Reconstruction and the Supreme Court: The Numbers Game Reconsidered

By STANLEY I. KUTLER

The congressional act of July 1866, reducing the Supreme Court from ten to seven members, usually is regarded as a typically cynical and sordid example of the Radical Republicans’ accumulated misdeeds. Moreover, it is treated as symptomatic of the Radicals’ violent hostility toward the Supreme Court and, consequently, as a distinct threat to the independence and integrity of the judiciary.

Charles Warren, a leading student of Court-Congress relations, may have set the tone for the standard interpretation of the law. “The Senate,” he wrote, “was determined to curb the President in every move; and fearing that he might have the opportunity to make further appointments to the Bench, it passed [the] . . . bill . . . .” James G. Randall, a distinguished historian of the period, discussed the measure under a general heading of attacks on the Court and Republican proposals for its annihilation. Specifically, he found that Congress acted “in order to take from President Johnson the power to make [judicial] appointments . . . .” Johnson’s biographers have viewed the subject in much the same way: “Congress . . . reduced the court from nine [sic] to seven to prevent Conservatives from being added to it by the President”; moreover, the step was part of the congressional attack upon the “foundations” of the Supreme Court. Writers of constitutional history have seen the measure as “the first Radical move against the Court” and have said it “became law over Johnson’s veto.”


Mr. Kutler is associate professor of history at the University of Wisconsin. The research for this article was supported in part by grants from the American Council of Learned Societies and the Louis M. Rabinowitz Foundation.
Persistent though they are, such views are questionable. They conflict with basic facts and ignore the rich variety of causal factors. Congress did, indeed, pass a law reducing the size of the Supreme Court, and President Johnson signed it—he did not veto it. Strange it is to read vindictive motives against Andrew Johnson in the passage of a bill that he himself accepted. Strange it also is to find vindictive motives against the Supreme Court at a time, in July 1866, when the Radicals had not yet been given sufficient reason for attempting to bridle or punish the justices. Finally, it is strange to attribute to the Radicals vindictive motives against the Court when its members may well have desired the legislation or, at least, seemed unperturbed by its passage.

Representative James F. Wilson, chairman of the House Judiciary Committee, reported a bill to reduce the membership of the Supreme Court on March 8, 1866. The intent of his bill, as Wilson explained it, was to return the Court to its previous number of nine. When a tenth circuit and justice were added in 1863, there were complaints that such a number was unwieldy and detrimental to the Court’s business. Wilson claimed to have private information that some of the justices themselves thought the number too large. On that basis, he hoped for a number less than nine. His bill, however, reduced the Court only to nine, and it passed the House without a roll call.²

Wilson’s desired goal was achieved in the Senate. Senator Lyman Trumbull, on instructions from the Senate Judiciary Committee, successfully proposed a further reduction to seven. Although Senator John Sherman and several others expressed some misgivings about an accompanying reorganization of the circuits,
there was no quarrel concerning the number of judges. The amended bill passed the Senate without a roll call. A mild fracas erupted in the House when Wilson, without the usual routing through the Judiciary Committee, called for House concurrence in Trumbull’s amendment. Some Democrats, led by Samuel J. Randall of Pennsylvania, vainly objected to the procedure. When the roll was called, the proposal won handily, 78-41. During the final debate in the House, Wilson made it clear that the proposed reduction would apply to Johnson’s recent nomination of Henry Stanbery to replace Justice John Catron, who had died in 1865. Wilson did not speak critically of the President, however, and reiterated his knowledge that the Court itself favored the proposal.

Wilson admitted that the bill would cancel Johnson’s new appointment, but emphasized that the original bill, providing for a reduction of one, had passed the House before Johnson’s nomination of Stanbery. At no time did Wilson or even the House Democrats contend that the bill’s purpose was to nullify the appointment. The same was true in the Senate. The Republicans obviously did not disapprove personally of Stanbery, for they soon confirmed his appointment as attorney general—a much more sensitive and influential position.

If it be insisted that a vote for the reduction bill should be interpreted as an anti-Johnson gesture, and vice versa, a comparison of roll calls on other substantive issues in this session casts doubt on the contention. Of the forty-one “nay” votes—what some might call a “pro-Johnson” stand—twenty-one were Republicans. Who were these Republicans, and what was their degree of loyalty to the Radical cause? Radical stalwarts such as George S. Boutwell, Henry L. Dawes, Rufus P. Spalding, and Frederick E. Woodbridge are easily recognizable. Yet, joining them were some

---

3 Cong. Globe, 39 Cong., 1 Sess., 3697-98 (July 10, 1866). Dunning also regarded Trumbull as a “moderate” Republican. Reconstruction, 88.
4 Cong. Globe, 39 Cong., 1 Sess., 3909 (July 18, 1866).
5 Ibid., 3909, 3697-99 (July 18, 10, 1866). Charles Warren, without a direct quotation, claimed Wilson stated that the “effect as well as purpose” of the act was to nullify Johnson’s appointment. Warren, Supreme Court, III, 145. As noted above, there is no such statement by Wilson. The original proposal passed the House on March 8; Stanbery’s nomination came on April 16. The latter event obviously did not precipitate the issue as Warren (III, 144) claimed. Warren further weakened his case that Stanbery’s nomination forced congressional action when he cited the favorable Republican newspaper reaction to Johnson’s choice. It is difficult to imagine that Congress had any misgivings about Stanbery in 1866. He was a Republican and recently had argued forcefully the government’s cause in the Milligan case.
well-known moderates such as Thomas A. Jenckes and John A. Kasson, and Johnson's most prominent supporter in the House, Henry J. Raymond.

The most useful House roll calls for comparative purposes seem to be the votes on the Civil Rights Bill (March 13, 1866), the motion to override the President's veto of that bill (April 9, 1866), the second Freedmen's Bureau Bill (July 3, 1866), and the motion to override Johnson's veto of the latter (July 16, 1866). On both bills, fifteen of these twenty-one Republicans voted “aye,” essentially an “anti-Johnson” position. On overriding the veto, sixteen voted “aye,” positively an “anti-Johnson” stance. Only one Republican voted “nay” on the Civil Rights Bill, three to sustain the veto; none opposed the Freedmen's Bureau Bill, while three supported the presidential veto. The Republicans who opposed the Court reduction decidedly opposed the President on crucial Reconstruction matters; over 71 per cent of these Republicans cast no “pro-Johnson” votes on any of the roll calls (some did not vote on all four), and more than 73 per cent of the total Republican votes were “anti-Johnson.” The seventy-eight Republicans who supported Court reduction meanwhile scored nearly 86 per cent in “anti-Johnson” votes on the four roll calls. The differential of 12 per cent between the Republican reductionists and their intraparty opponents is not very significant for comparative purposes.

The fairest conclusion, it seems, is that there is little correlation between “supporting” the President on Court reduction and general support for him in opposition to congressional policies. More specifically, perhaps, such evidence indicates little reason to cast this issue into a simple “pro” and “anti” Johnson dichotomy.

The evidence of Johnson's attitude toward the bill must weaken the notion that it was primarily directed against him. The bill was signed and enrolled by both houses on July 19, 1866. Johnson approved the bill four days later. Approval of the bill could not have been a mere case of Johnson bowing to the inevitable will of Congress because such was not his nature. Moreover, had he really opposed the bill, he could have resorted to the simple expedient of a pocket veto, for Congress adjourned on July 28.

In the light of Johnson's lifetime attitude toward the judiciary, his action, or inaction, in 1866 is not surprising. As a young con-

---

7 Ibid., 3922, 3933 (July 19, 1866); Statutes at Large of the United States, XIV (1868), 209.
gressman in 1848 he blunted Whig assaults on the presidential veto with a vigorous counterattack on the judicial power to void legislation. The judiciary, he said, "is irresponsible to the people," but nevertheless had a deplorably absolute and final veto power. On two occasions he unsuccessfully attempted to implement his ideas by proposing a constitutional amendment to limit federal judges to twelve-year terms. This was not an isolated effort on Johnson's part. As governor of Tennessee in 1853, and again in 1855, Johnson recommended that the Tennessee General Assembly address a joint resolution to Congress urging passage of such an amendment. Near the end of his presidential term, in July 1868, he advanced a remarkable set of constitutional amendments which provided for the direct election of Presidents, a limit of one six-year presidential term, cabinet succession to the Presidency in event of an absence of both a President and Vice-President, and again, a twelve-year tenure for federal judges. On the last point, he was of the strong impression that life tenure was "incompatible with the spirit of republican government."

Johnson's one significant defense of the judiciary came in the *Ex parte McCordle* controversy, but only as a matter of mere expediency. Early in 1868 Congress frankly sought to thwart a judicial threat, real or imagined, to the Reconstruction Acts of 1867. Under its constitutional authority to determine appellate jurisdiction, Congress repealed provisions giving the federal courts authority to hear further habeas corpus appeals arising from violations of the act. Apparently relying on Johnson's well-known attitudes toward judicial power, Justice David Davis and others on the Court recognized the possibility of presidential acquiescence. Johnson, however, vetoed the repeal, and Congress promptly overrode his action.

The President predictably pitched his veto message to constitutional objections, but he had to resort to abstract conceptions rather than concrete clauses. Such legislation, he said, affected

---

8 *Cong. Globe*, 30 Cong., 1 Sess., Appendix, 853-54 (August 2, 1848); 31 Cong., 2 Sess., 627 (February 21, 1851); 32 Cong., 1 Sess., 443 (February 2, 1852).


10 Davis to Julius Rockwell, April 22, 1868, in David Davis Papers (photostats in the Willard King Collection, Chicago Historical Society). Historians for this period owe an incalculable debt to Mr. King for collecting and making available these important papers.
“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.” Johnson’s consecration of judicial authority and power hardly befitted his Jacksonian past: “Thus far during the existence of the Government the Supreme Court . . . has been viewed by the people as the true expounder of their Constitution, and in the most violent party conflicts its judgment and decrees have always been sought and deferred to with confidence and respect. In public estimation it combines judicial wisdom and impartiality in a greater degree than any other authority known to the Constitution . . .”

As always, Johnson claimed to have a strong grasp of what the “people” desired. In March 1868 he was confident that the “people” saw the Court as the “true expounder” of the Constitution. Four months later, with equal certitude, he could assert that “popular judgment” demanded a restriction on the life tenure of the expounders of the true faith. The expediency of a veto in the McCardle affair notwithstanding, Johnson’s public statements do not indicate any reluctance to curb judicial power. Furthermore, the reduction act that he signed must shake any interpretation of congressional reprisal against him.

An interpretation of the reduction proposal as an assault or check against the Supreme Court must be made cautiously. It is true that the Court still operated under the cloud and opprobrium of the Dred Scott decision of 1857. In February 1865 a proposal to appropriate funds for a bust of Roger Brooke Taney gave vent to congressional anger, but the debate made it abundantly clear that congressional hostility was limited to Taney and his role in the Dred Scott case. After easy passage of the Taney bill in the House, Trumbull presented the proposal to the Senate on February 23. The Senator conceded the late Chief Justice’s error in the Dred Scott decision, but added: “No man is infallible. He was a great and learned and an able man.” Charles Sumner, however, vehemently objected: “[T]he name of Taney,” he said, “is to be hooted down the page of history . . . . Senator [Trumbull] says that he for twenty-five years administered justice. He administered justice at last [that is, in the Dred Scott case] wickedly,

11 Cong. Globe, 40 Cong., 2 Sess., 2128, 2170 (March 26, 27, 1868); Richardson (comp.), Messages and Papers, VI, 647. Johnson also found kind words for the Supreme Court when he expressed the desire to have the “final arbiter fixed by the Constitution” decide the validity of the Tenure of Office Act. Ibid., 627.
and degraded the judiciary of the country, and degraded the age.” And while Sumner lambasted Taney—for one decision only—he could still extol the virtues and greatness of John Marshall and Joseph Story.\(^\text{12}\) Sumner talked the language of concurrent review during the heyday of Reconstruction, but rarely failed to pay his respects to the Court as a vital institution; his objection to it rested exclusively upon the one transgression of Dred Scott.

Death and resignations had brought great changes to the Court since 1857. When the reduction proposal came in 1866, there were only three survivors—Robert C. Grier, Samuel Nelson, and James M. Wayne. Nathan Clifford, a conservative Northern Democrat, had been appointed in 1858. Lincoln himself had made five appointments—Salmon P. Chase, David Davis, Stephen J. Field, Samuel F. Miller, and Noah H. Swayne—and all were recognized as vigorous opponents of slavery and its expansion. In what fashion, then, had the current justices sinned so as to bring forth congressional reprisal?

Despite Taney's solo performance in *Ex parte Merryman* (1861),\(^\text{13}\) the Court had given solid support to presidential and legislative wartime policies, as is well illustrated in the *Prize Cases* (1863)\(^\text{14}\) and *Ex parte Vallandigham* (1864).\(^\text{15}\) Moreover, when the reduction bill passed Congress in July 1866, the Court had yet to give any indication of truculence or resistance to congressional authority. It is true that the Court had announced in April 1866 its intention to declare against the jurisdiction of certain military commissions. But Justice Davis did not write the majority opinion in *Ex parte Milligan* until the end of the summer, and he did not read it until December. Only then did the Radicals and the country learn that five of the nine justices rejected all congressional authority to utilize military tribunals while the civil courts were open and functioning.\(^\text{16}\) During the summer of 1866


\(^{13}\) 17 Fed. Cases 144.

\(^{14}\) 2 Black 635.

\(^{15}\) 1 Wall, 243.

\(^{16}\) The Court's first announcement is in 3 Wall. 776 (1866); the opinions are in 4 Wall. 2 (1866). Orville H. Browning’s diary entry of March 25, 1866, relates that Justice Robert Grier had already informed Browning of the Court's plans. Browning did not indicate whether this information was widespread. Theodore C. Pease and James G. Randall (eds.), *The Diary of Orville Hickman Browning* (2 vols., Springfield, 1925-1933), II, 67. “The decision in the Milligan case had occasioned no great outcry when it was first announced in April.” King, *Lincoln's*
there also were various rumors that the Court would rule against test oaths; again, however, there was no certainty until the opinions in *Cummings v. Missouri* and *Ex parte Garland* were announced in January 1867.\(^\text{17}\) The congressional debates reflected no concern with these decisions until 1867.

The dominant elements in the Thirty-ninth Congress had their share of faults and misconceptions. But they were not in the habit of setting up "straw men." A good deal of the later congressional program of Reconstruction was in response to presidential (and, on one occasion, judicial) resistance, real or imagined, to what the Radicals believed to be the proper course. The Court simply had not yet acted so as to call forth a congressional response.

There is some supporting evidence for Representative Wilson’s contention that the justices had no objection to a reduction in the Court’s membership. Chief Justice Chase, in fact, had prepared a proposal based on the same quantitative decrease. The Chief Justice was no stranger to the notion of reduction. As a senator in 1855 he had proposed that the Court be decreased to six members. At that time the Senate considered a bill to relieve the Supreme Court justices of circuit duties. Chase personally favored the idea but argued there no longer would be a need for a larger court in Washington. He reminded his colleagues correctly in 1855 that the Court had been increased to nine members in 1837 so as to apportion more equitably the onerous burdens of circuit travels. Although Chase’s plan failed in 1855, he managed to attract an interesting variety of supporters. Northern and Southern Democrats and Whigs and the Free Soilers either voted for Chase’s amendment or declared their support in principle. While Chase, and those who spoke in behalf of his motion, talked about a lessened need for nine justices, there was a less apparent, but more subtle and significant, motivating factor. The Su-

---

\(^\text{17}\) 4 Wall. 277 (1867); 4 Wall. 333 (1867). In late June 1866 there were rumors that the Court had decided against the test oaths. Reverdy Johnson seems to have been the source of the reports, and Justice Stephen J. Field allegedly supplied Johnson with the information. In a long letter to Chief Justice Salmon P. Chase, Field stoutly disclaimed any such impropriety. Moreover, he acknowledged that the final decision of the Court still seemed to be in doubt. Field to Chase, June 30, 1866, in Chase Papers (Library of Congress). Earlier, Field informed Orville Browning that Justice Miller had succeeded in gaining Grier’s acquiescence in postponing a decision until the next term—much to Grier’s later regret. Pease and Randall (eds.), *Diary of Browning*, II, 67, 69-70. Also see Chase to Miller, July 3, 1866, in Chase Papers (Historical Society of Pennsylvania).
The Supreme Court of 1855 had a preponderance of Southerners—five of the nine were from slave states. In many quarters there was an increasing concern that the Court did not properly reflect the national interest or, at the least, the interests of the various sections in equal fashion. Chase argued that reducing the Court to six men would lead to greater sectional harmony. With six justices, no judgment of a lower court could be reversed or no great constitutional principle promulgated unless four justices concurred. He trusted that the four would represent separate sections. Chase claimed his amendment could only encourage greater stability and public confidence in the Court’s decisions. Those rulings, he concluded, “will be most likely to command the respect of the bar, of the State courts, and of the people.”

Chase’s motivation and inspiration are open to speculation. There may well have been an altruistic concern on his part for the Court’s image and prestige. More likely, it probably reflected the political drive of the antislavery elements to alter the South’s disproportionate share of power in national political institutions. Whatever the cause, the “Radical” proposal of 1866 had a rather respectable paternity.

There were two additional amendments in Chase’s 1866 draft which provided for a substantial increase in judicial salaries and new arrangements for the Court’s marshal. For Chase, it was “very important” to reduce the size of the Court “if it [was] . . . important that adequate salaries should be paid” to the justices. In short, Chase had a most obvious and simple reason for supporting the bill. It would be easy to accuse him of obsequiousness toward Congress or an attempt to salvage something out of a bad situation, but this would ignore his long-standing concern with judicial salaries and the size of the Court.

In the summer of 1866 Chase and Justice Miller exchanged views on various legislative schemes affecting the judiciary. Along with the reduction bill, Congress had been considering the so-called Harris bill which involved certain circuit-court reforms,

---

18 Chase’s draft is in the legal file of his papers in the Historical Society of Pennsylvania. For his activity in 1855, see Cong. Globe, 33 Cong., 2 Sess., 216-17, 240, 275, 296-300 (January 9, 11, 16, 17, 1855); the quotation appears on page 217.

19 His comments in favor of the reduction are in Chase to Miller, June 15, 1866, in Chase Papers (Historical Society of Pennsylvania). Supreme Court salaries were not raised until 1873, Statutes at Large, XVII (1873), 486. The delay seemed to result from attempts to increase all federal judicial salaries. Congress enacted Chase’s recommendations for the Court’s marshal in March 1867. Ibid., XIV, 443.
including the creation of intermediate courts of appeal. As in 1855, there was a more than coincidental juxtaposition of proposals for Supreme Court reduction and circuit reforms. While Miller seemed particularly concerned with the pending Harris bill, both men, freely and without animus, discussed the reduction action. Miller, acting upon Chase’s prompting, reported that he had urged Wilson, his Iowa neighbor, to support the salary increase.20 Imagine the audacity of Miller’s request if Wilson, as is alleged, were a participant in some sort of cabal or plot seeking to destroy the Court! Chase and Miller, incidentally, were vigorous advocates for reducing the judicial burden, particularly by creating intermediate courts of appeal. The Harris bill of 1866 still required circuit duties for the justices, but they were to be much reduced, and the new courts ostensibly would lighten the appeals load on the high court in Washington. Chase’s and Miller’s implied backing for the reduction bill might be explained as a tactical gesture in exchange for congressional support of the circuit-court bill. Considering Chase’s 1855 bill, however, his support probably was more than merely tactical.

Miller also noted that only Justice Clifford expressed dissatisfaction with the pending circuit-court legislation; apparently, he had no knowledge of Clifford’s attitude toward the reduction proposal. Neither Chase nor Miller indicated awareness of any judicial opposition to it. Justice Davis, however, feared the reduction was tied to the circuit-court bill and would lead to an abolition of circuit duties for the justices. Davis enjoyed trial-court work and the opportunity to work in his home territory, and he hinted he might resign if such a bill passed. Davis admitted to his brother-in-law that he was “puzzled” by the reduction bill, but speculated that it had been designed to prevent any Johnson appointments. It is interesting that in numerous exchanges with

20 Chase to Miller, June 9, June 15, and July 3, 1866, in Chase Papers (Historical Society of Pennsylvania); Miller to Chase, June 27, 1866, in Chase Papers (Library of Congress). Charles Fairman in his biography of Miller quoted the June 27 letter and believed that Miller had referred to Senator Henry Wilson of Massachusetts. It is quite clear from the other Chase-Miller correspondence that the reference is to Representative James F. Wilson of Iowa. Miller and his fellow Iowan previously had collaborated on judicial matters. Fairman, Miller, 401-402, 46-50. See David M. Silver, Lincoln’s Supreme Court (Urbana, 1957), 52-55, for James F. Wilson’s relationship to Miller. While the Senate approved the Harris bill in 1866, the House took no action. In all probability, the idea was too drastic a change at that time. See Felix Frankfurter and James M. Landis, The Business of the Supreme Court: A Study in the Federal Judicial System (New York, 1927), 71-73; Cong. Globe, 39 Cong., 1 Sess., 1712-14 (April 2, 1866), and passim.
his colleagues on issues affecting the Supreme Court, however, Davis offered no comment on the reduction proposal.\textsuperscript{21}

Aside from Davis’ concern for his circuit-court work, there is no evidence indicating judicial hostility or resentment toward the congressional action. Quite significantly, Justice Stephen J. Field, in his outspoken, if not pretentious, \textit{Personal Reminiscences}, made no mention of the reduction incident in a chapter wholly devoted to post-Civil War hostility against the Supreme Court.\textsuperscript{22} The active lobbying of Chase and Miller, coupled with the lack of judicial protest, thus lends some credence to Representative Wilson’s original assertion regarding judicial desires and attitudes.

The fact that Congress in 1869 increased the size of the Court to nine members is usually utilized as a final linchpin to prove Republican cynicism and vindictiveness toward the Court or the President.\textsuperscript{23} But the usefulness of such “proof” is questionable. Quite simply, the increase proposal passed Congress \textit{before} Johnson left office, and the President pocket-vetoed the measure! Lyman Trumbull proposed the increase on January 18, 1869. But Trumbull and his Republican colleagues also had plans for genuine and needed judicial reform. The bill provided for the creation of a new circuit judge in each of the existing circuits, who would have the same powers and jurisdiction as the assigned Supreme Court justice. The latter was still required to attend at least one term of his circuit court during each two-year period. Trumbull maintained that both parts of his bill served the same end: to relieve the Supreme Court’s crowded docket, which was then two to three years in arrears, and thereby improve the administration of justice. Trumbull cited convincing statistics illustrating the rapid growth of judicial business within the previous three years.\textsuperscript{24}

\[\textsuperscript{21} \text{Davis to Julius Rockwell, March 11, 1866; Davis to William W. Orme, July 28, 1866; Davis to Rockwell, August 9, 1866; Miller to Davis, August 22, 1866; Davis to Clifford, August 22, 1866; Justice Samuel Nelson to Davis, September 3, 1866; Chase to Davis, October 4, 1866; Davis to Chase, October 22, 1866, in Davis Papers. For Davis’ \textit{nisi prius} preference, see King, \textit{Lincoln’s Manager}, 191. Miller’s June 27 letter to Chase specifically noted that only Clifford opposed the circuit bill. Apparently Davis had not yet revealed his dissatisfaction.}\]

\[\textsuperscript{22} \text{Stephen J. Field, \textit{Personal Reminiscences of Early Days in California, with Other Sketches} ([Washington, 1893]), 186-217.}\]

\[\textsuperscript{23} \text{See, for example, Kelly and Harbison, \textit{American Constitution}, 481; Warren, \textit{Supreme Court, III}, 169, 223. Also see Henry J. Abraham, \textit{The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France} (New York, 1962), 304: “. . . Congress demonstrated its utter contempt of the Supreme Court by \textit{thrice} [that is, 1863, 1866, and 1869] changing its size in six years . . . .”}\]

\[\textsuperscript{24} \text{Cong. Globe, 40 Cong., 3 Sess., 414, 1366, 1484 (January 18, February 19, 23, 1869), and \textit{passim}.}\]
The increase of one Supreme Court member provoked absolutely no controversy, Republicans and Democrats alike conceding the need. The bill's progress, however, bogged down in the Senate over the circuit-court reform. The recurrent issue of separate circuit judges had been bitterly debated and contested ever since the Jeffersonian Republicans abolished similar positions created by their Federalist predecessors. The partisan descendants of Jefferson continued a policy of judicial hostility, specifically against the idea of separate circuit judges, well into the late nineteenth century. Briefly, their position rested on the assumption that it was desirable for members of the Supreme Court to deal with people and law on the local level. Quite often, however, the opposition seemed to be a reflex reaction to a long-taught tradition. This Democratic opposition stirred again in 1869, but with a curious mixture of Republican allies.

Senator Charles R. Buckalew of Pennsylvania, one of the Democratic leaders, appropriately summed up his party's opposition to Trumbull's bill. He acknowledged the necessity for an increase in the Supreme Court, but countered that the bill's other features allowed for "too great" an increase in judicial power. Buckalew, perhaps reflecting his party's constant preoccupation with a fear of expanding federal power, believed that a total increase of ten federal jurists was an unreasonable demand. With some prominent Republican conservatives and radicals, he resorted to the argument that the new positions ultimately would separate Supreme Court members from circuit functions. The Court, he complained, then would be only a court of highest appeal, completely detached from "the people." The justices would not, he concluded, "be brought into contact with the great mass of the community, as they now are by traveling into different sections of the country, and becoming to some extent acquainted with local facts, the character of our people, and the various interests in different parts of the country, all of which is of great service even to a dignified judge of the Supreme Court . . . ."

Some Republican senators, led by George F. Edmunds of Vermont and Charles D. Drake of Missouri, similarly motivated by a reluctance to have the justices removed from their circuit duties, proposed increasing the high court to fifteen men. The Court would then divide itself, with the chief justice and seven associate justices, chosen by annual lot, remaining in Washington while the others held court in their various circuits. There was only a

25 Ibid., 1487, 1366-67 (February 23, 19, 1869). The quotation is on page 1487.
sprinkling of Republican support for the idea, and, with the prominent exception of Edmunds, it came from the Radical wing. Trumbull forcefully and persuasively argued against the Drake amendment with constitutional and practical objections. He contended that dividing the Court for particular cases might be a violation of the constitutional requirement that the judicial power be vested in one Supreme Court. Whenever there was a Supreme Court duty to perform, Trumbull said, each justice has a right to participate. More effectively, he warned that the inconsistent character of such a Supreme Court inevitably would result in the unsettling of rules and precedents. It is interesting to note that he defended *stare decisis* primarily because he feared unstable principles and rules of property. A bipartisan coalition easily overwhelmed the attempt to raise the Court to fifteen, the proponents mustering only six votes. Trumbull's original bill, providing for an increase of one Supreme Court member and nine circuit judges, then passed with ease on February 23, 1869. The House concurred without debate on March 3.  

The bill passed one day before the expiration of the Fortieth Congress and of Andrew Johnson's administration. For perhaps a variety of reasons—a recurrence of his antijudiciary attitude, spite for Congress, or pressures of the last day in office—Johnson did not sign the bill. The provision for new circuit judges may have been the key to his inaction. True to his Jeffersonian-Jacksonian faith, Johnson probably regarded the innovation with great distaste. Then, too, few outgoing Presidents would cheerfully acquiesce in handing a despised successor such a rich patronage plum.

Trumbull reintroduced the bill in the first days of the next Congress, and once again there was no difficulty on the Supreme Court increase provision. Many Senators recognized the need to raise the Court to an odd number. In 1869 there were eight men on the bench; judicial defiance of the mortality tables prevented fulfillment of the 1866 desire for the more decisive number of seven. As before, the circuit judgeships provoked opposition. Some Republicans and Democrats renewed their efforts to secure a greatly enlarged Supreme Court, dividing itself for duties in Washington and in the circuits. A few Republicans, led by Roscoe Conkling, opposed the bill as utterly inadequate and preferred a more complete and autonomous circuit-court system. There also

---

was some delay over a newly introduced provision for retirement of Supreme Court members. Despite widespread dissatisfaction and an awareness of the bill's shortcomings, the demand for some reform seemed irresistible, and the bill became law in April 1869.27

The legislation of 1869 hardly reflects cynicism or even contempt toward the Supreme Court. Andrew Johnson's impending departure may have stimulated some support for an increase in the high court, but the dominant Republicans were far more concerned with the realities of judicial needs. The provisions for an additional justice, and the new circuit judgeships, more profitably can be seen as an accommodation to the Supreme Court and as a limited attempt to improve the administration of justice.

Most writers on Reconstruction have relied on Charles Warren's account of the reduction proposal. It is instructive to trace Warren's sources. His only citation is to Ransom H. Gillet's *Democracy in the United States*, published in 1868. Gillet, a former Democratic member of the House of Representatives, penned an apologia and campaign document for the Democratic party and a defense of Andrew Johnson against alleged Radical Republican excesses. Moreover, he wrote of the reduction measure at a time when a small faction of the Republican party had launched an abortive assault against the independence and integrity of the Supreme Court. Gillet thus neatly fitted the reduction legislation into that category.28 While Warren advanced primarily an interpretation of political reprisal and vindictiveness, he acknowledged a contrary contemporary appraisal. The *American Law Review* in October 1866 noted that there had been "no serious opposition" to the reduction bill and that it "was in no sense a political measure, however much political feelings may have aided its passage."29

It is quite probable that some congressmen viewed the 1866 reduction as a useful device to strike at Johnson and the Supreme


28 (New York, 1868), 344-48.

29 Quoted in Warren, *Supreme Court*, III, 145n. See *American Law Review*, I (October 1866), 206. Warren's use of this quotation indicated some reservation on his part. This is not true of the writers who have followed him.
Court. The congressional failure to provide for a future decrease of the circuits simultaneously with reductions in the Supreme Court is perhaps the best, though indirect, evidence of Republican reluctance to allow a Johnson appointment. But unless one accepts Johnson as a masochist, the fact remains that he willfully acquiesced in the change. Given his prewar and final public views on the judiciary, this position becomes perfectly plausible. And again, the Supreme Court at that time had given Congress little cause for disenchantment or alienation. This notion that a reduction of membership would punish the Court incidentally begs the question of how this would prevent hostile opinions. An increase in the number of reliable justices would seem to be a rather more effective guarantee for Congress. It is quite likely that Wilson’s remarks concerning judicial desires for a more manageable number actually reflected Court wishes. In any event, the justices apparently never informed the opposition otherwise, and Wilson’s statements went unchallenged. Surely the Democrats would have welcomed the opportunity for criticism of the Republican measure if any valid basis for it could have been discovered. During Reconstruction the Democracy always stood united in defense of the Court. Finally, the whole of the 1869 increase act must be read as an accommodation to the Court.

It would be entirely naïve to suggest that the reduction measure passed Congress in a political void. But attaching political motivation to the Republican action has little to do with personalities—presidential or judicial. There is an apparent link between the reduction of the Court and sectional representation in the judicial circuits. Reducing the Court led to a corresponding decrease and reshuffling of the circuits. These changes marked the culmination of a shift first begun in July 1862. Then, with the South out of the Union, the dominant Republicans reconstructed the judicial system at the expense of the seceded states. In brief, they took the five judicial circuits (of nine) that consisted entirely of slave states (the Fourth, Fifth, Sixth, Eighth, and Ninth) and telescoped them into three (the Fourth, Fifth, and Sixth). At the same time they accorded recognition to the trans-Mississippi free states that were then unrepresented in a formal circuit. In 1863 they added a tenth circuit for the Far West. The 1866 reorganization reduced the circuits to nine and left only the Fifth composed exclusively of former slave states. Significantly, they combined the late Justice Catron’s assignment of Kentucky and Tennessee with Justice Swayne’s new circuit of Ohio and Michigan. Obvi-
ously, this change and others lessened the demand and need for Southern representation on the Supreme Court. In a sense, the act of 1866 was a variation on the underlying theme of Chase’s reduction proposal of 1855.

The circuit reorganization and reduction in 1866 fit into the general Republican pattern to reduce what they believed had been undue and disproportionate Southern influence in the national government—which was indisputably true with regard to the judiciary. The 1862 reorganization relieved Lincoln of any obligation to appoint Southerners. Even the usually obtuse Andrew Johnson apparently understood the determination and intentions of the Republican party. When he attempted to make an appointment to the Supreme Court, he nominated Stanbery, an Ohioan, to replace Catron, a Tennessean. Thus, without benefit of the 1866 changes, Johnson proved a willing ally for the Republican cause. Stanbery’s circuit under the 1862 law would have been composed of Louisiana, Texas, Arkansas, Kentucky, and Tennessee. The nomination of an outsider was a bold departure; even Lincoln waited until Congress redrew the circuit boundaries before he acted. After the reduction and realignment of 1866, only one Southerner, Justice Wayne, remained to handle the exclusively Southern Fifth Circuit. When he died in 1867 his Supreme Court seat remained vacant, while Justice Swayne did double duty in the Fifth and his own Sixth Circuit. When Congress enlarged the Court again in 1869, the new justice, Joseph P. Bradley of New Jersey, fell heir to the vacant circuit—the all-Southern Fifth.

Congress thus tailored the judicial system of the United States to suit better the demands and needs of the dominant section and, of course, the dominant party. The reduction of the Court was another means to this end. All this was done with the acquiescence of the Presidents in office; and in no way did it signify an assault upon the idea or the institution of the judiciary. Viewed in this light, Edward Bates’s reaction to the reduction proposal becomes more meaningful: “The Supreme Court,” he wrote, “is to be a mere party machine; to be manipulated, built up and pulled down as party exigencies require.” Bates significantly avoided any sug-

---

30 See acts of July 15, 1862, Statutes at Large, XII (1863), 576; March 3, 1863, ibid., 794; and July 23, 1866, ibid., XIV, 209.
31 Howard K. Beale (ed.), The Diary of Edward Bates, 1859-1866 (Washington, 1933), 553. Prior to the passage of the basic 1862 reform, the New York Daily Tribune remarked in its issue of December 12, 1861, that “the present [time] is a favorable opportunity to restore a just equilibrium between the sections” by redressing the imbalance that existed in Supreme Court seats and circuit
gestion that the Republicans primarily sought to avoid a Johnson appointment. Although Henry Stanbery, Johnson's nominee for the vacancy in 1866, appeared to be a tolerable choice at the time, the reduction and realignment of the circuits constituted a surer guarantee to make the judiciary safe for the North—and Republicans.

There still remains much to say concerning the standard accounts of a weak, frightened, intimidated, and pliant Supreme Court during Reconstruction. Such a story necessarily must consider the real intentions and fulfillment of Radical Republican attitudes and policies vis-à-vis the Supreme Court. Despite their critics, the Radicals were neither omnipotent nor always vindictive. A careful and thorough re-examination of the whole role and place of the Supreme Court during Reconstruction might well impair the traditional views. In any event, the existence of careless assumptions, preconceptions, and incorrect conclusions regarding the judicial legislation of 1866 and 1869 points to the need for such study.

arrangements. Not until Grover Cleveland appointed Lucius Q. C. Lamar in 1888 did a Southern Democrat serve on the Court following the Reconstruction era.