CHAPTER 3

The Reconstruction of Habeas Corpus

Reconstruction precipitated changes to habeas corpus in ways that still reverberate today. Most significant was the Habeas Corpus Act of 1867. Although the 1833 and 1842 habeas acts provided federal court review of state court convictions, they did so in limited ways and under specific circumstances. The 1867 act seemed to transcend these limited and specific categories by providing for federal court habeas review of anyone held by state or federal authorities in violation of the Constitution. Modern advocates of broad federal court habeas review lay claim to the 1867 act's supposed intent in justifying their contemporary claims. The 1867 act, in the words of its House sponsor, was a "bill of the largest liberty" that made "the jurisdiction of the courts and judges . . . coextensive with all the powers that can be conferred upon them."[1] So the argument goes, however, habeas's fate was unfortunately linked to broader goals of Reconstruction that were too quickly abandoned in the 1870s—racial equality; universal suffrage; and equal civil, political, and economic rights for all citizens—only to be subsequently resuscitated by twentieth-century courts. To realize and enforce these goals, the Warren Court and twentieth-century legal scholars relied on habeas corpus as an enforcement mechanism for the constitutional visions of the New Deal and Great Society regimes, in part because they believed that Reconstruction's political coalitions had always envisioned habeas to play this signal role.[2] The Warren Court thus helped secure these lost components of Reconstruction's unfinished revolution. There was no bigger advocate of this reading both on and off the bench than Justice William Brennan, who justified the Court's sweeping habeas changes during the 1960s as simply fulfilling a vision of habeas that was "at first delayed."[3]

The actual development of habeas during and immediately after Reconstruction, however, belies this Whiggish narrative. In fact, habeas's developmental trajectory was anything but certain from the beginning of the Civil War to the informal end of Reconstruction in the late 1870s. And even then, for more than a decade after the election of Rutherford B. Hayes and the beginning of redeemer rule, the exact contours of habeas's new role were still developing. Not until 1886—almost twenty years after the passage of the Habeas Corpus Act of 1867—would Congress and the Supreme Court finally come

to an understanding about habeas's role under the 1867 act. When they did, however, the settlement reflected the politics of a different time far removed from the exigencies of war, the imperative of union, the prospective uneasiness of an America without slavery, and most assuredly the moral fervor of Charles Sumner. Even before these momentous political, social, and economic changes doomed Radicals' hopes, Civil War and Reconstruction changes to habeas hardly sprang from rights-protecting and countermajoritarian wellsprings.

Instead, as I show in this chapter, habeas continued to develop from the Civil War through Reconstruction and to the end of the nineteenth century, largely as the result of the same political and institutional dynamics that drove its development during the first half of the century. To be sure, the formal eradication of slavery in 1865 ended habeas's split personality as a tool for enslavement; no longer would the writ serve to enforce the ugliness of the peculiar institution. At times, it would now help to guarantee the very rights that it in part helped to take away. Nevertheless, this particular use of habeas was neither foreordained nor consistently sustained. Federal habeas in the service of individual rights—and particularly freedmen's rights—was the product of a concerted effort by short-lived political coalitions that were only able to achieve their immediate goals when the larger political regime, including the federal courts, countenanced such efforts. Throughout the Civil War and Reconstruction, the Republican regime enacted habeas corpus legislation and enlarged federal court jurisdiction to enforce their preferred vision of constitutional governance. The use of habeas to vindicate fundamental rights in ways that we imagine today was only ever an ephemeral by-product of this larger political reality.

In many ways, then, the only similarity between habeas's use during and after Reconstruction and our more modern conceptions of the writ is that then, as now, it was an effective enforcement tool for political regimes in their attempts to govern. Like the Jacksonian regime before it, Reconstruction Republicans partnered with federal courts through increased grants of habeas jurisdiction against recalcitrant states.[4] Unlike the Jacksonian period, our modern sympathies most likely lie with Reconstruction Republican's national enforcement of regime goals through federal courts. But the fact that the recalcitrant states during the Jacksonian period were Northern states that enacted personal liberty laws in the service of individual liberty should at least give us pause about our sometimes uncritical assumptions that assign a normative role for the national government in the enforcement of rights, especially

That our understanding of modern habeas jurisprudence seems to turn almost exclusively on an understanding of the Great Writ during Reconstruction is nevertheless an important feature of habeas development in its own right.[5] The regime use of habeas involves a simultaneous redefinition of the writ's historical function. Like the principles of constitutional governance it enforces, problematic legal precedents and unfavorable historical realities are necessarily pushed aside and even ignored in an attempt to justify a new regime's powers and legitimacy. This dynamic in part explains why uses of the writ during and after the Civil War that call into question the historical veracity of most contemporary accounts are conspicuously absent from the Whiggish narrative that modern supporters of broad federal habeas power advance. As Pamela Brandwein argues, "Reconstruction" itself "has its own history" that is created and advanced to justify contemporary policy and law. As part of this creation, habeas's actual development is often sacrificed for cleaner and more progressive accounts.[6]

I offer a more political account of habeas's development during and after Reconstruction that takes into account the interpretation and use of the writ not only by federal courts, but by other political institutions as well. This allows us to see a how a number of important developmental variables that have always driven habeas's development helped create the foundation for our modern habeas jurisprudence during Reconstruction, not the least of which is the fact that Congress and the executive play extremely important roles in advancing various and often competing roles for the writ apart from the judiciary. This calls into question not only the utility of purely court-centered analyses of habeas, but also any countermajoritarian role for the judiciary. Despite some claims to the contrary, the massive and truly revolutionary changes to American federalism during the Civil War and Reconstruction also suggest that the role of the federal courts in Reconstruction was in important ways developed as a partnership with the elected branches.[7] At the very least, federal courts were able to help enforce national policy against recalcitrant Southern states in ways that were helpful, and in some ways superior to, congressional legislation or executive orders by themselves.[8] Interestingly, the power that federal courts wielded in this partnership was established decades before. The exigencies of war and the unprecedented challenges of Reconstruction might have prompted the Republican regime's partnership with the federal judiciary, but the precedents for this relationship, especially in prior uses of federal court habeas power, were most immediately available from the Jacksonian regime's use of the writ.

assert its own particular readings of habeas. When intraparty disputes significantly divided the regime over key issues, as they often did, the Court was able to protect and even entrench further its own independent habeas powers despite its precarious role in the incendiary politics of the Reconstruction era, largely because Congress consistently needed its support.[9] Despite vocal criticism of the Court's opinions—and even isolated threats to its very existence—congressional majorities continued to use federal court habeas power in the second half of the nineteenth century to help enforce their preferred vision of constitutional governance. To be sure, federal courts were not simply the handmaidens of either Congress or the executive. Their ability to protect and craft habeas jurisprudence almost always depended on their cooperation with the regime in power.

This perspective also allows us to begin to understand the writ's role during war or crisis. There is no question that the Civil War and Reconstruction were extraordinary and unprecedented events that pushed American constitutionalism to its limits. It would be a mistake to understand these events as wiping away the preceding, or "ordinary," development of American political and legal institutions.[10] As we will see, the Civil War only made the ordinary developmental variables discussed above play out more quickly and with more intensity than usual. Like accounts of Reconstruction that begin only with Lee's surrender and neglect the possibilities of the war's effects on subsequent Reconstruction politics, we miss much by assuming that events in 1859 had no impact on events in 1861.[11] In important ways, this allows us to see that the triumvirate of wartime jurisprudence cases—*Merryman, Milligan,* and *McCardle*—had less to do with how a seemingly independent judiciary could protect individual rights during war than it did with the extent to which regime-affiliated courts were able to carve out an independent role for themselves despite their dependence on the elected branches.

With these considerations in mind, this chapter does more than explore habeas's role in the salient court cases of the period, including *Merryman, Milligan, McCardle,* and others. It also analyzes the writ's role outside of the Court up to the end of the nineteenth century.[12] What will become clear is that although habeas was indeed "reconstructed" during Reconstruction, these changes not only were modeled on previous regime uses of the writ, but were also short-lived. Contrary to most accounts, these changes and the cases they precipitated were not seen as countermajoritarian, either by the Republican Reconstruction regime in 1867 that expanded the writ's reach or by subsequent regimes that scaled back these changes toward the end of the century. As a tool

which did not always align with the vindication of the rights of numerical or racial minorities as we often assume today.

CONTINUITIES AND DISCONTINUITIES IN EX PARTE MERRYMAN

There is no question that the first shots fired at Fort Sumter marked a turning point in American constitutional and political history. The Constitution of 1787 provided no explicit blueprint for civil war, though many clauses provided direction for war more generally. Even then, the exact role that the president, Congress, the courts, and the states were to play in light of the martial clauses of the Constitution was, and still is, unclear. In his Pulitzer Prize–winning book surveying and accounting for the effects of Lincoln's suspension of habeas corpus, Mark Neely boldly proclaimed that "there is little need to dwell . . . on the uses of the writ [of habeas corpus] before the Civil War" because the "abuses of the writ of habeas corpus in the struggle over slavery were no longer of practical interest."[13] But the institutional conflicts that arose with the sudden onset of civil war—and certainly with the suspension of habeas corpus—are not completely separable from ordinary institutional conflicts that animated the larger constitutional order, nor, as we will see, were the preceding political supports for the judicial uses of the writ wiped cleanly away with the beginning of the war or the advent of Reconstruction.[14] Edward Corwin's characterization of constitutional war powers as "an invitation to struggle" is certainly an empirical reality, but these interbranch struggles and their political contexts are a permanent part of American politics in both war and peace.[15] To understand the structural conflicts in Chief Justice Roger Taney's clash with Abraham Lincoln over the suspension of habeas corpus in *Ex parte Merryman,* then, we need to attend to the continuities with the immediately preceding state of politics, as well as the obvious discontinuities in the polity as the result of the realities of war. This not only allows us to account for differences and similarities, but also pushes us to see how these conflicts continued to shape politics even after the war ended.

At least for the Court, no better example of the impending changes that were to come during war and Reconstruction was the seemingly mundane fact that as the justices began the 1860 term, they now occupied a new and more spacious courtroom in the Capitol building.[16] With the nation divided during their move, and with the need for a new justice to replace Justice Peter Daniel looming large, an editorial in the antislavery *New York Tribune* seemed to

The Court consist[s] of five slave-holders and four non-slaveholders with the unscrupulous Taney at its head. This Court, as now arranged, is scandalously sectional, grossly partial, a mockery of the Constitution, a serf of the slave power, and a disgrace to the country. A truly National Administration will not fail to reform it so as to regain for it the confidence of the people, by adapting it to the ends for which it was created.[17]

Republican angst was only worsened when just a few weeks before Fort Sumter, and only a few days after Lincoln's inauguration, the Court ended its term with two opinions that demonstrated important continuities between the existing Court and the one yet to come.

In *Ex parte Kentucky v. Dennison,* the Court ruled that it would not force the governor of Ohio to deliver to Kentucky someone charged with violating Kentucky slave law.[18] And in *Freeman v. Howe,* the Court overturned a decision of the Massachusetts supreme court that allowed private bondholders to recover property seized by a United States marshal in a fugitive slave action.[19] These two opinions continued a developmental trajectory of increasing federal acquiescence to slavery's enforcement and expansion, a power that had reached its apex with the Court's decision in *Ableman v. Booth* just a year before.[20]

The preceding two decades of American constitutional development had witnessed an acute battle over the ability of American national institutions—political as well as judicial—to enforce slave law nationally.[21] As discussed in Chapter 2, habeas played a key role in this battle, as it served as a tool of enforcement for the Jacksonian regime and various Northern state antislavery political coalitions. Federal court habeas power increased during these decades, partly through congressional grants of increased jurisdiction and partly through federal court interpretation of their habeas powers. As a crucial partner in the Jacksonian regime, the Court helped sustain national slave power. With the election of 1860, a new regime was ascending to national control over political institutions. However, the Court was not immediately part of that regime. Indeed, in *Dred Scott,* it effectively held that the salient parts of the platform of the Republican Party were unconstitutional.

Continuity is present between the pre- and postwar constitutional patterns in the aggregate increase in national judicial power, but particularly with respect to federal court habeas jurisdiction. Although certainly critical of this increased judicial power, the ascending Republican regime needed a strong federal court system to buttress its political efforts, particularly one capable of commanding respect and legitimacy throughout the nation, as well as one that

tional governance of the new regime. Although the Republican Party had not yet formulated their full vision of constitutional governance in 1861—indeed, this process would drive much Civil War and Reconstruction development—it was immediately clear to the party as a whole that federal courts would have to play a role. As Stanley Kutler demonstrated in his powerful revisionist account of the Supreme Court during Reconstruction, the Republican Party's sometimes hostile relationship with the Supreme Court during the 1860s was less a negative reaction to the Court's substantive use of its powers in the past to enforce the nationalization of the slavery question (for example, *Dred Scott*) than a realization of the immediate need to redirect this power for Republican purposes.[22] The Court's new, more spacious courtroom did, in fact, seem to augur an even more capacious role for judicial power.

Abraham Lincoln most likely knew that the already developed power of the federal courts could be an important part of Union victory.[23] Lincoln's reaction to *Dred Scott* was not a wholesale critique of national judicial power per se as much as it was a critique of the substance of the Taney Court's decision and judicial supremacy more generally.[24] Indeed, throughout the war and with the beginning of Reconstruction, Lincoln maintained that his actions would always be subject to some form of judicial review. His goal, then, like the more general goal of the Republican Party, was to direct increased judicial power in support of their new regime. The opportunity for new judicial appointments, combined with the party's desire to recalibrate the federal court system to correct for the overrepresentation of Southern interests, could help change the Court's substantive stance while not sacrificing the increased institutional power gained over the past decade.

From the perspective of habeas corpus, there is yet another continuity that bears on the *Merryman* case. Encomiums to the writ's liberty-protecting foundations in both Taney's opinion and Lincoln's 4 July response were belied by the Court's extant opinions, Lincoln's actions, and the Republican Party's positions on slavery. Despite deep disagreements about slavery's extension during the 1850s, both Democrats and Republicans in 1860 supported the national enforcement of fugitive slave laws, the Corwin amendment, and more general commitments to leave slavery unmolested in the states where it existed.[25] We should remember that increased federal court habeas power in the antebellum period was rarely—if ever—correlated with our more normative ideas of universal rights and freedom.

Aside from the immediate exigencies of war and secession, there were important discontinuities that shaped the context of *Merryman* as well. During

Court's willingness to forego expansive readings of federal habeas for state prisoners in order to maintain national political support for its habeas jurisprudence. During the Taney Court, however, federal habeas power for state prisoners became an increasing reality for federal courts, as it was used to frustrate cases prosecuted by Northern states under their personal liberty laws. Now, however, habeas power would need to be justified horizontally across the federal branches as well as vertically against the states during war and Reconstruction. The difficulty of this task was compounded not only by the realities of an unprecedented civil war, but also by the significant political challenges of accomplishing this move with a Democratically appointed Court that was now pitted against a new Republican Party regime.

EX PARTE MERRYMAN

To speak of the Supreme Court's role in *Merryman* is problematic. Although there are conflicting accounts, Roger Taney's formal role in the events surrounding John Merryman's detention (and even including his opinion in the case) was as a circuit court justice first, and only as chief justice of the Supreme Court by title and by his own willful assertion.[26] Merryman's capture by Union forces in the middle of the night gave Taney—and only by implication the Court he led—an opportunity to hold forth in what would turn out to be the last gasp of national judicial power in the Jacksonian tradition. Carefully bypassing the judiciary when needed, but ever mindful of its necessity to a successful Republican regime in the future, Lincoln deftly brushed Taney—but not the Court—aside.

It is important to highlight the fact that Taney's role was partially manufactured by himself. Of those detained in the earliest days after Lincoln's first suspension of habeas corpus, many were actually allowed to speak with friends and family. Immediately after his arrest, Merryman's family attorney quickly traveled to Washington to petition "The Chief Justice of the United States and presiding Judge of the United States Circuit Court, Baltimore," for the writ. Taney immediately issued the writ to General Cadwalader, the commanding officer of Fort McHenry, where Merryman was detained, but removed his appellation of circuit court justice from the document. He further demanded that Cadwalader produce Merryman's body not in Washington, but in Baltimore, where he immediately traveled after issuing the writ. Taney claimed that he took this course of action because he wanted to spare Cadwalader the

instead wanted Merryman's habeas petition to rise to the level of a direct confrontation between the chief justice and the new president. Moving the location of the hearing to Baltimore also had the potential added effect of waging this battle in the home city and state of both Merryman and Taney.[27]

The overtly political and confrontational nature of Merryman's habeas case is further evident in the fact that a return to the writ was actually made in the first hearing on 26 May 1861, although it was certainly not complete. General Cadwalader's aide-de-camp, Colonel Lee, wearing full military dress and armed with his sword, appeared before Taney in the general's place. Lee expressed Cadwalader's regret for his absence and presented to Taney Cadwalader's return to the writ, stating therein that Merryman was in his custody and was "charged with various acts of treason, and with being publicly associated with and holding a commission as a lieutenant in a company having possession of arms belonging to the United States, and avowing his purpose of armed hostility against the Government." He further added that the charges could be "clearly established." Lee then went on to inform Taney that he was authorized by the president to suspend habeas corpus—a "high and delicate trust" that "has been enjoined upon him that it should be executed with judgment and discretion." Finally, Cadwalader requested through Morris that Taney postpone any judgment in the case to give him extra time to secure more direction from President Lincoln so he could make a more complete return to the writ. Not surprisingly, Taney refused Cadwalader's request and proceeded to issue an attachment that not only again demanded Merryman's "body," but also declared General Cadwalader guilty of acting "in disobedience to the writ." The chief justice was unflinching in his demands that the writ be honored and that Merryman's body be produced by noon the next day.[28]

The estimated crowd of over two thousand Baltimoreans who gathered in the streets the following day to partake of the spectacle would not see Merryman, however. When the marshal attempted to serve Taney's orders at Fort McHenry, sentries blocked his way, so when Taney, seated alone in the courtroom, asked the marshal, "Have you your return to the writ, sir?," he must have known the answer would be no.

Taney's opinion not only castigated the president for suspending the writ but also asserted that no suspension could ever be authorized by the president alone. Taney began by expressing "surprise" that the writ had been suspended because "no official notice has been given to the courts of justice, or to the public, by proclamation or otherwise." He claimed he listened to Cadwalader's partial return to the writ with surprise because he also assumed it was

ment."[29] The point, of course, was the president's assertion of the power to suspend the writ without congressional authorization. Taney justified his position by citing English precedent, which he claimed authorized only parliamentary suspension, and also by citing United States precedent, including Jefferson's explicit deferral to Congress for habeas's suspension during the Burr conspiracy and Justice Joseph Story's assertion of congressional exclusivity.[30] Moreover, Taney interpreted the suspension clause's location in Article I, which seemingly constitutes and limits only the legislative branch, as further evidence against executive suspension. The president's duty is to take care that the laws "be faithfully executed," Taney exclaimed.[31] The suspension, then, was an unconstitutional appropriation of legislative powers.

The most damning criticism, and the one that is most indicative of the extent to which the president's suspension portended further constitutional problems, was Taney's suggestion that there was no reason to suspend habeas in Merryman's case. The courts of Maryland, and of Baltimore in particular, were accessible. If Merryman was suspected of violating United States law, then the information concerning his actions should have been brought to the attention of the local district attorney for prosecution. The very fact that Taney himself was available and able to travel to Baltimore, hear the case, and issue his opinion proved as much. Moreover, the general discretion afforded to military commanders to suspend the writ when they saw fit was also too arbitrary to countenance without concomitant judicial review.

Seeking to limit the president's powers even more, Taney then went on to argue that even if Congress had authorized habeas's suspension, it would only apply to those detained by the military because the Bill of Rights would stand in the way in all other cases.[32] Here, Taney was attempting to vindicate the very rights he had torn asunder just four years earlier in *Dred Scott.* Just as Fifth Amendment rights in that case applied only to slaveholders and not to African Americans, they would remain inviolable for the very same people waging war against the United States. These rights could be suspended permanently for some (African Americans), but never for others (Southern slaveholders and their supporters). Taney then ended his opinion knowing well that his decision would likely be ignored: "I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome."[33]

Lincoln's retort would come less than two months later in his 4 July 1861 address to Congress, when he posed his famous rhetorical question, "Are all the laws but one to go unexecuted, and the government itself go to pieces, lest

cally; he did not even acknowledge that the chief justice had issued a habeas writ or that he even wrote an opinion.[34] Instead, Lincoln bypassed an answer to this oft-quoted phrase, asserting that "it was not believed that this question was presented. It was not believed that any law was violated." Because the habeas clause in Article I was "silent as to which" branch was authorized to suspend during periods of war or rebellion, Lincoln argued that this duty fell to him.[35]

All of this suggests that the *Merryman* case and Lincoln's famous response are best understood not as isolated examples of the more theoretical issues involved in presidential war power and their effects on civil liberties, but rather as the products of political and judicial processes that had been roiling during the past two decades.[36] With Lincoln's election and the advent of Civil War, the Jacksonian regime's ties to the federal judiciary were quickly crumbling, and Taney must have known this. Prospects for executive cooperation with the court, let alone the possibility of deference to its decisions from Lincoln, were unlikely. Considering the state of disarray of the Democratic Party and the complete evisceration of the Whigs over the last half decade, the 1860 election produced a president who famously said that while "the judicial department" and "its decisions on constitutional questions . . . should control . . . the particular cases decided . . . we shall do what we can to overrule [them]."[37] As a reconstructive president, Lincoln's interpretation of his own constitutional powers was thus decidedly departmentalist.[38] Combined with his stance on *Dred Scott* and his departmentalist theory of constitutional interpretation, his assertion of the constitutionality of executive suspension (even with the implicit caveat that he was acting when Congress could not) sought to carve out a coequal role in constitutional interpretation for the executive.[39]

Lincoln's assertion of executive independence in *Merryman* was necessarily a qualified one, and it is directly related to the relationship between the case and the preceding political context.[40] Again, Cadwalader initially asked Taney to give him more time to provide a more complete return to the habeas writ. Presumably, if there was a complete unilateral assertion of executive power, no military representative would have appeared at all. It is also possible that if Taney had agreed to give Cadwalader more time and did not engineer such a spectacle of the proceedings and his role in them, further habeas writs issued by federal judges may have been met with more deference despite the writ's suspension. More importantly, it is quite plausible that even with his assertion that the executive was constitutionally authorized to suspend the writ in situations such as those during the Civil War, Lincoln did not have a completely de-

decision to suspend on 27 April 1861, Lincoln had requested that his Cabinet, and Attorney General Edward Bates in particular, advise him on exactly what was at stake with suspension, and it was only a day after his famous address to Congress that the attorney general submitted in writing the administration's full written position on the constitutionality of suspension. It is more likely that in the trying and unprecedented days immediately after Fort Sumter, Lincoln was simply playing things as they went.[41]

Bates's more detailed justification of suspension begins to make this clear. If the suspension clause is understood to mean "a repeal of all power to issue the writ," he said, "then I freely admit that none but Congress can do it." Instead, he argued that "if we are . . . to understand the phrase to mean, that, in case of a great and dangerous rebellion, like the present, the public safety requires the arrest and confinement of persons implicated in that rebellion . . . the President has lawful power to suspend the privilege of persons arrested under such circumstances."[42] And for the most part, suspensions were limited. In fact, it was not until 24 September 1862, seven days after Congress passed the Militia Act, and over a year after the 4 July address to Congress, that habeas was effectively suspended for the entire country.[43]

Despite the more limited nature of Lincoln's assertion of executive independence in the *Merryman* case, the chief justice and others obviously perceived these actions as bordering on military despotism. Partisan critics in both parties did not hesitate to question and even condemn Lincoln's actions.[44] Taney even wrote in 1863 that he was doubtful of the court's ability to be "restored to the authority and rank which the Constitution intended to confer upon it."[45] And a common refrain among scholars, including many with little sympathy for the chief justice, concludes, as did Charles Warren, "that had the Chief Justice lived" a little longer, "he would have seen the doctrines laid down by him in the *Merryman Case* strongly upheld" in *Ex parte Milligan*.[46]

But we lose a key perspective by casting *Merryman* as purely a case of interbranch struggle during war. To be sure, separation-of-powers issues in *Merryman* would persist through the war and into Reconstruction. Lincoln would spar with congressional Republicans over early conceptions of emancipation and the individual rights of freedmen, and Andrew Johnson would raise this battle to a new level. But as the power and resources of a more sympathetic and regime-affiliated Court became more and more part of the war and Reconstruction effort, the institutional dynamics between the Court and Congress in 1866 (when *Milligan* was decided) would be even less comparable to those in 1861. *Merryman* tells us more about the early period of political and

and the Jacksonian Court than it does about the future relationship among the branches during Reconstruction.

HABEAS AND CONGRESS, 1862–1864

Although habeas was effectively suspended by the Lincoln administration in matters directly related to the prosecution of the war from 27 April 1861 onward, habeas development continued in other important ways. As a potential tool of regime enforcement, some in Congress believed early in the war that habeas could be used in ways to protect the newly acquired rights of slaves confiscated by Union forces. Although immediately unsuccessful, the role of habeas in the emerging need to protect the legal rights of an increasingly large amount of newly freed slaves, and in the quickening battles between Congress and the president over the substance and procedures of Reconstruction, are important to highlight. These early proposed uses of habeas in the first year of the Civil War would eventually serve as the basis for larger changes to the writ during the height of Reconstruction.

Aside from suspension, the first discussions of habeas corpus revision and extension during the war took shape in the early drafts of the confiscation acts. At the beginning of the war, both Congress and the executive were immediately concerned with depriving the Confederacy of manpower through the confiscation of property, which took the form of the emancipation of slaves for Union military purposes. This was a precarious but necessary tactic—necessary because slaves performed important and meaningful (but nevertheless menial) services for Southern armies (mostly as laborers), and precarious because complete emancipation of slaves was still not a politically popular position.[47] Couched in the language of military necessity, limited emancipation for mostly instrumental reasons was advanced by Lincoln and generally supported by Congress.

The Second Confiscation Act of 1862 sought to pacify those in Congress who wanted limited and controlled emancipation for military purposes and those more radical positions that were already warning of the possible civil and legal deprivations that freed slaves would face without concomitant federal protection. The first version of the act that was reported out of committee would have freed all slaves of anyone who was deemed to be disloyal to the Union, but it failed in the House by a 78–74 vote.[48] Opponents of the bill felt that emancipation of all slaves of disloyal rebels was too drastic a measure to be taken. More

were in place to protect freedmen. In a compromise measure, the House produced a revised version of the bill that limited the scope of emancipation to the slaves of Confederate officers and rebel state officials. It also contained a habeas provision that would allow federal courts to hear habeas petitions for freed slaves who were reenslaved by their former or pretended masters. However, the author of the revised provision, Albert Porter (R-Ind.), advanced it as a much more limited bill that would have two salutary effects. The first would be to reduce the potential influx of freed slaves that could potentially overwhelm the border states of the North—a persistent worry of those states, and one that explains their support of the new provision. The second effect was that by limiting emancipation to those most guilty of rebellion, the domestic state institutions of slavery would remain unchanged. In Porter's words, the purpose of the revised bill was to "deprive the leaders of this rebellion of their property in slaves, but at the same time not destroy the security of the domestic institutions of any of the slaveholding states."[49]

Porter's position helps us clarify his intent with respect to the bill's habeas provisions. If a slave of a Confederate officer or rebel state official was emancipated as a result of the bill and was subsequently claimed as property by another, then they were to be released on habeas corpus by the federal judiciary. Although this habeas provision was certainly monumental in its scope and substance, Porter argued that it was an indispensable enforcement mechanism of this emancipation measure: "In this way a sure remedy is provided to guard against prejudice."[50] Considering his unwillingness to see slavery abolished completely, and considering his general belief that this limited emancipation served military exigencies only, the habeas provision has to be understood as a mechanism to support larger military goals and not as a general provision for ensuring legal equality for freedmen.

We see this argument confirmed as the bill's habeas provisions were then jettisoned in committee. Democrat John Noell of Missouri believed that the grant of habeas to blacks would change their legal status too drastically. Noell drafted the report of the Committee on Emancipation of Slaves and Rebels, which laid out the fundamental objections to the bill's habeas provisions. His fear was that "the substitute [the new habeas provision] treats slaves as *persons* . . . not as *property*" and that habeas would not only permanently alter the legal status of slaves but the nature of federalism as well: "Confiscation seizes and condemns *property* as *property*, but does not change the legal status of *persons* in a State, which legal status results from *local* and not *federal* law."[51] Although the act's emancipation of slaves was acceptable, it was so only because they

"but we cannot ignore their character as *property*, and then alter their status as *persons*."[52] Although Noell's position did not prevent the bill from passing the House, the Senate did not share the House's concerns for legal and civil protections for confiscated property. The final version of the Second Confiscation Act, after revision in the Senate and in joint committee, ultimately provided no habeas protection. Instead, the bill classified confiscated slaves as captives of war and provided the president with the power to use this new labor for whatever purpose he deemed necessary to prosecute the war.

THE HABEAS ACT OF 1863

As the failed congressional attempts to craft meaningful habeas provisions in the first years of the Civil War demonstrate, questions surrounding the legal status of freedmen posed significant challenges to both Lincoln and Congress. Bound up within these challenges were the equally difficult—and increasingly divisive—questions about which branch would lead early Reconstruction efforts. The first successful habeas provisions passed by Congress reflected these emerging problems. Like the failure to include meaningful habeas protection in the Second Confiscation Act, the Habeas Corpus Indemnity Act of 1863 was concerned first and foremost with martial issues, as it indemnified federal officials against Southern state laws and gave congressional imprimatur to habeas's suspension.[53] Habeas's use to thwart recalcitrant state governments—and their state constitutions—was only implicitly designed with freedmen's rights in mind.

Passed on 3 March 1863, just two months after Lincoln's Emancipation Proclamation, the act sought to protect federal officials from prosecutions by Southern state governments and also to put a congressional stamp of approval on habeas's suspension. Not since the Habeas Act of 1833 had Congress used habeas to protect the actions of federal officials. This use of the writ was foremost in the minds of congressional Republicans who, like their Jacksonian predecessors, also used the writ to augment the role of federal courts in aid of their policies.[54]

Incorporating federal courts into the 1863 Habeas Act was a strategic, if risky, move by Congress. The impetus for this strategy was the larger division over early Reconstruction policy between Lincoln and Congress. Presidential war powers loomed large since the beginning of the war, and Congress had already failed to incorporate habeas provisions in the confiscation acts in 1862,

measures.[55] With Lincoln's Emancipation Proclamation, the possibility of a completely executive-led Reconstruction was becoming more and more of a reality. In Louisiana, for example, Lincoln was prepared to recognize a new government under his Ten Percent Plan (issued only five days before the 1863 Habeas Act), which would have left all but top-level Confederates in a position to influence all of that state's political and legal policies.[56] Moreover, the president's early Reconstruction plan was not only led by the military—and not Congress—but would also have allowed the establishment of apprentice-like labor systems for freedmen, a feature that incensed Radical Republicans. With strong Democratic upsurges following the 1862 elections threatening to embolden Southern states, and the simultaneous consideration of Lincoln's conscription bill (which portended even more military centralization), congressional Republicans needed to act. Here, then, was an opportunity for Congress to exert partial control over executive war power through federal courts by setting the terms of habeas's suspension and defining the procedures for indemnifying federal officials.[57]

The strategy had inherent risks, because Chief Justice Taney could hardly be thought of as a natural partner in this endeavor.[58] Despite reservations about Taney, congressional fears and criticisms of the court were far outweighed by an increasing willingness on the part of Congress to turn to the court to help enforce their early Reconstruction agenda. To be sure, Congress was always wary of the Court, especially since at any time it could overturn and frustrate their policies, but this possibility was becoming less likely. Lincoln had already made three appointments to the Court, and during the debate on the 1863 act, the Court was hearing arguments in the *Prize Cases,* and it would issue its favorable opinion in that case just seven days after the passage of the 1863 act.[59]

Section 1 of the 1863 act provided that "during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States." Whether this language gave congressional approval to past actions is not clear, but what this section did do was bring Congress in line with Taney's *Merryman* opinion that only that body could authorize habeas's suspension. Significantly, Thaddeus Stevens (R-Pa.), who authored the House version of the act, did not join some of his fellow Republicans who supported Lincoln's and Bates's constitutional justifications for executive suspension of habeas corpus in April 1861. Presumably, then, we can see in the 1863 act a less deferential stance toward executive and military reconstruction, and even an implicit statement that the president's suspension

Congressional imprimatur of suspension was seconded by the provisions in the next two sections, which detailed more restrictive procedures for executive suspension. Both the secretary of war and the secretary of state were now required to furnish to federal courts a list of those imprisoned by the executive branch within twenty days of an arrest. If a court did not return an indictment, the prisoner was to be released after swearing a loyalty oath.[61] Even with these provisions—which were enacted to achieve more congressional control over early executive and military reconstruction—many prisoners simply fell out of the processes so established. The definition of "prisoner" in the act was at times disputed, and the military often did not supply the names of those whom it sought to prosecute as criminals under the articles of war, including "bushwhackers, guerillas, saboteurs, and spies."[62] This distinction came to the fore just a month later, when Clement Vallandigham was arrested in Ohio and prosecuted by a military commission. In that case, the Court refused to entertain Vallandigham's writ of certiorari because the Court argued it had no jurisdiction from military commissions so established.[63]

The next sections detailed the procedures for removal of cases against federal officers from state to federal courts. The perceived recalcitrance of Southern state courts, whether or not they were located in areas still in rebellion, was the impetus for these removal provisions. Congress was also aware that state courts might litigate claims against draft officials, because the Enrollment Act (which was a conscription bill) was passed the same day. The defining feature of these sections, and the one that received the most intense criticism, was the fact that it left private citizens in Southern states with virtually no legal recourse, whether civil or criminal, for wrongs or injuries against their person or property.[64] Section 4 provided that any presidential "order" was a "defence . . . for any search, seizure, arrest, or imprisonment, made, done, or committed . . . under and by virtue of such order, or under color of any law of Congress."[65] The subsequent 1866 revisions of the act, which responded even more forcefully to continued Southern state resistance, would go even further by making state judges liable for continuing civil or criminal complaints against federal officers after removal to federal courts.[66]

The 1863 Act was one of the first of many types of removal legislation passed during the Civil War and Reconstruction. According to James Randall, this means that the act "must be judged in light of the fact that it was originally passed in the very midst of a desperate war" during a "period" when "extreme legislation was characteristic."[67] There is no question that war and rebellion provided the occasion for the 1863 act, but habeas's use by political

substantively and procedurally. The 1833 act's removal provisions, combined with that act's use in the 1850s to protect federal marshals as they carried out the provisions of the fugitive slave laws, served as an already established procedure to enforce the new Republican regime's substantive goals during the early phases of Reconstruction. That Congress partnered with federal courts to enforce their substantive goals against recalcitrant states further highlights the strategic power of habeas for regimes, even though it is quite likely that part of Congress' strategy in this and other removal legislation was to curb executive power.[68] And as it had during the antebellum period, the increasing regime use of habeas in federal courts would produce federal court habeas opinions wherein justices would seek to confirm their regime's preferred position of habeas while simultaneously protecting their institutional capacity to issue the writ. And this self-regarding dynamic proved to be even more pronounced when the party was divided.[69]

CONTINUITIES AND DISCONTINUITIES IN EX PARTE MILLIGAN

Justice David Davis's majority opinion in *Ex parte Milligan* is often hailed as a paean to individual liberty.[70] Some even go further. Charles Warren, for example, boldly asserted that Taney's *Merryman* opinion was vindicated by Davis in *Milligan:* "Never did a fearless Judge [Taney] receive a more swift or more complete vindication."[71] The image of a completely independent judiciary boldly defending the habeas rights of individuals in the face of tyrannical wartime political institutions, however, is simply wrong. And the assumption that meaningful continuities obtain between Taney's actions in *Merryman* just a few weeks after Fort Sumter, and Davis's majority opinion in 1866 after the end of the of the war, the assassination of Lincoln, and the beginning of the increasingly divisive interbranch battles over Reconstruction, vastly overstates the comparison. The changing political context in which habeas developed between April 1861 and December 1866, when the *Milligan* opinions were made public, suggests that the use of the writ by congressional Republicans to forge their own visions of Reconstruction policy better explains the seemingly countermajoritarian and rights-protecting elements of the opinion. From 1864 to 1867, Congress' Reconstruction agenda moved from checking Lincoln's military programs to checking Johnson's programs with military and judicial legislation.[72] This switch had a significant impact on habeas's development before

The rapidly shifting political context of habeas's development preceding the *Milligan* opinion is first evident in the failed Wade-Davis bill, which sought to shift Reconstruction efforts away from executive and toward congressional control. The Wade-Davis bill was proposed in reaction to what radical Republicans perceived to be an executive prosecution of Reconstruction that, with the exception of the basic abolition of slavery, was tilting toward the status quo ante position of states' rights.[73] Although Lincoln's territorial governments, especially in Louisiana, required the abolition of slavery, critics still felt that without a concurrent plan to enforce and protect legal and civil rights of freedmen, abolition alone would accomplish very little. Abolitionist and radical sentiment toward presidential Reconstruction were summed up by Wendell Phillips, who characterized Lincoln's early Reconstruction effort as one that "frees slaves, but ignores the negro."[74] No provisions were made, except those that would necessarily flow from state courts and legislatures, for their real, meaningful protection. Republicans realized, however, that some kind of civil rights protection was needed, if only because of the unique nature of the status of rebel states as they hung in constitutional limbo since secession. If they did not legislate for the states before they came back into the Union, civil rights would again be under the auspices of state governments. Henry Winter Davis, the architect of the Wade-Davis bill, made this very point in a special speech on the floor of the House on 25 February 1864, in which he sounded a cry for greater legal protection for freedmen through habeas. Without these extra protections, he argued, readmitted states would revert to their old ways:

> Slavery is not dead by the proclamation [the Emancipation Proclamation]. What lawyer attributes to it the least *legal* effect in breaking the bonds of slavery? Executed by the bayonet . . . it [presidential emancipation] is undoubtedly valid to the extent of turning them loose from their masters during the rebellion. Reestablish the old governments, allow the dominant aristocracy to repossess the State power in its original plenitude, how long will they be free? What courts will give them rights? What provision is there to protect them? Where is the writ of *habeas corpus*?[75]

The Wade-Davis bill's habeas provisions sought to preempt any state judicial or legislative decision concerning the most basic rights of freedmen, including preventing kidnapping, reenslavement, and all forms of involuntary servitude, most specifically peonage. Considering the potential divisiveness over the institutional control of Reconstruction, it made sense for Congress to partner with federal courts and look to them as another independent enforcement mechanism for their policies through the bill's habeas provisions. However,

measure. The bill was tabled because fear of losing a Republican in the White House in the November elections outweighed Congress' plans.[76] Once again, meaningful habeas protections were sacrificed.

Interbranch struggles over Reconstruction only continued to worsen. After the assassination of Lincoln and the ascendance of Andrew Johnson to the presidency, it became clear to congressional Republicans that the new president's plans for Reconstruction were problematic. Congressional response to Johnson's amnesty proclamation on 29 May 1865 could only be rhetorical, for Johnson's first major steps toward Reconstruction occurred between May and December 1865, when Congress was in recess. The amnesty proclamation is significant for the policies that it did and did not contain. Johnson provided for "amnesty and pardon, with restoration of all rights of property, except as to slaves," for all except the highest level of Confederate rebels, if supplemented with a loyalty oath.[77] Provisional governors, appointed by Johnson, would then create new state governments. Although each state had to ratify the Thirteenth Amendment, the proclamation provided for no additional legal safeguards for freedmen at a time when black codes had already quickly replaced slave codes in a few states. Presumably, without further protection, every state that followed Johnson's proclamation would do the same.[78] When the Thirty-ninth Congress finally met in December, its skepticism of Johnson's program was revealed in their refusal to seat the congressional delegations from states that met Johnson's requirements.[79] They also created the Joint Committee on Reconstruction, which became the platform for Congress' alternative Reconstruction program.[80]

Two of these legislative initiatives during the first session were the Freedman's Bureau bill and the Civil Rights Act of 1866.[81] Both bills sought to protect freedmen's rights under the Thirteenth Amendment in light of the onerous black codes. The Freedman's Bureau legislation explicitly removed cases of Southern state discrimination to military courts, and when these removal powers were combined with the 1866 Civil Rights Act's more general removal procedures to federal courts, it was evident that Congress sought to enforce their Reconstruction program partly through judicial means. Nevertheless, in the case of the Freedman's Bureau, it became increasingly evident that Congress was beginning to modify its previous stance against military-based Reconstruction measures.[82] Johnson vetoed both laws, and Congress was only able to override the Civil Rights Act's veto.[83] And to make matters worse, four days before the Civil Rights Act veto, Johnson's 2 April 1866 proclamation declared that the "insurrection" was "at an end." He went on to proclaim that

suspension of the privilege of habeas corpus are, in time of peace dangerous to public liberty, incompatible with the individual rights of the citizen . . . and ought not, therefore, to be sanctioned or allowed except in cases of actual necessity."[84]

It was in the midst of this critical time for congressional–executive relations that the holdings of the *Milligan* decision were announced on 3 April 1866.[85] Interpretations of the opinion that characterize it as a bold vindication of individual rights by the Court against the elected branches most often rely on the admittedly vitriolic but isolated criticisms by radical Republicans that largely occurred only after the justices' opinions were released in December 1866.[86] In April, as William Lasser argued, "There is little wonder that the announcement was largely ignored by the Republicans" because "military rule had just been denounced . . . and the freedmen's security had just been placed solidly in the hands of the civilian courts of the United States rather than those of the military."[87]

EX PARTE MILLIGAN

Negative reaction to Davis's majority opinion in *Milligan* after December 1866 was precipitated by the most recent events that had played out since April and also by speculation about the opinion's portent for congressional Reconstruction in the immediate future.[88] Between April and December, all of Johnson's provisional Southern governments (except his home state of Tennessee) failed to ratify the Fourteenth Amendment. And with Republican victories in the November elections, combined with increasing Southern state recalcitrance, Congress was poised to implement a stronger version of Reconstruction. Nevertheless, a reliance on federal courts, especially through increasing grants of habeas authority, continued to be an important part of their larger policies, even before military reconstruction became a real option for congressional Republicans. Davis's opinion, often hailed as a bulwark of American liberty, cannot be seen as a singular commitment to the blanket protection of individual rights by an independent judiciary. Justice Chase's dissenting opinion, which reads more like a concurrence, further pushes us to see how the Court was working, even if tentatively and partially, with Congress as they both waded through the unprecedented challenges of Reconstruction.

In its rhetorical flourishes, Davis's opinion striking down the jurisdiction of Lambden Milligan's military trial seems to be unwavering. "No graver ques-

more clearly concerns the rights of the whole people."[89] Because of the "late wicked Rebellion . . . the temper of the times did not allow that calmness in deliberation . . . so necessary to a correct conclusion of a purely judicial question." But "now that the public safety is assured, this question . . . can be discussed and decided without passion or admixture of any element not required to form a legal judgment."[90] Although he did not mention the case in his opinion, Davis most likely was referring to *Ex parte Vallandigham,* decided two years earlier, in which the Court, faced with a similar question involving the constitutionality of military tribunals, ruled that it had no jurisdiction in appeals from military trials.[91] Now, with the war over, Davis seemed to suggest that military rule during peacetime, when "courts are open," was unconstitutional.[92]

Yet in important ways, Davis's opinion could be understood to be less definitive about military rule—and hence military reconstruction—than many suggest. For one, his oft-quoted maxim concerning military rule where "courts are open" was immediately followed by the qualification that "their process" had to be "unobstructed."[93] After the opinions were released in December 1866 and criticism of Davis and the Court was reaching a crescendo, Davis even expressed dismay at Republican attacks on the opinion, writing to a friend soon after that his opinion "did not" contain "a word" about "reconstruction, & the power is conceded in insurrectionary States."[94]

However, Davis's private correspondence should not obscure the fact that the Court's opinion was unanimous concerning the unconstitutionality of Milligan's trial and sentence in the military tribunal. Even Chief Justice Chase agreed that Milligan's trial and sentence crossed the line. Nevertheless, the line that was crossed was not the arrest of Milligan or even his future prosecution. Milligan's arrest, like many others, was subject to the provisions of the 1863 Habeas Corpus Indemnity Act, which in part authorized habeas's suspension and also provided for judicial procedures and time limitations for detention. Accordingly, Milligan's case was referred to a federal district court, and no indictment was returned. Pace the provisions of the 1863 act, Milligan should have been released. "If this had been done," Davis said, "the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended."[95] Formal hostilities were over, and Andrew Johnson was now president. The prospect of military tribunals such as Milligan's now did not sit well, especially since Congress had already brought federal courts into the process. Executive-led martial law, while sometimes necessary because the nation "cannot always remain at peace," was always constitutionally and politically suspect. "Wicked men, ambitious of power,"

once occupied by Washington and Lincoln . . . the dangers to human liberty are frightful to contemplate."[96]

The most controversial part of Davis's opinion, which in fact prompted Chase to pen his concurrence, was not related specifically to Milligan's case at all. To Chase, this seemed to suggest "that it was not in the power of Congress to authorize" military tribunals in areas where hostilities had ended and courts were opened.[97] Considering Davis's personal correspondence regarding the inapplicability of the opinion's holding to the South and his qualification that courts had to be "unobstructed," Chase's worry might have been moot. Nevertheless, his acceptance of the Court's opinion that Milligan's trial in Indiana was unconstitutional did not prevent him from defending the possibility of the future use of military tribunals established by Congress. In what seemed like an uncanny foreboding of the actual operation of reconstructed Southern courtrooms, Chase argued that these courts "might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators." It must be recognized that Congress had the power to create and provide for military trials because it was still further possible that "judges and marshalls" might "be in active sympathy with rebels, and courts their most efficient allies."[98]

Even with these considerations, which should cause us to discount any characterization of the *Milligan* opinion as completely hostile to executive or congressional war power, both opinions nevertheless refused to abdicate all judicial power in the specific case. The Court was willing to concede some of its habeas power to the proposition that emergency situations might preclude judicial review of detainments, but by the time the case was decided, the emergency situation had passed, at least in Indiana. The fact that Milligan's case centered on the 1863 Habeas Act further suggests that the entire Court was solicitous of the powers conferred by Congress in the supervision of grand juries for those detained by the military. This, after all, was a point on which every justice agreed. Despite Davis's seemingly libertarian rhetoric, then, and even considering Chase's hypothetical deference to congressional power in the future, the Court sought to protect their own habeas powers first. This move by the entire Court, more so than the rather prosaic announcement that certain military trials were unconstitutional after Lee's surrender, was the real exercise of judicial independence by the Court in *Milligan.* With most Republicans generally hostile to executive-led military reconstruction, and with no plans for congressionally led military policies when the case was decided in April 1866, the Court had room to carve out and preserve its habeas powers.

Reconstruction policies were nevertheless real, even if they ultimately proved to be incorrect. Not long after the decision was released, one of Lincoln's assassins, who had been convicted in a military trial, applied for a writ of habeas corpus before Chief Justice Chase. Although Chase rejected the petition on the grounds that he could not issue the writ outside of his own circuit, the prospects of similar habeas writs in the immediate future did not ease the fears of some in Congress.[99] To make matters worse, Andrew Johnson, who, not unsurprisingly, was sympathetic to an anticongressional reading of *Milligan,* declared an end to all military trials then under way in areas that Republicans still considered belligerent. Even without a congressional consensus about the finer details of future Reconstruction policy hammered out by January 1867, Republicans, now bolstered by electoral victory, were poised to move ahead despite the seeming rebuke by the Court in *Milligan.*[100]

Not more than two months after the opinions in *Milligan* were released, and only a month after most journalistic and Radical Republican attacks on the opinion occupied both editorial pages and floor debates in the House and Senate, Congress passed the Habeas Corpus Act of 1867.[101] The act's origins are to be found earlier the previous year, but it would be odd for Congress to pass a bill such as this if they were as hostile to federal court power as some have assumed.[102] Although the debates surrounding the initial draft of the 1867 act are ultimately unhelpful in determining the exact intent of Congress in enlarging federal court habeas jurisdiction, it is beyond question that habeas's role in congressional Reconstruction was to be one that built on an already increasing relationship between Congress and the federal judiciary.[103] And the Republican regime's reliance on federal courts to enforce and give constitutional legitimacy to its Reconstruction program would continue even though Congress repealed the Supreme Court's jurisdiction under the 1867 act soon after its passage. The key to reconciling this seemingly hostile move, then, is in understanding exactly how Congress imagined federal court regime enforcement through habeas would play out. If Congress was first and foremost concerned with the legal supervision of recalcitrant Southern states with respect to freedmen's issues, and only tangentially concerned with habeas enforcement for federal prisoners, then the seemingly contentious issues in *McCardle* become less problematic.

THE HABEAS CORPUS ACT OF 1867

The Habeas Corpus Act of 1867, the origins of which are admittedly opaque,

importantly, the institutional relationship between state and federal courts. The act not only provided postconviction review of decisions, but also seemingly provided for federal review of state decisions on habeas for anyone held in violation of the Constitution.[104] The 1867 act also had the effect of providing federal court habeas review of state criminal law generally, a function that the 1833 and 1842 acts only implicated by default. Federal court review of state criminal cases was certainly contemplated in the 1833 act's provisions for the removal of state prosecutions of tariff officers to federal courts, but these provisions were not explicitly designed with the view that state criminal law was to fall under its auspices. Even when the 1833 act was used to remove cases involving federal marshals who were arrested for violating state personal liberty laws in the course of their duties in enforcing fugitive slave laws, this was a judicial, not congressional, interpretation of the writ. And although the 1842 act was explicitly designed to remove cases to federal courts involving state criminal prosecutions against foreign nationals acting as agents of a foreign nation, the act never contemplated the more general supervision of state criminal law.

The day after the Thirteenth Amendment went into effect, the House Judiciary Committee was directed to devise legislation to aid Congress in the enforcement of the amendment. Representative Shellabarger moved that the following resolution be passed:

> *Resolved,* That the Committee on the Judiciary be directed to inquire and report to this House, as soon as practicable, by bill or otherwise, what legislation is necessary to enable the courts of the United States to enforce the freedom of the wives and children of soldiers of the United States under the joint resolution of Congress of March 3, 1865, and also to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery.[105]

The 3 March 1865 joint resolution referred to in Shellabarger's House resolution was signed by Lincoln on the last day of the Thirty-eighth Congress and declared that the wives and children of those who served during the war were now free. It also conferred freedom upon those in slave states that were not in rebellion, including those slaves who did not fall under the provisions of the Emancipation Proclamation.[106]

The bill that was first proposed to the House Judiciary Committee three weeks after Shellabarger's resolution was, according to Iowa representative James Wilson, designed to "secure the writ of habeas corpus to persons held in slavery."[107] Although the bill died in committee, it suggests that the earliest iteration of what became the 1867 act was decidedly limited in scope. The bill

all persons who are held in slavery or involuntary servitude otherwise than for a crime whereof they are convicted shall be discharged on *Habeas Corpus* issued by any returnable before any court or judge of the United States; and if the court or judge refuse the discharge the petitioner may forthwith appeal to the Supreme Court, which court if then sitting or if not at its next term shall hear the case on the first motion day after appeal is docketed and discharge the petitioner if he shall appear to be held in slavery or involuntary servitude contrary to the constitution of the United States.[108]

A different version of what would eventually become the final bill was reported out of committee by Representative James Wilson on 25 July 1866. The relevant parts of the bill are as follows:

The several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have the power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.

From the final decision of any judge, justice, or court, inferior to the circuit court, an appeal may be taken to the circuit court . . . and from the judgment of said circuit court to the Supreme Court of the United States.[109]

On the same day the bill was reported, it was discussed on the floor of the House. One of the only questions raised was by Representative LeBlond, who was concerned that the bill exempted any person held under military authority.[110] Lawrence's response to the query was that it did not, and then he proceeded to give an explicit restatement of the act's intent:

On the 19th of December last, my colleague introduced a resolution instructing the Judiciary Committee to inquire and report to the House as soon as practicable, by bill or otherwise, what legislation is necessary to enable the courts of the United States to enforce the freedom of the wife and children of soldiers of the United States, and also to enforce the liberty of all persons. Judge Ballard, of the district court of Kentucky, decided that there was no act of Congress giving courts of the United States jurisdiction to enforce the rights and liberties of such persons. In pursuance of that resolution of my colleague this bill has been introduced, the effect of which is to enlarge the privilege of the writ of *habeas corpus,* and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them. It is a bill of the largest liberty, and does not interfere with persons in military custody, or

When the bill was reported out of the Senate Judiciary Committee, Senator Lyman Trumbull characterized the act thusly:

The habeas corpus act of 1789 . . . confines the jurisdiction of the United States courts in issuing writs of *habeas corpus* to persons who are held under United States laws. Now, a person might be held under a State law in violation of the Constitution and laws of the United States, and he ought to have in such a case the benefit of the writ, and we agree he ought to have recourse to the United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States.[112]

Despite Trumbull's seemingly clarifying language, determining the exact intent of the bill has proved to be an almost impossible task.[113] One House member, in commenting on the bill, for example, exclaimed, "I would ask whether anybody in this House, when he gives his vote . . . knows what he is voting on? [Laughter]."[114] Aside from intent beyond the text, the 1867 act was a significant development in its own right—this was, after all, an amendment to the Judiciary Act of 1789's habeas provisions. With the exception of the limited and specific classes of defendants specified in the 1833 and 1842 acts, federal court review of state court judgments through habeas was prohibited before the passage of the 1867 act. Now, however, anyone claiming to be held in violation of the Constitution or any federal law or treaty might challenge their detention through a writ of habeas corpus in federal court. Another significant development was that the habeas proceedings would now be permitted to review the facts of cases de novo, when previously de novo review was limited to questions of law.[115]

The act's broad, general language seemed to add yet another important element to federal habeas corpus review for federal prisoners. As discussed at length in Chapter 2, while section 14 of the Judiciary Act of 1789 prohibited federal habeas review of state prisoners, it did provide for habeas review of federal prisoners. Although the language did not explicitly provide for Supreme Court review of federal prisoner habeas appeals, Chief Justice John Marshall rectified that omission in *Ex parte Bollman,* arguing that federal prisoner habeas cases could be reviewed by the Court through the exercise of its appellate powers.[116] The only change with respect to federal prisoners in the 1867 act was the rather prosaic statutory authorization for appeals to the Supreme Court from habeas cases in the lower federal district and circuit courts. Indeed, the 1867 act prefaced the grant of appellate jurisdiction to the Supreme Court with the phrase "in addition to the authority already conferred by law." Providing federal habeas corpus review of state court decisions to federal courts, and

prisoners who had previously been denied federal habeas court access, but its utility—and hence its novelty—for federal prisoner habeas review was questionable at best.

The first case to arise under the 1867 act did little to resolve this problem, although it did seem to confirm the importance of the federalism and racial issues that most likely motivated the act two years before. *In re Turner* seemed to indicate a fairly straightforward understanding of the bill that gave legal support through habeas to both the Civil Rights Act of 1866 and the Thirteenth Amendment.[117] *Turner* involved a habeas appeal from a black minor named Elizabeth Turner who had become a free citizen of Maryland. Before the adoption of the revised Maryland state constitution in 1864, Turner and her mother were the slaves of Philemeon T. Hambleton.[118] But after Maryland's revised constitution was passed and slavery abolished per the Thirteenth Amendment, many freed slaves were immediately bound to their former masters as indentured servants. (Whites were also bound under similar peonage-type arrangements.) Turner's habeas appeal argued that the peonage laws violated the Thirteenth Amendment and the Civil Rights Act of 1866. Under the existing Maryland apprenticeship laws, white apprentices were entitled to an education, and they were not permitted to be arbitrarily transferred to other masters; unlike blacks, they were not legally described as "property and interest." All of these guarantees were not required of black apprentices. Chief Justice Chase, sitting on circuit, found the legal state of apprenticeship as applied to blacks and the legal discrepancies between blacks and whites to be grounds for releasing Elizabeth from her master. Thus habeas, under the 1867 act, was used to uphold the Thirteenth Amendment, its enforcement provisions, and the Civil Rights Act of 1866. Under these circumstances, at least, Chase held that "colored persons equally with white persons are citizens of the United States."[119]

EX PARTE McCARDLE

Like so many other aspects of habeas during Reconstruction, the received understanding of *Ex parte McCardle* overplays the refrain of a seemingly independent Court that advances the bold cause of individual liberty during periods of crisis, only to be quashed by forces out of its control. There is no question that the Court's opinion in the case ultimately deferred to an interpretation of the power of Congress to withdrawal the Court's appellate power as plenary

from Congress, because a close reading of *McCardle* and *Ex parte Yerger*, decided soon after, suggests the opposite.[120] Moreover, Court-curbing legislation was real and palpable, even if most of it never managed to pass. Thus while we should heed the lessons of revisionist historians in seeing these measures, advanced almost exclusively by Radicals, as less indicative of interbranch hostility toward the Court than had previously been thought, there is still reason to account for these measures, if only because they suggest a level of intraparty disagreement within the regime. Such divisions often allow the Court to carve out a more independent role that protects and entrenches their institutional power. *McCardle,* in important ways, shows this to be the case. As a whole, it is likely that Congress did not harbor as much animosity toward the Court in their repealer legislation as some suggest. If we instead interpret habeas's wider Reconstruction role through a federalism lens, with a primary concern for correcting recalcitrant Southern states, then the national-level habeas powers repealed in the 1868 act can be seen as less important to the regime's larger Reconstruction goals.

"Like the rain," Charles Fairman analogized, "the law impartially blesses the just and the unjust."[121] The timing of William McCardle's arrest in 1867 by Union military authorities in Vicksburg, Mississippi, for penning treasonous editorials could not have been more inopportune for congressional Republicans.[122] Now situated in an all-out battle for control of Reconstruction policy with Andrew Johnson, by the time McCardle's habeas appeal came before the circuit court of Mississippi in November 1867, Congress had already passed the Military Reconstruction Act over Johnson's veto, the Tenure of Office Act, and several supplemental bills further specifying the procedures of Reconstruction, all of which would be under control of Congress, and all of which established military rule for states not in compliance. To make matters worse, by the time of the appeal, Congress had also failed in their first attempts to bring impeachment charges against Johnson, further emboldening him to resist Republican policies.[123] With military reconstruction entrenched since March, Democratic forces were already hunting for ways to challenge the constitutionality of congressional Reconstruction with *Milligan*—and the 1867 act—as their benchmark. McCardle's case became a vehicle for this cause.

McCardle's case was dismissed in district court. He then promptly appealed to the circuit court of Mississippi, challenging not only his confinement but, more importantly, the constitutionality of military reconstruction in general as well. Just as significant was that his appeal from the district to the circuit court was justified under the grant of appellate authority for habeas appeals

United States" under the Habeas Corpus Act of 1867. With a denial by the circuit court, the question remained whether the Supreme Court would agree to hear the appeal. In *Ex parte McCardle I,* the Court denied the government's appeal to dismiss, arguing not only that it had the ability to hear habeas appeals aided by its writ of certiorari power under the Judiciary Act of 1789, but that the 1867 act explicitly gave them this authority. Chief Justice Chase said of the 1867 act that it was "of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction."[124] Chase, however, did not reach the merits of the larger, more important question of the constitutionality of congressional Reconstruction legislation. Chase limited the Court's decision to the purely jurisdictional questions raised.

With the prospect of the Court reaching a decision striking down congressional Reconstruction, and only a few days after oral arguments were concluded in *McCardle,* James Wilson offered an amendment to an otherwise innocuous bill permitting appeals to the Supreme Court in civil cases involving internal revenue officers that would repeal the 1867 Habeas Act's authorization of appeals from circuit courts to the Supreme Court.[125] With no debate in the House, the Senate considered the amendment later that day. Although some in that chamber now felt something was afoot, serious and heated debate on the amendment's true nature only occurred two days later.[126] Despite the pressure of his impeachment trial, President Johnson nevertheless vetoed the bill on 25 March. In his veto message, Johnson defended the Court, stating that even during the "most violent party conflicts," it had always been "deferred to with confidence and respect." The most ironic part of the veto message came when Johnson defended the 1867 act, a bill that he had vetoed, on the grounds that a repeal of the Court's appellate jurisdiction would now be contrary to the act's "wisdom and justice."[127]

In the debate over whether to override the president's veto, Lyman Trumbull, the only senator to comment on the 1867 act when it originally passed, and who was also counsel for the government in *McCardle,* tried to understate the 1867 act's importance, and hence the repealer's significance, only to be met with Democratic responses that chided Radicals for their seemingly wanton power grab.[128] Consistent with the arguments he would advance before the Court, Trumbull contended that McCardle fell within the 1867 act's exceptions for those in military custody, and also that the 1867 act only ever contemplated expansive federal court habeas jurisdiction for state prisoners.[129] Despite Dem-

defending broad federal habeas powers under the 1867 act, the veto was overridden on 27 March 1868.[130] With some dissent, the Court moved that the case be postponed and held over until the next term.[131]

When the Court's decision in *McCardle II* was finally announced in April 1869, Chief Justice Chase was clear that the Court had no choice: "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle."[132] Although the power of the Court's appellate jurisdiction is derived from the Constitution, that document gives to Congress the power "of making exceptions" to that jurisdiction.[133] This might seem like complete deference by the Court to Congress, as Chase then said of the repealer that the Court was "not at liberty to inquire into the motives of the legislature." However, Chase's last paragraph suggested something quite different:

> Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.[134]

The "jurisdiction which was previously exercised" was the habeas doctrine that had developed since Marshall's *Bollman* opinion, at least for federal prisoners. This is not an insignificant distinction, because the 1868 repealer simply withdrew the Court's appellate jurisdiction from circuit courts under the seemingly broad terms of the 1867 act. Combined with that act's new grant of federal court habeas rights for state prisoners, which was not at issue in McCardle's case, this meant that Chase simply affirmed Congress' right to adjust the Supreme Court's appellate jurisdiction for a limited class of petitioners. Federal district and circuit courts could still hear habeas cases for both state and federal prisoners regarding claims that arose under the 1789 Judiciary Act's habeas provisions and the 1867 act.

Significantly for some, the Court could have handed down a decision in the case before Congress overrode the repealer veto. Although there is evidence for claiming that the Court's self-imposed delay in reaching a decision earlier was due as much to political as to legal concerns, the fact remains that the Court interpreted the repealer as a legitimate exercise of Congress' power to determine the appellate jurisdiction of the Court.[135] Even with the Court's ac-

that passed the 1867 act most likely had in mind freedmen, their families, and federal officers who were unconstitutionally held in Southern states when they expanded federal habeas to include state convictions, it is less likely that they saw an immediate need for increased supervision of federal habeas for federal prisoners. The complete legislative history of the act suggests as much, originating almost a year and a half before the act's final passage as a supplemental piece of enforcement legislation for freedmen only, as does *In re Turner,* the first case heard under the act.[136]

The larger political context of Reconstruction suggests as much as well. It is certainly true that congressional military reconstruction policy implicated important constitutional questions concerning military detentions and trials, but Southern state resistance to congressional Reconstruction, combined with Johnson's resistance at every advance, was a more pressing concern for congressional Republicans. In fact, in the immediate political context of *McCardle,* it is likely that Congress was more concerned with the ratification of the Fourteenth Amendment than it was with a judicial ruling on military reconstruction, whichever way the ruling might go. Even if some Republicans doubted the legality of military detentions, they were willing to live with them in the short term in order to guarantee the long-term federalism changes that were inherent in the Fourteenth Amendment.[137] The fact that Johnson's impeachment trial loomed over the repealer debates might suggest that Congress was engaged in a struggle with the president purely over interbranch control of Reconstruction policies such as the Tenure of Office Act and the constitutionality of further military control of state governments. But these issues were ultimately bound up at every step with larger interbranch disagreements about the ability of the national government to control states more generally.[138]

The more salient concerns with federal judicial supervision of state institutions, rather than federal judicial supervision of national institutions, are also evident in Congress' other Court-related legislation during Reconstruction.[139] Although the 1863 Habeas Act was partly devoted to creating procedures for habeas's suspension, it also sought to remove state cases to federal courts. The Internal Revenue Act of 1866 provided removal for cases involving federal revenue officers from state courts and further allowed federal courts to begin actions de novo. The Separable Controversies Act of 1866, the Local Prejudice Act of 1867, and the 1867 Habeas Act's revision of the federal question doctrine, to name just a few, were completely concerned with state and local resistance.

The congressional partnership with the federal judiciary during the height

serving as the linchpin in both readings. In the first, the Court backed down, and Chase's unequivocal deference, combined with his decision to delay the case, is offered as evidence. In the second, *McCardle* stands as "the quintessence of judicial independence and courage."[140] What is more likely, especially in light of habeas's development during this period, is that while the Court was indeed a true partner with the moderate core of congressional Republicans and each branch was broadly sympathetic with the other, each branch was also deeply concerned with its own institutional independence and was never afraid to stand its ground when it believed that circumstances (real or imagined) would threaten its institutional integrity.[141] Congress needed the Court's habeas power, and the Court depended on Congress for these habeas powers and for other newly instituted removal-related powers as well. When Congress believed that the Court might overturn its military reconstruction program, despite its past and future partnership with the judiciary, it did not hesitate to pass a quick, albeit limited, repealer to the newly granted jurisdiction to ensure its ability to govern. Similarly, the Court felt bound to clarify its ability to hear habeas cases under already well-established congressional and judicial precedents. Even with sympathetic and regime-affiliated Courts, then, we can see that alongside issues that might divide majority parties (such as the extent of congressional military reconstruction), threats to core institutional functions—such as habeas—elicit an institutionally protective response.[142]

POSTREPEALER HABEAS AND THE DEMISE OF RECONSTRUCTION

Large-scale habeas change and development are almost always attributable to the creation and enforcement of new visions of constitutional governance by new political regimes. Although political in their origins, habeas changes are nevertheless adjudicated in a legal world. Combine this reality with the fact that courts, as we have seen, also partly craft habeas jurisprudence in ways that benefit and protect their institutional power, and we can see that the practice of regime enforcement through habeas has the potential to drift away and diverge from the regime's initial visions. This phenomenon only becomes more acute when initial regime changes to habeas begin to come into conflict with new and changing regime priorities.

The Republican retreat from Reconstruction was no different. After 1867, Republican commitment to larger egalitarian goals, including their national

Klan Act of 1871, which provided the last congressional authorization for the suspension of habeas corpus during the Reconstruction era.[143] Along with the Enforcement Acts passed the year before, the Ku Klux Klan Act was designed to enforce fundamental national rights in the face of Southern state violence and recalcitrance, particularly the Fourteenth Amendment.[144] Here civil, as opposed to previously provided-for criminal remedies, were now available to prosecute Southern resistance in federal courts. Significantly, section 4 of the act allowed President Ulysses S. Grant to suspend habeas corpus in states where armed violence threatened "to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State." Subject to the same provisions as Congress' approval of Lincoln's suspension in 1863, where time periods for detentions, names of defendants, and indictment protections were supervised by federal district courts, the act also limited any suspension to one year from the end of the next congressional session. Grant suspended the writ in nine counties, actions partly credited with helping to crush Klan violence in South Carolina.[145]

Despite successful regime use of habeas in 1871, the Republican Party, and the country as a whole, were moving away from a sustained commitment to Reconstruction's purported goals. The Republican Party had barely managed to keep its electoral numbers on par with the height of its power in 1866 and 1867, and Grant's victory in 1868 was most likely the result of black Republican turnout in the South. Democrats had been gaining seats, both in Congress and in state legislatures, since 1868. Even if the Republican Party had never been as radical as some have suggested it was during the party's most powerful years, the fact remained that by 1870, only less radical policies were viable in Congress.[146] The Enforcement Acts of 1870 tracked this pattern, as the financial and military personnel commitments required to fund and oversee the legislation in Southern states shrank considerably from 1868 to the early 1870s.[147] When, in 1870, Congress reenacted the Civil Rights Act of 1866, it did so under its enforcement power derived from the Fourteenth, not Thirteenth, Amendment.[148] The 1872 election further signaled this drift, as Horace Greeley's Liberal Republican Party secured the support of the Democratic Party for his presidential bid. Many former Radical Republicans supported Greeley, and though he lost by a sizable margin, both parties ran on platforms that emphasized economic concerns, states' rights, and the failures of Reconstruction all at the expense of egalitarian rights.[149] The seemingly strong habeas provision in the 1871 Ku Klux Klan Act must therefore be seen in this increasingly decentralizing environment, limited not only in time (one congressional session)

Yet even as Reconstruction commitments began to wane in the early 1870s, federal court habeas power continued unabated, with the single exception of the Supreme Court's ability to hear habeas cases on appeal from lower federal courts under the 1867 act. Representative of things to come for federal habeas for state prisoners under these changing political circumstances was *Griffin's Case* in 1869, one of the earliest habeas cases to come before the circuit court under the 1867 act.[150] While sitting on the Virginia circuit court, Chief Justice Chase heard a habeas appeal from a "colored man" named Caesar Griffin who had been convicted of murder in a Virginia state court. The judge in the case, Hugh Sheffey, was one of a series of public officials elected to the Virginia bench before the Civil War who joined the Confederacy at the outbreak of the war, only to return to the bench after Appomattox. Griffin was convicted of murder in Sheffey's court. He then petitioned the federal district court for a writ of habeas corpus under the 1867 act, arguing that the newly ratified Fourteenth Amendment's third section, which made Confederate sympathizers ineligible for public office, rendered Griffin's conviction null and void. The district court agreed, and an appeal was taken to Chase's circuit.

Although Griffin was a "colored man," Chase saw "no allegation that the trial was not fairly conducted, or that any discrimination was made against him."[151] Considering the purported integrity of the trial and the uncontested jurisdiction of the state court, to let a duly convicted man go free, argued Chase, would be an injustice, and was certainly not the intention of the 1867 act. Moreover, the third section of the Fourteenth Amendment should not be construed so as to "annul every official act" of the hundreds of men who would be affected by such a wide reading of its scope. If this was to be the intent of the amendment, "it [would] be impossible to measure the evils which such a construction would add to the calamities which have already fallen upon the people of the states."[152]

Although the retreat from Reconstruction could be characterized partly as a diminishing commitment to the use of national power to guarantee racial equality against recalcitrant states, it was certainly not the case that the Republican Party would let this hard-won national institutional power go to waste.[153] As a concerted push for racial equality decreased, the void was filled with the emerging concerns of the Gilded Age. From the Panic of 1873 onward, it became more difficult to support and defend egalitarian interventionist politics in Southern states, let alone in the rest of the country. Anti-Union hostility and rampant fears of socialism and communism put broad activism on the defensive. Continued concern for the supervision of Southern state govern-

in party platforms such as Greeley's Liberal Republican Party that pushed for reconciliation. But increasing calls for state-led economic regulation of the economy to ease unemployment and increase business regulation only made the existing structures of Reconstruction all the more indefensible. As Howard Gillman has demonstrated, the Republican Party then made a concerted effort from the 1870s onward to enforce their new economic nationalism through increased federal court jurisdiction. As federal courts cooperated with Republican Reconstruction policies during the 1860s to thwart Southern state recalcitrance, they would now partner again with the Republican promulgation of Gilded Age economic nationalism that needed a favorably disposed federal bench to resolve problems of state-level intransigence in economic matters.[154]

We can begin to see the role habeas would play in these larger developments not in Mississippi or Georgia, but in California. There, as in other parts of the country, the racial regression resulting from the waning of Reconstruction was only magnified by economic depression. As states began to pass racist legislation in its wake, preexisting legal structures developed during Reconstruction started to create friction within the new post-Reconstruction regime. The ability of lower federal courts to hear habeas state cases under the 1867 Habeas Act quickly became a liability for the regime's new goals. This reality was only compounded in California, where Chinese immigrants were increasingly the victims of racial discrimination that was made worse by the recent economic downturn. The Chinese, however, were in the unique position of benefiting from the rights guarantees of the Burlingame treaty, ratified by Congress in 1868, which became the basis for thousands of habeas cases challenging California's state laws.[155]

Representative of the increasing dissonance created by habeas was *In re Ah Fong,* decided by Justice Field sitting on circuit in 1874. The circuit court struck down a California law that restricted Chinese immigration as violating the Burlingame treaty. The petitioner was denied entry to California because she was declared to be a lewd woman, a status that under the more general police powers of states would normally be found to be within the proper constitutional scope of those powers. Nonetheless, because of the treaty, Field felt bound to overturn the law. Clearly, Field was uncomfortable with his decision, as he lent his sympathies to the state legislature's and people's more "general feeling" against the Chinese, a race that exhibited a "dissimilarity in physical characteristics, in language, in manners, religion and habits" that "will always prevent any possible assimilation of them with our people."[156] Although bound by law, he then recommended that the state's only option would be "recourse . . . to the federal government, where the whole power over this subject lies."[157]

prisoners were increasingly seen as burdensome, both in their sheer volume and, most importantly, in their substantive content. In *Ex parte Bridges,* for example, Justice Bradley, sitting on circuit in Georgia, heard a habeas petition from a former slave who was convicted in a Georgia state court for violating perjury laws in the course of a federal investigation.[158] The question facing the court was whether Georgia could try Bridges for violations of federal law. In Bradley's mind, there was no choice but to grant the habeas petition under the 1867 act because it explicitly allowed for removal to federal courts in cases just like *Bridges.* Bridges was charged by a state court with lying to a federal officer conducting his duties under the Enforcement Acts. Clearly, this was punishable under the laws of the United States, the perjury laws of Georgia notwithstanding. Bridges was charged with lying to United States officials, not Georgia officials. Considering habeas's common-law use to correct decisions by courts without jurisdiction, and the necessary result that his conviction by a Georgia court would then be void, Bradley's decision was not remarkable. Bradley went on to say, "The validity of these acts of Congress [those that treat this type of perjury as a federal offense] is not questioned. It would be a manifest incongruity for one sovereignty to punish a person for an offense committed against the laws of another sovereignty."[159]

Yet Bradley did more than make it explicit that he was troubled by his decision. He also suggested that the 1867 act itself should be changed to show more deference to state court decisions when issues of jurisdiction or overt state court discrimination were not present in the state's decision: "And although it might appear unseemly that a prisoner, after conviction in a state court, should be set at liberty by a single judge on habeas corpus, there seems to be no escape from the law."[160] He made it clear that this present case was not such an instance, but then ended his opinion with the suggestion that Congress repeal the very law that served as the basis for his opinion: "It might, however, be a wise amendment of this law, to provide that in all cases after conviction, the party should be put to his writ of error to the supreme court of the United States."[161]

Soon after, the Supreme Court corrected the problem for itself. In *Virginia v. Rives* (1879), the Court reinterpreted very narrowly the entire class of removal jurisdiction legislation that had been the centerpiece of the Court–Congress partnership throughout Reconstruction. Alleged victims of racial discrimination, such as the defendants in *Rives* who claimed discrimination in the selection of jurors for their trial, would now have to rely on writs of error. Removal legislation was effectively jettisoned and limited to a thin definition of state action.

Before and after it restricted removal case doctrine, the Court also nar-

ern states. In the *Slaughterhouse* cases, the Court seemed to countenance the reconciliation of North and South that had characterized the 1872 election with a dual citizenship reading of the Fourteenth Amendment's privileges and immunities clause.[162] The Fourteenth Amendment, argued Justice Miller, was not intended to make "this court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens."[163] Two years later, in *United States v. Reese* and *United States v. Cruikshank,* the Waite Court moved even further away from a strong commitment of national enforcement against state-level racial discrimination.[164] In *Reese,* a Fifteenth Amendment challenge to alleged voting discrimination brought under the Enforcement Act effectively gutted that act's legitimacy as an enforcement mechanism of the amendment. The rights allegedly violated by the Kentucky registrar who refused to count the votes of a black citizen, argued the Court, were rights that the state, not the federal government, had a duty to protect.[165] Similarly, in *Cruikshank,* differences between state and national citizenship were coupled with distinctions between official state action and the actions of private individuals to prevent federal indictments of whites who violated both the Fourteenth and Fifteenth Amendment rights of blacks.[166]

Rounding out this oft-cited trilogy of cases that increasingly signaled Reconstruction's demise, in the *Civil Rights Cases,* the Court struck down Charles Sumner's last salvo, the Civil Rights Act of 1875.[167] The Court's ruling seemed almost a fait accompli, as the 1875 act was passed during the lame-duck Forty-third Congress after a Democratic victory in the 1874 elections that gave it almost complete control over the House for the next decade. To make it more palatable, the act was also stripped of its two most controversial features: a ban on discrimination in churches and a ban on segregated education.[168] The act's core features—discrimination at inns, places of public amusement, and theaters—were interpreted as purely private actions among private citizens. Congress' power to regulate discriminatory actions in violation of the Thirteenth, Fourteenth, or Fifteenth Amendment was limited solely to state actions or legislation. Justice Bradley suggested that if the act were to be ruled constitutional and Congress could indeed regulate what he thought to be private, as opposed to public, discrimination, it "would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them. . . . In other words, it steps into the domain of local jurisprudence."[169] The rights guaranteed by the Reconstruction amendments were "guaranteed by the constitution against State aggression," and could not "be

ual, unsupported by any such [state] authority, is simply a private wrong."[170] When there was no explicit or demonstrated state action, there was no constitutional justification for national legislation that would seek to regulate it.[171]

To be sure, there was no straight, unbroken line connecting *Slaughterhouse, Cruikshank, Reese,* and the *Civil Rights Cases.* While from 1874 onward the electoral support for Republicans waned and elections became more competitive, support for the party's core principles did not disappear completely. Indeed, many scholars rightly recognize that Reconstruction, albeit in increasingly diminished form, lasted until the 1890s.[172] Others also correctly point out the salient differences among the Chase, Waite, and Fuller Courts in their resolution of the core federalism questions that belie a unified assault on Reconstruction's core values.[173] Two related explanations thus emerge for the doctrinal developments in these cases beyond the now-traditional argument that they completely eviscerated Reconstruction's egalitarian goals. Together, these accounts help to explain habeas's late nineteenth-century changes. The first is that the Court crafted what looked liked thin applications of Reconstruction's goals because those goals were never monolithic in the first place. Intraparty divisions among Republicans during the height of Reconstruction over some of their most fundamental achievements—such as the meaning of the Fourteenth Amendment's privileges and immunities clause—produced multiple accounts of those principles. As a result, the Court had room to craft Fourteenth Amendment jurisprudence with some degree of independence even though it was still largely sympathetic to the Republican regime.[174]

The second, related explanation is that the Court was able to continue to mold Reconstruction ideas well into the 1890s because these core Reconstruction goals were becoming less salient within the party and the country as a whole. Indeed, these goals were often liabilities for Republicans. Increasingly, federal courts could help the Republicans supervise and enforce either Reconstruction's egalitarian goals or the now-pressing goals of the enforcement of national economic development, but not both.[175] This further allowed the Court in the last three decades of the nineteenth century to have significant independence over Reconstruction issues.[176]

THE REPEAL OF THE REPEALER

For the Court to remain an effective partner with the Republican Party on economic issues, however, a critical institutional hurdle had to be overcome. The

under the 1867 Habeas Act from receiving appellate review by the Supreme Court, leaving habeas petitioners access only to lower federal courts. Such cases began to flood federal district and circuit courts, especially the ninth circuit.[177] Aside from the administrative burdens of these cases, the substantive content of most of them, especially those cases involving groups such as the Chinese, were now less pressing because of the increasing racial prejudice of the postwar years, and because of the increasingly dominant preference for national enforcement of economic issues. Without appellate power to revise or correct these cases or, just as importantly, to make new institutional rules for their administration within the federal court system, the Court had to wait for these cases to arrive via writs of error. Otherwise, it would remain a powerless partner with the larger regime on salient habeas issues.

The concerted push by many legal elites for congressional legislation restoring Supreme Court habeas review under the 1867 act was already evident in cases in the 1870s such as *Ex parte Bridges* and *In re Ah Fong,* discussed earlier, where justices riding circuit saw firsthand their potential administrative and political burdens. Beginning in earnest in the early 1880s, states' attorneys general and others pushed for change in what they perceived as a lopsided theory of federalism that now allowed a "single federal judge" to overturn a state conviction on habeas corpus.[178] Legal academics and the American Bar Association also began publishing law review articles that sought to detail this seemingly insulting process.[179]

The most important of these arguments was advanced by Seymour D. Thompson, editor of the *American Law Review.* Thompson argued that the 1867 act's intent had been subverted at the cost of the traditional relationship between the national and state governments. In his report to the committee of the American Bar Association in 1883, reprinted in the *American Law Review* in 1884, Thompson detailed a litany of recent federal habeas corpus cases involving state prisoners. He ultimately concluded, "These cases . . . show that under this act of 1867, the early and long-established idea of keeping the jurisdictions of national and State tribunals distinct and separate . . . is entirely overturned."[180] He then went on to argue that even if the authors of the 1867 act intended a reorientation between national and state tribunals for some cases (that is, newly freed slaves), they never intended the national courts to overturn final state court decisions where proper jurisdiction was arguably present.

Vermont congressman Luke Portland, who was equally troubled by the wide application of federal habeas to state cases, held hearings concerning the

tee's report began with a lengthy historical recitation of the statutory history of the writ from the Judiciary Act of 1789 to the 1833 and 1842 acts. It then characterized the 1867 act as a product of the "late civil war" that was designed only to ensure that blacks would get a fair and impartial trial:

> The overthrow of slavery and the conferring of citizenship upon the colored population were results of the war, and could not be expected to meet favorable conditions by the people of the States mainly affected by these changes. It was felt that these classes could hardly expect to get fair and impartial justice at the hands of local tribunals, and many acts of Congress were passed to extend to them, as far as possible under the Constitution, the protection of the Federal courts. *This act of 1867 was of that class of statutes.* It may be that the danger and necessity of such legislation was [*sic*] overestimated, but that it did exist to some extent was apparent from the condition of things and the ordinary operation of human motives and passions.[182]

The report went on to document how "individual" federal judges (on the district and circuit levels) were able to overturn state decisions single-handedly, effectively giving them final and plenary power over entire state judicial proceedings: "The fact is apparent, that if this jurisdiction is sustained, the final judgments of the highest courts of the States, may be held void and overturned by a single Federal judge of the lowest judicial rank, and from his decision there is no appeal."[183] The recommendation of the committee was to restore the appellate authority of the Supreme Court so it could determine its proper scope and application: "With this right of appeal restored, the true extent of the act of 1867, and the true limits of the jurisdiction of the Federal courts and judges under it, will become defined, and it can then be seen whether further legislation is necessary."[184] As a result of this push, on 3 March 1885, Congress repealed the McCardle repealer, allowing again for Supreme Court appellate review of habeas cases from lower federal courts under the 1867 act.[185]

With appellate power restored, and with an explicit blessing from Congress, the Court was free to set its own standards for habeas in the Gilded Age. The first case to come before the Court on appeal, *Ex parte Royall,* confirmed that the Court would continue to be a partner with the Republican regime.[186] Almost as if the Court were responding directly to the Judiciary Committee's explicit request for advice on how to proceed with habeas statutes, Justice Harlan's decision validated a reading of the 1867 act that was consistent with the withering of Reconstruction. Federal habeas was now limited to a certain class of cases that would not further serve to foster a general and sweeping revision of the relationship between state and federal courts.[187]

the circuit court had the necessary jurisdiction to hear a habeas appeal from someone held under state authority for the violation of state laws. The second was whether the federal courts were compelled to grant the writ. Harlan unequivocally found that both the lower federal courts, and through appeal the Supreme Court, did in fact have the requisite jurisdiction to hear the case. The question was whether federal courts were compelled to hear every habeas case from state prisoners who questioned the legality of their confinement. Relying on notions of comity, Harlan dismissed an expansive reading of the 1867 act and instead opted for one that reaffirmed deference to state courts. He said of the unique federal nature of the Union and of the intent of Congress in passing the 1867 act: "We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States."[188]

Federal courts thus had "discretion" in determining which cases on habeas could be heard. States' rights considerations and notions of "concord," for Harlan, required that those "relations [state and federal] be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." The Court then enumerated two new principles for deciding whether habeas appeals could be brought before a federal tribunal. The first required that appeals in cases from state prisoners first be brought in state courts. No more could habeas appeals be brought on behalf of those held in state custody before the appeal was heard on the state level. The second rule required that habeas petitioners first exhaust all state appellate avenues before even the lowest federal court could entertain the writ. This meant that a case must be fully adjudicated all the way up to a respective state's supreme court and have a disposition. Then—and only then—could the writ be applied for in federal-district court. The Court did recognize that the 1867 act made federal habeas review available for anyone who sought to challenge the constitutionality of his detainment and that federal courts had no choice but to adjudicate those claims. However, the Court now had the ability to determine the "time and mode" of those challenges.[189] Apart from exceptional circumstances, where the Court could—and sometimes did—decide to allow a case to come before it on habeas, state prisoners seeking to challenge the constitutionality of their confinement were now left only to writs of error. This allowed the Court to trim the federal courts' habeas docket at the same time that it allowed the Court to choose habeas cases that it felt merited federal court review. Without the

beas was to be scaled back, the Court would not have had the ability to shape its habeas jurisprudence with such latitude.[190]

The Court continued to sustain its creation of procedural habeas rules that would not interfere with or offend the states.[191] In 1891, *In re Wood* held that state courts could adjudicate matters of national and constitutional law coextensively with federal courts and that habeas appeals (which were already limited by the exhaustion rule) could only be heard if the state courts lacked jurisdiction.[192] This case is poignantly indicative of the late nineteenth-century admixture of race and federalism that informed these new post-Reconstruction rules. Joseph Wood, an African American, was convicted by an all-white jury of murder and sentenced to death. He claimed that criteria for jury selection in the state of New York precluded blacks from serving as jurors. He filed his writ in federal court arguing that his conviction (and, by default, his detention) was unconstitutional. Although the Court had previously ruled that jury discrimination was antithetical to the Constitution and the laws of the United States, it nevertheless held in this case that the constitutionality of New York's jury laws could be adequately determined by the state supreme court.[193] The determination of racial discrimination and civil rights violations was, in Harlan's words, a question "which the [state] trial court was entirely competent to decide, and its determination could not be reviewed by the Circuit Court." Justice Field's concurring opinion is even more indicative of the racial components that went into these habeas rollbacks. Reiterating his dissent in *Neal,* he said:

> there is nothing in the late amendments to the Constitution, the Thirteenth, Fourteenth and Fifteenth, which requires that colored citizens shall be summoned on juries . . . in order to secure to persons of their race justice and equality in the administration of the law; and, further, that the manner in which jurors to serve in the state courts shall be selected, and the qualifications they shall possess, are matters entirely of state regulation.[194]

By the 1890s, then, habeas's role as a potent tool of regime enforcement for recalcitrant Southern states receded into the background as Congress and the federal judiciary deliberately chose to redirect federal judicial power—and habeas power in particular—away from Reconstruction's initial goals and toward new challenges at the turn of the century.

CONCLUSION

Habeas's development during and after the Civil War belies contemporary ac-

ing and after Reconstruction, it was only when both the Court and Congress were in agreement that the writ served that function. The use of the writ in similar cases was therefore not as countermajoritarian as many today imagine. In *Turner,* for example, the use of the writ to free a former slave who was bound to her former master in an apprentice-like arrangement that bordered on slavery was a regime principle that a majority of Republicans—and the country as a whole—could easily tolerate and support. The 1867 Habeas Act was an enforcement tool of the Republican regime that sought to discipline outlier states, not large national majorities. This almost majoritarian use of the writ was soon confirmed in the repealer passed in the wake of the impending *McCardle* decision. The repealer, we must remember, was designed almost exclusively to eliminate Supreme Court jurisdiction specifically for federal prisoners such as McCardle. Federal court habeas access under both the 1789 Judiciary Act and the 1867 act were still available for both state and federal prisoners more generally. This reality hardly lends credence to a portrait of a hostile Congress bent on stripping the Court of its newly granted habeas powers.

The wartime development of the writ should also push us to look for continuities in habeas's development in the immediately preceding periods of normal political development. In *Merryman* especially, Lincoln's seemingly extraordinary actions were as much the products of the Republican Party's extant conceptions of departmentalism as they were of the exigencies of civil war. Lincoln and the Republicans were also aware of the necessity of federal court power in the prosecution of the war and Reconstruction. The precedents for federal court habeas power in particular had in any case already been developed during the Jacksonian period. To be sure, the war necessitated new and unprecedented actions on the part of American political institutions, but at least in the case of habeas, the policies eventually developed—such as indemnity and removal—had their origins in earlier developments before the outbreak of civil war.