Supreme Court and the lower federal courts—an understanding acknowledged by constitutional scholars across the ideological spectrum.[12] Within narrow limits, Congress's authority to "make all

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[4] *See* Carson v. Makin, 142 S. Ct. 1987, 2014 (2022) (Sotomayor, J., dissenting) ("Today, the Court leads us to a place where separation of church and state becomes a constitutional violation."); Kennedy v. Bremerton School Dist., 142 S. Ct. 2407, 2453 (2022) (Sotomayor, J., dissenting) (arguing that the majority "elevates one individual's interest in personal religious exercise, in the exact time and place of that individual's choosing, over society's interest in protecting the separation between church and state, eroding the protections for religious liberty for all").

[5] Merrill v. Milligan, No. 21-1086, https://www.scotusblog.com/case-files/cases/merrill-v-milligan-2/.

[6] Moore v. Harper, No. 21-1271, https://www.scotusblog.com/case-files/cases/moore-v-harper-2/.

[7] Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, No. 20-1199, https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-president-fellows-of-harvard-college/ ; Students for Fair Admissions, Inc. v. University of North Carolina, No. 21-707, https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-university-of-north-carolina/.

[8] 303 Creative LLC v. Elenis, No. 21-476. https://www.scotusblog.com/case-files/cases/303-creative-llc-v-elenis/.

[9] Steve Vladeck, *Brett Kavanaugh's Defense of the Shadow Docket Is Alarming*, Slate, Feb. 8, 2022, https://slate.com/news-and-politics/2022/02/the-supreme-courts-shadow-docket-rulings-keep-getting-worse.html.

[10] 141 S. Ct. 2494 (2021).

[11] U.S. CONST. art. III, §§ 1, 2.

[12] Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1753 (2021) ("While Article III assumes the existence of a Supreme Court and Article I, Section that there will be a Chief Justice, nothing in the text seems to bear on how large or small the Court must be."); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L. J. 148, 175 (2020) ("The size of the Supreme Court is not specified in the Constitution and has always been set by statute."); Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J. L. & LIBERTY 18, 64 (2016) ("Nothing in the Constitution specifies the size of the membership of the Supreme Court . . . . The size and details of the

laws which shall be necessary and proper for carrying into execution . . . all other powers vested by this Constitution . . . in any department,"[13] empowers it to reform the federal courts, including the Supreme Court.

There is a robust debate today over court reform—even as the prospects for passage appear dim while the Senate remains incapacitated by the filibuster. But despite the political reality that major legislation stands little chance of being enacted in Congress until fifty Senators end the filibuster, calls to fix a broken Supreme Court are growing more insistent than at any time in recent history. How should we fix a Supreme Court bent on abandoning some of our most cherished constitutional rights?

Structural reformers urge that "structural redesign must be central to the conversation about how to reform the Supreme Court—and, indeed, how to save it."[14] For some, court expansion is the tried and true solution: increasing the number of justices on the Court, these advocates say, has been used in the past and is "the most direct way to address the structural imbalance brought about by Republican manipulation of the nomination process."[15] Others fear that adding seats to the Court appears too nakedly political, risks undermining the rule of law, and invites a spiraling tit-for-tat.[16] They prefer reforms to lower the political stakes of the appointment process, such as term limits, the use of rotating panels, or requirements to ensure an ideologically balanced Supreme Court bench.[17] A third view, represented by the work of Ryan Doerfler and Samuel Moyn, argues that the goal of court reform should be to truncate the Supreme Court's power, not enhance its legitimacy. On this view, court reform should aim to clip the Supreme Court's wings through "disempowering reforms," such as jurisdiction-stripping or super-majority voting requirements, that limit "the Supreme Court's ability to make policy" and "effectively reassign power away from the judiciary to the political branches."[18]

This Article examines the question of court reform through the lens of Reconstruction, a historical era in which the Supreme Court was bitterly attacked and Congress hotly debated court reform, ultimately enacting many measures into law. Reconstruction not only produced transformative changes to the Constitution; it also changed the federal judicial system in hugely important ways. During Reconstruction, Congress repeatedly changed the size of the Supreme Court, produced one of the notable examples of jurisdiction-stripping in American history and enacted landmark statutes that greatly expanded the jurisdiction of the federal courts. Indeed, almost all of the court reforms being debated today have historical antecedents in the Reconstruction period. For this reason,

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Supreme Court's membership are up to Congress, pursuant to its powers under the Necessary and Proper Clause."); *id*. at 54 ("The text says that Congress has the power to legislate exceptions to the Court's appellate jurisdiction. The structure of the Constitution makes such control over jurisdiction a powerful limit on the powers of the Supreme Court . . . .").

[13] U.S. CONST., art. I, § 8, cl. 18.

[14] Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy,* 130 YALE L.J. F. 821, 827 (2021).

[15] Elie Mystal, *There is Only One Way Out of This Crisis: Expand the Court*, THE NATION, Sept. 23, 2020, https://www.thenation.com/article/politics/supreme-court-packing/; *see also* Nancy Gertner & Laurence H. Tribe, *The Supreme Court Isn't Well. The Only Hope for a Cure is More Justices*, WASH. POST, Dec. 9, 2021, https://www.washingtonpost.com/opinions/2021/12/09/expand-supreme-court-laurence-tribe-nancy-gertner/ ("A Supreme Court that has been effectively packed by one party will remain packed into the indefinite future, with serious consequences to our democracy. This is a uniquely perilous moment that demands a unique response.").

[16] Epps & Sitaraman, *supra* note 12, at 152; Neil Siegel, *The Trouble With Court-Packing,* 72 DUKE L.J. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4023686.

[17] Roger C. Cramton, *Reforming the Supreme Court*, 95 CALIF. L. REV. 1313 (2007) (term limits); Epps & Sitaraman, *supra* note 12, at 181-205 (rotating panels and balanced bench proposals).

[18] Doerfler & Moyn, *supra* note 12, at 1721; *see* Christopher Jon Springman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1780-81 (2020) (arguing that Article III "give[s] to Congress a means to limit the scope of judicial review—to take back from the federal courts, in specific cases, the power to say what the law is"); Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893 (2003) (arguing that Congress could provide that the Supreme Court may not strike down an Act of Congress without a two-thirds majority).

Reconstruction provides a fascinating lens through which to examine court reform and has important lessons for current debates over court reform.

Despite its relevance, this story remains obscure. While there is a mountain of scholarship on President Franklin Roosevelt's court-packing plan that portrays "Roosevelt's 1937 plan" as "the paradigmatic example of an illegitimate threat to the judiciary,"[19] the story of how the Reconstruction Congress utilized the powers given to Congress to reform the federal judiciary remains underappreciated. Reconstruction history provides an important reminder that Congress has many tools available to it to ensure a more just federal judicial system.

Reconstruction's model of legislative constitutionalism has three core components relevant to today's court reform debate. Faced with a Supreme Court hostile to our deepest constitutional values, Congress can (1) change the composition of the Court, (2) alter its jurisdiction and regulate its proceedings, and (3) use its express enforcement powers to protect basic rights and equal citizenship—including by enforcing constitutional commitments that the Supreme Court will not. The last of these is the handiwork of the Reconstruction Framers, who insisted that "the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative, because in each the amendment itself provided that it shall be enforced by legislation on the part of Congress."[20] Fearful that the Supreme Court would be unwilling to respect new constitutional guarantees that sought to broadly safeguard fundamental rights and equal citizenship, the Reconstruction Amendments gave Congress broad powers to legislate prophylactically to realize the full promise of liberty and equality for all. The enforcement power "was born of the conviction that Congress—no less than the courts—has the duty and the authority to interpret the Constitution."[21]

The Reconstruction Congress employed each of these devices to reform the federal judiciary: it enacted (1) structural reforms to change the size of the Supreme Court, first expanding the Court to ten justices, then shrinking it to seven justices to prevent President Andrew Johnson from filling any vacancies, and then finally expanding it to nine justices during the presidency of Ulysses Grant; (2) "disempowering" reforms to strip the Supreme Court of jurisdiction over some of the most charged cases of the day, cases that sought to challenge the very foundation of Reconstruction; and (3) "justice" reforms that expanded the jurisdiction of the federal courts to vindicate constitutionally guaranteed rights and enforce the promise of freedom, justice, and equality at the core the Reconstruction Amendments. Despite some caustic attacks on the Supreme Court, Reconstruction witnessed the greatest enlargement in the power of the courts in American history, as Congress reformed our judicial system,

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[19] *See, e.g.*, Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence,* 71 VAND. L. REV. 465, 512 (2018); *see id.* at 506 (arguing that there is a "norm against court packing" that is "likely due in part to the ultimate defeat of Roosevelt's effort"); Curtis A. Bradley & Neil Siegel*, Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 259 (2017) (arguing, based on "the Senate hearings and other materials from 1937" that "many criticisms of the Court-packing plan involved claims about historical gloss, which were often tied to claims about constitutional structure"); Siegel, supra note 16, at 23-29 (arguing that court-packing is likely prohibited by a constitutional convention, principally arising from the rejection of FDR's plan).

[20] CONG. GLOBE, 42nd Cong. 2d Sess. 525 (1872); RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 252 (2021) (arguing that "the Court's claim that the Fourteenth Amendment was designed to leave the judiciary with 'primary authority to interpret' the meaning of Section 1 . . . is not sustainable"); Jack M. Balkin, *The Reconstruction Power,* 85 N.Y.U. L. REV. 1801, 1805 (2010) ("[The[] [Reconstruction] amendments were designed to give Congress broad powers to protect civil rights and civil liberties: Together they form Congress's Reconstruction Power. Congress gave itself these powers because it believed it could not trust the Supreme Court to protect the rights of the freedmen."); Michael McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 182 (1997) ("Section Five of the Fourteenth Amendment was born of the fear that the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power.").

[21] McConnell, *supra* note 20, at 183.

often to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments, to ensure that federal courts could hold states and localities accountable for violating constitutionally guaranteed rights.[22]

Of these, the Reconstruction Congress's access to justice reforms—which included measures to broaden the writ of habeas corpus to protect persons held in state custody in violation of the Constitution, to establish a federal cause of action to permit suits in federal court against state and local officers who violated constitutional rights, and to give federal courts jurisdiction over all cases raising questions under federal law—have proved to be the most enduring. These jurisdictional innovations were not always immediately embraced by the Supreme Court, but, over the long run, they transformed the federal judiciary.[23] Despite a history of the Court taking a far too narrow view of these landmark statutes,[24] our constitutional system has been forever changed by the efforts of the Reconstruction Congress to open broadly the federal courthouse doors to individuals aggrieved by abuse of state power.

The history of efforts to expand the Court and regulate Supreme Court jurisdiction during Reconstruction, is more mixed—both proved important in the short run, but neither changed the institution in a lasting way. Still, Reconstruction's reforms are a reminder that changes to the composition and jurisdiction of the Court provide a powerful weapon to rein in a Supreme Court that has gone off the rails. While court expansion and jurisdiction-stripping provided the greatest short-term bang for the buck, what proved to be more lasting were the landmark pieces of legislation enacted by the Reconstruction Congress that opened the doors of federal courts to enforce the Reconstruction Amendments and allowed individuals victimized by state abuse of power to seek justice in a federal court of law.

The takeaway here is that reforms that open courthouse doors and make our courts into true institutions of justice should be just as much a part of the court reform conversation as court expansion, term limits, or reforms that seek to disempower the Supreme Court. A central goal of court reform should be to help realize our Constitution's promise of equal justice under law, safeguard bedrock rights, and ensure that our courts work for all Americans—particularly as the Supreme Court declares open season on fundamental rights and strikes one blow after another to accountability. Whether the Supreme Court grows in size or remains at nine, progressives today should take a page from the Reconstruction reformers that overhauled the federal courts and broadly opened the courthouse doors to vindicate constitutionally guaranteed rights and hold wrongdoers accountable in a court of law. With a 6-3 conservative Supreme Court systematically bent on rolling back fundamental freedoms and closing the courthouse doors on the most marginalized of Americans, the goal of court reform must include ensuring the promise of liberty and justice for all.

Should progressives fear that the conservative supermajority will look for ways to gut any new legislation enacted by Congress? Of course, they should. Any new measures must be drafted using the clearest language possible to prevent a conservative Court from exploiting ambiguities to hollow out Congress's handiwork (and the likelihood that a Court like the current one could simply ignore these legislative endeavors suggests they should probably be part of a reform package that includes other reforms like expansion). But Congress should not shy away from acting on its constitutional obligation to enforce constitutional rights because it will provoke a major clash with the conservative super-majority on the Supreme Court. As Reconstruction reminds us, the Constitution does not leave our

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[22] BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 136 (2010) ("This period saw the greatest enlargement of federal jurisdiction ever."); William M. Wiecek, *The Reconstruction of Judicial Power*, 13 Am. J. Leg. Hist. 333, 333 (1969) ("In no comparable period of our nation's history have the federal courts, lower and Supreme, enjoyed as great an expansion of their jurisdiction as they did in the years of Reconstruction").

[23] *See* Wiecek, *supra* note 22, at 334 (observing that "the jurisdictional statutes of the Reconstruction-era laid the groundwork for the judicial self-assertiveness of the late nineteenth and early twentieth centuries").

[24] Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952); Jack Beerman, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981 (2002).

rights solely to the Supreme Court. The Constitution gives Congress key tools that are vitally important in this moment.

This Article unfolds as follows. Part I tells the story of how the Reconstruction Congress reformed the federal judicial system, discussing their efforts to change repeatedly the size of the Supreme Court; to rein in a Court they feared would undo Reconstruction; and finally, to fundamentally alter federal jurisdiction to make the federal courts partners in the Reconstruction project of securing true freedom and equal citizenship. Part II examines the lessons we should take away from the history of court reform during Reconstruction, discussing which of the reforms worked best and which proved less successful. While court expansion and jurisdiction-stripping proved most important in the short run, the most enduring reforms were those that provided a federal forum to vindicate constitutionally guaranteed rights. Reconstruction offers a reminder that, whether the Court stays at nine members or not, reforms that protect bedrock rights and ensure accountability are critical. A brief conclusion follows.

I. Reconstruction and Court Reform

During Reconstruction, the Supreme Court was under fire, the bitter memory of the Court's horrendous decision in *Dred Scott v. Sandford* [25] still fresh in the public mind. It proved difficult to forget that less than a decade earlier "[t]he Supreme Court not only disgraced itself as a tribunal of justice, but it disgraced our common humanity, when it mouthed from that high seat sacred to justice the horrid blasphemy that there were human beings either in this land or in any other land who had no rights which the white man was bound to respect."[26] There were calls to radically restructure the Court, entirely revise its appellate jurisdiction, and to even to abolish the Supreme Court. [27] These drastic proposals did not come to pass. Indeed, by the end of Reconstruction, the Supreme Court and the federal courts as a whole emerged more powerful than ever. This Section examines the court reforms of the Reconstruction era. Section A examines the changes made to the size of the Supreme Court; Section B turns to efforts to discipline the Court, including by curtailing its jurisdiction over cases challenging the foundation of Reconstruction. Section C discusses the landmark Reconstruction legislation that revolutionized the jurisdiction of the federal courts to vindicate the Constitution and the supremacy of federal law, and to rein in state abuses of power.

A. Court Expansion During Reconstruction: Changing the Court

During the Civil War and continuing into Reconstruction, Congress restructured a Supreme Court that was systemically biased in favor of slavery. It is well known that in *Dred Scott* and other cases the Supreme Court of the antebellum era mangled the Constitution in service of slavery.[28] What is less well known is that a pro-slavery bias was built into the very structure of the antebellum Supreme Court. Under federal legislation enacted in 1837 that increased the size of the Supreme Court to nine justices, the federal judicial system was gerrymandered in favor of slavery: the federal judiciary was made up of

[25] 60 U.S. (19 How.) 393 (1857).

[26] CONG. GLOBE, 40th Cong. 2d Sess. 483 (1868).

[27] Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 3 (2002) (observing that, during Reconstruction, "there were threats to abolish, reform, or reconstruct the Supreme Court").

[28] PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT 25 (2018) (describing the pre-Civil War Supreme Court as "a constant friend of slavery and almost never a friend of liberty").

nine circuits, and a whopping five out of the nine circuits were composed of slave states.[29] And because Supreme Court justices had the responsibility of circuit-riding, one justice was appointed from each of the nine circuits. What this means is that slave states had a permanent majority on the Supreme Court.[30] The nation's high court, one newspaper charged, was "scandalously sectional, grossly partial, a mockery of the Constitution, a serf of the slave power, and a disgrace to the country."[31]

During Reconstruction, Republicans in Congress repeatedly sought to manipulate the size of the Supreme Court to produce a high Court that would protect freedom and equality rather than perpetuate the legacy of slavery.[32] Calls to change the composition of the Court were commonplace: those who sought to change the Court observed that "by increasing or diminishing the number of judges, the Court may be reconstructed in conformity with the supreme decisions of the war."[33] That is indeed what happened.

In 1863, Congress approved legislation increasing the size of the Supreme Court to ten; the legislation also created a tenth circuit, composed of the districts of California and Oregon.[34] This expansion of the high Court—enacted into law as the Supreme Court was hearing a challenge to Lincoln's naval blockade of Confederate ports—strengthened President Lincoln's hands at the Court. While some had urged Lincoln to add four new justices to the Court to give Lincoln a one-seat majority,[35] Congress took the more measured step, as the New York Times observed, of "add[ing] one to the number which would speedily remove the control of the Supreme Court from the Taney school."[36]

The Supreme Court would not remain at ten justices for long. In 1866, the Reconstruction Congress reduced the size of the Supreme Court to seven justices—a change that effectively prevented President Andrew Johnson, Lincoln's successor, from appointing justices hostile to Reconstruction.[37] The legislation was a response to the nomination of Henry Stanbery, who had helped draft Johnson's veto of the Civil Rights Act of 1866 and would go on to represent Johnson in his impeachment trial. Rather than block Stanbery's nomination, Congress reduced the Court's size to seven by attrition, denying Johnson the opportunity to appoint new justices to the Supreme Court.[38] This move prevented

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[29] STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 14 (1968) ("Five [circuits] consisted exclusively of slave states, with a population of a little over eleven million, while the remaining four contained over sixteen and a half million. . . . Eight of the newer states, six of them free states, were not assigned to any circuit.").

[30] Mark Graber, *"No Better Than They Deserve:"* Dred Scott *and Constitutional Democracy*, 34 N. Ky. L. Rev. 589, 604 (2007) ("Federal law . . . structured the federal judicial system in ways that guaranteed that a majority of the justices on the Supreme Court would be citizens from slave states.").

[31] N. Y. Trib., Mar. 26, 1859, quoted in KUTLER, *supra* note 29, at 16.

[32] FRIEDMAN, *supra* note 22, at 133 ("No fewer than three times, Congress altered the size of the Supreme Court to ensure a sound majority in important cases.").

[33] N.Y. Herald, Dec. 20, 1866, at 4, quoted in FRIEDMAN, *supra* note 22, at 134-35.

[34] Act of Mar. 3, 1863, ch. 100, 12 Stat. 794.

[35] Joshua Braver, *Court-Packing: An America Tradition?*, 61 B.C. L. REV. 2747, 2770 (2020).

[36] N.Y. Times, Mar. 4, 1863, at 1; DAVID M. SILVER, LINCOLN'S SUPREME COURT 84 (1956) ("It was prudence that dictated a packed Court, and President Lincoln was willing to increase the size of the Supreme Court to strengthen the position of those Justices who would view with favor the acts that the administration deemed necessary.").

[37] Act of July 23, 1866, ch. 210, 14 Stat. 209; FRIEDMAN, *supra* note 22, at 134 (explaining that the change aimed "to deprive Andrew Johnson of appointments").

[38] Braver, *supra* note 35, at 2782-83 ("In effect, this was a blanket refusal to confirm any nominee to the vacant tenth seat. What's more by reducing of the Court by three seats, the Senate also sent the message that it would not entertain any nominees, not only for this newly opened seat, but also for the next vacancies as well.").

President Johnson from replacing two members of the *Dred Scott* majority, who passed away during Johnson's presidency, and left the Court short-staffed.[39] As one Democratic Senator lamented several years later, it was "remarkable" that the Court's size was reduced at a time "when the business of the Supreme Court had increased very greatly . . . . The explanation is political. It was not desired that the President, who at that time was entering upon the existing chronic difference with Congress, should fill a vacancy upon that bench by nomination[.]"[40]

Seven, like ten, proved not to be a magic number. The Judiciary Act of 1869, signed by President Ulysses Grant, one month into his presidency, increased the size of the Supreme Court to nine justices.[41] Republicans who had shrunk the Court when Andrew Johnson was President now insisted that "the Supreme Court of the United States is overloaded with business" and should be expanded.[42] With the retirement of Justice Robert Grier, another member of the *Dred Scott* majority, President Grant quickly added two new justices to the Supreme Court, consolidating a Republican majority on the Supreme Court.

This series of Reconstruction-era measures changing the size of the Court were couched in neutral language and, by and large, received little debate in Congress.[43] The addition of a tenth justice in 1863 occurred simultaneously with the creation of a tenth circuit court for the states of California and Oregon. The creation of a new circuit dictated a new justice, who would be responsible for circuit riding in the newly-created circuit.[44] The 1866 reduction of the Supreme Court's size to seven justices, apparently, met with approval from the Supreme Court and was supported by Chief Justice Chase as a means of increasing judicial salaries.[45] Democratic newspapers attacked the reduction as a simple act of hostility to President Johnson, but the reduction sailed through Congress with almost no debate.[46] The 1869 legislation—the exception that proves the rule—featured extensive debate, but what is notable is that virtually everyone agreed that the Supreme Court should be expanded to relieve a "very much crowded" docket and remedy the fact that "[i]t is now two and sometimes three years before a cause taken to the Supreme Court can be heard," amounting to what Senator Lyman Trumbull called "a denial of justice in many cases."[47] Senator Trumbull's bill increased the Supreme Court to nine justices.

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[39] *Id.* at 2785 ("Reducing the number of Supreme Court Justices meant that the circuit courts would not be adequately staffed. Before, ten Justices had not been a sufficient number to ride circuit, but now there would be only seven.").

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

[41] Act of April 10, 1869, ch. 22, 16 Stat. 44.

[42] CONG. GLOBE, 41st Cong., 1st Sess. 209 (1869).

[43] KUTLER, *supra* note 29, at 19 (noting "total absence of debate" over 1863 plan to add a tenth justice); Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 181 (2003) (arguing that "deliberation preceding adoption of the 1866 amendment to reduce the size of the Court from ten to seven was so truncated that no conclusive inferences can be drawn as to Congress's underlying motivations").

[44] Braver, *supra* note 35, at 2768 (describing the 1863 "expansion, from nine to ten seats," as "the last example of the circuit-riding system at work").

[45] CONG. GLOBE, 39th Cong. 1st Sess. 3909 (1866) ("[A] number of the members of the Supreme Court think it will be a vast improvement."); KUTLER, *supra* note 29, at 53 (observing that "Chase was no stranger to the notion of reduction"); Friedman, *supra* note 27, at 39 ("Chase felt strongly that an increase in salaries was appropriate and the easiest way to accomplish this was to reduce the number of Justices while dividing up a similar-sized pie.").

[46] Braver, *supra* note 35, at 2784 (observing that Democratic newspapers "roundly condemned the reduction").

[47] CONG. GLOBE, 40th Cong. 3d Sess. 1366 (1869); *see also id.* at 1483 ("The docket is overloaded."); *id.* at 1484 ("[T]he business of the Supreme Court is so large that under the present system it cannot be transacted within a reasonable time."); CONG. GLOBE, 41st Cong. 1st Sess. 208 (1869) ("[I]t is necessary that the Supreme Court should have some relief in some way by a law that will expedite the transaction of business before that tribunal.").

Others urged a "complete reorganization of the Supreme Court," which would involve increasing the high Court to fifteen or eighteen justices and instituting the use of a lottery system in which some of the justices would remain in Washington D.C to hear appeals, while the others would preside over cases in the nation's circuit courts.[48] Senator Trumbull's proposal, which matched the number of justices to the number of circuits, won out.[49]

The members of the Reconstruction Congress never were so forthright as to announce that their goal was to change the Supreme Court, but it is difficult to view these repeated changes to the size of the Supreme Court as anything but efforts to achieve that goal.[50] The best explanation for increasing and decreasing the Court's size is the most obvious one: Republicans in Congress were aiming to create a Supreme Court more to their liking, using the powers entrusted to them by the Constitution. Reconstruction reformers understood that Article III empowered Congress to decide the size of the Supreme Court. In their view, the Constitution "does not fix the number of judges which shall constitute the Supreme Court; hence the number has at times been increased by Congress and again diminished at its pleasure. This has been done several times, as we all know."[51] Republicans, who possessed huge majorities in Congress, were not shy about using these powers to remake the Court—even if that left the Court understaffed at times. Indeed, to Democratic Senator Charles Buckalew, what these repeated changes to the size of the Court showed is that Congress had effectively meddled with the Supreme Court: "Have we not sought to mold and to conform it, to some extent at least, to our own will?"[52]

Did court expansion succeed? The answer is both yes and no. The new majority flexed its muscles almost immediately, voting to overturn a decision from the year before that had denied Congress the power to make paper money legal tender, one of the biggest issues of the day because of the role of legal tender in funding government operations during the Civil War. In 1871, in *Knox v. Lee*,[53] the re-constituted Supreme Court overturned the 4-3 ruling in *Hepburn v. Griswold*, that had denied this power to Congress, boldly insisting on a sweeping understanding of Congress's power to solve national problems. The majority's ruling—delivered by Justice William Strong, one of President Grant's new appointees—argued that, because the 1870 ruling had been decided "by a court having a less number of judges than the law, then in existence provided this court shall have," it was the prerogative of the "full court" to correct the error and ensure that Congress has the authority to "employ freely every means . . . necessary for its preservation, and for the fulfilment of its acknowledged duties" under the Constitution.[54] Manipulating the size of the Court had, in short order, succeeded in changing the law on one of the most important constitutional questions of the day—to the condemnation of many who insisted that the Court had degraded itself in the eyes of the American people by overruling a very

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[48] CONG. GLOBE, 40th Cong. 3d Sess. 1484 (1869); CONG. GLOBE, 41st Cong. 1st Sess. 209 (1869) (urging adoption of a plan that "would double the number of supreme judges of the United States, making them eighteen" and would "provide that the Supreme Court of the United States should be held by nine of those judges, and that the nine others should be engaged in the performance of circuit duty").

[49] CONG. GLOBE, 41st Cong. 1st Sess. 210 (1869) (urging that "the Supreme Court shall consist of nine judges, the same number of judges that we have circuits").

[50] Braver, *supra* note 35, at 2784 (observing that "Republican congressmen did not openly admit their partisan intentions because it would have aroused more opposition.")

[51] CONG. GLOBE, 40th Cong. 2d Sess. 482 (1868); *id.* at 487 ("The Constitution declares . . . there shall be a Supreme Court. But it leaves entirely to Congress to determine the number of judges which shall constitute the court.").

[52] *Id.* at 2127.

[53] 79 U.S. (12 Wall.) 457 (1871) (overruling Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870)).

[54] *Id.* at 553-54, 534.

recent decision based solely on the fact that the membership of the Court had changed.[55] Abrupt judicial flip-flops, like the reversal of *Hepburn* one year later in *Knox*, seemed to put at risk public respect for the Court. Overruling precedent was unusual in itself; never before had a precedent been discarded so quickly.[56]

The legal tender cases proved to be the high-water mark for court expansion. In the years to come, the Supreme Court would repeatedly gut the Fourteenth Amendment and hamstring Congress's enforcement power, squelching the promise of one of Reconstruction's greatest achievements. In 1873, in the *Slaughter-House Cases*,[57] the Supreme Court all but excised the Privileges or Immunities Clause—the centerpiece of the Fourteenth Amendment written to broadly protect fundamental rights—from our Constitution, leading Lincoln-appointee Justice Noah Swayne to accuse the majority of turning "what was meant for bread into stone. 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 enactment."[58] Later cases continued to break faith with the Fourteenth Amendment. In 1876, in *United States v. Cruikshank*,[59] the Court overturned the convictions of three members of a white mob that had slaughtered scores of Black people, and it held that the federal government lacked the power to protect Black people from white terrorists. *Cruikshank* "gutted one of the key promises of the Fourteenth Amendment—the states' constitutional obligation to protect individuals from private violence—and gave the Klan and other white terror groups the green light to use terror and violence to bring down Reconstruction."[60] In short, court expansion did not produce a Court willing to honor the text and history of the Fourteenth Amendment.

Decisions like the *Slaughter-House Cases* and *Cruikshank* confirmed Republican skepticism that the Supreme Court would faithfully honor the transformative changes made by the Reconstruction Amendments.[61] It also partially reflected what Lincoln and Grant aimed to achieve through enlarging the Court: ensuring that the Court respected the Fourteenth Amendment did not figure at all in the Supreme Court appointments of the Reconstruction era, many of which predated the Amendment by many years. Instead, issues relating to President Lincoln's war-time measures loomed large. When Lincoln was considering whom to name as Chief Justice following the death of Chief Justice Roger Taney, Lincoln reportedly said that "we wish for a Chief Justice who will sustain what has been done in regard to emancipation and the legal tenders."[62] Some of Lincoln's appointees turned out to take a very dim view of the Fourteenth Amendment. Justice Samuel Miller, an 1862 Lincoln appointee who wrote the majority opinion in the *Slaughter-House Cases*, disliked the Fourteenth Amendment and supported an alternative version of the Amendment proposed by President Andrew Johnson, which

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[55] *See* FRIEDMAN, *supra* note 22, at 135 ("[A]fter the deed was done, the press called the decision a 'judicial comedy,' 'humiliating,' 'contempt'-provoking, and 'a terrible blow at the independence and dignity of the profession.").

[56] *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 676, 691 (1999) (citing three overrulings in the Marshall Court and four in the Taney Court).

[57] 83 U.S. (16 Wall.) 36 (1873).

[58] *Id.* at 129 (Justice Swayne, J., dissenting).

[59] 92 U.S. (2 Otto) 542 (1876).

[60] David H. Gans, *"We Do Not Want to be Hunted": The Right to be Secure and Our Constitutional Story of Policing*, 11 COL. J. RACE & L. 239, 320 (2021).

[61] *See* BARNETT & BERNICK, *supra* note, at 252.

[62] *See* GEORGE S. BOUTWELL, 2 REMINISCENCES OF SIXTY YEARS IN PUBLIC SERVICE 29 (1902), quoted in KUTLER, *supra* note 29, at 21.

omitted the Privileges or Immunities Clause.[63] In the *Slaughter-House Cases*, he effectively rewrote the Fourteenth Amendment to make it more like the version he preferred.[64]

In short, President Lincoln's and Grant's appointments produced a Court disposed to uphold Lincoln's war-time measures, which it generally did, particularly after Grant's two appointments in 1870.[65] It did not produce a Court willing to honor the Fourteenth Amendment. To be sure, not all the blame can be heaped on the appointments process. By the mid-1870s, as the national mood soured on Reconstruction, even Justices who had written full-throated dissents in *Slaughter-House* would join in burying the Amendment's promises and castigate efforts to ensure equal citizenship for Black Americans as "running the slavery argument into the ground."[66] Indeed, the nineteenth-century Justice with the greatest legacy of defending the Fourteenth Amendment was Justice John Marshall Harlan, who was not appointed until after the end of Reconstruction.[67]

Even before the *Slaughter-House Cases*, the Reconstruction Congress remained deeply fearful that the Supreme Court would deal a fatal blow to Reconstruction and arrogate to themselves powers that Republicans insisted belonged to the legislative branch. In sum, changing the Court was not enough, so Congress also took steps to rein in the Supreme Court. The next Section examines these efforts.

B. Disempowering Reforms During Reconstrution: Reining in the Supreme Court

Reconstruction presented immense and unprecedented legal and political questions in the aftermath of the Civil War. What terms and conditions would have to be fulfilled before the states of the former Confederacy would be readmitted to the Union and their citizens restored to the political rights they previously enjoyed? How would Southern states be governed in the interim? What measures were necessary to ensure the protection of fundamental rights and equal citizenship stature in the former Confederacy? And, more fundamentally, who would decide these questions—Congress, the executive, or the courts? Republican members of Congress insisted that it was up to Congress to set the terms and conditions of Reconstruction and that it would be a flagrant violation of the judicial role for courts to intrude. In other words, if the Supreme Court refused to stay in its lane, Congress stood ready to respond. John Bingham—a respected, moderate Republican Congressman who played a key role during Reconstruction—made clear the stakes were sky high: "If . . . the [C]ourt usurps power to decide political questions and def[ies] a free people's will it will only remain for a people thus insulted and defied to demonstrate that the servant is not above the lord by procuring a further constitutional amendment and ratifying the same, which will defy judicial usurpation by annihilating the usurpers in

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[63] *See* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI.-KENT L. REV. 627, 660 (1994) ("When Bingham was working for the adoption of the Fourteenth Amendment, Miller was willing to accept a conservative counter-proposal by certain Southern Governors and endorsed by President Johnson.").

[64] *Id.* at 660 n.228 ("[T]he rejected proposal would have produced the very result Miller reached in *Slaughter-House*.").

[65] *See* Braver, *supra* note 35, at 2783 (observing that "it seems likely that President Grant chose his two nominees based on the belief that they would overrule *Hepburn*").

[66] *Compare Slaughter-House*, 83 U.S. at 112-13 (Bradley, J., dissenting) ("A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen, and the whole power of the nation is pledged to sustain him in that right.") *with Civil Rights Cases*, 103 U.S. 3, 24-25 (1883) (opinion of Bradley, J.). ("It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business.").

[67] *Plessy v. Ferguson*, 163 U.S. 537, 554-64 (1896) (Harlan, J., dissenting); *Civil Rights Cases*, 109 U. S. at 27-62 (Harlan, J., dissenting).

the abolition of the tribunal itself."[68] If members of Congress doubted the Supreme Court's fidelity to the Constitution, Congress could "sweep away at once their appellate jurisdiction in all cases, and leave the tribunal without even color or appearance of authority for their wrongful intervention."[69] Republicans repeatedly insisted that the Supreme Court would be in peril if it claimed power to dictate the terms of Reconstruction.

These matters came to a head beginning in the 39th Congress, which first met in late 1865, after the assassination of President Abraham Lincoln and at a time when President Andrew Johnson had begun the process of bringing Southern states back into the Union, to disastrous results. State after state enacted Black Codes, which sought to subjugate Black Americans, strip them of the promise of freedom, and force those freed from bondage to continue to work for their former owners, a state of enslavement in all but name.[70] Congress responded by passing the nation's first federal civil rights legislation and a new constitutional amendment that would secure "the civil rights and privileges of all citizens in all parts of the republic."[71] In June 1866, Congress proposed the Fourteenth Amendment and submitted it to the states for ratification. Tennessee quickly ratified the Fourteenth Amendment and was re-admitted to the Union, but other states remained under military rule.

Eventually, in March 1867, Congress passed the First Reconstruction Act, which split the former Confederacy into five military districts and established a process for Southern states to be readmitted to the Union, which required them to establish new state constitutions that granted the right to vote to all adult men regardless of race and to ratify the Fourteenth Amendment.[72] President Johnson, in his veto message, denounced the Act in the most strident of terms, insisting that Congress had no right to impose military authority on the South "solely as a means of coercing the people into the adoption of principles and measures to which it is known that they are opposed, and upon which they have an undeniable right to exercise their own judgment."[73] This was, Johnson claimed, "in palpable conflict with the plainest provisions of the Constitution."[74] The passage of the Reconstruction Act over Johnson's claim that Congress had transgressed the Constitution set off what Barry Friedman has called a "footrace to the finish": Southern litigants sought to invalidate the Reconstruction Act before the Fourteenth Amendment could be ratified by reconstructed Southern legislatures that, for the first time in history, would be elected with the votes of Black men.[75]

Even before final passage of the Reconstruction Act, congressional Republicans had tremendous fears that the Supreme Court would strike down military rule in the South and upend Reconstruction.

In *Ex Parte Milligan*,[76] the Supreme Court considered a habeas petition brought by Lambdin Milligan, a Confederate supporter, who, while living in Indiana, was part of a conspiracy to free Confederates

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[68] CONG. GLOBE, 39th Cong. 2nd Sess. 502 (1867).

[69] *Id.*

[70] *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 198-209 (1988).

[71] REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, AT THE FIRST SESSION THIRTY-NINTH CONGRESS xxi (1866).

[72] FONER, *supr*a note 70, at 273-80.

[73] Andrew Johnson, Veto Message Concerning the Reconstruction Act, Mar. 2, 1867, https://www.presidency.ucsb.edu/documents/veto-message-426.

[74] *Id.*

[75] Friedman, *supra* note 27, at 15 (noting that "southern politicians and legal advocates organized a deliberate campaign of litigation to coax the Supreme Court into ruling on the constitutionality of the Reconstruction legislation before the Southern ratification votes on the Fourteenth Amendment were cast").

[76] 71 U.S. (4 Wall.) 2 (1866).

held in prison camps and was sentenced to death for treason by a military tribunal. The Court unanimously ruled for Milligan, but what was significant was the majority's reasoning. A five-justice majority held that military proceedings could not constitutionally be "applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[77] Four justices rejected this constitutional argument,[78] but to many, it seemed that the majority's insistence that "[m]artial rule can never exist when courts are open, and in the proper and unobstructed exercise of their jurisdiction" might mean the death knell of military rule of the states of the former Confederacy.[79]

The published *Milligan* ruling, released on January 1, 1867, provoked a storm of controversy. Republicans denounced *Milligan* as the new *Dred Scott*. A day after the ruling, Rep. Thaddeus Stevens argued that *Milligan*, "although in terms perhaps not as infamous as the Dred Scott decision, is yet far more dangerous in its operation upon the lives and liberties of the loyal men of this country. The decision has taken away every protection in every one of these rebel States from every loyal man who resides there."[80] *Harper's Weekly* offered a similar comparison a few weeks later. "The Dred Scott decision was meant to deprive slaves taken into a Territory of the chance of liberty under the United States Constitution. The Indiana decision operates to deprive freedmen in the late rebel states, whose laws grievously outrage them, of the protection of freedmen's courts."[81] To *Harper's Weekly*, the remedy for a Supreme Court bent on perverting the law was plain: "let the Supreme Court be swamped by a thorough reorganization and increased number of Judges."[82]

Milligan led to a wave of suits brought by Southern litigants urging the Supreme Court to strike down the Reconstruction Act. A pair of suits brought as original actions in the Supreme Court by Mississippi and Georgia were dismissed,[83] but a habeas action brought by Mississippi newspaper editor William McCardle appeared to have legs. McCardle used his editorial perch to undermine Reconstruction in Mississippi; he was charged with inciting insurrection and impeding reconstruction efforts and held in military custody. By the end of 1867, McCardle's habeas petition, which urged that the Reconstruction Act was unconstitutional, was in front of the Supreme Court. Although McCardle was out on bail, his counsel moved to advance his case on the Court's docket so that it could be decided on an expedited basis. In January 1868, the justices did so, stoking fears that the Supreme Court would strike down the Reconstruction Act and wreak havoc with Reconstruction. These actions spurred Congress into action.

Congressional Republicans first moved to amend an uncontroversial bill to add the requirement that the Supreme Court could not strike down an act of Congress without the concurrence of two-thirds of the justices.[84] Republicans pointed out that, at the Founding, the Supreme Court was composed of six justices, effectively requiring two-thirds of the Court to decide a case. "Washington and the first Congress," John Bingham pointed out, "had so organized that court that if all the judges were present

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[77] *Id.* at 121.

[78] *Id.* at 140 (Chase, C.J., concurring) (arguing that "when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety").

[79] *Id. at* 127.

[80] CONG. GLOBE, 39th Cong. 2d Sess. 251 (1867).

[81] *The New Dred Scott*, HARPER'S WEEKLY, Jan. 19, 1867, at 34.

[82] *Id.*; *see also* Friedman, *supra* note 27, at 24-25 (collecting commentary on *Milligan*).

[83] *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867); *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1868).

[84] CONG. GLOBE, 40th Cong. 2d Sess. 478 (1868).

no judgment could be pronounced whatever without the assent of two thirds of all the members of the court."[85] Others drew an analogy to the constitutional rule for overriding a presidential veto, insisting that the requirement of a two-thirds majority was "the rational rule, the one which is in unison with the rule that obtains in Congress under the Constitution."[86] The measure requiring a vote by a two-thirds super-majority to strike down an Act of Congress passed the House of Representatives, but died in the Senate.

Where structural reform failed, jurisdiction-stripping succeeded. In March 1868, after the Supreme Court heard four days of oral argument in *McCardle*,[87] a bill quickly passed Congress taking away the Supreme Court's power to hear McCardle's appeal. Ironically, in 1867 habeas legislation designed to protect Black people from racist southern criminal justice systems, Congress had for the first time conferred on the Supreme Court appellate jurisdiction to review habeas decisions by lower federal courts. As a result, "[t]he Military Reconstruction Act, intended principally to protect Blacks and loyal whites against harassment by southern state authority . . . had become a federal sword in the hands of an unreconstructed Mississippi editor."[88] Faced with the possibility that the Court might use *McCardle* as a vehicle to strike down the Reconstruction Act, Congress repealed the grant of appellate jurisdiction it had provided just one year earlier. To this day, *McCardle* represents one of the most famous (or infamous) examples of jurisdiction-stripping in Supreme Court history.[89]

The jurisdiction-stripping measure was snuck into to an uncontroversial bill that, ironically enough, expanded the jurisdiction of the Supreme Court in revenue collection cases and passed without debate. When Democratic opponents of Reconstruction discovered what had happened, they were livid. This was a deceptive act, they argued, that "must proceed . . . from a consciousness on the part of the majority that their acts are illegal and outside the Constitution."[90] Republicans insisted that it was their duty to "clip the wings" of the Supreme Court to prevent the justices from "arrogating to themselves the pretension to settle not merely judicial but political questions" and "declare the laws for the government of the rebel states in every respect unconstitutional."[91] The raison d'etre of the amendment, as Rep. Henry Wilson insisted, was "to take away the jurisdiction given by the act of 1867 reaching the *McCardle* case" for the purpose of "sweeping the case from the docket."[92]

President Johnson vetoed the Act, insisting that it would "affect most injuriously the just equipoise of our system of government; for it establishes a precedent which, if followed, may eventually sweep away every check on arbitrary and unconstitutional legislation."[93] In the debate that followed, Democratic

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[85] *Id.* at 484.

[86] *Id.* at 483.

[87] KUTLER, *supra* note 29, at 102; Friedman, *supra* note 27, at 28 (noting that "each side ha[d] three times the usual time for oral argument").

[88] William W. Van Alstyne, *A Critical Guide to* Ex Parte McCardle, 15 ARIZ. L. REV. 229, 238 (1973).

[89] *See* KUTLER, *supra* note 29, at 100 (calling *McCardle* "one of those rare Supreme Court cases" that has "persistent relevance to the nature of judicial power in the American system of government"); Friedman, *supra* note 27, at 4-5 ("*McCardle* is commonly taught as a law case, as the precedent sanctioning Congress's power over the jurisdiction of the Supreme Court. But it is difficult when reading *McCardle* in context not to treat the case as a highly dubious precedent from a Court under pressure—from politics as much as law."); Grove, *supra* note 19, at 533 (tracing *McCardle*'s evolution from "an 'abhorrent' precedent to 'black-letter' law").

[90] CONG. GLOBE, 40th Cong. 2d Sess. 1882 (1868).

[91] *Id.* at 1883, 2062.

[92] *Id.* at 2061, 2062.

[93] *Id.* at 2094.

Congressmen argued the legislation was a base attack on the role of the courts in safeguarding liberty: "It closes the door of the Supreme Court—just opened for the tax-payer—upon every citizen who has been despoiled of his liberty in violation of the Constitution and laws of the Republic, and hands him over to his oppressor, to wear the chain or rot in his dungeon."[94] Republicans, oddly enough, insisted the measure was a "bill of very little importance" and nothing of great significance would be lost by the repeal of the Supreme Court's jurisdiction given that "the liberties of the people had been pretty well preserved for three-quarters of a century without the act of February 5, 1867."[95] Senator Lyman Trumbull, who represented the government in *McCardle* while serving in the Senate, even went so far as to suggest the repeal would have no practical effect: "[t]here is no such case before the Supreme Court."[96] This led Wisconsin Senator James Doolittle to respond that "[w]e all know, the whole world knows, that this case of *McCardle* is pending in the Supreme Court" and the law's proponents "know that these acts will be decided to be unconstitutional. That is the reason why they decide to take away from the court the consideration of the question."[97] Republican proponents of jurisdiction-stripping did not meaningfully grapple with their opponents' arguments; they did not have to. On March 27, huge majorities voted to override Johnson's veto.

Congress successfully checked the Court, preventing it from reaching the merits of McCardle's case. The Supreme Court could have decided the case after its marathon oral argument, but voted to postpone consideration of the case while the legislation was under consideration by Congress. In a public protest, Justice Robert Grier, joined by Justice Stephen Field, denounced the majority for refusing to decide a case that involves "the liberty and rights not only of the appellant but of millions of our fellow-citizens."[98] "By the postponement of the case," Grier charged, "we shall subject ourselves, whether justly or unjustly, to the imputation that we have evaded the performance of a duty imposed on us by the Constitution, and waited for legislation to interpose or supersede our action and relieve us from our responsibility."[99] The postponement of the case quashed Southern hopes that the Supreme Court would strike down the Reconstruction Act before the ratification of the Fourteenth Amendment, which became part of the Constitution on July 8, 1868.

Ultimately, the Supreme Court issued its decision in *Ex Parte McCardle* in April 1869, more than a year after Congress pushed through the jurisdiction-stripping measure.[100] The Court's unanimous opinion, written by Chief Justice Chase, dismissed the case with a sweeping affirmation of congressional power to deprive the Court of jurisdiction, even over a pending case. "Without jurisdiction, the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[101] According to Chief Justice Chase's opinion, it did not matter that Congress had taken away the Court's jurisdiction for the purpose of preventing the Court from deciding McCardle's constitutional challenge. The Supreme Court insisted that it was not "at liberty to inquire

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[94] *Id.* at 2168.

[95] *Id.* at 2096.

[96] *Id.*

[97] *Id.* at 2097.

[98] *See* Friedman, *supra* note 27, at 36 (quoting Grier's protest).

[99] *Id.*

[100] 74 U.S. (7 Wall.) 506 (1869).

[101] *Id.* at 514.

into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."[102]

Notably, the Court made clear that Congress had not ousted all appellate habeas jurisdiction; it had simply restricted one avenue for appealing to the Supreme Court, while leaving intact the right to file an original habeas writ in the Supreme Court. In its concluding paragraph, the *McCardle* Court rejected the view that "if effect be given to repealing act in question . . . the whole appellate power of the court, in cases of habeas corpus, be denied.[103]" This, the Court said, was wrong. "The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised."[104] In other words, McCardle was out of luck,[105] but other habeas petitioners could still seek Supreme Court review by an original habeas writ—a fact confirmed later in 1869 when the Court held it had jurisdiction over a habeas action filed by Edward Yerger, who had been brought before a military commission for stabbing to death the army officer serving as the Mayor of Jackson, Mississippi.[106] But by then, the "storm had passed": the Fourteenth Amendment had been ratified and all but three states of the former Confederacy had been readmitted to the Union.[107]

Chase's opinion deftly ended McCardle's case and avoided a political clash that could have wreaked havoc on Reconstruction and badly damaged the Court, while also reading the jurisdiction-stripping measure narrowly to preserve judicial review in other cases.[108] Going forward, habeas litigants would still have their day in the highest court. In a later case, *United States v. Klein,*[109] Chief Justice Chase pushed back against a broad reading of *McCardle*, striking down a statute that stripped jurisdiction over certain pardon cases because it "prescribe[d] rules of decision to the Judicial Department . . . in cases pending before it" and "with[e]ld appellate jurisdiction" simply "as a means to an end."[110] *Klein* is a messy confusing opinion that still befuddles,[111] but it sent the clear message that the Court took seriously the "vital importance" that legislative and judicial powers "be kept distinct."[112]

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[102] *Id.*

[103] *Id.* at 515.

[104] *Id.*

[105] This alternative basis of jurisdiction might have provided a way for the Court to hear McCardle's case, but none of the Justices explored this avenue. *See* Van Alstyne, *supra* note 88, at 247 ("Should not the Court have proceeded to the merits, acknowledging that the technical basis on which the appeal had been perfected from the circuit court had been withdrawn by Congress, but declining to reject the case in view of the existing alternative basis for retaining jurisdiction as confirmed by Section 14 of the Judiciary Act of 1789?").

[106] *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1869).

[107] Friedman, *supra* note 27, at 37 & n.217.

[108] BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 242 (1998) ("On the one hand,. . . the Court *did* acquiesce to Congress at a critical moment of constitutional transformation; on the other, the Court's opinion did *not* recognize Congress's unconditional and plenary power to strip it of jurisdiction."); William M. Wiecek, *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, 36 J. SO. HIST. 530, 543 (1970) ("Judicial power had been preserved nearly unscathed except for the niche carved out by the McCardle repealer.").

[109] 80 U.S. (13 Wall.) 128 (1872).

[110] *Id.* at 146, 145.

[111] Friedman, *supra* note 27, at 34 ("*Klein* is sufficiently impenetrable that calling it opaque is a compliment.").

[112] *Klein*, 80 U.S. at 147. For a critique, see Helen Hershkoff & Fred Smith, Jr., *Reconstructing* Klein, 90 U. CHI. L. REV. (forthcoming 2023), manuscript at 11 ("Far from glorifying *Klein* as a case about judicial independence . . . the Court's assertion of constitutional supremacy should be reconsidered as facilitating political efforts to defeat Reconstruction in ways that suppressed racial equality"), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4180792.

Ultimately, the balance struck by Chief Justice Chase's opinion in *McCardle* held. In the wake of the *Yerger* decision, additional bills were introduced that would have stripped the Court's jurisdiction over habeas cases, but they quickly died.[113] Ultimately, Yerger's case was settled; once Mississippi was readmitted to the Union, the Attorney General announced an agreement transferring his murder case to the state authorities in Mississippi.[114] By the summer of 1870, "there were no longer any more whites who could bring concrete cases challenging Army administration of Reconstruction."[115] Jurisdiction-stripping did not rein in the Supreme Court in a lasting way—as the failed bill requiring a super-majority to invalidate an Act of Congress might have—but it succeeded in preventing the Supreme Court from ever considering the constitutionality of the Reconstruction Act. Congress had boxed the Court out of one of the biggest cases of Reconstruction. Eventually, in 1885, Congress would restore the Supreme Court's jurisdiction over appeals from circuit court habeas decisions.[116]

McCardle illustrates the lengths to which the Reconstruction Congress was willing to go to control the Supreme Court when congressional measures essential to Reconstruction were in the crosshairs. At the same time, the Reconstruction Congress understood that courts were essential for enforcing the Constitution's new guarantees of liberty and equality. Despite some occasional talk of annihilating the Supreme Court or eliminating judicial review, members of the Reconstruction Congress ultimately appreciated that "the greatest safeguard of liberty and of private rights" is to be found in the "fundamental law that secures those private rights, administered by an independent and fearless judiciary."[117] Even as they acted to rein in the Supreme Court, they enacted the greatest expansion of federal court jurisdiction in American history. These measures transformed the federal judicial system. The next section turns to examine the landmark legislation enacted by Congress to hold states and localities accountable for constitutional violations and to remedy abuse of government power.

C. Justice Reforms During Reconstruction: Opening the Federal Court-House Doors

The most enduring legacy of court reform during the Reconstruction era lies not in the changes to the size of the Supreme Court and its jurisdiction, but in how the Reconstruction Congress refigured the federal judiciary and empowered it to check state abuse of power and enforce the supremacy of the Constitution and federal law. In the span of less than a decade, using the enforcement powers conferred by the Thirteenth, Fourteenth, and Fifteenth Amendments, Congress revolutionized the jurisdiction of the federal courts: (1) it expanded habeas corpus review to provide a remedy for persons held in state custody; (2) it created a cause of action to permit individuals to sue persons acting under color of state law for violating federal rights; (3) it broadened the removal jurisdiction of the federal courts, reflecting members' concern that state courts would not fairly apply the law to protect Black people and their allies; and (4) it conferred federal question jurisdiction on the federal courts. The Reconstruction Amendments changed the Constitution; Congress's court reforms changed the tools available to enforce the Constitution.

One of *McCardle*'s deep ironies was the lengths to which the members of the Republican majority went to downplay one of their singular achievements: a seismic expansion of habeas corpus that made the

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[113] Friedman, *supra* note 27, at 59-60.

[114] ACKERMAN, *supra* note 108, at 243-44.

[115] *Id.* at 244.

[116] Act of Mar. 3, 1885, ch. 353, 23 Stat. 437.

[117] CONG GLOBE, 41st Cong., 2d Sess. 94 (1869).

Great Writ available to those held in custody by state governments. At the Founding, the Judiciary Act of 1789 limited habeas corpus to those held in federal custody. Section 14 of the Act provided that "writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States."[118] No matter how egregious the case, federal courts could not intervene to free a prisoner held in state custody. The Habeas Corpus Act of 1867 removed this limitation, empowering federal judges and justices to "grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States."[119] The first section of the Habeas Corpus Act gave federal courts the power to correct systemic abuses in state criminal justice systems, including the power to hear testimony and find the facts anew; upon finding that "the petitioner is deprived of his or her liberty in violation of the constitution and laws of the United States," the Act commanded that "he or she shall forthwith be discharged and set at liberty."[120] The 1867 legislation's second section expanded the appellate jurisdiction of the Supreme Court, enabling criminal defendants and others to contest state court decisions upholding state action challenged as inconsistent with the Constitution, treaties, and laws of the United States.[121]

The debate on the Act, though brief, stressed that this was "a bill of the largest liberty" that enlarged the scope of the Great Writ, principally to prevent the re-enslavement of Black people under southern Black Codes.[122] Against the backdrop of horrific criminal justice abuses in the states, the Founding-era limitation of habeas corpus to federal custody proved anomalous. As Senator Lyman Trumbull observed during the debates in the Senate, "a person might be held under a State law in violation of the Constitution and laws of the United States, and he ought to have in such a case the benefit of the writ, and we agree that he ought to have recourse to United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States."[123] Expanding the Great Writ would "secure to the people of the United States their rights and liberties."[124] While Congress had previously provided habeas corpus review of persons held in state custody in certain specific settings in 1833 and 1842 legislation—such as preventing states from using their criminal justice systems to go after federal officials doing their jobs[125]—the Habeas Corpus Act provided, in sweeping terms, for federal court review of all state deprivations of liberty, reflecting the Reconstruction Congress's deep distrust of state criminal justice systems.[126] As Chief Justice Chase observed not long after the Act's

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[118] Act of September 24, 1789, § 24, ch. 20, 1 Stat. 73, 82.

[119] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

[120] *Id.*

[121] *Id.* § 2.

[122] CONG. GLOBE, 39th Cong. 1st Sess. 4151 (1866); Michael P. O'Connor, *Time Out of Mind: Our Collective Amnesia About the History of the Privileges or Immunities Clause*, 93 KY. L.J. 659, 712 (2005) ("Only by extending habeas corpus to permit review of state criminal convictions could Congress ameliorate the egregious harm perpetuated under the state Black Codes.").

[123] CONG. GLOBE, 39th Cong. 1st Sess. 4229 (1866).

[124] *Id.*

[125] Lee Kovarsky, *Prisoners and Habeas Privileges Under the Fourteenth Amendment*, 67 VAND. L. REV. 609, 658 (2014) ("Neither statute embodied a general habeas power to review state custody, but the 1833 and 1842 Acts established that the habeas privilege could rely on federal judicial power to discharge prisoners from state custody.").

[126] David McCord, *Visions of Habeas*, 1994 BYU L. REV. 735, 739 ("[T]he Reconstruction Congress . . . authorized federal courts to issue writs of habeas corpus on behalf of state prisoners because of distrust of state criminal justice systems."); Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 818 (1965) (observing that the "Thirty-Ninth Congress thoroughly distrusted the State courts and expected nothing from them but resistance and harassment").

passage, "[t]his legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction."[127] The Constitution's promise of freedom would be illusory without the right to go to a federal forum to seek release from wrongful imprisonment.[128]

The Act was used almost immediately to strike down apprenticeship laws used to force young Black children to continue to work for their former owners. In the case of *In re Turner*, Chief Justice Chase, riding circuit, ordered Elizabeth Turner "discharged from restraint," finding the apprenticeship was nothing less than "involuntary servitude" and lacked the guarantees given to white apprentices, such as access to education.[129] During the debate over *McCardle*, Senator Lyman Trumbull suggested that the habeas legislation was designed with cases such as these in mind: "it was to meet a class of cases which was arising in the rebel states, where, under pretence of certain State laws, men made free by the Constitution of the United States were virtually being enslaved."[130] But nothing in the Act's sweeping text was limited to these cases, as Democrats regularly pointed out during the 1868 debates. Maryland Senator Reverdy Johnson conceded Trumbull's point, but observed that "it was necessary to make the law comprehensive, and it therefore covers all cases in which any man entitled to any right under the Constitution and laws of the United States" challenges his imprisonment as unlawful.[131] Because of the Act's breadth, once the Fourteenth Amendment was ratified, the Habeas Corpus Act provided a critical means of freeing from confinement persons held in custody in violation of the Fourteenth Amendment's commands and redressing systemic abuses in state criminal justice systems.[132]

The Habeas Corpus Act fundamentally altered the scope of the Great Writ, interposing the federal courts to protect individuals from unlawful confinement by the states. In other legislation, Congress ensured that individuals could go to federal court to vindicate their basic rights to be free and equal citizens.

The process began at the outset of Reconstruction in the wake of the passage of the Black Codes. The Civil Rights Act of 1866 sought to vindicate the freedom promised by the abolition of chattel slavery by establishing birthright citizenship and guaranteeing citizens of "every race and color . . . the same right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."[133] At a time when *Dred Scott* had not yet been formally overruled, Republicans insisted that the Thirteenth Amendment empowered Congress to protect basic civil rights, arguing that the Enforcement Clause was an express grant of

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[127] *Ex Parte McCardle*, 73 U.S. (6 Wall.) 318, 325-26 (1868).

[128] Kovarsky, *supra* note 125, at 659 (observing that the "text and history" of the Habeas Corpus Act "sound in the same register of federal supremacy as do the other pieces of Reconstruction legislation—specifically, legislation clearing the path to a federal courthouse"); Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners*, 92 MICH. L. REV. 862, 886 (1994) ("The writ known to the framers of the Fourteenth Amendment was not simply a writ of the 'largest liberty' but also a writ essential to federal supremacy.").

[129] 24 F. Cas. 337, 339, 340 (C.C.D. Md. 1867).

[130] CONG. GLOBE, 40th Cong. 2d Sess. 2096 (1868); *see also id.* at 2120, 2168.

[131] *Id.* at 2120; *see also id.* at 2116 (observing that "the writ of habeas corpus is given to protect a man's liberty").

[132] Kovarsky, *supra* note 125, at 665 (arguing that "[t]he 1867 Habeas Act and the Fourteenth Amendment were mutually reinforcing features of the federal supremacy established through Reconstruction"); Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 14 (2010) ("[F]ederal habeas review was not only about emancipating wrongly convicted individuals; it was about coercing reluctant states to enforce federal rights.").

[133] Act of April 9, 1866, ch. 31 § 1, 14 Stat. 27.

power "to secure freedom to all people in the United States."[134] The 39th Congress demonstrated its broad understanding of the enforcement power conferred by the Thirteenth Amendment by passing the Civil Rights Act of 1866 over President Andrew Johnson's veto, but this fight crystallized the need for more constitutional change. The Fourteenth Amendment, which also included a similar grant of enforcement power, ended any doubts over the constitutionality of the Civil Rights Act of 1866. In no uncertain terms, "Section 5 explicitly delegates to Congress a power to implement the Fourteenth Amendment" and secure fundamental rights and equal citizenship stature.[135]

The Civil Rights Act of 1866, the first federal civil rights law in American history, gave the federal courts responsibility for enforcing the rights set forth in the Act, providing the federal district courts with exclusive jurisdiction over "all crimes and offences committed against the provisions of this act."[136] Congress consciously chose not to provide any governmental immunities, refusing to "place[] officials above the law."[137] Congress opened the doors of the federal courts to safeguard rights and ensure accountability. Congress did not trust state courts to protect federal rights.[138]

Section 1983, enacted in 1871 against the backdrop of horrific state and Ku Klux Klan violence aimed at undoing Reconstruction, used the same template in creating a federal cause of action to permit individuals to enforce constitutional rights in federal court.[139] Prior to the enactment of Section 1983, suits to vindicate constitutional rights often had to be brought in state courts under common law causes of action.[140] Section 1983 changed that by opening the door of the federal courts to suits against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[141] Going forward, individuals could go directly to federal court to safeguard their rights from infringement by persons acting under color of state law.

The impetus for this seismic shift in the federal-state balance was a reign of terror by the Ku Klux Klan that was winked at or abetted by state and local governments. State courts could not be trusted to vindicate basic rights; indeed, they were part of the problem. The testimony before Congress showed that "the courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity. What benefit would result from appeal to tribunals whose officers are secretly in sympathy with the very evil against which we are striving?"[142] Congress refused to leave matters "with the States," where "large classes of people" were "without legal remedy in the

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[134] CONG. GLOBE, 39th Cong. 1st Sess. 475 (1866).

[135] BARNETT & BERNICK, *supra* note 20, at 253.

[136] Act of April 9, 1866, ch. 31 § 3, 14 Stat. 27.

[137] CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866).

[138] *Id.* at 602 ("[W]hy do we legislate upon this subject now? Simply because we fear and have reason to fear that the emancipated slaves would not have their rights in the courts of the slave States."),

[139] *See generally* David H. Gans, *Repairing Our System of Constitutional Accountability, Reflections on the 150th Anniversary of Section 1983,* 2022 CARDOZO L. REV. DE NOVO 90, 95-100.

[140] Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 399 (1987) ("The predominant method of suing officers in the early nineteenth century was an allegation of common law harm, particularly a physical trespass. The issue of whether the action was authorized by existing statutory or constitutional law was introduced by way of a defense and reply when the officer pleaded justification.").

[141] 42 U.S.C. § 1983.

[142] CONG. GLOBE, 42nd Cong., 1st Sess. 394 (1871); *id.* at 459 ("The arresting power is fettered, the witnesses are silenced, the courts are impotent, the laws are annulled, the criminal goes free, the persecuted citizen looks in vain for redress.").

courts."[143] Section 1983 gave federal courts the responsibility to "carry into execution the guarantees of the Constitution in favor of personal security and personal rights" by affording an "injured party redress in the United States courts against any person violating his rights as a citizen under claim or color of State authority."[144] Congress, once again, interposed the federal courts to safeguard constitutional rights because Congress "thoroughly distrusted the State courts and expected nothing from them but resistance and harassment."[145] Like other Reconstruction legislation, Section 1983 was written in the broadest possible language to empower the federal courts to protect the Fourteenth Amendment's guarantees and to ensure accountability. Congress insisted that "whoever interferes with the rights and immunities granted to the citizen by the Constitution of the United States, though it may be done under State law or State regulation, shall not be exempt from responsibility to the party injured when he brings suit for redress either at law or in equity."[146] As in 1866, Congress refused to create governmental immunities that placed state officials above the law.

During Reconstruction, Congress not only passed landmark statutes that expanded the jurisdiction of the federal courts, it also passed a number of statutes that allowed defendants sued or criminally prosecuted in state court to remove those cases to federal court.[147] These enactments reflected congressional concerns that local justice systems in the South were so broken that certain individuals should have a right to transfer their cases to federal court at the outset of litigation.[148] In so doing, Congress intervened directly in state criminal processes, giving defendants the right to stop state court proceedings that all too often were aimed to oppress federal officers and others.

Removal provisions were commonplace during Reconstruction. First during the Civil War and then during Reconstruction, Congress repeatedly enacted legislation to protect government officers from malicious prosecutions and suits filed against them. Congress enacted measures permitting federal officers to remove to federal court cases arising out of the Civil War,[149] and arising out of acts taken to enforce federal revenue laws,[150] to enforce the rights protected by the Civil Rights Act of 1866 and the Freedmen's Bureau Act, [151] and to enforce federal voting rights legislation.[152] Removal legislation did

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[143] *Id.* at app. 252; *id.* at 653 ("We are driven by existing facts to provide for the several States in the South what they have been unable fully to provide for themselves, i.e., the full and complete administration of justice in the courts.").

[144] *Id.* at 374, 376.

[145] Amsterdam, *supra* note 126, at 818.

[146] CONG. GLOBE, 42nd Cong., 1st Sess. app. 310 (1871).

[147] See KUTLER, *supra* note 29, at 143-60; Wiecek, *supra* note 22, at 336-342; Michael G. Collins, *The Unhappy History of Federal Question Removal,* 71 IOWA L. REV. 717, 720-23 (1986).

[148] Amsterdam, *supra* note 126, at 808-09 (discussing "congressional concern" that litigants "could not receive a fair trial in hostile state courts, and that the appellate supervision of the Supreme Court . . . would be inadequate to rectify the decisions of lower state tribunals having the power to find the facts").

[149] Act of Mar. 3, 1863, § 5, ch.81, 12 Stat. 755, 756 (providing for removal of all suits and prosecutions "against any officer, civil or military, or against any other arrest or imprisonment made, or other trespasses or wrongs done" during the course of the Civil War "by virtue or under color of" of presidential or congressional authority); *see also* Act of May 11, 1866, § 4, ch. 80, 14 Stat. 46 (strengthen legislation by voiding any state court proceedings after removal and imposing damages and double costs on all parties to the state court proceedings).

[150] Act of July 13, 1866, § 67, ch, 184, 14 Stat. 98, 171 (authorizing removal "in any case, civil or criminal, . . . against any officer of the United States appointed under or acting by authority" of federal revenue laws "or against any person acting under or by authority of any such officer on account of any act done under color of his office").

[151] Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27.

[152] Act of Feb. 28, 1871, ch. 99, § 16, 16 Stat. 433, 438-39 (providing for removal in any "suit or prosecution, civil or criminal," brought in state court "against any officer of the United States, or other person, for or on account, of any act

not merely protect federal officers doing their job. The Civil Rights Act of 1866 took the momentous step of authorizing removal to federal court of "any suit or prosecution, civil or criminal" brought in state court where the proceedings affected "persons who are denied or cannot enforce" the Act's protections "in the courts or tribunals of the State or locality where they may be."[153] Faced with the reality that state courts would flout the protections of the Civil Rights Act of 1866, Congress employed removal as a device to bypass state courts unwilling to respect the promise of freedom. For Black people and their white allies, the Reconstruction Congress repeatedly recognized, the federal courthouse "is where they are most likely to have their rights protected" and "where local prejudices are frowned down."[154]

Finally, in 1875, Congress gave federal courts jurisdiction over "all suits . . . arising under the Constitution or laws of the United States," subject only to a $500 amount-in-controversy requirement.[155] In expanding federal court jurisdiction, Congress acted to "confer a jurisdiction just as it is conferred in the Constitution," ensuring that federal courts would be open to hear all claims under federal law consistent with Article III.[156] "This bill," Senator Matthew Carpenter argued, "gives precisely the power which the Constitution confers—nothing more, nothing less."[157] The 1875 legislation completed Reconstruction's great transformation in our judicial system: federal courts, not state courts, were tasked with safeguarding federal rights and maintaining the supremacy of federal law. Federal courts were to be the frontline protection against state infringement of fundamental rights and acts of state oppression and subordination.

These jurisdictional innovations did not produce the kind of immediate changes that court expansion and jurisdiction-stripping wrought, but they transformed our federal judicial system in enduring ways. The expansion of habeas, as the Supreme Court confirmed as early as 1886, empowered a "single judge on habeas" to free "a prisoner after conviction in a state court."[158] "[T]here was no escape" from the fact that "the act of 1867 . . . invested such judge with power to discharge when the prisoner was restrained of his liberty in violation of a law of the United States."[159] In the late 19th and early 20th century, the Supreme Court employed habeas review to grant relief to state prisoners in a broad array of circumstances,[160] recognizing that "[w]hen a prisoner is in jail he may be released upon *habeas corpus* when held in violation of his constitutional rights."[161] Other reforms emerged more slowly. It took almost a century before the Supreme Court delivered a major ruling on the scope and meaning of Section 1983, recognizing that the statute intended "to give a remedy to parties deprived of

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done under the provisions of this act"); *see also* Wiecek, *supra* note 22, at 339 (noting the 1871 legislation took steps that "made it yet easier to bypass the state courts").

[153] Act of April 9, 1866, ch. 31 § 3, 14 Stat. 27 (authorizing removal in "any suit or prosecution, civil or criminal," brought in state court "against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing [the Freedmen's] Bureau" or "for refusing to do any act on the ground that it would be inconsistent with this act").

[154] CONG. GLOBE, 39th Cong. 1st Sess. 1526 (1866).

[155] Act of March 3, 1875, § 1, ch. 137, 18 Stat. 470.

[156] 2 CONG. REC. 4986 (1874).

[157] *Id.* at 4987.

[158] Ex Parte Royall, 117 U.S. 241, 253 (1886).

[159] *Id.*

[160] *See, e.g.* Yick Wo v. Hopkins, 118 U.S. 356 (1886); Ex Parte Nielsen, 131 U.S. 176 (1889); Ex Parte Medley, 134 U.S. 160 (1890); Moore v. Dempsey, 261 U.S. 86 (1923); Wade v. Mayo, 334 U.S. 672 (1948); Brown v. Allen, 344 U.S. 443 (1953).

[161] Rogers v. Peck, 199 U.S. 425, 433 (1905).

constitutional rights, privileges and immunities by an official's abuse of his position."[162] The Court's long overdue recognition that Congress created Section 1983 to "interpose the federal courts between the States and the people, as guardians of the people's federal rights"[163] helped revolutionize constitutional litigation.

The Court has not always given these statutes their due. Conservative majorities have invented a number of judge-created doctrines that have undermined federal habeas review and Section 1983's promise of accountability. But it is undeniable that our constitutional system has been forever changed by the efforts of the Reconstruction Congress to open broadly the federal courthouse doors to individuals aggrieved by abuse of state power. More than the efforts to expand or rein in the Supreme Court, the legacy of Reconstruction's impact on the courts lies in its transformative jurisdictional enactments.

II. Lessons For Court Reform from Reconstruction

The story of how the Reconstruction Congress reformed the federal judicial system is undoubtedly a fascinating one. But does it have any modern relevance for today's battles over the Supreme Court? What can it teach us about court reform more than 150 years later? In this Section, I sketch two payoffs to paying attention to debates over court reform during Reconstruction.

First, at a time in which the Supreme Court seems untouchable and unaccountable, and calls to reform the Supreme Court are often met by claims that the Court must be left to manage its own affairs,[164] Reconstruction provides a critical reminder that the Constitution entrusts to Congress broad powers to reform the Supreme Court and the federal judiciary. During Reconstruction, Republicans who pressed for court reform repeatedly pointed out that the Constitution's text created the Supreme Court and gave its members life tenure, but left to Congress broad power to decide its size, establish a quorum and voting rules, and set its jurisdiction. Thus, while the Article III judiciary, headed by the Supreme Court, is a separate and co-equal branch of government, the Constitution does not leave it to manage its own affairs. Congress can alter the composition of the Supreme Court and has extremely broad leeway to regulate the jurisdiction or proceedings of the Supreme Court.[165] Reconstruction offers a valuable reminder of a period in American history when Congress repeatedly exercised these powers.

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[162] Monroe v. Pape, 365 U.S. 167, 170 (1961).

[163] Mitchum v. Foster, 407 U.S. 225, 242 (1972).

[164] See Chief Justice John G. Roberts, *2021 Year-End Report on the Federal Judiciary* 1 (Dec. 31, 2021) ("The Judiciary's power to manage its internal affairs insulates courts from inappropriate political influence and is crucial to preserving public trust in its work as a separate and coequal branch of government."), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

[165] There is a long-running and voluminous debate over the scope of Congress' power to strip the Supreme Court of jurisdiction. *Compare* Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1637 (1990) ("[T]he inescapable implication of the text is that Congress possesses broad power to curb the jurisdiction of both the lower courts and the Supreme Court."); Paulsen, *supra* note 12, at 58 (arguing that the "Exceptions Clause *power*" is a "constitutionally permissible check Congress may employ against a runaway or renegade Supreme Court's misuse of its case-deciding power") *with* Henry Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) (arguing that "the exceptions [to the Supreme Court's appellate jurisdiction] must not be such as will destroy the essential role of the Supreme Court in the constitutional plan"); Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What* the Dialogue *(Still) Has to Teach Us*, 69 DUKE L.J. 1, 17-18 (2019) ("[T]he Exceptions Clause, which as a textual matter seems to

Added to these powers are those created by the Reconstruction Amendments: the power to enforce constitutional rights. Bitterly aware from *Dred Scott* and other cases that the Supreme Court might fail to honor the promise of liberty, equality, and democracy at the heart of the Reconstruction Amendments, Congress took pains to ensure that "the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative, because in each the amendment itself provided that it shall be enforced by legislation on the part of Congress."[166] Congress produced some of the greatest achievements of Reconstruction using these powers.

Second, Reconstruction provides a lens to evaluate the reforms pursued by Congress. Discussion of court reform often takes place on a highly theoretical level; Reconstruction gives us the opportunity to gauge the results of the court reforms enacted into law during Reconstruction. This is particularly valuable because the Reconstruction Congress employed multiple, overlapping reforms to achieve its aims. Studying Reconstruction's successes and failures can provide important insights that can inform modern debates over court reform.

Expanding the size of the Supreme Court is often viewed as a nuclear option that has the potential to transform the institution. Reconstruction complicates this standard account of court expansion.

On the one hand, one of the takeaways from Reconstruction is that court expansion can be incredibly strong medicine. Expanding the size of the Supreme Court helped produce the 1871 decision in *Knox*, which sustained the constitutionality of a federal law that made paper money legal and overruled an 1870 precedent to the contrary—one of the quickest overrulings in Supreme Court history. The Justices appointed by President Grant provided the critical votes to overrule the earlier precedent. *Knox* illustrates that court expansion is an incredibly powerful tool to change a Court that has lost its way.

On the other hand, it is striking that *Knox* stands alone among cases of the era in which court expansion made a critical difference. A Supreme Court dominated by Lincoln and Grant appointees was responsible for a string of awful rulings that gutted the Fourteenth Amendment. The changes to the composition of the Supreme Court did not produce a high Court willing to respect the text and history of the Fourteenth Amendment a mere few years after its ratification.

Court expansion did not wreck the Supreme Court or lead to a death-spiral of retaliation,[167] but perhaps that reflects that the change to the composition of the Court had less of an effect on the Court's decision-making than might be expected. Overall, despite multiple changes to the size of the Court, the story of the Supreme Court of the Reconstruction-era is more about continuity than change. The hopes of those that, in the Chase Court, "the Constitution . . . may now be interpreted wholly for Liberty" were repeatedly dashed.[168]

Reconstruction, thus, offers a reminder both about the power of court expansion as well as its potential limits. This remains an important lesson—even in today's radically different circumstances. Does this mean that court expansion is a counter-productive strategy? Certainly not. History—including our

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connote something of relatively minor importance, is a strikingly oblique way to endow legislators with the expansive authority to eviscerate completely a central responsibility of another constitutionally ordained branch of government!"). For an overview of the literature, see Springman, *supra* note 18, at 1791-1801.

[166] Cong. Globe, 42nd Cong. 2d Sess. 525 (1872).

[167] *See* Braver, *supra* note 35, at 2785-88 (offering some reasons for this).

[168] Letter from Charles Sumner to President Abraham Lincoln, dated Oct. 12, 1864, quoted in KUTLER, *supra* note 29, at 21.

own--provides many examples that show that appointments to the Court provide a crucial lever of constitutional change.[169] Court expansion, if enacted, could reverse the packing of the Court by conservatives and halt the 6-3 conservative majority's effort to rewrite huge swathes of constitutional law and imperil basic freedoms long enjoyed by Americans. While court expansion during Reconstruction fell short, much of that had to do with the appointments made by Republican presidents. With the right appointments, court expansion could be a powerful tool to change a Supreme Court that, in case after case, turns its back on our whole Constitution's core constitutional commitments to safeguarding the full promise of liberty, equal citizenship and an inclusive multiracial democracy. As Reconstruction reminds us, court expansion remains a tool in the congressional arsenal to redress the hardball tactics conservatives used to pack the Supreme Court.[170] Indeed, as the Reconstruction debates remind us, the size of the Supreme Court has always been set by Congress, and can be changed.

As important as it is, however, court expansion should not be the sole aim of the court reform agenda. Other reforms will continue to be essential, even with an expanded Supreme Court, for two basic reasons. First, the Supreme Court is often reluctant to overrule its precedents construing federal statutes, but Congress is free to override Supreme Court statutory precedents it disagrees with.[171] Perhaps even more importantly, only Congress can alter the jurisdiction of the federal courts and create new statutory safeguards for rights now at risk. As Reconstruction reminds us, progressives shouldn't put their eggs in any one basket. Multiple strategies are likely to offer the best chance for success.

Some argue that progressives should scale back the Supreme Court's powers using jurisdiction-stripping, which the Reconstruction Congress used to great effect to prevent the Supreme Court from hearing *Ex Parte McCardle*, a case that threatened to deal a mortal blow to the entire Reconstruction project. Proponents of disempowering reforms argue that it is not enough to simply change the composition of the Supreme Court; instead they urge "stripping the court of its authority and returning our society's most pressing and important questions to the democratic arena—where progressive causes, backed by popular movements, stand the best chance."[172]

Would today's Supreme Court follow *McCardle*? In the 2018 ruling in *Patchak v. Zinke*,[173] the Supreme Court's most recent case concerning jurisdiction-stripping, Justice Thomas and Chief Justice Roberts debated *McCardle*'s legacy. Justice Thomas's plurality opinion invoked *McCardle* to demonstrate that "Congress generally does not violate Article III when it strips federal jurisdiction over a class of cases."[174] "The core holding of *McCardle*," Thomas insisted, "has never been questioned" and

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[169] *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067-68 (2001) ("Partisan entrenchment is an especially important engine of constitutional change. When enough members of a particular party are appointed to the federal judiciary, they start to change the understandings of the Constitution that appear in positive law. If more people are appointed in a relatively short period of time, the changes will occur more quickly."); *id.* at 1067 (noting that "partisan entrenchment" is "a familiar feature of American constitutional history.").

[170] *See* Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 917 (2018) (pointing to the "arguably unprecedented blockade of the Merrick Garland nomination" as "classic example of constitutional hardball").

[171] For discussion, see Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 57 (2018); Matthew R. Christiansen & William S. Eskridge, *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317 (2014).

[172] *See* Ryan Doerfler & Elie Mystal, *The Supreme Court Is Broken. How Can We Fix It?*, THE NATION, June 6, 2022, https://www.thenation.com/article/society/how-to-fix-supreme-court/.

[173] 138 S. Ct. 1897 (2018).

[174] *Id.* at 906-07.

"has been repeatedly reaffirmed."[175] In dissent, Chief Justice Roberts suggested that *McCardle* was a dubious precedent from a Court that had been cowed into submission by Congress and should not be read to permit Congress to completely oust Supreme Court jurisdiction.[176] To Roberts, key to McCardle's holding was the fact that habeas review was not wholly foreclosed.[177] Chief Justice Roberts would have invalidated the jurisdiction-stripping provision in that case on the grounds that it "surpasses even *McCardle* as the highwater mark of legislative encroachment on Article III."[178] A bill stripping the Supreme Court of jurisdiction and broadly foreclosing judicial review over a class of cases would provoke a major constitutional fight.[179]

Even if that fight is winnable, progressives should think long and hard before employing jurisdiction-stripping as a tool to prevent the Supreme Court from exercising the power of judicial review. Courts play a fundamentally important role in our system of government in checking abuse of power. Even if jurisdiction-stripping might produce short term gains, in the long run, congressional action closing courthouse doors on litigants has the potential to harm the most marginalized in society, who turn to the courts because their rights will not be protected in the political process. Historically, jurisdiction-stripping has been wielded by conservative activists as a way to reverse progressive legal victories in the courts and prevent courts from safeguarding established constitutional rights.[180] There are particular risks in progressives taking up this strategy.

Jurisdiction-stripping is particularly fraught in today's legal climate. There are critical differences between Reconstruction and today. At the time of Reconstruction, Congress worried that the Supreme Court would use its habeas jurisdiction to undo Reconstruction. Lower federal courts could be counted to stay in their lane, but the Supreme Court, Republicans feared, might issue a sweeping ruling that would wreak havoc with Reconstruction. Jurisdiction-stripping solved Congress's *McCardle* problem, but it is less likely to be a successful strategy in the present moment.

Part of the problem is that the federal judiciary is stocked with conservative jurists, the results of efforts of the Trump administration, together with Senator Mitch McConnell leading a Republican majority in the Senate, to pack the lower courts with conservative ideologues handpicked to move the law far to the right. While President Joseph Biden has made it a priority to appoint a cadre of brilliant federal jurists from a wide array of personal and professional backgrounds, with a commitment to uphold the whole Constitution's text and history, the lower federal courts still remain incredibly conservative. Stripping the Supreme Court's jurisdiction would only empower the lower courts Trump packed. This makes stripping the Supreme Court of jurisdiction over certain cases less likely to be a successful avenue for reform.

Assume that, in the wake of *Dobbs*, Congress enacted a statute taking away the Supreme Court's jurisdiction to hear cases concerning marriage equality as a way to prevent the Supreme Court from

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[175] *Id.* at 907 n.4.

[176] *Id.* at 921 (Roberts, C.J., dissenting) (arguing that "facts of *McCardle,* however, can support a more limited understanding of Congress's power to divest the courts of jurisdiction" because "the Court's decision did not foreclose all avenues for judicial review of McCardle's complaint").

[177] *Id.* (stressing that "the Court's decision did not foreclose all avenues for judicial review of McCardle's complaint").

[178] *Id.*

[179] *See* Epps & Sitaraman, *supra* note 12, at 178 (noting that "the constitutionality of jurisdiction-stripping proposals remains one of the most significant unanswered questions in the field of federal courts').

[180] *See* Grove, *supra* note 19, at 523 (noting that, in recent decades, "social conservatives sought to eliminate both Supreme Court and inferior federal court jurisdiction over a range of constitutional issues, including abortion, religion, criminal procedure, desegregation, and same-sex marriage").

overruling *Obergefell v. Hodges*, which held that state laws that prohibited same-sex couples from marrying violated the fundamental right to marry guaranteed by the Fourteenth Amendment.[181] Would that necessarily leave *Obergefell* safe? Hardly. Conservative judges in the federal courts of appeal—particularly without the possibility of Supreme Court review—might say that *Dobbs* had undercut *Obergefell* and vote to permit states to ban same-sex marriage. In Texas, the Fifth Circuit would have the last word on whether *Obergefell* remains good law. That is a very scary scenario. A reform that empowered the Fifth Circuit and other deeply conservative federal courts of appeal to declare that *Obergefell* is no longer binding law would not be progress.[182]

What if Congress went even further and stripped all federal courts of jurisdiction? The cure might be worse than the disease: states would have the green light to pass the most draconian restrictions imaginable without any federal court review. Some state courts might abide by *Obergefell*, but others would not. Constitutional rights would be left to the state courts, without any further review. We would have no mechanism for ensuring the protection of fundamental rights and the supremacy of federal law.

Lastly, jurisdiction-stripping puts defenders of constitutional rights in the position of attacking the institution of judicial review. Recall the debates that led to the passage of the statute that stripped jurisdiction over McCardle's case. Republicans had the votes to pass the bill, but the debates were an embarrassment for them. As Democrats repeatedly pointed out, Republicans were seeking to repeal part of a landmark habeas statute they just enacted in order to deprive McCardle of liberty and prevent the Supreme Court from passing on the constitutionality of a federal statute. Republicans—who throughout Reconstruction often were passionate defenders of the Constitution—had no convincing response. This is not merely a one-off: jurisdiction-stripping puts congressional proponents in the unenviable position of explaining why the Supreme Court should not be permitted to perform its basic role in our constitutional system.[183]

Other options to regulate the jurisdiction and proceedings of the Supreme Court might be more attractive. Today, the Supreme Court has virtually complete control of its docket; four justices can vote to accept review of a case.[184] As a result, it has the unbounded freedom to take cases purely to pursue its ideological projects.[185] This past term is a case in point: *Dobbs* and many other big cases of this past term were cases in which the Court granted review to move the law to the right, not resolve a split between lower courts. To change this, Congress might consider restoring mandatory appellate jurisdiction over certain cases,[186] or impose new rules regarding the Court's certiorari jurisdiction, such as increasing the number of votes needed to hear a case or requiring a conflict in the lower courts as a

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[181] 576 U.S. 644 (2015).

[182] Perhaps Congress could legislate around this problem by directing that certain cases be only heard by the D.C. Circuit, one of the few federal courts of appeal not packed by former President Trump. Directing that cases only be heard in the D.C. Circuit might be feasible for legislation stripping jurisdiction over challenges to a federal statute—say a post-*Dobbs* federal law protecting access to abortion—but would be more difficult to justify in the context of challenges to state law.

[183] *See* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 111 HARV. L. REV. 869 (2011) (arguing that Article I's structural safeguards make it incredibly difficult to enact jurisdiction-stripping legislation).

[184] Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 853 (2022) ("[T]he Court has nearly complete control of its agenda to take the cases—and questions—it wants.").

[185] *Id.* at 801 ("The modern Court has effectively abandoned the traditional judicial role of deciding cases in favor of targeting preselected questions. . . . [T]he Supreme Court now uses certiorari to directly engage with the most contentious underlying issues.").

[186] Paulsen, *supra* note 12, at 61 (describing "'jurisdiction-loading'" as "an effective way to keep the justices out of trouble by keeping them busy with routine case-deciding work").

prerequisite to review. Congress might also enact rules regarding emergency relief to fix the appalling use of the shadow docket to make new law without briefing or oral argument.[187] Congress need not give the conservative majority unfettered control over its docket.

A third path forward—one that often is slighted in today's debates over court reform—builds directly off the greatest achievements of the Reconstruction Congress. When six Justices insist on rolling back fundamental rights and putting accountability further out of reach, Congress should do what it did during Reconstruction: employ its enforcement powers to pass landmark civil rights legislation that opens the courthouse doors and ensure the promise of justice for all Americans. These reforms represent the most enduring legacy of court reform during Reconstruction. As Reconstruction teaches, this is an essential part of court reform.

This approach will be vital in the wake of *Dobbs*. Congress should use the powers explicitly conferred on it by the Reconstruction Amendments to pass federal legislation protecting the rights the Court has abandoned. Whether the Court grows in size or remains at nine, legislation of this kind will be essential—indeed, it is also necessary to combat how the conservative majority of the Roberts Court has gutted the Voting Rights Act.[188] This, too, can draw on precedents set by the Reconstruction Congress, which passed our nation's first federal civil rights laws to protect fundamental rights that were under attack.

This will not be easy. It will not come without a major constitutional clash between Congress and the conservative wing of the Supreme Court, who have repeatedly jettisoned their supposed fealty to text and history when it comes to the grant of powers given by the Fourteenth and Fifteenth Amendment to enforce constitutional freedoms and safeguard equal citizenship stature.[189] But if there is a clash between the 6-3 conservative majority and Congress, the fight should be about the fact that the 6-3 Court is rolling back deeply rooted fundamental rights, not about the institution of judicial review, which is a bedrock and widely beloved feature of our constitutional system. A fight over judicial review is one progressives cannot hope to win, as Reconstruction reminds us. Ultimately, rather than attack the courts wholesale, the Reconstruction Congress revitalized the federal judicial system, seeking to make the federal courts bulwarks for freedom and equality. That, too, should be our aim today.

Some will insist that there is no point passing new enforcement legislation because any new legislation will not be worth anything so long as the Supreme Court is in the hands of a radical 6-3 majority.[190] This is a real concern that Congress must take into account in the drafting process, and likely counsels a multi-pronged approach that includes other reforms. But Congress should not shy away from fulfilling its duty to enforce the Reconstruction Amendments simply because the current conservative

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[187] *Cf.* Miller v. French, 530 U.S. 327 (2000) (upholding automatic stay provision against separation of powers challenge).

[188] *See* David Gans, *Selective Originalism and Selective Textualism: How the Roberts Court Decimated the Voting Rights Act,* SCOTUSBLOG, July 7, 2021, https://www.scotusblog.com/2021/07/selective-originalism-and-selective-textualism-how-the-roberts-court-decimated-the-voting-rights-act/.

[189] *See, e.g.*, Balkin, *supra* note 20, at 1805 (arguing that "modern doctrine has not been faithful to the text, history, and structure of the Thirteenth, Fourteenth, and Fifteenth Amendments"); McConnell, *supra* note 20, at 194 (arguing that the Court has "erred in assuming that congressional interpretation of the Fourteenth Amendment is illegitimate" because "the framers of the Amendment expected Congress, not the Court, to be the primary agent of its enforcement, and that Congress would not necessarily consider itself bound by Court precedents in executing that function"); William Baude, *The Real Enemies of Democracy*, 109 CALIF. L. REV. 2407, 2414 (2021) (arguing that *Shelby County* "is vulnerable as a matter of first principles, since the Reconstruction Amendments explicitly grant Congress an enforcement power and were ratified against the background of dramatic federal enforcement against a group of recalcitrant states").

[190] Doerfler & Mystal, *supra* note 172 ("Right now, the law is whatever five Supreme Court justices say it is. The way to fix this is not to pass new laws, as those five people will just ignore laws they don't like anyway.").

majority will look for ways to undermine Congress's handiwork. If the 6-3 conservative majority guts new enforcement legislation, that will surely signal that more radical reforms are necessary.

What would a court reform statutory agenda look like? Beyond *Dobbs*, at least three other areas cry out for congressional intervention.

First, the conservative majority of the Supreme Court continues to decimate our system of constitutional accountability, making it nearly impossible to hold government actors accountable for abuse of the immense power they wield. When state and local government officers are sued for violating constitutionally guaranteed rights, the Supreme Court almost always gives them immunity—even when Congress has expressly provided individuals a right to sue to redress constitutional wrongs.[191] It is virtually impossible to sue a federal officer for violating your constitutional rights no matter how egregious the officer's conduct; the 1971 decision in *Bivens v. Six Unknown Federal Narcotics Agents*,[192] is basically a dead letter. Ignoring that the Constitution was framed and ratified against the backdrop of officer accountability, the Supreme Court has conferred on federal officials a form of absolute immunity.[193] This past term, the six-justice conservative majority continued to ratchet up the protections of the judge-made doctrine of qualified immunity,[194] while insisting that they had no authority to permit suits against federal officers without the say-so of Congress.[195] In each area, conservative Justices are moving the law far to the right to put accountability out of reach. Congress can reverse these rulings by amending Section 1983 to allow suit against persons acting under color of federal law, which would codify *Bivens*, and by adding language to Section 1983 that would eliminate qualified immunity.[196]

Second, habeas corpus review is badly broken. The Supreme Court's conservative majority has interpreted AEDPA—a 1996 law that has been called "the worst criminal justice law of the last thirty years"[197]—to make it nearly impossible to vindicate constitutional rights. AEDPA requires federal courts to defer to state courts unless they disobey clearly established law, but in the hands of a conservative Supreme Court, this means that federal habeas review will not lie except in cases so egregious that no fair-minded jurist would deny relief.[198] This past term, the six-Justice conservative majority insisted that AEDPA must be read as restrictively as possible because federal habeas review

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[191] *See* Gans, *supra* note 139, at 101 ("The text of Section 1983 is as clear as can be: it makes state officials acting under color of state law liable for constitutional violations and provides no immunities from suit. Rather than heeding this text, the Supreme Court has held that all state officials, in fact, must be accorded a broad immunity from suit.").

[192] 403 U.S. 388 (1971).

[193] *See* Egbert v. Boule, 142 S. Ct. 1793 (2022); Stephen I. Vladeck, *The Disingenuous Demise and Death of* Bivens, 2019-2020 CATO SUP. CT. REV. 263; Richard H. Fallon, *Bidding Farewell to Constitutional Torts*, 107 CAL. L. REV. 933, 942-43 (2019).

[194] Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 8 (2021) (per curiam); City of Tahlequah v. Bond, 142 S. Ct. 9, 12 (2021) (per curiam).

[195] *Egbert*, 142 S. Ct. at 1800.

[196] *See* Brandon Hasbrouck, *Who Can Protect Black Protest?*, 170 U. PA. L. REV. ONLINE 39, 47-52 (2021) (discussing *Bivens*); Gans, *supra* note 139, at 117 ("The only way to fix the long line of immunity doctrines devised by the Court is to end them, and to ensure that those wronged by the government can seek justice in the courts.").

[197] Radley Balko, *It's Time to Repeal the Worst Criminal Justice Law of the Past 30 Years*, WASH. POST, Mar. 3, 2021, https://www.washingtonpost.com/opinions/2021/03/03/its-time-repeal-worst-criminal-justice-law-past-30-years/.

[198] Harrington v. Richter, 562 U.S. 86, 101 (2011); Lee Kovarsky, *Structural Change in Post-Conviction Review*, 93 NOTRE DAME L. REV. 443, 463 (2017) ("Because of the no-fairminded-jurist standard, federal habeas relief is largely unavailable for claims previously decided on the merits in state court.").

"'intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority'"[199] and is not intended for "[f]ull, blown constitutional error correction."[200] The habeas statute—once called a "bill of the largest liberty"[201]—now rubber-stamps injustices perpetuated by state criminal justice systems.[202] Even innocence apparently is irrelevant; in *Shinn v. Ramirez*, the Court's conservative majority held that a habeas petitioner who did not present newly gathered evidence of his innocence in the state courts because of his counsel's incompetence could not present that evidence to a federal court.[203] Congress can restore an Article III forum to vindicate constitutional claims by state prisoners by repealing AEDPA.[204]

Third, the conservative majority of the Supreme Court has rewritten federal arbitration laws, ostensibly designed to afford businesses a speedy way to resolve commercial disputes, to give corporations the power to force consumers and employees to have their legal claims resolved through arbitration—in which claims against the company will be decided by a decision-maker chosen by the company—rather than in a court of law.[205] As a result, cases in which corporations violate federal rights are shunted out of court into an arbitral forum slanted in favor of defendants. Even worse, the conservative Court has sanctioned forced arbitration even if the injured individuals cannot effectively vindicate their federal rights in arbitration.[206] The upshot is that "through the procedural device of private arbitration," corporations "have the quasi-lawmaking power to write substantive law largely off the books by precluding or severely impeding the assertion of various civil claims."[207] Congress could change that by forbidding arbitration agreements that force arbitration of employment, consumer, antitrust, or civil rights disputes. The idea would be to ensure that workers, consumers and others could go to a federal court of law to vindicate their federally protected rights.

Reforms in these three areas are urgently needed to redress how the Court's conservative majority has shuttered court-house doors on those victimized by abuse of power and obstructed accountability. A court reform agenda should include strengthening Section 1983, scrapping AEDPA, codifying *Bivens*,

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[199] Shinn v. Ramirez, 142 S. Ct. 1718, 1731 (2022) (quoting *Harrington*, 562 U.S. at 103).

[200] Brown v. Davenport, 142 S. Ct. 1510, 1522 (2022).

[201] CONG. GLOBE, 39th Cong. 1st Sess. 4151 (1866).

[202] *See* Brandon L. Garrett & Caitlin Phillips, *AEDPA Repeal*, 107 CORNELL L. REV. 101, 126 (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4133841 ("The barriers to federal habeas corpus introduced by AEDPA— in combination with the ever-more restrictive ways the Supreme Court has interpreted such barriers—have left countless petitioners without an opportunity to bring a federal petition, let alone the ability to access a remedy, even for seemingly clear constitutional violations."); Hon. Diane P. Wood, *The Enduring Challenges of Habeas Corpus*, 95 NOTRE DAME L. REV. 1809, 1828 (2020) (discussing how AEDPA "shuts the door on potentially meritorious petitions, whether based on actual innocence, or on one of the other grounds indicating a breakdown in the criminal system or a fundamental failure of justice").

[203] *Shinn, supra*; Radley Balko, *In Death Row Case, Supreme Court Says Guilt is Now Beside the Point*, Wash. Post, June 1, 2022, https://www.washingtonpost.com/opinions/2022/06/01/arizona-death-row-supreme-court-shinn-innocence/.

[204] Garrett & Phillips, *supra* note 202, at 127-140 (offering suggestions for fixing AEDPA).

[205] *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 612 (2018); Compucredit Corp. v. Greenwood, 565 U.S. 95 (2012); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Rent-A-Center, West, Inc. v. Jackson, 561 U.S 63 (2010); 14 Penn Plaza, LLC v. Pyett, 556 U.S. 247 (2009); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

[206] *See* American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013); *id.* at 253 (Kagan, J., dissenting) ("The FAA conceived of arbitration as a 'method of *resolving* disputes' — a way of using tailored and streamlined procedures to facilitate redress of injuries. In the hands of today's majority, arbitration threatens to become more nearly the opposite — a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability." (citations omitted)).

[207] J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3057 (2015).

and ensuring that Americans have a right to go to a court of law to hold corporations accountable for legal wrongs. Regardless of whether there is court expansion, these are all actions Congress could take to make our federal courts more just.

Conclusion

The Supreme Court is broken. How do we fix it? In wrestling with these questions, we should not forget the lessons of Reconstruction, a moment in American history when the role of the Supreme Court in American life was hotly debated and Congress took many steps to reform both the Supreme Court and our federal judicial system. Employing enforcement powers contained in the Thirteenth, Fourteenth, and Fifteenth Amendments, the Reconstruction Congress enacted a long list of landmark federal civil rights laws that sought to make the federal courts partners in Reconstruction's project of ensuring true freedom and equal citizenship, opening the federal courthouse doors wide open to rein in state abuse of power and hold states and localities accountable. To this day, these statutes provide a model for court reform that remains critically important in this moment. In the wake of *Dobbs*, we should not forget the idea at the core of Reconstruction's legislative constitutionalism: the Supreme Court is not infallible and Congress has its own express and independent power to protect our most cherished constitutional rights.

When the Supreme Court runs roughshod over our national charter of liberation, Congress need not sit on the sidelines. The Constitution gives it powerful tools to reform our federal judicial system and ensure that our federal courts—including the Supreme Court—uphold the ideals of liberty and equal justice under law at the core of our Constitution. When the 6-3 conservative majority eviscerates fundamental rights and puts accountability out of reach, Congress can pass statutes to do what the Supreme Court will not: uphold our core constitutional commitments. The story of Reconstruction provides a vital reminder of a period in which American history in which Congress repeatedly utilized its powers to make the federal courts instruments of liberty and equality.