THE SUPREME COURT UNDER THREAT: EARLY LESSONS IN JUDICIAL SELF-PROTECTION

Curtis A. Bradley[*] & *Neil S. Siegel*[**]

Because the Supreme Court is powerful, it is largely able to fulfill its legal responsibilities. Because it is a court — because it lacks both the sword and the purse — it is vulnerable to being defied successfully by Presidents and states and punished by Congress.

This Essay argues that the Court has become powerful despite being vulnerable because it has learned through hard experience to perform two roles reasonably well. The first is legal: The Court interprets and applies the Constitution and federal statutes in disputes before it. The second is political: The Court must survive in a world in which it ultimately must persuade powerful politicians to abide by its decisions. In short, the Court has two central tasks, especially when under threat — preserving the rule of law, and protecting itself. Commentators who believe that the Court should focus exclusively on its legal function fail to credit sufficiently the fact that, even today, the Court does not just act; it can also be acted upon — or ignored.

As this Essay shows, the Court began playing both roles early on. The Court made itself available to interpret and apply the law, as Article III of the Constitution and the Judiciary Act of 1789 directed. But the Court soon learned that it could not continue performing this legal function if it did not develop a way of practicing self-protective politics. Drawing upon several historical episodes, this Essay contends that the Supreme Court inevitably, and (within limits) properly, takes account of political threats to itself in exercising judicial review.

Part I identifies the reasons for the Court's institutional vulnerability and the devices that the Court has developed over time to navigate difficult situations, including the current challenges facing the Court. Parts II through IV examine three episodes from the nineteenth century in which the Court successfully, although not always perfectly, navigated existential threats to its continued authority: cases arising out of the Jeffersonian backlash against the judiciary after the elections of 1800; Georgia's defiance of the Court in the *Cherokee Cases* of the 1830s; and the Court's decisions about military trials after the Civil War. The Conclusion defends the Court's use of the tools of judicial self-protection despite the potential costs of such use.

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* Allen M. Singer Distinguished Service Professor, University of Chicago Law School.

** Professor and Co-Director, Center on the Structural Constitution, Texas A&M University School of Law. For helpful feedback, we thank Katherine Mims Crocker, Tara Grove, Alison LaCroix, Richard Pildes, Eric Posner, Lawrence Solum; symposium and workshop participants at Harvard, Texas A&M, and UCSF Law Schools; and the editors of the *Harvard Law Review*.

I. TOOLS OF JUDICIAL SELF-PROTECTION

This Part first explains why the Supreme Court is vulnerable to political threats. It then recounts a wide variety of tools that the Court can and does use to avoid or reduce those threats.

A. *The Court's Institutional Vulnerability*

As Alexander Hamilton observed in *The Federalist*, the federal judiciary, unlike the political branches, "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever."[1] The judiciary, Hamilton added, "may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[2] Given the courts' institutional vulnerability, it might seem puzzling why powerful actors like Presidents typically obey judicial rulings that disallow or limit their actions.[3] Scholars have identified a number of likely reasons. Each depends on circumstances.[4]

First, because of tradition, socialization, and legal training, norms of compliance usually permeate the executive branch.[5] The second Administration of President Donald Trump, however, has been notorious for disregarding traditional norms of government behavior.[6] Second, there will typically be political costs associated with defying judicial orders. Those costs depend, however, on public support for the judiciary, which cannot always be taken for granted.[7] Moreover, it is not hard to imagine situations in which a President would conclude that the political costs are outweighed by the benefits of noncompliance. Third, Presidents generally benefit from a strong judiciary, which helps the

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[1] THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[2] *Id.*

[3] *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 15 (2007) (explaining that "[c]hallenges to judicial supremacy . . . are likely to be most fully and significantly developed by the president" due to "the status and power of the presidency").

[4] The following paragraph draws from *id.* at 1–27 and Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 733–45 (2011). *See generally* Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465 (2018) (arguing that the norms protecting judicial independence have been constructed over time by political institutions and are historically contingent).

[5] *See* Curtis A. Bradley & Trevor W. Morrison, Essay, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1132–34 (2013).

[6] *See, e.g.*, Mattathias Schwartz et al., *Judges Grow Angry Over Trump Administration Violating Their Orders*, N.Y. TIMES (Feb. 24, 2026), https://www.nytimes.com/2026/02/23/us/politics/judges-contempt-immigration-trump.html [https://perma.cc/HD92-48RJ]; Justin Jouvenal, *Trump Officials Accused of Defying 1 in 3 Judges Who Ruled Against Him*, WASH. POST (July 21, 2025), https://www.washingtonpost.com/politics/2025/07/21/trump-court-orders-defy-noncompliance-marshals-judges [https://perma.cc/UUA8-A6HH].

[7] *Cf.* Scott Dodson, *The Supreme Court and Public Opinion*, 111 IOWA L. REV. 117, 153 (2025) (contending that the Court is now "beset by low-grade but persistent political and public skepticism, fueled by charged partisanship and the Court's own conduct").

executive branch enforce federal law, legitimate some of its contested actions, resolve divisive issues that fracture a President's coalition, and provide insurance against future political harm when a President's party loses power.[8] But there is no guarantee that a President will care more about such matters than about getting the courts out of his way. Whatever the exact reasons for typical presidential compliance with judicial decisions, the bottom line, as Professor Daryl Levinson has observed, is "that the judiciary can impose constitutional constraints on powerful political actors only if these actors support the judiciary"[9] — either because the public does or the politicians themselves do.[10]

The truth of Hamilton's observation may have been more obvious at the Founding and, as discussed below, during the nineteenth century. But it retains substantial truth today, as evidenced by the fact that the Court has been in a difficult position during President Trump's second term even though it is, at least in many respects, ideologically aligned with his Administration.

Tensions between the Administration and the Supreme Court surfaced quickly after the start of the second Trump Administration.[11] These tensions started in the lower federal courts, which responded unfavorably to many of Trump's initiatives.[12] When courts ruled against him, Trump accused the judges of endangering the country, and some of his partisans in Congress even called for the impeachment of these judges or significant restrictions on judicial power.[13]

After Trump himself advocated the impeachment a federal judge (who had temporarily barred the government from deporting certain noncitizens), Chief Justice Roberts made a rare public statement. "For more than two centuries," Roberts observed without mentioning Trump, "it has been established that impeachment is not an appropriate response to disagreement concerning a judicial decision."[14] Since then, there have been instances in which the Administration has not complied with judicial orders, either of the lower courts or of the Supreme Court

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[8] *See, e.g.*, Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 252–53 (2012).

[9] Levinson, *supra* note 4, at 744; *accord* WHITTINGTON, *supra* note 3, at 26 ("[T]he Court's judgments will have no force unless other powerful political actors accept the importance of the interpretive task and the priority of the judicial voice.").

[10] *See* WHITTINGTON, *supra* note 3, at 18 ("Political actors defer to the authority claims of the courts because the judiciary can be useful to their own political and constitutional goals, or at least because challenging the Court may be too politically costly.").

[11] *See, e.g.*, Carl Hulse, *House Republicans Want to Impeach Judges. Here's How the Process Would Work.*, N.Y. TIMES (Mar. 20, 2025), https://www.nytimes.com/2025/03/20/us/politics/trump-judges-impeach-congress.html [https://perma.cc/Z7Y3-29KK].

[12] *See id.*

[13] *See id.*

[14] Adam Liptak, *Rebuking Talk from Trump, Roberts Calls Impeaching Judges over Rulings Improper*, N.Y. TIMES (Mar. 18, 2025) (quoting Chief Justice Roberts), https://www.nytimes.com/2025/03/18/us/chief-justice-roberts-impeachment-trump.html [https://perma.cc/GX2C-2T36].

itself.[15] Judicial-executive relations became sufficiently strained in one case that a prominent conservative appellate judge, J. Harvie Wilkinson III, warned that if events continued on this path, "[t]he Executive may succeed for a time in weakening the courts, but over time history will script the tragic gap between what was and all that might have been, and law in time will sign its epitaph."[16]

B. The Court's Tools of Self-Protection

Although the Court lacks the sword and the purse, it has other tools to protect itself. One might group these tools into four, partially overlapping, categories:

Avoidance or Delay

For example:

- using denials of certiorari or limitations on jurisdiction or justiciability;
- delaying to agree to hear a case or issue a decision;

Minimalism

For example:

- practicing gradualism in decisionmaking;
- issuing a narrow opinion;
- crafting remedies in a way that will reduce confrontation;
- using the emergency orders docket (also known as the interim orders docket or the shadow docket) to manage interactions between lower federal courts and a presidential administration;

Strategic Bundling

For example:

- grouping news that will be viewed unfavorably by powerful actors with news that will be viewed favorably;
- imposing a limitation on executive action given a congressional prohibition or silence, combined with an assurance of judicial approval if Congress were to authorize the action;
- using dicta to offer consolation or plant seeds for the future;

Symbolism, Rhetoric, and Communication

For example:

- achieving unanimity in decisionmaking;
- appealing to the national ethos (that is, American collective identity) and the deployment of rhetorical skill more generally;
- communicating (especially via the Chief Justice) to political actors or the public outside judicial opinions or orders.

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15 *See* sources cited *supra* note 6.

16 Abrego Garcia v. Noem, No. 25-1404, 2025 WL 1135112, at *3 (4th Cir. Apr. 17, 2025).

In extreme circumstances, these tools include temporary surrender to a political reality that the Court is powerless to confront or affect.[17]

Justices are fallible, so it is not inevitable that they will use the tools of self-protection wisely or effectively. How well the Court uses them likely depends in part on the abilities of the Chief Justice. Traditionally, the Chief Justice is the lead spokesperson for the Court, both internally and externally, and the legacy of a Chief Justice is tied more closely to the overall success of the institution than are the legacies of other Justices. These considerations mean that the Chief Justice may be well-positioned to help the Justices overcome their own disagreements and collective action problems. The Court is a collective body, and there is a danger that individual members will prioritize their own concerns over those of the institution. An effective Chief Justice can reduce this individualism, including by encouraging relatively narrow and unanimous decisionmaking and by making skillful extrajudicial statements.

For analytical purposes, we distinguish between the tools of judicial self-protection and the Court's view of what the law requires. In practice, this distinction will blur at the margins because it turns on judicial motivation, and motivation can be difficult to discern, especially when the Justices in the majority may not all have the same motivation. Some of the tools we identify, such as limits on jurisdiction and justiciability, are rooted in legal materials, even if they also have discretionary elements. Thus, what might look like an effort at judicial self-protection could simply be an application of law. In drawing the distinction in the contemporary and historical episodes that we examine, we rely on private statements of the Justices involved, the assessments of historians and legal scholars who have studied the episodes, and our own analysis of the relevant materials. The distinction we draw can also become blurry in the opposite direction: Decisions on the merits could themselves be responses to political threats. For example, to avoid a confrontation, the Court could simply adopt a legal interpretation that upholds governmental action. The Court is likely to prefer the tools we describe over this option, however, because they do not require the Court to make long-term concessions of its legal authority. In each episode that we consider, whether contemporary or historical, the Court seemed to be trying to avoid making such concessions while also protecting the institution.

[17] Professor Alexander Bickel memorably defended some of these tools as part of his discussion of the "passive virtues." For this discussion, see generally ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 111–98 (1962). *See also* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 53 (1960) (referring to tools like these as "the arts of judicial governance"). Bickel's account was focused on the lawyerly distinction between justiciability and the merits, whereas, under our account, justiciability doctrines are among a long list of tools that the Court does and should employ to protect itself from acute political threats. While we focus on the Supreme Court, lower federal courts also likely weigh institutional considerations when issuing decisions. *See* Rachel Bayefsky, *Judicial Institutionalism*, 109 CORN. L. REV. 1297, 1306–07 (2024).

The Court appears to have employed the tools of self-protection during the second Trump Administration. For example, Chief Justice Roberts issued the unusual public statement noted above, while taking care not to call out President Trump by name.[18] In addition, in an initial challenge to Trump's controversial use of the Alien Enemies Act of 1798[19] to remove individuals from the United States, the Court held that the lower courts had lacked jurisdiction to issue relief while also declaring in dicta that the detainees could file their challenges in other courts and that due process required the Administration to give all such detainees advance notice of their removals so they would have sufficient time to contest them.[20] Some observers compared this approach to the Court's decision in *Marbury v. Madison*,[21] which we discuss below in Part II.[22] Moreover, in a case involving an individual whom the government conceded was illegally removed to El Salvador, the Court unanimously directed the government to "facilitate" the individual's return while including qualifications that seemed crafted to reduce the likelihood of defiance.[23]

The practice of judicial self-protection has a long history. We focus here on three episodes from the nineteenth century in which the Court faced significant threats to its authority: two famous cases arising out of the Jeffersonian backlash against the judiciary after the elections of 1800; Georgia's defiance of the Court in the *Cherokee Cases* of the 1830s; and the Court's decisions after the Civil War about military trials. In each episode, the Court used the tools of judicial self-protection to navigate the threats to itself, stand up for the rule of law, and preserve its future legal authority.

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[18] A famous direct communication by a Chief Justice to political actors was sent by Chief Justice Hughes to the Senate during the Court-packing controversy of 1937; his letter demonstrated the falsity of President Franklin Roosevelt's claim that the Court was behind in its work and argued that adding Justices would likely harm the Court's functioning. *See* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 283 (2017).

[19] 50 U.S.C. §§ 21–24.

[20] Trump v. J.G.G., 145 S. Ct. 1003, 1006 (2025) (per curiam).

[21] 5 U.S. (1 Cranch) 137 (1803).

[22] *See, e.g.*, Ann E. Marimow, *Supreme Court Walks a Tightrope as It Confronts Trump's Power Moves*, WASH. POST (May 30, 2025), https://www.washingtonpost.com/politics/2025/05/29/trump-john-roberts-supreme-court [https://perma.cc/H5XE-NP68].

[23] Noem v. Abrego Garcia, 145 S. Ct. 1017, 1018 (2025) (noting that the district court should give "due regard for the deference owed to the Executive Branch in the conduct of foreign affairs"). After insisting it was unable to bring this individual back to the United States, the government did so in June 2025 and tried prosecuting him. Sarah N. Lynch & Luc Cohen, *Abrego Garcia, Mistakenly Deported, Is Returned to US to Face Migrant-Smuggling Charges*, REUTERS (June 7, 2025, at 10:58 ET), https://www.reuters.com/world/us/abrego-garcia-way-us-face-criminal-charges-abc-news-reports-2025-06-06 [https://perma.cc/CE69-B4VT].

II. JEFFERSONIAN BACKLASH CASES

The elections of 1800 led to the first transfer of power in the United States from one political party to another, at a time when the parties despised each other and thought that the other party posed an existential threat to the country.[24] This led to some well-known challenges for the Supreme Court.

After the elections, the outgoing Federalists, led by President John Adams, sought to strengthen their control of the federal courts before the Democratic-Republicans, led by Thomas Jefferson, took office.[25] Contrary to the conventional, pure-partisanship account of this episode, the Federalists had started seriously discussing reforms to the federal judiciary about a year before the Jeffersonians' victory,[26] and "the movement that led to the Judiciary Act of 1801[27] predated the election of 1800 by several months."[28] But the election results provided an immediate, partisan reason for the Federalists to enact their deeply held ideas about expanding federal jurisdiction and eliminating circuit riding by the Justices.[29]

In late January 1801, Adams nominated John Marshall as Chief Justice, and the lame-duck Federalist Congress speedily confirmed him.[30] For the remaining weeks of Adams's Administration, Marshall would serve as both Chief Justice and Acting Secretary of State.[31] Then, on February 13, the Federalist Congress passed the Judiciary Act of 1801, which ended the onerous practice of circuit riding by Justices and instead created six new circuit courts with sixteen new federal judges to serve on them.[32] These judgeships went to "staunch Federalists."[33] The statute also expanded the scope of federal jurisdiction and reduced the size of the Court from six to five, which would have denied Jefferson his first appointment.[34] The Democratic-Republicans were furious and prepared for political warfare; for example, Jefferson invoked martial imagery in private correspondence, writing that the Federalists "have

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[24] *See generally* EDWARD J. LARSON, A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN (2007) (describing this election).

[25] *See* Michael W. McConnell, *The Story of* Marbury v. Madison*: Making Defeat Look Like Victory*, *in* CONSTITUTIONAL LAW STORIES 13, 14 (Michael C. Dorf ed., 2004).

[26] Alison L. LaCroix, *The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic*, 2007 SUP. CT. REV. 345, 384 (2008).

[27] Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (repealed 1802).

[28] LaCroix, *supra* note 26, at 387 (footnote added).

[29] *Id.* at 381–84.

[30] McConnell, *supra* note 25, at 15.

[31] *Id.*

[32] Act of Feb. 13, §§ 6–7, 2 Stat. at 90, 98. The Judiciary Act of 1789 had required Justices to "ride circuit" twice a year, hearing appeals from district courts. Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75.

[33] McConnell, *supra* note 25, at 15.

[34] Act of Feb. 13, § 3, 2 Stat. at 92–94; McConnell, *supra* note 25, at 15.

retired into the Judiciary as a strong hold . . . and from that battery all the works of republicanism are to be beaten down [and] erased."[35]

On February 27, a week before the end of Adams's presidency, the Federalists turned to more mundane matters by passing the Organic Act for the District of Columbia,[36] which created the office of justice of the peace in the new District.[37] Justices of the peace would maintain public order and "serve for five-year terms."[38] Adams submitted forty-two nominees for these positions to the Senate, one of whom was William Marbury, a Georgetown businessman.[39] By the close of business on March 3, the day before Jefferson's inauguration, the Senate had quickly confirmed all the nominees.[40] Adams signed the commissions into the evening, and his aides brought them to the State Department, where Marshall, as Acting Secretary of State, affixed the Great Seal of the President of the United States to them.[41] Some commissions were delivered to the appointees, but some (including Marbury's) were not.[42] They were discovered at the State Department when Jefferson took office the next day.[43]

Jefferson prohibited the delivery of these commissions.[44] More significantly, on March 8, Democratic-Republicans in Congress repealed the Judiciary Act of 1801,[45] removing the sixteen new circuit judges from office by eliminating their courts despite Article III's provision of life tenure (service during "good Behaviour") for federal judges.[46] Congress also increased the number of Justices back to six.[47] Then, on April 29, Congress passed the Judiciary Act of 1802,[48] which restored circuit riding by the Justices.[49] The Jeffersonians understood that the Repeal Act[50] could be challenged on the ground that removing the court from the judge was constitutionally no different from removing the judge from the court.[51] To delay and deter any Court decision invalidating

[35] Letter from President Thomas Jefferson to John Dickinson (Dec. 19, 1801), *in* 36 THE PAPERS OF THOMAS JEFFERSON 165, 165–66 (Barbara B. Oberg ed., 2009).

[36] Act of Feb. 27, 1801, ch. 15, 2 Stat. 103.

[37] McConnell, *supra* note 25, at 16.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 17.

[41] *Id.*

[42] *Id.* at 17–18.

[43] *Id.* at 18.

[44] *Id.*

[45] Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132.

[46] *Id.*; U.S. CONST. art. III, § 1.

[47] Act of Mar. 8, 1802, 2 Stat. at 132.

[48] Act of Apr. 29, 1802, ch. 31, 2 Stat. 156.

[49] *Id.* § 4, 2 Stat. at 157–58.

[50] Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

[51] *See* Stuart v. Laird, 5 U.S. (1 Cranch) 299, 304 (1803) (argument by challenger that Congress "may modify the courts, but they cannot destroy them, if thereby they deprive a judge of his office"); McConnell, *supra* note 25, at 20.

the Act, Congress canceled the Court's June Term, postponing the Court's next meeting for almost a year — until February 1803.[52]

Chief Justice Marshall and his colleagues also knew that the Democratic-Republicans were contemplating the impeachment of Federalist Justices, starting with the combative partisan Justice Samuel Chase.[53] Worried about the Court's survival if Justices could be removed from office based on disagreement with their decisions, Marshall astonishingly wrote in a private letter to Chase that he would prefer to have Congress exercise appellate jurisdiction over the Court if granting Congress this authority would defuse the impeachment threat.[54] No such proposal was being actively considered in Congress.

In this environment, the Justices would have risked removal from office by holding in *Stuart v. Laird*[55] that the Repeal Act contravened Article III.[56] When they eventually decided the case, the Justices instead surrendered to political reality by unanimously upholding the Repeal Act in an opinion by Justice Paterson spanning only four paragraphs that did not address whether terminating federal judgeships by terminating courts violated Article III.[57] Rather than expressly endorse the Jeffersonians' likely violation of Article III, the Court wrote as if all that were at issue was Congress's decision (which the Court approved) to transfer the case from the circuit court created by the Judiciary Act of 1801 to the circuit court created by the Judiciary Act of 1802.[58]

In short, the Court acquiesced in giving effect to the questionable Repeal Act. It almost certainly did so because it had no other reasonable choice. The Jefferson Administration would likely have refused to enforce or comply with any decision invalidating the Act,[59] and, to repeat, impeachment and removal of Federalist Justices was on the table. As Professor Michael McConnell has written, Marshall "was powerless to confront directly" the Repeal Act.[60] But the Court also used the tool of minimalism to avoid setting a broad precedent.

Neither political party cared nearly as much about whether the Adams appointees received their commissions to serve as justices of the

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[52] Act of Apr. 29, 1802, § 1, 2 Stat. at 156–57; McConnell, *supra* note 25, at 21.

[53] MCCLOSKEY, *supra* note 17, at 45–46.

[54] *See* Letter from Chief Justice John Marshall to Justice Samuel Chase (Jan. 23, 1805), *in* 6 THE PAPERS OF JOHN MARSHALL 347, 347 (Charles F. Hobson ed., 1990); *see also* Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1124–25 (2001) (discussing the letter).

[55] 5 U.S. (1 Cranch) 299 (1803).

[56] *Cf.* SANFORD LEVINSON ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 109 (8th ed. 2022) (observing that "in political terms [*Stuart*] was in fact . . . far more important [than *Marbury* was] at the time").

[57] *Stuart*, 5 U.S. (1 Cranch) at 308–09.

[58] *Id.* at 309 ("Congress have constitutional authority to establish from time to time such inferior tribunals as they may think proper; and to transfer a cause from one such tribunal to another.").

[59] *See* McConnell, *supra* note 25, at 23–24.

[60] *Id.* at 31; *see also* LEVINSON ET AL., *supra* note 56, at 109 n.68 ("Marshall acquiesced to the Jeffersonian Repeal Act, in spite of his privately expressed reservations about its constitutionality.").

peace.[61] Nonetheless, litigation began over the matter in 1801 when Charles Lee, who had been Attorney General during the Washington and Adams Administrations, sued in the Court's original jurisdiction and asked the Justices to issue a writ of mandamus to compel Jefferson's Secretary of State, James Madison, to deliver copies of their commissions to Marbury and three other Adams appointees.[62]

Writing for the Court, Marshall both asserted the Court's authority and avoided the political threat. The Jefferson Administration would almost certainly have ignored a judicial order to deliver the commissions, thereby exposing the Court's impotence, and any such order might well have provoked impeachment proceedings against Marshall and his colleagues.[63] The issue facing the Court was whether to hand the Jefferson Administration a complete victory, or instead to have Marbury lose while still offering consolation to Federalists, the federal judiciary, and the rule of law for which the Court was responsible. Marshall's oddly organized opinion (which itself evidences the presence of judicial self-protection, not straightforward legal analysis) bowed to the inevitable while standing up for Marbury and the Court itself.

Marshall concluded that, although Congress had given it jurisdiction to hear the case, it could not do so because the conferral of jurisdiction conflicted with the limits on the Court's jurisdiction set out in the Constitution.[64] Before getting to that issue, however, Marshall decided the merits of the case favorably to Marbury — declaring that he was legally entitled to his commission and mandamus as a remedy for being denied his commission.[65] By refusing to apply a federal statute for the first time,[66] Marshall also planted seeds of judicial authority for the future.

Many commentators have concluded that Marshall's opinion is filled with vulnerable legal reasoning, both on the question of Marbury's entitlement to his commission and on the issue of why the Court lacked jurisdiction.[67] Most importantly, Marshall held that the Court lacked jurisdiction because Section 13 of the Judiciary Act of 1789, which he read as granting the Court original jurisdiction to hear suits for a writ of mandamus, violated Article III and so was unconstitutional because Congress may not enlarge the Court's original jurisdiction.[68] The relevant portion of Section 13 probably referred only to the Court's

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[61] McConnell, *supra* note 25, at 21.

[62] *Id.* at 20.

[63] *See supra* notes 53–54 and accompanying text; *cf.* McConnell, *supra* note 25, at 18 ("It is likely that Jefferson had [the commissions] destroyed.").

[64] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173–80 (1803).

[65] *See id.* at 154–73.

[66] *See id.* at 176–80.

[67] *See generally, e.g.*, William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1 (discussing reasoning in *Marbury* critically).

[68] *Marbury*, 5 U.S. (1 Cranch) at 173–76.

appellate jurisdiction, however, not to its original jurisdiction.[69] In any event, Marshall likely confused the distinction between jurisdiction and remedies: Statutory authority to grant a writ of mandamus is not best viewed as itself creating jurisdiction; rather, the writ is a remedy that courts may be permitted to order if they independently possess jurisdiction.[70] Turning from statutory interpretation to constitutional interpretation, Marshall read Article III as imposing a ceiling on the Court's original jurisdiction,[71] but Article III could plausibly be read as identifying a floor that Congress could supplement by statute as long as it remained within the overall Article III judicial power.[72]

These lawyerly objections, however, which Marshall may have appreciated, miss the broader picture. After Congress substantially delayed the Court's issuance of a decision (obviating any need for the Court to delay the proceedings), Marshall recognized the political limits on the Court's authority and held for a unanimous Court that it lacked jurisdiction to adjudicate the case.[73] But Marshall did not simply have the Court surrender. He used dicta to underscore that his Court was not endorsing the Jeffersonians' condemnation of the Federalists' midnight judges.[74] Moreover, this dicta provoked less of a political backlash than it might otherwise have produced because it was strategically bundled with good news for the Democratic-Republicans regarding the outcome of the case, and because it was followed just six days later by the more important (and acquiescent) decision in *Stuart*.[75] Marshall also declared that the Court possessed the power of judicial review over federal statutes and executive actions in a context that was unlikely to provoke much resistance from the Democratic-Republicans, and he ironically justified judicial review based on the Court's distinctly legal obligation to decide cases according to law — that is, based on an assertedly strict separation between law and politics.[76] As Professor Robert McCloskey described it in his history of the Supreme Court, Marshall's opinion was "a masterwork of indirection, a brilliant example

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[69] *See* Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81 (referencing "appellate jurisdiction," not original jurisdiction).

[70] For discussion of how Marshall likely misread the statute, see Akhil Reed Amar, Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 453–59 (1989).

[71] *See Marbury*, 5 U.S. (1 Cranch) at 173–76.

[72] *Cf.* Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753, 783–84 (2013) ("Article III was . . . supposed to set a floor for original jurisdiction and a ceiling for appellate jurisdiction, and Congress can move up from the floor or down from the ceiling using statutes.").

[73] *Marbury*, 5 U.S. (1 Cranch) at 176.

[74] *See id.* at 167–68.

[75] *See* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 269 (1922); *see also* Klarman, *supra* note 54, at 1123 ("[I]f the Supreme Court had possessed any genuine political clout in 1803, *Marbury* almost certainly would not have taken the form that it did.").

[76] *See Marbury*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another."[77]

As the crisis subsided, the Court remained alive and relatively well. What had been required was the use of numerous tools of judicial self-protection to produce "a measure of present judicial self-restraint."[78] True, the Repeal Act could have set a dangerous precedent. But the Court became stronger after this controversy and thereby put itself in a better position to resist similar future efforts. Partial proof of the wisdom of the Court's approach occurred on March 1, 1805, when Chase's impeachment failed in the Senate.[79] As McCloskey noted, this was "one of the signal events in the history of the federal judiciary."[80] At a time when it was unclear what an impeachable offense was for a federal judge, Chase's acquittal suggested that federal judges could not appropriately be impeached and removed based only on disagreement with their opinions or because members of Congress viewed the judges as political adversaries.

III. THE *CHEROKEE CASES*

Professor Charles Warren described *Worcester v. Georgia*[81] as involving "the most serious crisis in the history of the Court."[82] That characterization seems doubtful, given the threats faced by the Court in the other two historical episodes we recount in this Essay. Nevertheless, as shown below, *Worcester* did involve a state's outright defiance of the Court, without any prospect that the Executive would help enforce the Court's mandate. It was one of several cases involving the Cherokee Indians that were decided near the end of the Marshall Court, when Chief Justice Marshall was in his mid-seventies and in ill health during the populist presidency of Andrew Jackson.

In the first case, *State v. Tassels*,[83] Georgia had prosecuted a member of the Cherokee tribe for killing another member of the tribe on tribal lands within Georgia, and the state sentenced him to be hanged.[84] The defendant appealed to the Supreme Court, contending that Georgia lacked the authority to regulate on tribal lands.[85] The Court agreed to hear the case and issued a writ of error directing Georgia to appear

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[77] MCCLOSKEY, *supra* note 1717, at 40.
[78] *Id.* at 47.
[79] *Id.* at 46–47.
[80] *Id.* at 47.
[81] 31 U.S. (6 Pet.) 515 (1832).
[82] 2 WARREN, *supra* note 75, at 189.
[83] 1 Dud. 229 (Ga. Super. Ct. 1830).
[84] *See* ALISON L. LACROIX, THE INTERBELLUM CONSTITUTION: UNION, COMMERCE, AND SLAVERY IN THE AGE OF FEDERALISMS 291–92 (2024); Robert Scott Davis, *State v. George Tassel: States' Rights and the Cherokee Court Cases, 1827-1830*, 12 J.S. LEGAL HIST. 41, 49 (2004).
[85] *See* LACROIX, *supra* note 84, at 291–92.

before the Court to defend the state court judgment.[86] The state ignored the writ and executed the defendant before the Court could hear the case.[87]

The tribe then filed an action directly in the Court, seeking to enjoin the state from any further enforcement of state law on tribal lands.[88] Georgia refused to appear for the proceedings and publicly pronounced that it would not comply with any decision against it.[89] In *Cherokee Nation v. Georgia*,[90] the Court dismissed the case on questionable jurisdictional grounds, reasoning that the tribe was not a "foreign state" under Article III.[91] In a move reminiscent of *Marbury*, however, Marshall noted that the case could "perhaps be decided by this court in a proper case with proper parties."[92] In addition, by describing Indian tribes as "domestic dependent nations,"[93] Marshall laid the groundwork for the argument that they were under the exclusive authority of the federal government. Marshall's explanation prompted Justice Baldwin to complain that "the reasons for the judgment of the court seem to me more important than the judgment itself."[94] Marshall also encouraged two Justices to write dissents addressing the merits to counter two concurring opinions (including one by Baldwin) that were critical of the tribe's claims.[95]

In the next case, *Worcester v. Georgia*, Georgia had prosecuted two white missionaries for residing in the Cherokee territory without a state license, and it had sentenced them to four years of hard labor.[96] The missionaries appealed to the Supreme Court, challenging the state's authority.[97] Again, the state declined to appear. This time, the Court concluded that it had jurisdiction, and it held against the state. The Court reasoned that the convictions were made "under colour of a law which is void, as being repugnant to the constitution, treaties, and laws of the United States."[98] The Court remanded to the state court, directing it to reverse its decision and release the missionaries.[99]

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[86] *Id.*

[87] *See id.*

[88] *See id.* at 293.

[89] *See id.*

[90] 30 U.S. (5 Pet.) 1 (1831).

[91] *Id.* at 27. Because the case concerned a federal treaty, the Court presumably could have relied on the Federal Question Clause and Original Jurisdiction Clause in Article III. *See* Stephen Breyer, *The Cherokee Indians and the Supreme Court*, 25 J. SUP. CT. HIST. 215, 221 (2000).

[92] *Cherokee Nation*, 30 U.S. (5 Pet.) at 20; *see* Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 514 (1969) (noting that Marshall's "approach to the *Cherokee* case is reminiscent of *Marbury v. Madison*").

[93] *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

[94] *Id.* at 32 (Baldwin, J., concurring).

[95] *See* Burke, *supra* note 91, at 516–17.

[96] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 529, 532 (1832).

[97] *Id.* at 534–35.

[98] *Id.* at 562–63.

[99] *Id.* at 597.

The state court refused to follow the Court's mandate, and it was unclear what would happen next.[100] Justice Story was fatalistic, remarking in a letter: "The Court has done its duty. Let the nation now do theirs. If we have a Government, let its command be obeyed; if we have not, it is as well to know it at once, and to look to consequences."[101] Story had expressed similar sentiments before the Court had dismissed *Cherokee Nation v. Georgia*, writing that, although "it would have been desirable to have escaped [a political confrontation,] . . . it is not for Judges to choose times and occasions"; rather, "[w]e must do our duty as we may."[102]

Perhaps fortuitously, a jurisdictional limitation stalled any further escalation between the Court and Georgia. Under section 25 of the 1789 Judiciary Act, the Court could not issue a final judgment in a case coming from a state court until "the cause shall have been once remanded before."[103] But, because the Court's Term ended shortly after issuing its decision, it was unavailable to consider a request from the missionaries for entry of final judgment until its next Term, which was ten months away.[104]

During this period, there was a growing fight between the national government and South Carolina over nullification. South Carolina was asserting the right to ignore federal tariff laws as unconstitutional and to disallow Supreme Court review of the matter.[105] Opponents sought to isolate South Carolina, so there was increasing pressure to resolve the Georgia controversy. Ultimately, the missionaries were persuaded to drop their appeal to the Supreme Court and were released from custody.[106]

In part because of this settlement, the damage to the Court from the *Cherokee Cases* was limited. It involved defiance by one state, on one set of issues. More importantly, although President Jackson never tried to assist the Court in its conflict with Georgia, the case did not develop

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[100] *See* LACROIX, *supra* note 84, at 305 ("As in *Martin v. Hunter's Lessee*, the case raised profound questions about how the Supreme Court ought to deal with a defiant state court. Now, however, the defiance was emanating from the governor and legislature of the state as well.").

[101] Letter from Justice Joseph Story to Professor George Ticknor, Harvard Univ. (Mar. 8, 1832), *in* 2 LIFE AND LETTERS OF JOSEPH STORY 83, 83 (William W. Story ed., Boston, Charles C. Little & James Brown 1851).

[102] Letter from Justice Joseph Story to Professor George Ticknor, Harvard Univ. (Jan. 22, 1831), *in* 2 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 101, at 48, 49.

[103] 1 Stat. 73, 86 (1789). This jurisdictional provision was amended in 1867 to allow the Supreme Court to enter a final judgment without first remanding to the state court. Act of Feb. 5, 1867, § 2, 14 Stat. 385, 386–87.

[104] LACROIX, *supra* note 84, at 306–07. Unlike today, the Court did not consider petitions while it was out of session, and its sessions were shorter.

[105] For discussion, see RICHARD E. ELLIS, THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES' RIGHTS AND THE NULLIFICATION CRISIS 41–73 (1987).

[106] *See* Edwin A. Miles, *After John Marshall's Decision:* Worcester v. Georgia *and the Nullification Crisis*, 39 J.S. HIST. 519, 533, 540 (1973).

into a full-scale confrontation between the Court and the powerful executive branch.[107]

It has been claimed that, in response to *Worcester*, President Jackson remarked, "John Marshall has made his decision. Now let him enforce it."[108] This statement, which is sometimes cited as precedent for presidential authority to disobey a Supreme Court decision,[109] is almost certainly apocryphal.[110] In a letter to a friend, Jackson did write: "The decision of the supreme court has fell still born, and they find that it cannot coerce Georgia to yield to its mandate."[111] While this statement suggests that Jackson would not help the Court enforce its decision, it is not presidential defiance of the Court. The federal government was not a party to the Cherokee litigation, and the Court in *Worcester* did not order anyone in the federal government to do anything. While in theory Jackson could have used the military to force Georgia to release the missionaries, his failure to do so did not involve any disobedience of a court order. Moreover, such action was arguably not ripe because of the limitation in section 25.[112]

Notably, by the time of *Worcester*, the Court had survived a threat to its authority *in Congress*. States' rights members (of various stripes) had sought to repeal section 25, which gave the Court jurisdiction over many state court decisions concerning federal law; in early 1831, the House Judiciary Committee voted for such a repeal, but the full Congress roundly rejected it.[113] The Court would have been aware of that development when it decided *Worcester*. It was therefore not facing an immediate congressional threat.

The settlement of the case by the missionaries, by allowing the federal government to focus on South Carolina, likely resulted in a *strengthening* of federal judicial authority, something that has often happened

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[107] *See* Burke, *supra* note 92, at 531 (noting that the state defiance in *Worcester* "was not as fateful as it seemed, for no direct confrontation with the President could have occurred in the *Worcester* case without a second writ of error").

[108] *Id.* at 525.

[109] *See, e.g.*, Charlie Savage & Minho Kim, *Vance Says "Judges Aren't Allowed to Control" Trump's "Legitimate Power,"* N.Y. TIMES (Feb. 9, 2025), https://www.nytimes.com/2025/02/09/us/politics/vance-trump-federal-courts-executive-order.html [https://perma.cc/KDN4-XVS5].

[110] *See* 2 ROBERT V. REMINI, ANDREW JACKSON AND THE COURSE OF AMERICAN FREEDOM, 1822–1832, at 276–77 (1981).

[111] Letter from President Andrew Jackson to Brigadier Gen. John Coffee (Apr. 7, 1832), *in* 10 THE PAPERS OF ANDREW JACKSON 225, 226 (Daniel Feller, Thomas Coens & Laura Eve-Moss eds., 2016).

[112] *See* 2 WARREN, *supra* note 75, at 219 (noting that "the time never arrived when the exercise of Executive power to enforce the law was called for").

[113] *Id.* at 201. States' rights supporters in Congress then sought to have the House Judiciary Committee consider a constitutional amendment that would limit the terms of federal judges, but this effort also failed. *Id.* at 203.

after the Court has pulled its punches.[114] In response to the nullification controversy, Congress (at Jackson's request) enacted the Force Act,[115] which, among other things, expanded federal court jurisdiction and gave federal judges (including the Justices) habeas authority over individuals in state custody due to acts performed pursuant to federal law.[116] Jackson also strongly opposed nullification, including by emphasizing the importance of Supreme Court review of state court decisions.[117] The Court had weathered this crisis through a mix of avoidance, delay, skillful use of dicta, leadership by the Chief Justice, congressional support, and luck.

Assessed against the Court's joint needs to preserve both the rule of law and itself, the Court's performance in the *Cherokee Cases* should be judged a success. When confronted with a defiant state, a President unwilling to enforce any judicial decision against that state, and states' rights sentiments in Congress, the Court neither completely abandoned its responsibility to vindicate the rights of the Cherokee nor foolishly insisted upon a political confrontation that it could not win. By initially avoiding a confrontation through a jurisdictional decision that also contained dicta preserving the Court's authority, and then not demanding immediate compliance from Georgia or enforcement action from Jackson, the Court likely secured greater authority for itself in the long run. To be sure, these events did not help the Cherokee tribe, which ended up being forcibly removed from Georgia.[118] But the Court could not prevent that catastrophe when both the political branches and the states demanded a policy of Indian removal.[119] Importantly, throughout these events, the Court took account of the political landscape in which it was operating rather than leave its survival to chance, as Story's fatalism suggested.[120]

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[114] This point is emphasized by MCCLOSKEY, *supra* note 17. *See, e.g.*, *id.* at 47 ("[P]aradoxical though it may seem, the Supreme Court often gains rather than loses power by adopting a policy of forbearance.").

[115] Act of Mar. 2, 1833, ch. 57, 4 Stat. 632.

[116] *See* ELLIS, *supra* note 105, at 94, 176.

[117] *See* Andrew Jackson, Anti-Nullification Proclamation (Dec. 10, 1832), *reprinted in* THE STATESMANSHIP OF ANDREW JACKSON AS TOLD IN HIS WRITINGS AND SPEECHES 232–56 (Francis Newton Thorpe ed., 1909) (expressing this view).

[118] LACROIX, *supra* note 84, at 326.

[119] *See* Burke, *supra* note 92, at 531 ("Perhaps the real winner in the Cherokee cause was the Supreme Court.").

[120] A twentieth-century example of state resistance to the Court is the massive resistance of Southern states to *Brown v. Board of Education*, 347 U.S. 483 (1954). Amid such resistance, the Court adopted a gradual approach to enforcing its decision. *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 343 (2004). *Brown* nonetheless illustrates that courageous action, not inaction, can sometimes best promote the Court's long-term authority.

IV. MILITARY TRIAL CASES AFTER THE CIVIL WAR

Reconstruction was another period of significant political threat to the Court. The threat this time was principally from Congress rather than the Executive or a state. The Court's management of this crisis, although ultimately successful, was flawed because it was first more assertive and then more deferential than it needed to be.

During the Civil War, the Lincoln Administration had used military trials to prosecute members of the Confederate army and many individuals who assisted the Confederate cause or otherwise conspired or agitated against the Union. The military trial of noncombatants occurred not only in areas under Union military occupation, but also in some states with civilian rule.[121]

These trials were constitutionally questionable, given (among other things) the Constitution's jury trial requirements.[122] The Court avoided deciding this question during the war, in part by invoking jurisdictional limitations.[123] In April 1866, however, about a year after Robert E. Lee's surrender, the Court in *Ex parte Milligan*[124] invalidated the use during the war of a military court to try pro-Confederate conspirators in Indiana.[125] The Court broadly reasoned that, even during a war, the government may not try civilians in military courts in states in which the regular courts are operating.[126] Although Congress had not authorized the military trial of civilians in this case, the Court further reasoned that such a trial would be unconstitutional even if Congress had authorized it.[127] The Court stated frankly that it would have been difficult to issue this decision earlier: "During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question."[128] In a concurrence by Chief Justice Salmon Chase, four Justices argued more narrowly that, to be valid, the military commission required congressional authorization.[129]

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[121] *See* Curtis A. Bradley, *The Story of Ex parte* Milligan*: Military Trials, Enemy Combatants, and Congressional Authorization*, *in* PRESIDENTIAL POWER STORIES 93, 95–101 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

[122] *See* U.S. CONST. art. III, § 2, cl. 3 (criminal prosecutions); *id.* amend. VI (same); *id.* amend. VII (civil trials).

[123] *See, e.g.*, *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 251 (1864) ("[T]he petition before us we think not to be within the letter or spirit of the grants of appellate jurisdiction to the Supreme Court.").

[124] 71 U.S. (4 Wall.) 2 (1866).

[125] *Id.* at 107.

[126] *See id.* at 127.

[127] *Id.* at 121–22.

[128] *Id.* at 109.

[129] *Id.* at 136–37 (opinion of Chase, C.J.).

It is unclear why the majority insisted on ruling broadly.[130] Perhaps there was pent-up frustration at having been institutionally limited for years by the combined weight of the damaging *Dred Scott*[131] decision and the Civil War, which, like most wars, was hard on courts.[132] In any event, partly because of the Court's broad reasoning, *Milligan* provoked fierce criticism in Congress and the Northern press. Although today *Milligan* is regarded as a civil liberties milestone, many contemporaneous critics compared it to *Dred Scott*.[133]

A few months later, the Republican Congress passed the Military Reconstruction Act,[134] which allowed for military trials of civilians in Southern states under military occupation.[135] The Act's constitutionality was dubious given the reasoning in *Milligan*.[136] Concerned that the Court might invalidate the Act, Congress began considering measures to limit the Court's authority, including a bill that would have required a two-thirds majority on the Court to invalidate federal legislation.[137] Congress had already shown its capacity to legislate aggressively against the Court: In 1866, it reduced the Court's size from ten to seven to deprive President Andrew Johnson of appointments who might be unsympathetic to Reconstruction.[138] (Johnson, who became President when Lincoln was assassinated, was a white supremacist Democrat who sympathized with the South.)

The Court managed for a time to avoid deciding the constitutionality of the Reconstruction Act, invoking opaque jurisdictional and political question grounds.[139] Congress became alarmed, however, when the Court concluded in 1868 that it had jurisdiction to hear *Ex parte*

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[130] *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 291 n.25 (1985) ("In light of the Court's familiar principle of construing statutes if possible to avoid having to find government action unconstitutional . . . , Chase's position seems entirely reasonable.").

[131] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[132] In *Dred Scott*, the Court invalidated the Missouri Compromise, a statute that banned slavery in certain territories. *Id.* at 452. The statute compromised on an issue that threatened to (and subsequently did) fracture the nation. *See infra* note 171 and accompanying text (discussing *Dred Scott*).

[133] *See* Bradley, *supra* note 121, at 117 (describing such criticism of *Milligan*); *see also* 3 WARREN, *supra* note 75, at 149–50 ("This famous decision has been so long recognized as one of the bulwarks of American liberty that it is difficult to realize now the storm of invective and opprobrium which burst upon the Court at the time when [*Milligan*] was first made public.").

[134] Act of Mar. 2, 1867, ch. 153, 14 Stat. 428.

[135] *See id.* § 3, 14 Stat. at 428.

[136] *See* MCCLOSKEY, *supra* note 17, at 110 ("Under the rule of the *Milligan* case such trials were plainly invalid, but in that case the Court had been looking back at a situation in the past, and now it was looking squarely at a present danger.").

[137] CONG. GLOBE, 40th Cong., 2d Sess. 473 (1868); *see also* 3 WARREN, *supra* note 75, at 169–76, 188–93 (describing various proposed limitations on the Court considered in Congress).

[138] *See* Act of July 23, 1866, ch. 210, 14 Stat. 209. This was an instance of Court-unpacking.

[139] *See* Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866); Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 77 (1868); *see also* CURRIE, *supra* note 130, at 299–304 (describing the decisions).

McCardle.[140] The military had arrested a newspaper editor in Mississippi for publishing inflammatory articles.[141] The lower court denied him habeas relief, and he sought Supreme Court review.[142] In an 1867 amendment to the Habeas Corpus Act,[143] Congress had given the Court appellate jurisdiction over habeas appeals.[144]

After the Court heard argument on the merits in *McCardle*, Congress repealed the 1867 habeas amendment.[145] President Johnson vetoed the bill containing the repealer, but Congress overrode his veto.[146] Once the measure became law, the Court postponed *McCardle* until the following Term and asked for new arguments over its jurisdiction to hear the case.[147] The political situation at this point was fraught. Shortly after President Johnson vetoed the repealer, Congress began impeachment proceedings against him.[148] Chase was presiding over the impeachment proceedings when the Court was hearing arguments in *McCardle*.[149]

The Court finally issued its decision in April 1869, unanimously holding (in an opinion by Chase) that it lacked jurisdiction.[150] Article III states that the Court "shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make,"[151] and the Court suggested that this authority is plenary,[152] even though the Court easily could have dismissed the case on narrower grounds.[153] Despite its broad reasoning, the Court noted at the end of its opinion that Congress had not eliminated another jurisdictional path, which the Court had used prior to the 1867 Act.[154] The Court could have invoked this path in *McCardle* itself, but without explanation it did not.[155] As the Court knew, McCardle was already out on bail at this point and

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[140] 73 U.S. (5 Wall.) 318, 327 (1868).

[141] William W. Van Alstyne, *A Critical Guide to Ex parte McCardle*, 15 ARIZ. L. REV. 229, 236 (1973).

[142] *McCardle*, 73 U.S. at 320.

[143] Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

[144] *Id.* § 1, 14 Stat. at 386.

[145] *See* Stanley I. Kutler, Ex parte McCardle*: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered,* 72 AM. HIST. REV. 835, 844 (1967). Aware of the repealer's movement through Congress, the Justices considered ruling before it became law but deemed it inappropriate to race against Congress. *See id.*

[146] *Id.* at 842–43.

[147] *Id.* at 844.

[148] *See id.* at 849.

[149] Bradley, *supra* note 121, at 118 & n.118.

[150] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 515 (1868).

[151] U.S. CONST. art. III, § 2, cl. 2.

[152] *See McCardle*, 74 U.S. at 513.

[153] *See id.* For a related critique, see Van Alstyne, *supra* note 141, at 249–54.

[154] *McCardle*, 74 U.S. at 515.

[155] *See* Van Alstyne, *supra* note 141, at 245–47.

back to writing editorials, so there was no pressing need to act.[156] At least for now, the Court had avoided a confrontation with Congress.[157]

The significance of the qualification at the end of the opinion quickly became apparent in *Ex parte Yerger*,[158] which involved the military's arrest and trial of a civilian for killing an army officer.[159] The lower court denied him habeas relief, and he appealed to the Court, which held that it had jurisdiction under the alternate jurisdictional path it had mentioned in *McCardle*.[160] But the Court never reached the merits because the military transferred Yerger to state civilian custody, mooting the case.[161] In any event, by this point the political danger to the Court had subsided. The Fourteenth Amendment had been ratified, and representatives from all the Southern states except Virginia, Mississippi, and Texas had been readmitted to Congress.[162] Thus, although there were some calls in Congress after *Yerger* to act against the Court, they did not amount to anything.[163]

Once again, the Court had primarily used delay and avoidance to sidestep political danger, while retaining the credible threat of judicial review.[164] And, once again, as a result, the Court likely emerged a stronger institution. The Court did not, however, manage the situation seamlessly. The Court's inability to remain unanimous and its unnecessarily broad reasoning in *Milligan* (against the preference of the Chief Justice)[165] likely heightened the political danger.[166] Moreover, in seeking to avoid conflict, the Court in *McCardle* went farther than necessary by endorsing potentially unlimited congressional authority to strip the

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[156] *See id.* at 248. The military later dropped all charges against McCardle. *The Precedent — 1868 McCardle Case*, N.Y. TIMES, Aug. 16, 1964, at E3, https://www.nytimes.com/1964/08/16/archives/the-precedent1868-mccardle-case.html [https://perma.cc/LT3K-M873].

[157] Several weeks later, Chief Justice Chase wrote to a friend that, "had the merits of the McCardle Case been decided the Court would doubtless have held that his imprisonment for trial before a military commission was illegal." 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88, PART ONE 494 (1971) (quoting Letter from Chief Justice Salmon P. Chase to Judge Robert A. Hill, U.S. Dist. Ct. for the N. & S. Dists. of Miss. (May 1, 1869)).

[158] 75 U.S. (8 Wall.) 85 (1869).

[159] *See id.* at 88; Kutler, *supra* note 145, at 845–46.

[160] *See Yerger*, 75 U.S. at 88, 106.

[161] Van Alstyne, *supra* note 141, at 246 n.67.

[162] FAIRMAN, *supra* note 157, at 558–59.

[163] *See, e.g.*, Kutler, *supra* note 145, at 850 ("Some senators admitted that there was no pressing need for any legislation. The Court was about to adjourn, and as military reconstruction was being abandoned, even in Mississippi, there were few challenges against the Reconstruction Acts.").

[164] *See* CURRIE, *supra* note 130, at 307 ("With the *Dred Scott* debacle in the wings, and with a little help from the other branches, the Court managed to tread the narrow path between rendering a judgment that might have been ignored and holding that Congress had the right to prevent judicial review." (footnote omitted)).

[165] *See supra* notes 124–133 and accompanying text.

[166] *See, e.g.*, Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 17 (2002) ("[I]t is obvious that the Court was aware of a political threat and sought to avoid it. But it is equally obvious that the Court was insufficiently savvy or perhaps too confident of its own authority.").

Court's appellate jurisdiction.[167] Such reasoning would subsequently be invoked at times as a threat against the Court.[168]

CONCLUSION

We acknowledge the empirical difficulties associated with studying and evaluating the tools of judicial self-protection that we describe. In any particular instance, it can be difficult to distinguish acts of self-protection from the Court's views of the law or its general institutional sensibilities. During the second Trump Administration, for example, some observers may see ideological agreement or cowardly acquiescence where others see self-protection. Our descriptive claim is simply that the phenomenon of judicial self-protection exists and that it is not easily reducible to formal accounts of the law.

We cannot here offer a full normative assessment of the tools of judicial self-protection whose presence we have documented. We emphasize that there are potential costs associated with the Court's use of these tools. The Justices are lawyers, not gifted politicians, so they may be too aggressive when they should be more diffident, and they may acquiesce when they should push back. A danger of acquiescing is that it may encourage the continuation of similar bad behavior by elected officials, which may be even more difficult for the Court to resist because the officials can now invoke political precedent for the behavior. In other words, practicing self-protective politics can sometimes undermine the Court's legitimacy, although *not* practicing such politics also carries this risk.[169]

Despite these potential costs, we do not perceive a realistic alternative to the Court's use of the tools of judicial self-protection. To survive amid real power, any institution must attend to the environment in which it operates, and it is hard to believe that the Court would have managed the crises discussed above more effectively had it proceeded in a formalist or rights-maximizing fashion.[170] What is clear is that the

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[167] *See* CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE 236–37 (2006) ("It is virtually indisputable that the Court bent over backwards [in *McCardle*] to avoid deciding a case that could have infuriated Congress, and there is ample room to argue that its decision to dismiss would have been different if Congress had not been waving a gun in the general direction of the Court's head.").

[168] *See, e.g.*, Bradley & Siegel, *supra* note 18, at 305.

[169] *Cf.* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2245 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)) ("[I]n politically charged moments, the Justices may feel pressure to sacrifice the legal legitimacy of their judicial decisions in order to preserve the sociological legitimacy of the Court as a whole.").

[170] This approach is institutionally realist: It takes account of the Court's functioning relative to other political actors. *See* Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 2 (2014) (defining "institutional realism" as "constitutional and public-law doctrines that penetrate the institutional black box and adapt legal doctrine to take account of how [the relevant] institutions actually function in, and over, time").

Court has regularly used the tools we describe when faced with political threats and that it has become more powerful over time. Moreover, when the Court has had setbacks that have damaged its authority, they have often resulted from a *lack* of political attentiveness — for example, in unnecessarily addressing in *Dred Scott* the most explosive national issue in the years leading up to the Civil War (congressional authority to ban slavery in the territories), and in insisting in the 1930s on maintaining *Lochner*-era jurisprudence during the greatest economic catastrophe in the nation's history.[171]

One might respond that the Court's job is to do law, not manage crises. Putting aside the difficult jurisprudential questions associated with determining what it means to "do law," we agree that the Court's efforts at self-protection can trade off in particular cases with the Court's execution of its legal responsibilities; our case studies illustrate this point. But the relationship between the two is paradoxical, not contradictory. Practices of self-protection can sacrifice sound legal reasoning in a given case, but within a longer time horizon and from a systemic perspective, these practices — if done reasonably well — make it possible for the Court to say what the law is. Put differently, judicial self-protection is an inevitable byproduct of the fact that judicial authority, like maintenance of the Constitution and the rule of law more generally, rests on political foundations.[172]

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[171] *Dred Scott* devastated the Court's credibility in Northern states and contributed to its difficulties after the Civil War. *See* BICKEL, *supra* note 17, at 45. During the 1930s, the Court's insistence on invalidating New Deal legislation prompted President Franklin Roosevelt to propose Court-packing. *See id.* ("[F]ive Justices, in a series of spectacular cases in the 1920's and 1930's, went to unprecedented lengths to thwart the majority will," and "[t]he consequence was very nearly the end of the story."); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 82–83 (1996).

[172] Judicial self-protection, if exercised carefully, can help sustain "a system of constitutional remedies adequate to keep government generally within the bounds of law." Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–79 (1991).