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# The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners

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# The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners

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*Federal habeas corpus petitions allow state prisoners to collaterally attack a state court conviction on the ground that the conviction is constitutionally infirm. Whether federal courts should fully review state court determinations of constitutional claims or whether they should be limited to only those instances in which the state forum did not provide an adequate hearing of the federal claims is an issue of some debate. Those engaged in the debate who rely on historical sources to prove their point generally rely on the same body of literature. This Article argues that a large portion of this literature does not address collateral review of state court convictions. In its early stages, habeas corpus petitions were brought in state court by individuals detained by federal authorities for military enlistment. In the state courts, habeas questions concerned whether a court could hear evidence to contradict a detaining authority's petition prior to conviction. Later, in the federal courts, the same issues which existed in the state courts arose, only this time the detainees were federal officers in pursuit of fugitive slaves. The Article concludes that given the history of habeas corpus, debates over the extent of collateral review should remain in the twentieth century.*

> [T]he founders were right all along, but . . . the results are a lot funnier than they intended.
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> MOLLY IVINS, NOTHIN' BUT GOOD TIMES AHEAD xi (1993)

* Professor, Fordham University School of Law. I would like to thank Richard H. Fallon, Jr., Jill E. Fisch, Abner Greene, Robert Kaczorowski, Michael M. Martin, Henry P. Monaghan, Daniel Richman, William Treanor, Lloyd L. Weinreb, and Larry W. Yackle for their helpful comments on earlier versions of this Article. I also wish to thank the Fordham University School of Law for its research grant in support of this project.

Irony is the stuff of history.

Take, for example, the debate over federal habeas corpus relief for state prisoners. Those favoring full review of state court decisions have staked out the moral high ground, proclaiming that every federal right deserves a federal remedy dispensed by a federal forum.[1] They leave to their opponents the dubious honor of championing the so-called "institutional competence model,"[2] a position that advocates limiting federal review to situations in which the state has failed to provide an adequate hearing for the federal claim—and that hardly has the ring of Magna Charta to it. Both sides have skirmished for years over the length of their respective historical pedigrees, with one side suggesting that habeas "relitigation" of state judgments is a novelty known only to the waning days of the twentieth century,[3] while the other claims that common-law habeas courts routinely set aside final judgments from the inception of the republic and before.[4]

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1. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 422 (1963) (opinion of Frankfurter, J.) ("The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right."), *overruled by* Coleman v. Thompson, 501 U.S. 722 (1991); 1 JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 5-24 (1988); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 583 (1982); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 999 n.24 (1985).

2. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 523-28 (1963). According to Professor Ann Woolhandler, who herself is engaged in an effort to "demodel" the habeas corpus debate, "this model is also referred to as a 'corrective process' model, because it assumes that federal habeas should be available only 'if the state itself failed to provide adequate process to correct the constitutional violation.'" Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 577 n.12 (1993) (quoting Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 277 (1988)); *cf.* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970) (arguing that a state prisoner must make a colorable showing of innocence as a prerequisite to federal collateral review of a state criminal conviction).

In fact, the taxonomy of habeas corpus has become a legal discipline in itself. *See, e.g.*, Friedman, *supra*, at 277 (identifying more than two models); Evan Tsen Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U. L.Q. 151, 151-56 (1994); Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 941, 943 (1991) (arguing that Friendly and Bator jointly provided the intellectual basis for recent Supreme Court decisions restricting habeas corpus review); *cf.* Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1146 (1988) (arguing that different approaches to the history of habeas corpus reflect different approaches to federalism).

3. *See, e.g.*, Bator, *supra* note 2, at 505 (observing that federal relitigation of the final decisions of state courts was all but unknown prior to the Supreme Court's 1953 decision in Brown v. Allen, 344 U.S. 443 (1953)).

4. *See, e.g.*, Peller, *supra* note 1, at 612 (arguing that lower federal court decisions revealed habeas corpus as a broad remedy for the vindication of constitutional rights and

Some commentators have pointed out that both parties to this historical debate rely for support on essentially the same limited body of case law.[5] This would be a fine irony if it were absolutely accurate. But, in fact, the institutional competence people quote Supreme Court precedent[6] while the full review people quote lower court precedent[7] and, for the most part, the two pass like the proverbial ships in the night.[8]

The true irony instead comes from a different source—the nature of the early habeas cases themselves. For, if either side had looked closely at the lower court decisions generally thought to establish broad federal review of state criminal judgments,[9] it would have found, not simply that the evidence was more equivocal than advocates have argued—that result might be expected—but, that all the cases were on the *wrong side*. The cases routinely cited in the modern literature as precedent for a full-review approach to habeas corpus before the Civil War arose when the federal government issued writs of habeas corpus to release slaveholders and federal marshals

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values from the inception of the republic). Revisionist histories of habeas corpus include James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 1998-99 (1992) (claiming that habeas corpus existed in parity with direct review and as a substitute for it); Woolhandler, *supra* note 2, at 587-629.

5. *See, e.g.*, Woolhandler, *supra* note 2, at 580.

6. *See* Bator, *supra* note 2, at 463-74.

7. Peller, *supra* note 1, at 612. Peller contends that the true picture of historical habeas practice does not appear in Supreme Court opinions, which were distorted by the Court's lack of appellate jurisdiction, but in the lower court decisions that Bator ignored. It should be noted, however, that Peller's position suffers from a fundamental weakness. Before the late nineteenth century, lower federal courts had nearly the same appellate jurisdiction—or lack thereof—as the Supreme Court in criminal matters. *See, e.g.*, ALFRED CONKLING, A TREATISE ON THE ORGANIZATION, JURISDICTION, AND PRACTICE OF THE COURTS OF THE UNITED STATES 51-71 (1864) ("As to writs of *Habeas Corpus*, it is proper to observe that the principles settled in the decisions ... treating of the appellate jurisdiction of the Supreme Court are applicable also to the Circuit Courts.").

8. Peller explicitly criticizes Bator's historical analysis on the ground that Bator limited his reading to Supreme Court decisions and omitted any discussion of lower federal court precedent. Peller, *supra* note 1, at 612.

9. Historians, legal and otherwise, have certainly considered these cases, but the historical context has largely escaped the legal writers studying the writ of habeas corpus itself. As an example, Robert M. Cover discussed many of these cases in detail in his enormously influential book, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 185-91 (1976). His focus, however, was not on the innovations in habeas practice, but, rather, on the behavior of the judges whose courts were invoked on behalf of the slaveholders. Part of the aim of this Article is to bring together these two separate strands of inquiry.

jailed by state governments for their efforts to recapture the slaveholders' fugitive property.[10] These decisions, now cited for their fidelity to individual rights, overturned official state actions aimed at helping the runaway slaves. Not only that, but the decisions were rendered by northern federal judges, some of whom were opponents of slavery.

Were this not irony enough, the most florid language extolling the value of habeas corpus arose in cases that did not involve review of final state judgments. In fact, many of them did not even review the legality of the detention, for the simple reason that the Lincoln administration already had suspended the privilege of habeas corpus.[11] Even had the writ had been available, most of these rhetorically stirring cases involved petitions by disunionists complaining of executive detentions without trial by the federal government.[12]

As other scholars have noted, habeas corpus is best understood as a dynamic institution, continually expanding, particularly in the nineteenth century.[13] Its growth in America arose from the traditional sources of habeas expansion: the judiciary guarding its own prerogatives and coordinate branches of government jockeying for power.[14] But, unlike the English experience, which largely focused on the contest between the Crown and the rest of the government,[15] the American experience added a new twist: federalism. In that most vexed period in American history, the decades leading up to the Civil War, the writ of habeas corpus served as the stalking horse for the larger issues in the tug of war between the states and the federal government.[16]

In fact, the debate over relitigation is largely miscast. The campaign for extended habeas powers was not fought over collateral

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10. *See infra* Part V.

11. *See infra* Part VI.

12. *See infra* Part VI.

13. Woolhandler, *supra* note 2, at 580 (contending that "[v]iewing habeas corpus in the broader context of judicial review of official action . . . produces a dynamic, rather than static, model of habeas"); *cf.* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 309 (1980) (suggesting that the entire historic tendency of habeas corpus is toward expansion of the writ).

14. *See, e.g.*, 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 223-26 (3d ed. 1926); *Developments in the Law: Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1045-55 (1970).

15. 9 HOLDSWORTH, *supra* note 14, at 227-28.

16. *See, e.g.*, Peller, *supra* note 1, at 616-18.

review of the final decisions of courts of competent jurisdiction; such review did not appear until after the state-federal problems created by the Fugitive Slave Act of 1850.[17] Instead, it was fought out over a more subtle form of disrespect: Whether the habeas court could hear evidence intended to contradict the version of the facts in the detaining authority's answer to the petition, whether that authority be a sheriff, marshal, army officer, or a fugitive slave commissioner. To the antebellum lawyer, this was a significant innovation and a significant assertion of power over another sovereign.

The assertion of jurisdiction to challenge the return began in the state courts as they extended their common-law habeas jurisdiction to federal detainees claiming to be victims of military enlistment fraud. The move to assert jurisdiction gathered momentum as antislavery forces urged greater evidentiary powers in state habeas proceedings in order to test the truth of a slaveholder's claim of title to the person detained. And, it reached the federal courts, first in imitation of the state courts, and then, in the struggle over enforcement of the Fugitive Slave Act of 1850, as a weapon to impose federal policy on recalcitrant free states opposed to the law. It is here, in these federal cases, that the theme of irony emerges at its fullest.

The story played out in the lower courts is a good one, until now unnoticed, and perhaps a little complex. This Article is an effort to tell that story and, in the process, to clear some brush about the history of habeas corpus and American federalism.[18] It is also about irony: No one has exclusive claim to the moral high ground. Not only that, but the moral high ground itself is frequently built on quicksand.

## I. ANTEBELLUM HABEAS CORPUS LAW AND PROCEDURE IN A (BRIEF) NUTSHELL

In the early nineteenth century, if a lawyer had inquired about the workings of habeas corpus in American courts, he would have been

17. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.

18. For example, the received wisdom is that it was not until the passage of the Fourteenth Amendment that the federal government assumed the role of the protector of individual liberties against the states. *See, e.g.*, Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1501 (1987). However, active federal intervention on behalf of individual property rights—against state efforts to regulate those rights—before the Civil War seems, at least, to introduce the possibility of a more nuanced account of the development of federalism. *See* Larry Kramer, Toward a Theory of Federalism, or Back to the Future (preliminary draft on file with author).

told that the Great Writ was the legal mechanism by which a person could test—and seek release from—an allegedly illegal detention, whether public or private.[19] He would also have been told that the federal constitution protected against the suspension of the writ except in times of dire national emergency,[20] that state constitutions contained similar guarantees,[21] that both state[22] and federal courts routinely issued the writ, and that their practice was largely determined by the common law and tradition.[23]

In fact, the term "habeas practice" covers three related questions: to whom did a court's power to issue the writ extend; under what circumstances could a court issue a writ; and what procedures

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19. *See generally* DUKER, *supra* note 13, at 156; *Developments in the Law: Federal Habeas Corpus*, *supra* note 14 (discussing, among other things, the history of habeas corpus). For an example of a federal habeas petition directed at a private custody, see the rather bizarre case of *Ex parte* Des Rochers, 7 F. Cas. 537 (C.C.D. Cal. 1856) (No. 3824) (attempting to obtain federal habeas corpus relief for a judge kidnapped by private persons to prevent him from performing his judicial duties).

20. U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). For further background regarding the suspension clause, see Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605. Mark E. Neely, Jr. points out, citing Milton Cantor, that the writ of habeas corpus is the only common-law process named in the Constitution, an indication of its importance to the Framers. MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES xiv (1991).

21. For a discussion of state constitutional guarantees of the availability of habeas corpus, see Dallin H. Oaks, *Habeas Corpus in the States: 1776-1865*, 32 U. CHI. L. REV. 243, 249-51 (1965). Federal law further assured that the writ would extend to newly acquired territory. *See, e.g.*, Act of June 4, 1812, ch. 95, § 14, 2 Stat. 743, 747 ("The people of the said territory [Missouri] shall always be entitled to ... the benefit of the writ of habeas corpus."); Act of Feb. 20, 1811, ch. 21, § 3, 2 Stat. 641, 642 (Louisiana's government "shall secure to the citizen ... the privilege of the writ of *habeas corpus*, conformably to the provisions of the constitution of the United States."); Northwest Ordinance of 1787, Act of July 23, 1787, § 2, *recodified in* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52 ("The inhabitants of the said territory, shall always be entitled to the benefits of the writ of habeas corpus ....").

22. *See, e.g.*, Oaks, *supra* note 21, at 255.

23. *See, e.g.*, LARRY W. YACKLE, POSTCONVICTION REMEDIES § 19, at 84 (1981) (noting that early federal decisions "steered a conservative course, roughly following the English habeas practice"); Milton Cantor, *The Writ of Habeas Corpus: Early American Origins and Developments*, *in* FREEDOM AND REFORM: ESSAYS IN HONOR OF HENRY STEELE COMMAGER 55-78 (Harold M. Hyman & Leonard W. Levy eds., 1967) (observing that habeas practice was derived from tradition, trial-and-error usage, and compromise arrangements rather than statutory mandates). Benjamin V. Abbott, author of a nineteenth-century treatise, states that the federal habeas corpus acts before 1867 "were almost silent upon *procedure*" and thus "left the courts to follow the common law practice or form one for themselves." 2 BENJAMIN V. ABBOTT, A TREATISE UPON THE UNITED STATES COURTS, AND THEIR PRACTICE 209 (1871).

governed the formal steps in the process of examining the legality of a detention. In the early years of the republic, the answer to the first question depended on whether a state or federal court was involved, but the answers to the second and third were the same, no matter where the petitioner filed the application for a writ.[24]

The reason for the different answer to the "who" of habeas practice rested on the different sources of habeas jurisdiction in the state and federal systems. At the very beginning of the nineteenth century, most state courts continued to draw their authority to issue the writ from their common-law powers which preceded independence.[25] Accordingly, state courts answered all three questions based on the common law. Codification of habeas powers did not become a significant factor in the states until somewhat later in the century.[26] And, as the state courts came to understand their role, the common law told them to issue the writ of habeas corpus to *any* prisoner claiming a colorably illegal detention.[27]

The federal courts, on the other hand, were courts of limited jurisdiction and required legislative authorization in order to exercise habeas jurisdiction.[28] The first of these enabling statutes was the

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24. *See, e.g.*, YACKLE, *supra* note 23, § 16, at 73 (the nature of the federal and state writ was substantially the same).

25. *See, e.g.*, Oaks, *supra* note 21, at 251 (observing that only South Carolina had a habeas corpus act at the time of independence); *see also* Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143, 146 (1952) (stating that all colonial charters were silent about habeas corpus).

26. *See, e.g.*, Oaks, *supra* note 21, at 251-52. Oaks expresses surprise that state lawmakers "apparently had no sense of urgency about enacting habeas corpus legislation." *Id.* at 251. Only South Carolina, Georgia, Massachusetts, New York, Pennsylvania, and Virginia had acts by 1787; Delaware and New Jersey followed in the 1790s. The remaining states straggled in, Maryland in 1809, New Hampshire in 1815, Connecticut in 1821, Rhode Island in 1822, and North Carolina in 1836. With the exception of Connecticut, the acts were modeled on the English Act of 1679, which was so limited that state courts continued to rely on their residual common-law powers. *Id.* at 252-55.

27. Paschal argues that "the Constitution's habeas corpus clause is a directive to all superior courts of record, state as well as federal, to make the habeas privilege routinely available." Paschal, *supra* note 20, at 607. He bases this conclusion, in part, on the fact that the Constitution did not require the creation of the lower federal courts, although by implication, it did require that habeas corpus be made available. *Id.* at 616-17; *cf. Developments in the Law: Federal Habeas Corpus*, *supra* note 14, at 1267 ("A purposive analysis [of the suspension clause], then, supports a constitutional requirement that there be *some* court with habeas jurisdiction over federal prisoners.").

28. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807). In *Bollman*, Chief Justice Marshall held that congressional authorization was necessary to confer habeas jurisdiction

Judiciary Act of 1789,[29] which granted federal judges the power to issue writs of habeas corpus. The Act, however, contained a significant limitation, reflecting the balance of power between state and federal interests at the time: Federal courts could only issue the writ on behalf of persons in jail if they were in federal custody.[30]

Congress supplemented this grant of habeas jurisdiction twice during the antebellum period, each time reaching a little further into state prerogatives. The first extension took place in 1833, during the Nullification Crisis. When South Carolina threatened to imprison federal marshals who enforced the federal "tariff of abominations," Congress granted federal courts the power to issue writs of habeas corpus to persons in state custody because of acts performed pursuant to federal law or federal court process.[31]

Nine years later, in 1842, New York attempted to try a British national for murder, despite diplomatic protests that the homicide took place during hostilities between the United States and Great Britain,

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on the federal courts but that Congress had a constitutional "obligation" to make the writ available. *Id.*

29. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 82.

30. The Judiciary Act of 1789, 1 Stat. 82, provided:

> [E]ither of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

31. The Force Act, Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632, 634-35, provided in pertinent part:

> That either of the justices of the Supreme Court, or a judge of any district court of the United States, in addition to the authority already conferred by law, shall have the power to grant writs of habeas corpus in all cases of a prisoner or prisoners, in jail or confinement, where he or they shall be committed or confined on, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof, any thing in any act of Congress to the contrary notwithstanding. And if any person or persons to whom such writ of habeas corpus may be directed, shall refuse to obey the same, or shall neglect or refuse to make return, or shall make a false return thereto, in addition to the remedies already given by law, he or they shall be deemed and taken to be guilty of a misdemeanor, and shall, on conviction before any court of competent jurisdiction, be punished by fine, not exceeding one thousand dollars, and by imprisonment, not exceeding six months, or by either, according to the nature and aggravation of the case.

and that, therefore, the trial violated the law of nations.[32] In response, Congress again extended federal habeas jurisdiction. This time, Congress granted federal courts the power to issue the writ of habeas corpus to another group of state prisoners: foreign nationals who claimed that their incarceration was the result of actions performed under the authority of a foreign nation and governed by international law.[33] The first federal habeas act reflected the importance of state power at the time of the framing; each successive act extended national power over the states in order to protect a necessary federal function from state encroachments.[34]

If the preceding discussion begins to answer the "who" of habeas law, the "what" and "how" are a bit harder to pin down. In the Supreme Court's leading—and profoundly opaque—statement regarding the habeas corpus provisions of the Judiciary Act of 1789, Chief Justice Marshall held that, except for the limitation to federal

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32. People v. McCleod, 25 Wend. 483 (N.Y. 1841); 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 98 (1947). McCleod crossed the Niagara River at night with an armed band and destroyed the steamboat *Caroline*, moored on the American side. An American citizen was killed in the incident. New York courts rejected McCleod's claim that his acts were done under the authority of the Canadian—that is, British—government. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 310 n.*a* (1844).

33. Act of Aug. 29, 1842, ch. 257, 5 Stat. 539, 539. This act gives to the justices of the Supreme Court and the district judges the power to:

> grant writs of habeas corpus in all cases of any prisoner or prisoners in jail or confinement, where he, she, or they, being subjects or citizens of a foreign State, and domiciled therein, shall be committed or confined, or in custody, under or by any authority or law, or process founded thereon, of the United States, or of any one of them, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, or order, or sanction, of any foreign State or Sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof.

34. Most modern commentators assume that the 1833 and 1842 acts did not enlarge the types of custody embraced by the writ, but simply extended existing federal practice to a new group, a limited class of persons in state custody. *E.g.*, Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 659 (1948). Case law, discussed in Part V below, does not bear out this view.

It should also be noted that not until 1867 did federal courts receive the power to grant habeas to state prisoners "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." Act of Feb. 5, 1867, ch. 28, 1 Stat. 385, 385. *But see* Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 37 (1965) (arguing that the 1867 Act was solely intended to be an enforcement device for the Thirteenth Amendment).

prisoners, the writ was governed by the common law.[35] This appeared to place state and federal practice on an equal footing, but it still left open the question of exactly what the common law said. The answer to that question is further complicated by the fact that practice was relatively fluid, varying in details from state to state and court to court. Thus, a broad outline of common-law practice is all that can be fairly given.

According to a standard antebellum reference work,[36] in criminal matters, federal habeas corpus jurisdiction under the 1789 Act—paralleling common-law and state practice—extended only to pretrial detentions.[37] Federal courts would not issue the writ to a prisoner already convicted or serving a sentence imposed by a court of competent jurisdiction. The reason generally given for this limitation was that, at the time, federal courts did not enjoy appellate powers in criminal cases.[38] But it is also clear that this restriction preserved English practice under the Habeas Corpus Act of 1679,[39] which had, in turn, worked its way into colonial courts. As a matter of fact, the issue of postjudgment remedies was unlikely to have arisen because

35. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93-95 (1807); *see Ex parte* Dorr, 44 U.S. (3 How.) 103, 104-05 (1845).

36. ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT: WITH A VIEW OF THE LAW OF EXTRADITION OF FUGITIVES (1858). Hurd's testimony on this point is all the more important because he was an antislavery activist whose political agenda dictated an extremely expansive reading of precedents governing the writ.

37. *Id.* at 338; *see also* YACKLE, *supra* note 23, at 84-85 ("The writ issued in behalf of prisoners attacking executive detention, but generally was not available to challenge detention by court order *after* conviction. The only exception was in the case of conviction by a court that lacked jurisdiction."); Oaks, *supra* note 21, at 262-63 (authorities compiled therein).

38. *E.g.*, CONKLING, *supra* note 7, at 35, 85.

39. 31 Car. 2, ch. 2 (1679). That Act, passed in reaction to Crown and judicial abuses of the common-law writ, contained a variety of procedural reforms. Its provisions, however, applied only to persons detained for criminal matters, and even as to those, its benefits were not available to persons committed to prison for felonies or treason or "to persons convict or in execution by legal process." *Id.* § 3. These persons had their remedy, if any, in the surviving common-law writ of habeas corpus. WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS 31 (2d ed. 1893). But there is no evidence that the scope of the writ was any greater in criminal cases under common-law practice in the United States. *E.g.*, Oaks, *supra* note 21, at 262. The 1679 Act maintained the common-law practice that the habeas court could not go behind a facially sufficient return. 9 HOLDSWORTH, *supra* note 14, at 119.

incarceration was not routinely imposed as a means of postconviction punishment for criminal acts until the nineteenth century.[40]

The key to understanding the practical workings of this limitation on habeas relief in criminal cases rests in the phrase "court of competent jurisdiction." Although a writ was unavailable to challenge ordinary errors in the trial or sentencing process, it could be used to challenge errors that, if corrected, would deprive the trial or sentencing court of jurisdiction. For example, if a court martial, a body whose jurisdiction extended only to military personnel, tried and sentenced a civilian, the prisoner could challenge his detention in a habeas proceeding by claiming the court lacked jurisdiction over him. The invitation to creative advocacy was obvious: Lawyers attempted to convince the court that every error or defect was jurisdictional in nature. This, in turn, led to a great deal of what modern readers find to be fairly obscure talk about void and voidable judgments. To translate into modern terms, if a judgment was beyond the court's jurisdiction, it was void and could be challenged collaterally in habeas corpus; if the error did not go to jurisdiction, the judgment was merely voidable and the prisoner was limited to appellate remedies, if any existed.[41]

The "how"—the procedures governing habeas corpus applications—followed a general pattern inherited from English practice.[42] The detainee, known as the "petitioner," or another person acting on the prisoner's behalf, generally called the "relator,"[43] presented a petition to the court in the form of an affidavit or other sworn document demonstrating a prima facie case of illegal detention. If satisfied by the showing, and convinced that this was a situation in

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40. *See, e.g.*, J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 416-24 (2d ed. 1979); George Fisher, *The Birth of the Prison Retold*, 104 YALE L.J. 1235, 1239 (1995). Before the 1830s, conviction of a crime ordinarily ended incarceration in the United States and punishment was largely noncustodial in nature. *See, e.g.*, DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 57-109 (1971).

41. *E.g.*, Johnson v. United States, 13 F. Cas. 867, 868 (C.C.D. Mich. 1842) (No. 7418), discussed *infra* note 95.

42. The following account of habeas procedure is largely drawn from HURD, *supra* note 36, at 211-213, 225, 231, 239, 243-62.

43. The "relator" is an informer or the person upon whose information a writ is issued and who stands in the position of the plaintiff in a proceeding. BLACK'S LAW DICTIONARY 1289 (6th ed. 1990).

which it had jurisdiction to act,[44] the court would then issue a writ of habeas corpus directed to the person with custody of the petitioner. The writ itself simply commanded the custodian to bring his charge before the judicial authority ("habeas corpus" roughly translates as "we want to have the body here in our courtroom"[45]) and to state the reasons that the petitioner was being held.[46]

The custodian set forth the reasons for the detention in a document called the "return." The return was subject to a number of formal requirements: it had to display, among other things, the time and cause of the prisoner's "caption," the cause of detention, and whether the custodian would produce the detainee before the court or provide a good excuse for failing to do so.[47] In cases of arrest on judicial process, the warrant, and frequently affidavits in support of the government's version of the facts, were also attached to the jailer's return.[48]

The habeas court then was able to hold a hearing to consider the adequacy of the return.[49] The focus of the hearing was, for obvious reasons, the custodian's justification for continuing to detain the petitioner.[50] If the reasons set forth by the custodian were not legally sufficient to justify the restraint, the court would order the prisoner released, or, if circumstances warranted, admitted to bail instead.[51]

But, at least in common-law practice as Americans inherited it from England,[52] courts were bound by the version of the facts stated in

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44. HURD, *supra* note 36, at 225. For example, if a federal court found that the prisoner was in state custody, it would refuse to issue the writ on the ground that it lacked jurisdiction to act.

45. *Id.* at 232.

46. *Id.*

47. *Id.* at 239.

48. *Id.*

49. *Id.*

50. *Id.* Courts also considered the adequacy of the other components of the return, such as the cause for caption (the modern equivalent would be probable cause to arrest) or the propriety of the custodian's refusal to produce the prisoner. *Id.* at 256, 303. According to Hurd, courts tended to pay little attention to the former, but were skeptical of the latter and would take evidence on the validity of the proffered excuse if necessary. *Id.* at 243-62.

51. *Id.* at 271-72. Hurd stressed that at common law, habeas corpus was not a means of avoiding trial on the merits before a jury, but rather a remedy to obtain speedy bail before the trial of bailable offenses. *Id.* at 271-77; *cf.* United States v. Lawrence, 26 F. Cas. 887 (C.C.D.C. 1835) (No. 15,577) (refusing to grant a writ of habeas corpus to admit to bail a petitioner detained for assault on President Andrew Jackson so that the petitioner might demonstrate his mental incapacity and the court might discharge him to the proper restraint).

52. *E.g.*, Darnel's Case, 3 Cobbett's St. Tr. 1, 1-2 (K.B. 1627).

the return and were unable to accept extrinsic evidence to controvert the jailer's response.[53] The judgment of a court of competent jurisdiction, a facially sufficient arrest warrant showing probable cause, and an affidavit swearing that the party held was a slave—all these legally justified the restraint and were not subject to any but the most limited challenges. The few permissible challenges were analogous to the modern-day affirmative defense, for the prisoner was allowed to "confess and avoid" the facts stated in the return.[54] For example, if a return showed that a prisoner was legally detained on civil process, he might, by affidavit, show that he was privileged from arrest in some way.[55]

The reasons for this rule of finality are not entirely clear, although in stressing the limited fact-finding capabilities of the court, they may well reflect the appellate aspect of habeas corpus. The courts' refusal to accept direct challenges to sworn statements of coordinate authorities may also demonstrate respect for the competence of those authorities within its own sphere. In any event, the rule of evidentiary finality began to change both in England[56] and the United States during the early decades of the nineteenth century, as courts began to assume greater fact-finding powers in habeas proceedings. *The American Law Register*, writing in 1856, summarized the developments of the preceding four decades this way:

> On general principles, and by common law, the return was absolutely conclusive, could not be in any way controverted or pleaded against, and the relator was left to his action for a false return; this strict rule, however, had some relaxations, parties being allowed to confess and avoid the return, though not to controvert it; and the courts refusing to consider themselves bound by a manifestly false return though as to what should be the test of falsehood in a return, there was not perfect agreement.
>
> The inconvenience of the doctrine became so great as to require and obtain the interposition of the legislature both in England, and probably, all of the United States; and under the provisions of the

53. *See, e.g.*, HURD, *supra* note 36, at 263-77.

54. *Id.* at 270.

55. *Id.*

56. In 1816, by statute, Parliament gave English courts the power to test the validity of the return. 56 Geo. 3, ch. 100 (1816).

> statutes so enacted, the truth of the facts stated in the return may, generally, be controverted and investigated.[57]

The first half of this Article describes the erosion of the rule of evidentiary finality in the early decades of the nineteenth century under the pressure of military abuses, a development that took place first in the state courts and then in the federal system.[58] In admitting challenges to the truthfulness of a detaining authority, courts not only found themselves possessed of enhanced powers, they also participated in a lowering of the barriers between previously separate repositories of power in society. In that way, the change in the treatment of the return paved the way for the irony that forms the subject of the second half of this Article. The growth of habeas evidentiary powers prepared the federal judiciary to overturn final judgments of state courts in the interest of federal supremacy as embodied in the habeas provisions of the 1833 Force Act.[59] The federal courts, thus, laid the groundwork for federal collateral review of state criminal convictions to protect federal rights in cases in which the federal rights enforced were those of slaveholders in their human property, an irony as profound as any in American history.

## II. THE ENLISTMENT CASES: STATE COURTS EXPAND THEIR POWERS OF INQUIRY IN HABEAS CORPUS

The serious expansion of habeas corpus in the United States can be said to begin with the military build-up preceding the War of

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57. *Remarks on the Writ of Habeas Corpus ad Subjiciendum and the Practice Connected Therewith, in* 4 THE AMERICAN LAW REGISTER 257, 268-70 & 268 n.1 (1856) (citations omitted). The same authority continued, describing developments by mid-century:

> The conclusiveness of the judgment or sentence of a court or officer of competent jurisdiction is, however, in no way affected by opening the questions of fact to investigation; the rule, it is submitted, being that while all the facts, and probably the law, passed upon or decided by the judgment or sentence in question are forever and conclusively put to rest thereby, except under process in the nature of appeal all other facts alleged in the return, and indeed the *existence* of that judgment or sentence, are fully open to contradiction and disproof.

*Id.* at 269.

58. *See, e.g.*, HURD, *supra* note 36, at 283-92 (compiling state statutory authority and case law permitting courts to go behind the return and asserting that, by the mid-nineteenth century, a number of states explicitly permitted their courts to inquire into the veracity of the return).

59. Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 634.

1812.[60] The federal government paid bounties to enlistment brokers for each new recruit secured. Predictably, the number of fraudulently induced enlistments was quite high. When the new recruits came to their senses—or their parents or guardians located them—they petitioned for habeas corpus on the ground that they were wrongfully detained by the military authorities.[61]

These petitions primarily came before the state courts. In part, this forum choice seems to reflect the obvious: There were more state than federal courts and state courts were more geographically convenient. But, it is also tempting to speculate that petitioners believed themselves more likely to obtain a sympathetic hearing for their claims in their nearby state courts than in federal courts which were, after all, agents of the detaining government.[62]

The complicating issue was whether, in the newly established federal system, state courts had the authority to issue writs of habeas corpus to federal officers and, more important, to order them to release

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60. In 1807, tensions from French and British efforts to control shipping during the Napoleonic Wars reached a critical level. The British navy boarded the United States frigate, *Chesapeake*, fired three broadsides into her when her captain refused to permit a search, and then impressed three American sailors and one British deserter into the Royal navy. Thereafter, from 1807 to 1809, the American government attempted to enforce an embargo on foreign trade in order to bring the English government to terms. SAMUEL ELIOT MORISON ET AL., A CONCISE HISTORY OF THE AMERICAN REPUBLIC 156-59 (2d. ed. 1983).

61. The majority of enlistment cases went unreported so that the issue—and fraudulent enlistment—was more widespread than the frequency of published cases indicates. *E.g.*, Sims's Case, 61 Mass. (7 Cush.) 285, 309 (1851) (noting that issuance of habeas corpus "is constantly done, in cases of soldiers and sailors, held by military and naval officers, under enlistments complained of as illegal and void"); *cf. In re* Reynolds, 20 F. Cas. 592, 595 (N.D.N.Y. 1867) (No. 11,721) ("During my own service as judge in a state court, I exercised the power of discharging minors held under invalid enlistments in repeated instances.... In most of these instances not even a newspaper notice of the case was ever published."). Although these cases are a little late to serve as direct evidence of underreporting during the War of 1812, there is no reason to assume that the dynamic changed during the antebellum period.

62. Supporting this suggestion that state residents tended to favor their own courts is the fact that one of the few early federal enlistment cases, Wilson v. Izard, 30 F. Cas. 131 (C.C.D.N.Y. 1815) (No. 17,810), involved English nationals who had no home court to petition. The English nationals had enrolled in the United States army for the purposes of defending New York. They unsuccessfully argued that they were entitled to discharge from the army on the grounds that (1) they were enemy aliens, (2) they had enlisted to defend a particular place, and (3) they had enlisted to serve under a particular officer who no longer commanded them. American courts did not, in practice, draw careful or explicit distinctions between executive and judicial detentions, so that patterns initially established in the review of executive detentions spilled over into review of judicial detentions. *See* Woolhandler, *supra* note 2, at 590-93.

persons in federal custody.[63] At the very start of the military build-up, state courts were deferential to federal prerogatives and generally found that they lacked jurisdiction to interfere in what were essentially federal criminal offenses of enlistment fraud.[64] Thus, in 1812, New York's Chancellor Kent, faced with a petition involving enlistment abuse, reluctantly declined to act. He characterized the difficulty as a lack of state-court jurisdiction over a federal matter: "If the soldier, in the present case, be detained against his will, knowing him to be an infant, or if, though an adult, he has been compelled to enlist, by *duress*, or violence, it is a public offence, but an offence of which this court cannot take cognisance."[65] Indeed, even if a state court had issued the writ on behalf of a federal detainee, it was still bound to accept the federal officers' response as conclusive on the legality of the custody.[66]

As the abuses mounted, however, state courts overcame their jurisdictional—and, subsequently, their evidentiary—reservations. For example, no less an authority than Chancellor Kent reversed his position on the jurisdictional issue within the space of a year. In the case *In re Ferguson*, Kent's jurisdictional misgivings had caused the New York court to refrain from issuing the writ on behalf of the enlistee, although the other justices had not voted with him.[67] One year later, in *In re Stacy*, Kent changed his mind and wrote an opinion that freed an individual held by federal military authorities for treason.[68]

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63. *See supra* notes 24-26 and accompanying text.

64. *E.g.*, *In re* Ferguson, 9 Johns. 239, 240 (N.Y. Sup. Ct. 1812). In *Ferguson*, Chancellor Kent discussed the case of Emmanuel Roberts, 2 Hall's Law J. 192 (Md. 1809), observing that

> *habeas corpus* was awarded ... upon *affidavit* that the person had been seized and forcibly carried on board of a public vessel, belonging to the *United States*, then lying in the harbor of *Baltimore*, and where he was detained. By the return of the writ, it appeared that *Roberts* had voluntarily enlisted in the naval service of the *United States*; and the court declared it to be a proceeding under the authority of the *United States*, and that they had no right to interfere, although it was alleged, that the party was only sixteen years of age and was drunk when enlisted.

*Ferguson*, 9 Johns. at 239-40.

65. *Id.* at 240.

66. *Id.*

67. *Id.* at 239-42.

68. 10 Johns. 328 (N.Y. Sup. Ct. 1813).

Although Kent's decision in *Stacy* was based on a finding that the charge was not on oath and the military court lacked authority to try the offense—a lack of jurisdiction in the court martial—the case established that state courts could, indeed, reach out to federal prisoners and command federal officers to obey state-court process. The Chancellor's revised view that state courts could issue the writ to federal detainees found its way into his enormously influential *Commentaries on American Law* and established itself among American courts.[69]

The state judiciary's assertion of authority to release federal prisoners weighed powerfully in the ongoing tug of war between state and federal spheres of authority. In order to make that assertion meaningful, however, state judges had to expand the issues that could be tried in the habeas proceeding. As discussed earlier, under the received common-law rule, a prisoner could not introduce any evidence to contradict the version of the facts in the return. Thus, the military offered a conclusive and sufficient return to a petition for habeas corpus on behalf of a soldier by showing that he was held under a regular enlistment. The habeas court could not challenge the statement, much less consider additional evidence, to decide whether the detention was, in fact, legal.

Widespread enlistment fraud, however, made courts skeptical of returns presented by federal officials. In England, by the middle of the eighteenth century, some judges had begun to suggest that they had the right to disregard an openly and manifestly false return, although as a matter of actual practice, they rarely exercised the power.[70] It seems as if, faced with patent abuse of citizen rights, American state courts came to the same conclusion; they began to engage in extensive fact-finding in military cases in aid of their underlying habeas jurisdiction

69. Despite the obvious differences, Kent described *Stacy* as "a similar case" to *Ferguson* in his *Commentaries on American Law*, and wrote approvingly of state courts issuing writs of habeas corpus on behalf of federal detainees. KENT, *supra* note 32, at 400. Thereafter, the practice seems to have been unanimously established in the state courts. *Id.* The New York Supreme Court later unanimously affirmed its right to discharge a minor who had enlisted in the army without parental consent by pretending that he was twenty-one. *In re* Carlton, 7 Cow. 471, 471-72 (N.Y. Sup. Ct. 1827); *cf. In re* Reynolds, 20 F. Cas. 592, 595 (N.D.N.Y. 1867) (No. 11,721) (stating that, "During my own service as judge in a state court, I exercised the power of discharging minors held under invalid enlistments in repeated instances, and without the jurisdiction being questioned; and I well know that the same authority was frequently exercised by other state courts and judges.").

70. HURD, *supra* note 36, at 264-66.

to reach illegal detentions.[71] State-court refusal to accept the statements of federal officers at face value, in turn, posed a significant challenge to federal powers.[72] Although the early cases are scattered and underreported, the pattern that emerges supports this reading.

Take, for example, a pair of unrelated cases heard by Massachusetts state courts in 1814, at the height of hostilities with the British. The first, *Commonwealth v. Cushing*, involved William Bull, who had enlisted and then deserted the army.[73] Bull was captured and brought before a general court martial, where he admitted his guilt.[74] While in custody under sentence of the military court, Bull petitioned for a state writ of habeas corpus. The Massachusetts court granted the writ and subsequently discharged Bull after finding that his enlistment was void because he was under age when he joined the army.[75] In doing so, the court narrowly construed the federal enlistment statute, holding that minors without guardians were not subject to enlistment at all and that the resulting contract was, at the least, voidable at the minor's request.[76]

The court's jurisdictional reasoning is not articulated. Nowhere does the court justify its authority to discharge a federal detainee; rather, it simply listed a series of cases at the end of the opinion, including *Ferguson* and *In re Roberts*, both of which had actually denied discharge to an enlistee on jurisdictional grounds. Perhaps the key to the decision is its citation to *Martin v. Hunter's Lessee*,[77] a case that considered the respective spheres of authority of state and federal

71. The courts did so on the basis of their inherent common-law powers. Legislation formally empowering courts to scrutinize the return in evidentiary hearings did not generally appear until later in the century. *See, e.g., id.* at 285.

72. *See, e.g., In re* Roberts, 2 Hall's Law J. 192 (Md. 1809). In *In re Roberts*, the state court issued the writ but held it had no right to interfere once the federal officers presented a return stating that Roberts had voluntarily joined the navy, even though Roberts presented an affidavit swearing that he had been underage and drunk when he enlisted. *See In re* Ferguson, 9 Johns. 239, 239-40 (N.Y. Sup. Ct. 1812) (discussing *In re Roberts*).

73. 11 Mass. 67, 67 (1814).

74. An extract of the record of the court martial was appended to the return presented by General Cushing. *Id.*

75. *Id.* at 71.

76. *Id.*

77. 14 U.S. (1 Wheat.) 304 (1816). The citation to *Martin* was added after the Court handed down the actual decision in *Cushing*, while *Cushing* was being prepared for publication, because *Martin* was decided two years after *Cushing*. This enhances its significance for understanding the basis of the decision.

courts and established that both were authoritative interpreters of federal law.

As to the underlying merits of the petition, the Massachusetts court apparently found that the military court lacked jurisdiction to try Bull because, due to the invalid enlistment, he remained a civilian.[78] The reasoning of *Cushing* raises a number of interesting points. First, in order to make this finding, the Massachusetts court accepted Bull's affidavit avowing that he was a minor when he enlisted. The affidavit thus contradicted the return in suggesting that the enlistment was invalid and was contrary to both factual and legal matters already determined by the federal court martial. Second, the Massachusetts court implicitly asserted its authority to reconsider the jurisdiction of a federal tribunal, albeit one of limited jurisdiction, finding that the military court was not the conclusive arbiter of its own jurisdiction. This, too, was a significant assertion of state authority over federal interests.

In the second case, *Commonwealth v. Harrison*, the Massachusetts court granted a writ of habeas corpus on behalf of a master whose minor apprentice—a foreign national—had enlisted in the army without the master's consent.[79] In *Harrison*, government counsel relied on *Ferguson* and argued that the state court was without jurisdiction to consider a petition on behalf of a federal prisoner.[80] The Massachusetts court simply brushed the objection aside, baldly asserting, "This Court has authority—and it will not shun the exercise of it on proper occasions—to inquire into the circumstances under which any person brought before them by writ of *habeas corpus* is confined or restrained of his liberty."[81]

The court flatly held that federal laws prohibited the enlistment of minors into the army without the consent of parents or guardians; a foreign minor was within the prohibition; the enlistment was therefore

78. Opinion differed whether a wrongful enlistment was a good defense to desertion. For example, in *In re Reynolds*, the court stated, "'There would be an end of all safety if a minor could insinuate himself into an army, and after having perhaps jeoparded [*sic*] its very existence, by betraying its secrets to the enemy, escape military punishment by claiming . . . infancy.'" 20 F. Cas. 592, 609 (N.D.N.Y. 1867) (No. 11,721) (quoting Commonwealth v. Gamble, 11 Serg. & Rawle 93 (Pa. 1824)). *Cf.* Commonwealth v. Robinson, 1 Serg. & Rawle 353, 355 (Pa. 1815) (holding that there was no restraint reachable by habeas corpus when the minor enlistee affirmed that he wished to remain in the army).

79. 11 Mass. 63, 66 (1814).

80. *Id.* at 63.

81. *Id.* at 65.

"unjustifiable" and "void"; and the government "has no authority to detain" the minor.[82] The disputed factual issue in the case was whether the detainee was actually a minor, since he had sworn that he was twenty-one in his enlistment papers. To resolve this, the court held a plenary hearing, and as a result of its own fact finding, found the apprentice to be visibly underage.[83] In accepting evidence outside the facially sufficient return, the Massachusetts court placed its distaste for federal abuses ahead of the received limitations on its habeas powers.

By the late 1840s, the United States was again at war,[84] and the expansionary dynamic associated with wartime habeas corpus was again triggered. There is limited, but suggestive, evidence that faced with military abuses, state courts even reconsidered the final decisions of other state courts within their own system, eroding the strong rule against challenging the final decision of a court of competent jurisdiction. Thus, in a Pennsylvania case, *Commonwealth ex rel. Webster v. Fox*, which involved the military enlistment of a minor without parental consent, the Pennsylvania Supreme Court re-examined the final decision of a lower Pennsylvania court of apparently competent jurisdiction.[85] The minor enlisted, deserted, and then surrendered. A Pennsylvania Court of Common Pleas found him subject to penalties for desertion.[86] His father then petitioned the Pennsylvania Supreme Court for a writ of habeas corpus.

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82. *Id.*

83. *Id.* The detainee, George Ribkin, was an apprentice seaman on a Russian vessel anchored in Boston harbor. He enlisted in the United States army under an assumed name, stating that he was twenty-one. The court rejected the live testimony of the master on the grounds that he was the applicant, but decided the case on other proof presented to it, as well as on the demeanor evidence of Ribkin himself, who was obviously underage. *Id.* at 64; *cf.* Commonwealth v. Downes, 41 Mass. (24 Pick.) 227, 232 (1836) (ordering that a minor be discharged from the navy and restored to the custody of his guardian).

84. Following a protracted period of diplomatic maneuvering, the United States went to war with Mexico in 1846. The war ended with the Treaty of Guadalupe Hidalgo, signed early in 1848, paving the way for the annexation of California. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 47-77 (1988) (discussing the significance of the Mexican War in bringing on the Civil War); MORISON ET AL., *supra* note 60, at 243-44.

85. 7 Barr. 336, 339 (Pa. 1847).

86. *Id.* at 336 ("The return stated, that the prisoner had enlisted in the army of the United States, had deserted, and surrendered himself; and the matter had been decided by the Court of Common Pleas. It was proved that the prisoner was the minor son of the relator, who had never assented to the enlistment."). Nowhere does the record indicate why a Pennsylvania state court was engaged in deciding whether a federal prisoner was liable for desertion, although that may provide an alternative unarticulated explanation for the

Based on its own fact-finding hearing, the Pennsylvania Supreme Court held the enlistment void under federal law, therefore finding the desertion immaterial and the restraint unauthorized.[87] In issuing its decision, the state court ignored the earlier inconsistent Common Pleas decision, although counsel had argued that the lower court decision was binding and final.[88] Instead, the Pennsylvania Supreme Court announced,

> This is in accordance with the principles of the common law, by the provisions of which the writ of *habeas corpus ad subjiciendum* is the prerogative of the citizen; the safeguard of his person, and the security of liberty—no matter where or how the chains of his captivity were forged—the power of the judiciary in this state is adequate to crumble them to dust, if an individual is deprived of his liberty contrary to the law of the land.[89]

The court thus construed its common-law habeas jurisdiction as entailing all necessary powers to reach any illegal detention whatsoever, whether state or federal, whether already decided or not. The language is remarkably strong—it suggests that the common-law writ was a check on government power, tapping into an almost mythic conception of citizen liberties embodied in the phrase "law of the land."[90]

*Webster* may well be a sport, decided during an unpopular war,[91] at a time when sentiment against the federal government ran high. On the other hand, it illustrates the potent expansive force of habeas

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Supreme Court's decision. That is to say, the Court of Common Pleas may have lacked jurisdiction over the offense. It is also possible that the Common Pleas's decision was based on a petition for habeas corpus, in which case ordinary rules of res judicata would not apply. If that were the case, however, one might expect the court simply to have said so.

87. *Id.* at 339.

88. The reporter's note shows counsel arguing that "[t]he previous hearing should have been considered binding; since all the courts have equal jurisdiction, and no appeal is given...." *Id.* at 337. The Pennsylvania Supreme Court, however, did not discuss this argument at all.

89. *Id.* at 338.

90. It is suggestive that such language appears at a time when the so-called higher law doctrine was beginning to circulate among antislavery activists. *See, e.g.*, WILLIAM HOSMER, THE HIGHER LAW IN ITS RELATION TO CIVIL GOVERNMENT: WITH PARTICULAR REFERENCE TO SLAVERY AND THE FUGITIVE SLAVE LAW v-vi (1852). Certainly, there is an escalation in rhetoric as the successive sectional crises and resistance to territorial expansion took a toll on ordinary legal discourse.

91. The war with Mexico was extremely unpopular outside the Mississippi Valley. The Whigs opposed the war and antislavery people generally viewed it as part of the slave power's expansionist efforts. *See, e.g.*, HENRY D. THOREAU, CIVIL DISOBEDIENCE (1847).

corpus when judges took seriously the writ's power to reach illegal detentions, no matter what the detaining authority. By mid-century, armed with this understanding of their prerogatives, state habeas courts were accustomed to issuing the writ to federal prisoners and to taking facts that contradicted the military's return in order to determine the legality of a petitioner's enlistment.[92] The next step in this story shows the pattern of enhanced evidentiary powers beginning to spill over into the federal courts, as they too began to erode the traditional limitations on habeas procedure in aid of their underlying jurisdiction.[93]

## III. FEDERAL HABEAS CORPUS UNDER THE JUDICIARY ACT OF 1789

Until 1850, it appears that all reported federal habeas cases arose under the habeas provision of the Judiciary Act of 1789.[94] As a result, federal habeas relief was restricted to federal detainees and was subject to the traditional common-law limitations. In particular, courts would not entertain petitions to reconsider the final decision of a court of competent jurisdiction.[95] At the same time, however, the traditional

92. In one mid-century decision on behalf of a father challenging the enlistment of his son, the court took evidence that the son had enlisted at Berwick, Maine, while underage and was subsequently stationed in New York. State v. Dimmick, 12 N.H. 194, 195 (1841). The petitioner argued that the enlistment was void and therefore incapable of ratification, but the court found that the son had ratified the contract by staying in the service for more than a year after he came of age, and accordingly, was not entitled to discharge. *Id.* at 199-200; *see* State v. Brearly, 5 N.J.L. 653, 662 (1819). Similar issues arose in cases involving the question of whether a master had the right to continued custody of a minor apprentice. Commonwealth v. Hamilton, 6 Mass. 273, 273 (1810); *In re* M'Dowle, 8 Johns. 328, 328 (N.Y. Sup. Ct. 1811).

93. *See, e.g.*, *In re* Keeler, 14 F. Cas. 173 (D. Ark. 1843) (No. 7637). This was a petition by a father on behalf of a minor son enlisted in the army. The court first held that, under the 1789 Act, it must look to the common law to ascertain the substantive content of habeas corpus. *Id.* at 174. The court then declared, "It is in the nature of a writ of error to examine the legality of the commitment." *Id.* Since underage enlistment was illegal, the court proceeded to determine the facts underlying the parental claim. *Id.*

94. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

95. *E.g.*, Johnson v. United States, 13 F. Cas. 867, 868 (C.C.D. Mich. 1842) (No. 7418). In *Johnson*, the petitioner argued that he was convicted under an indictment that showed that the charged offense occurred more than two years before the date the grand jury indicted him, violating the then-existing statute of limitations for federal crimes. This defect, he argued, rendered the proceedings "null and void, and not merely erroneous," entitling him to release. *Id.* The court refused to grant relief because there was "no want of jurisdiction in this case." *Id.* Instead, as the court pointed out, habeas corpus was not the proper forum for such objections:

> [I]f there was a bar under the statute, it should have been pleaded. No such plea was interposed, and the question is, whether the objection can be raised on a

common-law limitation that prevented a federal habeas court from accepting evidence to contradict a facially sufficient return had weakened significantly.

Although the data is rather ambiguous, the federal cases that extended the habeas court's evidentiary power apparently involved petitions directed at state power[96] or executive misconduct in the form of military or agency acts.[97] Presumably, federal courts were less inclined to extend their evidentiary powers in cases challenging federal judicial detentions because they paid greater deference to judgments of sister courts.[98] Moreover, into the 1850s[99] and even the 1860s and beyond,[100] federal courts remained notoriously divided on whether the 1789 Act permitted them to pierce the factual and legal conclusions embodied in the return to a writ of habeas corpus.

In 1833, Chief Justice John Marshall himself, sitting on circuit with District Judge Barbour, illustrated the potential for a broader use of the court's evidentiary powers in a habeas case involving an

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> writ of habeas corpus.... By failing to set up the defence, the defendant waived it. And if this were not the legal effect of failing to set up the statute, it is clear that on the habeas corpus, the court cannot look behind the sentence of the court, where the jurisdiction is undoubted.

*Id.*

96. Because the 1789 Act restricted the federal court's habeas power to federal detainees, cases presenting state misconduct were rare. However, the issue did arise in extradition cases when prisoners were held in federal facilities on warrants issued by state authorities.

97. *Cf.* Woolhandler, *supra* note 2, at 580 (noting that the scope of habeas corpus review in the nineteenth century reflected the Supreme Court's willingness to address random acts of "official illegality").

98. In part, this reflects the existing belief during the early republic that a federal court was the final arbiter of its own jurisdiction. *See* Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 289-92 (1990) (suggesting that, in the early years of the republic, the Supreme Court's interpretation of full faith and credit did not permit inquiry in a sister court's jurisdiction for any reason).

99. *Remarks on the Writ of Habeas Corpus ad Subjiciendum and the Practice Connected Therewith*, *supra* note 57, at 268-69 n.1.

100. *E.g.*, *In re* Leary, 15 F. Cas. 106, 111 (S.D.N.Y. 1879) (No. 8162) (holding that when a prisoner petitioning for habeas corpus is held under a warrant for extradition reciting that it was issued on the requisition of the governor of another state, the warrant is conclusive, but the question whether the prisoner is the same person named in the indictment attached to the warrant is always open to question); *In re* Clark, 5 F. Cas. 833, 833-34 (S.D.N.Y. 1868) (No. 2797) (stating that when the indictment is presented in the return, the habeas court "must" look into the indictment, but it "must be considered sufficient, unless it be so defective in its material averments that it would be the manifest duty of a court before which it was presented by a grand jury to decline to take action upon it").

executive detention. In *Ex parte Randolph*, a case pled under the 1789 Act, Chief Justice Marshall issued the writ and, after considering the petition and return, discharged the petitioner, Robert B. Randolph, from federal custody.[101] The case arose when a federal marshal arrested Randolph on a warrant issued by the solicitor of the treasury, a procedure authorized by an act of Congress intended to aid in the final settlement of public accounts maintained by military personnel.[102]

Randolph's counsel argued, among other things, that the act under which he was arrested was unconstitutional because it violated both the separation of powers and the Eighth Amendment.[103] In response, the government maintained that the claim of unconstitutionality was beyond the scope of a habeas proceeding because

> the court upon the return of a habeas corpus, will not look into the regularity of the proceedings upon which a judgment is founded, in pursuance of which, a party is taken into custody; but that they will only inquire, whether a sufficient probable cause existed, to warrant the commitment, and that in a case of this sort, they have not the powers of a court of error.[104]

The government claimed that the return presented a facially adequate reason for the incarceration and was, therefore, conclusive. According to the government, a habeas court could not pierce the return to reconsider issues determined in the warrant proceeding that yielded the "judgment" upon which Randolph was arrested.

The government failed to persuade the court. Even before counsel ventured his argument, the judges had received extrinsic evidence in the form of supplementary exhibits and records, although the material did not figure in the final decision.[105] Instead, Chief Justice Marshall found the constitutional issue to be within the scope of the habeas proceeding because it went to the lawful authority of the

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101. 20 F. Cas. 242, 242 (C.C.D. Va. 1833) (No. 11,558).

102. *Id.*

103. *Id.* at 245. Counsel contended that the act violated the Eighth Amendment because it permitted life imprisonment for a public debt without possibility of clemency. *Id.* (citing the reporter's account of the remarks of Randolph's counsel, Mr. Robertson, former attorney general of Virginia). *But see* Harmelin v. Michigan, 501 U.S. 957, 976-78 (1991) (Scalia, J.) (arguing that the Framers did not intend the ban on cruel and unusual punishment to extend to terms of years).

104. *Randolph*, 20 F. Cas. at 250 (containing the reporter's account of the argument of Mr. Nicholas, who appeared on behalf of the United States at the request of the court).

105. *Id.* at 244, 247 (presenting the reporter's description of the proceedings).

treasury official to issue the arrest warrant.[106] If the act were unconstitutional, then the warrant was void, and Randolph was entitled to release:

> [F]irst and most important [the question is whether] the act of congress, under the authority of which it is issued, is repugnant to the constitution of the United States. If this objection be sustained, the warrant can certainly convey no authority to the officer who has executed it, and the imprisonment of Mr. Randolph is unlawful.[107]

Although Chief Justice Marshall expressed doubts about the act's constitutionality, he held that it could be saved by a narrow construction that excluded Randolph himself from its reach.[108] In ordering Randolph's release, the Chief Justice concluded, "[T]his warrant has been issued in a case which the law does not authorize; in a case which ought to have been submitted to a court of justice."[109]

The government framed the dispositive issue in *Randolph* as the impropriety of relitigating the legal conclusions embodied in a facially valid warrant.[110] Instead, the court reached beyond the warrant to

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106. *Id.* at 254.

107. *Id.* at 253.

108. *Id.* at 255-56.

109. *Id.* at 257. Chief Justice Marshall then said, "On both these points I am of opinion, that the agent of the treasury has exceeded the authority given by law, and consequently that the imprisonment is illegal." *Id.*

Without elaborating his reasoning, the Chief Justice agreed with the separate opinion of Judge Barbour that habeas corpus would lie in cases of civil commitment because the use of the writ in the United States was not confined to the provisions of the Act of 1679, but also included common-law practices. *Id.* Because Randolph's incarceration appeared to be imprisonment for debt, the remainder of Judge Barbour's opinion seems to treat the matter as if it were an imprisonment after a final judgment. *Id.* at 251. To this extent, it illustrates that antebellum sources frequently called any decision that issued in process a judgment. Judge Barbour stated that it was improper for a habeas court to consider whether there were errors in the audit of Randolph's account, remarking that "sitting as we are, upon a habeas corpus, the question is not, whether there is error in the proceedings, but, whether there was jurisdiction of the case in the auditor of the treasury." *Id.* at 251. Barbour continued,

> [A] habeas corpus will not lie, where the imprisonment is under voidable process, but only where it is merely void; for void process is the same thing as if there were none at all; and then the party is in effect imprisoned, without any authority whatever. Hence, the question would seem naturally to arise, whether the auditor had jurisdiction in the case—in other words, whether the person and the subject matter are such as to bring the case within the provisions of the act of congress—for these are the criteria of jurisdiction.

*Id.*

110. Judge Barbour's analysis of the jurisdictional questions in terms of void and voidable judgments supports the argument that the reach of habeas corpus was connected

consider the constitutionality of the underlying statute. Disregarding the finality of the return in order to inquire into the jurisdiction of the detaining authority,[111] the court perhaps took a small step, but one that demonstrated a willingness to hear whatever issues were necessary to determine whether a challenged restraint was beyond the bounds of the law. An aggressive reading of *Randolph* might go further and point out that a federal court under the 1789 Act reconsidered the decision of a coordinate branch of government embodied in an apparently sufficient and regular return that justified the prisoner's detention.

Written a decade later,[112] *Ex parte Smith*, an 1843 case arising out of an extradition proceeding between Illinois and Missouri, gives some indication of the direction of this growth.[113] Federal authorities had custody of the Mormon leader, Joseph Smith, while he was awaiting extradition from Illinois on a Missouri charge of being an accessory before the fact to an assault with intent to kill. Smith petitioned for federal habeas corpus under the 1789 Act and then attempted, in response to the government's return, to prove that he had an alibi for the time the attack occurred. The Illinois attorney general argued that, at least in extradition cases, courts could not take evidence to

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with the court's limited powers of revision of trial court judgments. *Id.* at 251. On the other hand, had Randolph been able to obtain a trial, he likely would have been entitled to a writ of error on the legal question if the court were willing to construe it as a civil matter. Perhaps Robert's inability to obtain a trial coupled with the possible appealability of a civil judgment explains Chief Justice Marshall's decision.

111. *Cf.* Woolhandler, *supra* note 2, at 588-93 (arguing that the courts had greater discretion to consider "jurisdictional" matters when the defendant was incarcerated on the authority of a court of limited jurisdiction rather than a court of general jurisdiction).

112. A few federal cases before the 1840s seem to assert the power to consider issues behind and outside the return in proceedings involving state charges. For example, the 1825 case of *Ex parte Bennett* contains quite forceful language to that effect, even if the result is rather mundane. 3 F. Cas. 204 (C.C.D.C. 1825) (No. 1311). Bennett was arrested in the District of Columbia on a charge stemming from a New York theft. He was then released and later arrested on a District of Columbia theft charge. When Bennett petitioned for habeas corpus, the circuit court found that the first discharge was proper because of an irregularity in the warrant. *Id.* at 204. It then announced that, even if the commitment on the second charge were regular on its face, "the court can and will rehear the case and revise his judgment." *Id.* This is particularly interesting because it shows that contemporary sources continued to use the term "judgment" to describe nonfinal decisions by other courts, illuminating the reluctance of habeas courts to unsettle those "judgments." These comments have created some confusion in the recent literature. *E.g.*, Liebman, *supra* note 4, at 2059 n.354 (describing *Ex parte* Milburn, 34 U.S. (9 Pet.) 704, 710 (1835), as involving double jeopardy when, in fact, it only concerned pretrial proceedings denominated "judgments").

113. 22 F. Cas. 373, 374 (C.C.D. Ill. 1843) (No. 12,968). Federal law governed interstate rendition of fugitives. Act of Feb. 12, 1793, ch. 7, §§ 1-2, 1 Stat. 302, 302.

contradict the return. Conversely, Smith's counsel contended that the prisoner had every right "even to go behind the return and contradict it."[114]

Curiously, the opinion reads as though the court believed the government to argue that habeas corpus could not be used to "review the acts of an executive functionary," such as a governor.[115] The case, thus, assumed the rare posture of a federal petition aimed at an abuse of power by a state executive.[116] The court implied in dictum that, if necessary, it would have accepted Smith's alibi evidence in direct contradiction of the return.[117]

As matters turned out, it was able to avoid reaching the issue. Instead, the court found numerous factual and procedural deficiencies in the record, dismissing a primary supporting affidavit as inherently incredible.[118] Rather than accept the state's version of the facts, the court concluded that the factual basis of the charges was insufficient to support the detention, much less the extradition.[119]

The most significant assertion of federal power to pierce the return occurred later in the century, during the Civil War, when federal courts faced the same military-abuse cases previously heard primarily in the state courts. This shift in the federal docket resulted from the Supreme Court's 1859 decision in *Ableman v. Booth*, which held that state courts could not issue writs of habeas corpus to federal

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114. *Smith*, 22 F. Cas. at 375.

115. *Id.* at 377.

116. *Id.* ("In supporting the second point, the attorney general seemed to urge that there was greater sanctity in a warrant issued by the governor, than by an inferior officer. The court cannot assent to this distinction. This is a government of laws, which prescribes a rule of action, as obligatory upon the governor as upon the most obscure officer. The character and purposes of the habeas corpus are greatly misunderstood by those who suppose that it does not review the acts of an executive functionary. All who are familiar with English history, must know that it was extorted from an arbitrary monarch, and that it was hailed as a second magna charta, and that it was to protect the subject from arbitrary imprisonment by the king and his minions, which brought into existence that great palladium of liberty in the latter part of the reign of Charles II.").

117. *Id.*

118. *Id.* at 379.

119. *Id.* ("The court can alone regard the facts set forth in the affidavit of Boggs, as having any legal existence. The mis-recitals and overstatements in the requisition and warrant, are not supported by oath, and cannot be received as evidence to deprive a citizen of his liberty, and transport him to a foreign state for trial. For these reasons, Smith must be discharged.").

prisoners.[120] Although a fuller discussion of *Booth* is reserved for later,[121] at present it is worth remarking that the decision had the effect of channeling more enlistment cases into the federal courts, not because of any change in the underlying habeas law, but simply because petitioners had nowhere else to go.

In these military abuse cases, the federal judiciary explicitly looked to the developments in state evidentiary practice. On occasion, federal courts even voiced opposition to *Booth* on the ground that state courts were better able to protect citizens from military fraud because of the state courts' firmly established powers to contradict a sufficient return. Even federal courts that had previously resisted expansion of their evidentiary powers felt pressure in the absence of state habeas relief to exercise broader habeas powers themselves, at least in cases that petitioners previously would have brought to a state forum.[122]

Perhaps the most interesting, if extreme, example of this situation is the 1867 case of *In re Reynolds*, in which a New York federal district judge explicitly considered the issues raised by *Booth* in light of the disparity between federal and state habeas powers.[123] The

120. 62 U.S. (21 How.) 506 (1859). *Booth* is generally construed as holding that the state courts did not have the power to issue the writ of habeas corpus to federal prisoners so long as the federal writ was available to them. *E.g.*, PAUL BATOR ET AL., HART AND WECHSLER'S, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 427-28 (2d ed. 1973). Not until Tarble's Case, 80 U.S. (13 Wall.) 397, 410 (1872), however, did the Supreme Court conclusively determine that the state courts were unable to grant the writ to federal detainees.

121. *See infra* note 183 and accompanying text.

122. *See, e.g.*, Seavey v. Seymour, 21 F. Cas. 947, 950 (C.C.D. Me. 1871) (No. 12,596) (rejecting the government's argument that the age shown on the certificate of enlistment was a conclusive return to a writ of habeas corpus, on the ground that "[w]here the recruit is less than eighteen years of age, and was mustered into the military service without the consent of his parent, guardian, or master, proof to show that fact has always been admissible in evidence"); *Ex parte* Schmeid, 21 F. Cas. 702, 702 (C.C.D. Iowa 1871) (No. 12,461) (stating that "[t]he validity of the enlistment of a person into the military service of the United States may be inquired into on habeas corpus by a United States judge"); *In re* Ferrens, 8 F. Cas. 1158, 1159 (S.D.N.Y. 1869) (No. 4746) (conducting an extensive hearing on a wife's challenge to her husband's enlistment on the ground that the oath of enlistment was invalid); *cf.* United States *ex rel.* Murphy v. Porter, 27 F. Cas. 599, 602 (D.D.C. 1861) (No. 16,074a) (denying writ to minor enlistee in the union army on the ground that President Lincoln had suspended the privilege of habeas corpus in the district).

123. 20 F. Cas. 592, 592 (N.D.N.Y. 1867) (No. 11,721). It is significant that the district judge in this case was formerly a state judge who had regularly issued writs of habeas corpus to federal prisoners in enlistment cases. *Id.* at 595. It is also noteworthy that none of the parties treated *Booth* as conclusive authority on the issue of state habeas powers and that their knowledge of the case was rather shaky.

factual background reads just like that of many of the earlier state-enlistment cases. Reynolds was in military custody for the crime of desertion. He applied for a writ of habeas corpus from a New York state court, claiming that he had never enlisted in the first place. After a full hearing, the state judge remanded him to military custody.

Reynolds then took advantage of *Booth*. He brought a second habeas petition, this time in federal court, asserting that the state court lacked jurisdiction in the first proceeding. Despite *Booth*, the federal district court asserted that state courts retained the authority to issue writs of habeas corpus to federal officers on behalf of federal prisoners.[124] *Reynolds*, in fact, read *Booth* to mean that state courts could issue a writ to test the truth—and validity—of federal custody, reasoning that an invalid federal detention was no federal detention at all.[125] If federal custody were valid, then the state court had to dismiss

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124. *Id.* *Booth* met with substantial resistance in state courts, which continued to assert their traditional prerogatives. As Charles Warren observed,

> Such was the tenacity with which the state courts maintained their authority to issue writs of *habeas corpus*, that, for twelve years after the *Booth* decision, they continued to issue such writs against federal officials, on the ground that the *Booth* case only applied to instances where the prisoner was held under actual judicial federal process. Thus, during the Civil War, New York, Ohio, Iowa and Maine judges granted *habeas corpus* for persons serving in the United States Army. And as late as 1871, the Massachusetts court said that this power was so well settled by judicial opinion and long practice that it was not "to be now disavowed, unless in obedience to an express act of congress, or to a direct adjudication of the supreme court of the United States."

*Federal and State Court Interference*, 43 HARV. L. REV. 345, 357 (1930) (quoting McConologue's Case, 107 Mass. 154, 160 (1871) (Gray, J.)); *cf. In re* Farrand, 8 F. Cas. 1070, 1070-71 (D. Ky. 1867) (No. 4678). In *Farrand*, the local mayor's court attempted to issue a writ of habeas corpus on behalf of an allegedly underage recruit, and when the military officer in charge refused to obey the order of release, the mayor's court ordered him imprisoned for contempt. The officer then sought a writ of habeas corpus in federal court under the 1833 Force Act, alleging that he was held by a state authority for performing federally imposed duties. *Cf. In re* Neill, 17 F. Cas. 1296, 1301 (S.D.N.Y. 1871) (No. 10,089) (state judge may not discharge a soldier on a writ of habeas corpus if the soldier is held by a bona fide army officer and a federal court will discharge any army officer held in contempt by a state court for refusal to comply with a state order).

Federal courts showed surprising sympathy with state courts. *See, e.g., In re* McDonald, 16 F. Cas. 33, 36 (D. Mass. 1866) (No. 8752) ("I may here confess to a serious doubt whether, upon the true theory and practice of our mixed government, the state courts ought ever to have taken jurisdiction of these cases. Upon this point, Ableman v. Booth . . . and other authorities . . . are instructive. But the practice is now so well established that only the supreme court of the United States can change it." (citation omitted)).

125. *In re Reynolds*, 20 F. Cas at 606. The decision stated:

the proceeding; the state court's writ was permissible as part of the threshold inquiry into whether it had jurisdiction over the case.

In construing *Booth* in this remarkably limited fashion, *Reynolds* focused on the importance of the habeas court's ability to contradict the facts in the return:

> [I]t has lately been claimed in other cases, as it was claimed in this, that under the case of Ableman v. Booth a state court has no authority to inquire into the truth of the facts alleged in a return to a writ of habeas corpus, or to decide upon their legal effect; in other words, that a state court has no jurisdiction to inquire whether a person claimed and held as a soldier has ever enlisted, or, if he have enlisted, whether he is an infant, and his enlistment therefore illegal and void, if the return sets forth that he is legally in custody under the authority of the United States.[126]

The *Reynolds* court reasoned that if it were to read *Booth* to strip the state courts altogether of habeas jurisdiction, individuals detained by the armed forces, or others, through forged papers would have no remedy.[127] Detainees could not contest false papers because the return to the petition evidencing federal custody—whether true or false—would conclusively deprive the state court of jurisdiction.[128] Because

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> [T]he fact that the prisoner is legally held under the authority of the United States must not only be alleged, but proved, in order to oust the jurisdiction of a state court or judge in a habeas corpus case, there can certainly be no doubt that all those judges require, not merely the allegation or return of facts showing such authority, but also their actual existence,—the actual truth of the return, and not the mere formal, but false, assertion of a state of facts that does not exist. Even under this latter construction of these opinions, the state court or judge, if authorized by the state law to entertain proceedings upon habeas corpus, should certainly proceed and order the discharge of the party, unless the facts alleged are proved or admitted; leaving the party holding the prisoner to retain or discharge him, at his peril, upon the ground that he is actually authorized to hold him under the laws of the United States, although not able to prove the facts in the proceeding before the state court or judge. No other course, it is submitted, can be consistent with the authority or dignity of the state, the duty of the judge, or the rights of the citizen.

*Id.* at 606-07.

126. *Id.* at 605.

127. *Id.* at 605-06.

128. *Id.* What is more, the district judge observed, parity would require the same practice of the federal courts in situations in which the return alleged that petitioner was held under state process, since that would divest the federal court of jurisdiction. *Id.* at 606-07.

federal courts were often unable to go behind the return to test the same facts, the petitioners would be left without a remedy.[129]

The *Reynolds* court thus found that the state habeas court properly had jurisdiction to consider the validity of Reynolds's detention, but held that the state decision was not res judicata to a federal habeas proceeding.[130] That rather tangled web left the federal court free to consider Reynolds's petition. Here, the district court demonstrated more than sympathy for the prerogatives of its sister courts; it relied on existing state habeas practice, an influence other federal courts explicitly acknowledged as well.[131]

In the ensuing oral argument, government counsel argued that the issues of fact before the habeas court were more properly resolved in the already pending court martial proceedings. Unmoved, the *Reynolds* court asserted that a court martial had no jurisdiction to try a citizen who had never belonged to the military.[132] The court then held a full hearing to determine whether the prisoner had ever been a member of the military.[133] As is evident from the opinion, the court took oral testimony from both the prisoner[134] and Riley, an employee of a recruiting broker in Detroit,[135] as well as from several alibi, character, and other witnesses.[136] The judge concluded that Reynolds

129. *Id.*

130. *Id.* at 607-08.

131. *See, e.g., In re* McDonald, 16 F. Cas. 17, 20-21 (E.D. Mo. 1861) (No. 8751).

132. *In re Reynolds*, 20 F. Cas. at 609. The court admitted, however, that it had no jurisdiction over the offense of desertion. *Id.*

133. *Id.* at 612.

134. *Id.* There was some question whether the prisoner, as a party to the action, was a competent witness on his own behalf, but the court held that both New York and federal law permitted the petitioner to testify since this was a civil matter. *Id.*

135. *Id.* at 609-10 ("The evidence bearing upon this question of fact has been deliberately considered, and I cannot doubt that it is my duty to discharge the prisoner; believing, as I do, that the testimony of Riley in regard to the petitioner's enlistment . . . is entirely false."). Riley testified that he knew Reynolds from home and that he witnessed Reynolds enlist under the name of William Sloan. Under extremely successful cross examination, Riley sought the protection of the Fifth Amendment to avoid incriminating himself regarding whether he brought men to Detroit to enlist under false names and had done so himself. Riley also confessed that he had been indicted for stealing sheep and steers and had been convicted of theft of property worth more than $25. He also testified that he and his brother were indicted for stabbing Reynolds and that Reynolds had been a witness at his brother's trial, and that he made his perjurious affidavit about a week after that trial. *Id.* at 610.

136. *Id.* at 611 (containing extensive testimony regarding the whereabouts of the prisoner at all relevant times, that his height and hair color did not match the description on

had never enlisted and was the victim of a malicious fraud by Riley, explicitly basing his decision on the demeanor evidence of the prisoner and his chief accuser during their oral testimony.[137] As a result, the court ordered that Reynolds be released from custody.[138]

Other federal decisions rendered during the Civil War demonstrate a similar willingness to go beyond the return in order to remedy wartime abuses. In one interesting case connected with a purported Confederate plot to burn New York City,[139] for example, a federal circuit court strongly asserted its right to re-examine the entire record of commitment proceedings before a federal magistrate,[140] reweighing the magistrate's findings of both fact and law. Even though the return was facially sufficient, the circuit court found that the supporting evidence was too unreliable to establish probable cause.[141] In doing so, the circuit court discussed the lack of admissible evidence at the hearing that would establish a link between the defendant and the alleged crime and commented unfavorably on the magistrate's reliance on defense counsel's compelled testimony.[142]

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the enlistment papers, and character testimony regarding the good reputation of the prisoner and the bad reputation of Riley).

137. *Id.* at 611-12 ("It is perhaps impossible, now, to say what my conclusions would have been if the case stood upon this evidence alone [referring to Riley and the alibi and character witnesses], and the evidence afforded by the inspection of the petitioner in respect to his age . . . but I am strongly inclined to the opinion that I should have held, upon his evidence alone, that the petitioner ought to be discharged. But the petitioner himself was sworn as a witness, and directly and positively contradicted Riley in respect to everything which related to his alleged enlistment, or being in uniform, or in the military service; and I have no doubt that he testified to the truth.").

138. *Id.* at 612.

139. *In re* Martin, 16 F. Cas. 875, 879 (C.C.S.D.N.Y. 1866) (No. 9151). Martin, the defendant, had been arrested and imprisoned on charges that he knowingly attempted to destroy public records of the United States and that he gave aid and comfort to the rebellion. Both charges were based on his presence in New York under an assumed name and his association with suspicious characters.

140. *Id.* at 878 ("The importance of this power of the court, to look into the evidence as far as may be necessary, in order to decide whether it is proper or not to hold a prisoner in confinement, will be clearly seen on examining the condition of things if no such power existed. . . . Either the prisoner would be kept in confinement just as long as the prosecution might see fit to hold him, or the court would be compelled to make a mere arbitrary order limiting the time within which he should be indicted or discharged.").

141. *Id.* at 879. The court commented acerbically on the quality of the evidence involved: "It will, I presume, not be contended that the color of the defendant's carpet-bag, or the fact that he had a small amount of gold, supplies any material evidence in the case." *Id.*

142. *Id.* at 879-80. Counsel testified that his client was reputed to be a member of the Confederate army.

These cases indicate that federal courts participated in the general extension of evidentiary procedure in habeas corpus that characterized the antebellum period, even while acting under the common-law restrictions embodied in the habeas provisions of the 1789 Judiciary Act. Federal courts challenged the return in order to perform the habeas core function of preventing government abuse, especially in cases that involved military service. These developments preceded—and subsequently converged with—another series of pressures to expand federal habeas jurisdiction, pressures arising from the growing sectional crisis over slavery.[143] Thus, the story has to backtrack in time slightly in order to describe fully the contributions of the antislavery movement to the growth of habeas corpus. It is here that our story turns to irony.

## IV. STATE HABEAS CORPUS AS A TOOL OF THE ANTISLAVERY MOVEMENT

The War of 1812 postponed the national crisis over slavery, although it provided a foretaste of the creative uses of habeas corpus yet to come. As the sectional crisis resolved itself into a crisis of federal-state relations, fueled by westward territorial expansion, both sides had recourse to the ancient weapon in intragovernmental squabbles: the writ of habeas corpus. Much of the battle was played out over the plight of fugitive slaves[144]—an emotional issue familiar to those who have read *Uncle Tom's Cabin*,[145] with its famous scene of the fugitive Eliza crossing the frozen Ohio River to freedom.

During the antebellum period, both antislavery and proslavery forces had what charitably may be termed an instrumental view of federalism. At the risk of oversimplification, antislavery activists tended to stress the primacy of the federal government when it came to congressional power to exclude slavery from the territories, but maintained that states had the right to regulate the status of persons

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143. *See* NEELY, *supra* note 20, at xiv. Neely pointed out that by the 1850s, Republicans thought of the writ, if at all, primarily as a tool to free fugitive slaves. For example, Salmon P. Chase, Secretary of the Treasury from 1861 to 1864, had repeatedly invoked habeas corpus in fugitive cases. Abraham Lincoln, it might be added, had represented the master in an Illinois habeas case brought on behalf of a fugitive by two abolitionists. *Id.*

144. COVER, *supra* note 9, at 185-91.

145. HARRIET BEECHER STOWE, UNCLE TOM'S CABIN OR, LIFE AMONG THE LOWLY (1852).

within their borders when discussing state obligations to return fugitives to bondage.[146] Conversely, the South and its allies advocated local control within the territories, raising constitutional challenges to Congress's power to legislate for the territories on the slavery issue, but were quite content to hide behind expansive federal power when talking about fugitives. Not surprisingly, both sides were blissfully untroubled by any inconsistency in their positions.

The groundwork for the crisis over the rendition of fugitives was laid in the Constitution itself.[147] In 1793, Congress first implemented the guarantee of Article IV, Section 2—the Fugitive Slave Clause[148]—in a law entitled "An Act respecting fugitives from justice, and persons escaping from the service of their masters."[149] The first half dealt with criminal extradition;[150] the second half empowered a slaveholder or his

146. *See generally* MCPHERSON, *supra* note 84, at 47-233 (discussing political and legal maneuvering by both antislavery activists and Southern sympathizers with regard to fugitive slaves and to the expansion of slavery into the territories prior to the Civil War). McPherson commented with regard to Southerners, "On all issues but one, antebellum southerners stood for state's rights and a weak federal government. The exception was the fugitive slave law of 1850, which gave the national government more power than any other law yet passed by Congress." *Id.* at 78; *see* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861, at 1-106 (1974).

147. The contradiction between the principles espoused by the American Revolution and chattel slavery was not lost on the Founders. *See, e.g.*, EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA (1975).

148. Article IV, § 2, clause 3, of the United States Constitution provided in part:

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

How the Framers expected this clause to operate has been the subject of much uncertainty, both then and now. At the time, James Madison said the clause "secures us in that property which we now possess. At present, if any slave elopes to any of those states where slaves are free, he becomes emancipated by their laws; for the laws of the states are uncharitable to one another in this respect." 3 ELLIOT'S DEBATES: THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 453 (Jonathan Elliot ed., 1937). The Fugitive Slave Clause was, according to Madison, "expressly inserted, to enable owners of slaves to reclaim them." *Id.*; *see* DON FEHRENBACHER, SLAVERY, LAW AND POLITICS 21-24, 207-08 (1981); William W. Wiecek, *The Witch at the Christening: Slavery and the Constitution's Origins*, *in* THE FRAMING AND RATIFICATION OF THE CONSTITUTION 167, 178 (Leonard W. Levy & Dennis J. Mahoney eds., 1987).

149. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.

150. *Id.* §§ 1, 2. The law provided that whenever one governor, upon proper paperwork, asked another governor for the return of a fugitive from justice who had fled from one state into another, it "shall be the duty" of the governor of the second state to

agent to cross state lines, seize the alleged fugitive slave, and take the fugitive before any federal judge or local magistrate.[151] Once there, upon proof of ownership, the slaveholder received a certificate entitling him to return home with his property.[152] Not only was this a significant blow to state sovereignty, it raised serious questions about the safety of free blacks. The standards of proof in the hearing were low, and the possibilities for abuse by cynical persons were correspondingly high.[153]

One result of the 1793 Act's weakness was enactment of so-called personal liberty laws in the northern states.[154] These were antikidnapping statutes that attempted to supplement the Fugitive Slave Act's rudimentary fact-finding processes.[155] Another result was increased use of state habeas corpus to test the legality of the slaveholder's claim to the person detained.[156] This tactic put federal

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honor that request. The law provided no means of enforcement; accordingly, interstate rendition of fugitives from justice remained largely a matter of comity.

151. *Id.*

152. *Id.*

153. Although one commentator suggested that the Act's "administrative procedures were so cumbersome ... that it was a 'dead letter' from the start in regions where public sympathies were hostile to slavery," DONALD L. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS 1765-1820, at 286 (1971), the more common reaction was that of Don Fehrenbacher, who called the law "an invitation to kidnapping." FEHRENBACHER, *supra* note 148, at 21.

154. NEELY, *supra* note 20, at xvi (asserting that "Illinois was the only contiguous state of the U.S. not to pass some sort of personal-liberty law before the Civil War").

155. For a full discussion of the personal liberty laws, see MORRIS, *supra* note 146, at 1-70. Robert Cover, in his influential study of the subject, suggested that the sympathy engendered by fugitives—and particularly by free blacks wrongfully captured—led the antislavery bar to focus on the representation of fugitives and those who assisted them. COVER, *supra* note 9, at 185-91.

156. COVER, *supra* note 9, at 185-91; Oaks, *supra* note 21, at 267-68. In 1837, the radical abolitionist, Alvan Stewart, went so far as to argue, based on the Fifth Amendment to the federal Constitution, that slavery was unlawful within the United States unless the person had been lawfully deprived of freedom by means of indictment, trial, and judgment in a court of law. Anything less was not "due process of law." In the absence of due process, "'any judge in the United States, who is clothed with sufficient authority, to grant a writ of *Habeas Corpus*'" had the power to "'discharge the slave and give him full liberty.'" JACOBUS TENBROEK, EQUAL UNDER LAW 68 (First Collier Books 1965) (1951) (quoting Alvan Stewart).

Antislavery lawyers also raised a series of constitutional challenges to the 1793 Act—and later to the 1850 Act—alleging, among other things, that the 1793 law impermissibly required state officers to enforce federal law, a position consonant with the federalism of the day. In addition, antislavery advocates argued that Congress lacked the power to legislate on the issue of slavery altogether. *See, e.g.*, Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 YALE L.J. 161, 165 (1921); Anthony J. Sebok, *Judging the Fugitive*

and state authorities in direct conflict and placed a premium on the proverbial race to the courthouse. But if the state habeas court was required to treat the return as conclusive, then the writ presented few advantages over the Fugitive Slave Act proceeding. Accordingly, antislavery forces devoted substantial energy to securing broader evidentiary powers for state habeas courts.[157]

As early as 1816, for example, Richard Peters, eventually a reporter of the United States Supreme Court, discounted the view of some commentators that production of the certificate showing that a court had determined the fugitive's status was "a sufficient return to any writ of Habeas Corpus, which may be issued."[158] Such a conclusive presumption, based on *ex parte* testimony, "violated 'one of the fundamental principles of the administration of justice'"; it allowed a decision "'against the liberty of a fellow man, upon allegations, which he had no opportunity to contradict, and the witness in support of which, he is not permitted to confront or interrogate.'"[159] Instead, Peters argued, a habeas court should fully reconsider a claim of title, even if a judge or magistrate had already decided the issue when

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*Slave Acts*, 100 YALE L.J. 1835, 1849 n.70 (1991) (speculating that location of the Fugitive Clause in Article IV, while congressional powers are exclusively enumerated in Article I, supports the conclusion that Congress had no power to legislate to enforce the Clause).

157. In 1837, antislavery activists also made an effort to obtain a right to jury trial for fugitives by reviving the ancient common-law writ of *de homine replegiando*. This writ was a form of personal replevin, which, despite its extremely cumbersome process, provided for trial by jury on all issues joined by the parties. Federal courts have authority to issue *de homine replegiando* under the All Writs Act, Act of Sept. 24, 1789, § 14, 1 Stat. 73 (current version at 28 U.S.C. § 1651 (1988)). *De homine replegiando* had a small but useful role in antislavery activity. *See, e.g.*, Margaret v. Muzzy, Case No. 40, dated 1768 *in* 2 THE LEGAL PAPERS OF JOHN ADAMS 58-59 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (stating that a black woman was replevied and the issue of her freedom went to a jury); COVER, *supra* note 9, at 164-65; MORRIS, *supra* note 146, at 11; Oaks, *supra* note 21, at 281-87.

What may have been *de homine replegiando*'s most notable moment came somewhat before its northern revival, at the hands of a South Carolina federal court in a case called Elkison v. Deliesseline, 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4366). A South Carolina law provided that, if a ship carrying free blacks entered a South Carolina port, the blacks would be enslaved if the captain failed to leave with them. *Id.* at 493. A boatload of such stranded people, who were detained for sale by South Carolina authorities, petitioned the federal court for habeas corpus. The court found that it lacked habeas jurisdiction because the blacks were in state custody. *Id.* at 498. Undaunted, it held the South Carolina law unconstitutional and issued a writ of *de homine replegiando* to release the prisoners. *Id.*

158. MORRIS, *supra* note 146, at 34 (quoting letter from Richard Peters to William Wayne (Dec. 31, 1816)).

159. *Id.*

granting the certificate permitting the fugitive's removal to a slave state.[160]

In late 1817, those sympathetic to the interests of the slaveholders responded to the direction of northern opinion. They introduced a draft bill in Congress to amend the Fugitive Slave Act of 1793.[161] Among its provisions was one that made a slaveholder's sworn statement that he held the fugitive under the Act a complete return to a writ of habeas corpus, if the slaveholder had already obtained a judicial certificate adjudicating the status of the captive.[162] Taken on its own terms, this was a fairly moderate suggestion; it did not seek to outlaw state interference in the recapture of fugitives, but simply to limit it.

Nevertheless, one Senator termed the draft bill an unconstitutional suspension of the writ of habeas corpus because "'a person of color taken under it . . . cannot have the right to his freedom tried by the judge before whom the return of the writ of habeas corpus is made.'"[163] A supporter of the bill responded that a writ of habeas corpus merely gave the person in custody the right to "'demand an inquiry whether he is held in custody upon a ground warranted by law; and if the judge before whom he is brought finds he is detained by legal authority and upon legal grounds, he cannot discharge him but is obliged to remand him.'"[164] The sectional controversy was clearly focusing on the right to challenge the federal process embodied in the return.

States, such as New York, took up the challenge with relish. In 1829, the New York legislature passed an act entitled: "Of the Writ of Habeas Corpus, to bring up a person to testify, or to answer in certain cases."[165] Intended to supplement the federal Fugitive Slave Act, the law provided that, in order to claim a runaway, the claimant had to apply to a state court authorized to issue writs of habeas corpus. Upon presentation of acceptable proof of title, the state court would issue a writ of habeas corpus to the sheriff in the county in which the fugitive resided or was detained. The sheriff would then bring the fugitive

160. *Id.*

161. *Id.*

162. *Id.* at 35-37.

163. *Id.* at 38 (quoting the remarks of Senator James Burrill, Jr. of Rhode Island in 31-32 ANNALS OF CONG. 231 (1818)).

164. *Id.* (quoting the remarks of Senator William Smith of South Carolina in 31-32 ANNALS OF CONG. 231 (1818)).

165. 2 N.Y. REV. STATS. 560-61, §§ 6-12 (1829).

before the court, which would hold a hearing, possibly including live testimony, in order to try the issue of freedom.

Within a few years, New York went even further. It followed a number of other states in passing a law providing that when a writ of habeas corpus was sought on behalf of a person alleged to be a fugitive from labor, the issues of title and freedom should be tried to a jury.[166] Other states merely had recourse to their statutes permitting the habeas court to go behind the return. Those provisions had the effect of permitting claims of title to be fully tried by the habeas court.[167] The actual cases brought on behalf of the fugitives are legion, well beyond the scope of this Article.

Then, in a series of cases, the Supreme Court attempted to put an end to the merry anarchy spreading throughout the free states.[168] For purposes of the present discussion, the two most important decisions were *Prigg v. Pennsylvania*[169] and *Ableman v. Booth*,[170] both of which aimed to restrict state-court habeas powers over areas of federal interest. Legal historians have made a substantial cottage industry out of the ambiguities of *Prigg*, a case that generated seven separate opinions in an era in which most opinions were unanimous.[171]

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166. Act of May 6, 1840, § 1, 1840 N.Y.L. 174; *cf.* Oaks, *supra* note 21, at 278 n.186 (citing Act of June 1, 1838, § 1, 1838 CONN. COMP. LAWS 572; Act of June 22, 1824, § 3, 1838 IND. REV. STATS. 322; Act of Oct. 29, 1840, § 1, 1840 VT. LAWS 13 (providing jury trial for fugitives in habeas corpus proceedings)).

New York's relationship with the 1793 Fugitive Slave Act was nothing if not complex. In *Jack v. Martin*, Chancellor Reuben Walworth, speaking for the New York's highest court, found the Fugitive Slave Act unconstitutional due to Congress's lack of power to pass such an act. 14 Wend. 507, 526 (N.Y. 1835). At the same time, he also upheld the claim of the master and the obligation of state officials to return fugitives, bottoming the obligation directly on the constitutional Fugitive Slave Clause. *See* Paul Finkelman, *Sorting Out* Prigg v. Pennsylvania, 24 RUTGERS L.J. 605, 625-27 (1993).

167. HURD, *supra* note 36, at 283-92.

168. For a comprehensive survey of the slavery-related cases decided by the Supreme Court, see William W. Wiecek, *Slavery and Abolition Before the United States Supreme Court, 1820-1860*, 65 J. AM. HIST. 34 (1978); *see also* Earl M. Maltz, *Slavery, Federalism, and the Structure of the Constitution*, 36 AM. J. LEGAL HIST. 466 (1992) (discussing key cases).

169. 41 U.S. (16 Pet.) 539 (1842).

170. 62 U.S. (21 How.) 506 (1859). *Booth* was issued on March 7, 1859.

171. At the time, dissents, much less separate concurrences, were rare. Finkelman, *supra* note 166, at 606. Other recent entrants in the *Prigg* sweepstakes include Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and* Prigg v. Pennsylvania, 78 CORNELL L. REV. 1086, 1088 (1993); Maltz, *supra* note 168, at 473-80; *see* COVER, *supra* note 9, at 166-71; FEHRENBACHER, *supra* note 148, at 21-23, 118-19; MORRIS, *supra* note 146, at 94-107.

Nevertheless, it is probably fair to say that over significant reservations in the dissents, *Prigg* established that the power to regulate the fugitive-slave issue rested in the federal government.[172] *Prigg* held that the Constitution guaranteed the slaveholder the "positive, unqualified right" to the "immediate possession" of his property[173] and therefore invalidated any law that "interrupts, limits, delays, or postpones the right of the owner" to recaption.[174] In addition, the majority found, Congress had both the constitutional right and the obligation to implement the enforcement mechanisms necessary to uphold the right embodied in the Fugitive Slave Clause.[175] The states could pass no law either in aid of or to obstruct the right of the master.[176]

*Prigg* was a triumph of federal supremacy. Even the dissenters[177] agreed that the federal government had the right to regulate the rendition of fugitive slaves. Justice Story's decision made only one concession to state autonomy: States were permitted to treat unclaimed runaways as they pleased, even expel them like any other vagrants.[178] *Prigg* ought to have put the states out of the business of issuing writs of habeas corpus to persons held under the Fugitive Slave Act—even if the slaveholder was exercising the right to self-help without judicial process. As we shall see shortly, it did not come close to achieving that end.

Sixteen years later, the Supreme Court issued its decision in *Ableman v. Booth*.[179] Many things had happened in those sixteen years to sharpen sectional tensions: the collapse of the Missouri

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172. 41 U.S. (16 Pet.) at 622-25 (Story, J.).

173. *Id.* at 612 (Story, J.).

174. *Id.* (Story, J.).

175. *Id.* at 615-16 (Story, J.). The Court's opinion argued that the Fugitive Slave Clause was self-executing, so that free states had to recognize the common-law principle of recaption, which granted the slaveholder "the right to seize and repossess the slave, which the local laws of his own state confer upon him as property." *Id.* at 613 (Story, J.). Thus, *Prigg* determined that slavery itself was a local law issue, like other forms of status and property, such as marriage and rights of inheritance. It might be argued that *Prigg* was the first attempt at a federal constitutional rule governing choice of law, at least with regard to status, and it was one that did not encourage further efforts in that direction.

176. *See, e.g., id.* at 662 (McLean, J., dissenting).

177. Justice McLean dissented and Justice Taney concurred in part and dissented in part on the issue of whether the power to legislate rested exclusively in Congress. *Id.* at 626 (McLean, J., dissenting), 658 (Taney, J., concurring in part and dissenting in part).

178. *Id.* at 625 (Story, J.).

179. 62 U.S. (21 How.) 506 (1859).

Compromise, the passage of the Kansas-Nebraska Act, the *Dred Scott* decision,[180] and most important, the enactment of the Fugitive Slave Act of 1850.[181] *Booth* arose from facts that demonstrated the conflict between state and federal authority; its holding was another attempt to restrict the powers of state habeas courts in the interests of federal policy and federal supremacy. Part III briefly previewed *Booth*'s holding that state courts could not issue writs of habeas corpus to federal prisoners,[182] while discussing *Booth*'s role in shifting military abuse cases from state to federal courts. Here, we will consider the facts that gave rise to *Booth* as epitomizing both the use of habeas corpus on behalf of slaves and state court resistance to federal assertions of power, as well as the legal rationale of *Booth* itself.

*Booth* began with the 1854 vigilante rescue of a fugitive slave who had been captured by his master in Wisconsin. Federal authorities prosecuted Sherman M. Booth, a leading participant in the rescue, for violating the Fugitive Slave Act of 1850. After being taken into federal custody, Booth was twice freed by writs of habeas corpus issued by the Wisconsin Supreme Court, which found the restraint illegal on the ground that the federal statute was unconstitutional. The second Wisconsin writ of habeas corpus was even more provocative than the first: Booth had already been convicted by a federal district court of violating the 1850 Act when the Wisconsin Supreme Court ordered his discharge from federal custody, finding that the Fugitive Slave Act was unconstitutional, and that therefore the federal proceedings under it were void.[183]

Writing for the unanimous court, Justice Taney asserted in unwavering language the unavailability of state habeas corpus to reach

180. Scott v. Sandford, 60 U.S. (19 How.) 393, 455 (1857) (holding that residence in a free state did not entitle a slave successfully to sue for freedom upon return to a slave state). *See* MCPHERSON, *supra* note 84, at 121-30 (describing the collapse of the Missouri Compromise that had banned slavery north of 36°30' in order to secure passage of the Kansas-Nebraska Act, which permitted local option regarding slavery in territory previously closed to the institution).

181. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.

182. *Booth*, 62 U.S. (21 How.) at 523.

183. *Id.* at 507-14. This exercise of the habeas power was all the more noteworthy because the Wisconsin habeas statutes in effect at the time excluded persons confined under "process, by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction" and under "the final judgment or decree of any competent court of civil or criminal jurisdiction." *Id.* at 516.

a prisoner in federal restraint.[184] As Robert Cover has observed, "Taken at its broadest, and there are no qualifications in the decision, the doctrine was a startling assertion of federal power"[185] and a remarkable reversal of existing practice.[186] *Booth*'s language underscores its uncompromising approach: "[T]he sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye;"[187] federal supremacy is established by the constitution in "language . . . too plain to admit of doubt or to need comment."[188]

The Court observed that state courts, and in particular state habeas powers, cannot trench on federal supremacy. Although a state court may issue a writ of habeas corpus to a prisoner, once apprised in the return that the individual is in federal custody, the court "can proceed no further."[189] On this point, the Supreme Court was adamant:

> [I]f the authority of a State, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference.[190]

Surprisingly, neither *Prigg* nor *Booth* put state courts out of the federal habeas business. Instead, both decisions illustrate that the battle between state and federal interests in the north was playing itself out in the courtroom through the use of habeas corpus, the traditional common-law weapon in intragovernmental warfare. The Fugitive Slave Act of 1850 turned these relatively minor engagements into pitched battles. *Booth* was the culmination of one such battle. The story now turns to other such fights and with them to the decisions in which lower federal courts finally discovered that the habeas provisions of the 1833 Force Act gave them the additional powers they

184. *Id.* at 516.
185. COVER, *supra* note 9, at 187.
186. *Id.*
187. *Booth*, 62 U.S. (21 How.) at 516.
188. *Id.* at 517.
189. *Id.* at 523.
190. *Id.* at 524.

needed to impose federal law on the recalcitrant states. It is in these cases, with their efforts to uphold federal rights, that relitigation in the modern sense begins.

## V. THE FEDERAL RESPONSE TO STATE RESISTANCE TO THE FUGITIVE SLAVE ACT: HABEAS CORPUS UNDER THE 1833 FORCE ACT

In a remarkable series of cases emanating from efforts to enforce the Fugitive Slave Act of 1850,[191] the federal and state courts skirmished over state efforts—particularly in Ohio and the upper midwest—to avoid rendition of fugitive slaves. The conflicts played out through competing writs of habeas corpus: States attempted to free fugitives or their rescuers detained under federal law and federal authorities tried to free slaveholders, their allies, or federal officers detained under state process. Because these cases involved federal relief for prisoners in state custody for acts performed while executing federal law, petitioners had recourse, for the first time, to the habeas corpus provisions of the 1833 Force Act.[192] Almost by accident, the courts and petitioners discovered that the Force Act conferred broad new habeas powers on the federal judiciary as a necessary aid to the Act's primary aim, the assertion of federal supremacy over the states.

Most of the federal cases invoked the core habeas function. Federal courts were asked to release improperly incarcerated pretrial detainees—usually federal officers in state jails awaiting trial on state assault charges. In one of the many twists in these cases, antislavery forces now urged a limited habeas jurisdiction, reminding the federal courts that a facially sufficient return was conclusive proof of the

191. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462. Passed as part of the Compromise of 1850 that secured the admission of California as a free state and ended the slave trade in the District of Columbia, the Act significantly expanded federal involvement in the return of fugitives, providing for the appointment of special federal commissioners to hear fugitive rendition proceedings and to issue certificates of removal.

Claimants were authorized to secure warrants of arrest or to seize runaways themselves and to bring the fugitives before either a court or a commissioner. The commissioner was then to issue a certificate of removal based on either the live testimony of the claimant or on affidavit evidence. Testimony by the fugitive was excluded. If the commissioner issued the certificate, he received a fee of $10; if he denied the slaveholder's claim, he received only $5. Commissioners were also empowered to appoint "suitable persons" to execute any warrant or process they might issue. Moreover, if a claimant feared that the fugitive would be rescued before return to slavery, a federal marshal could be required to retain the fugitive in custody and to employ as many people as necessary to overcome the threatened rescue and deliver the fugitive across state lines to slavery.

192. Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632, 635. *See supra* note 21.

legality of detention. That facial sufficiency appeared in the form of a regular state arrest warrant.

Federal courts, on the other hand, now assumed the power to look behind the return and to allow the prisoner to prove his federal defense. They did so as a necessary aid to their habeas jurisdiction and to the interests of federal supremacy. Almost unnoticed amid the rhetoric of federal right and impending anarchy, federal courts, pressed to the wall, freed federal marshals incarcerated on validly issued state contempt judgments, a profound extension of federal powers. Federal courts now treated what they had previously seen as sister courts of coordinate jurisdiction as inferior tribunals of limited jurisdiction, akin to courts martial and other fora subject to federal revisory powers.

In 1853, the first of these resistance cases—apparently the first case to apply the habeas provision of the 1833 Force Act[193]—arose in Pennsylvania. The facts underlying *Ex parte Jenkins*[194] anticipate the

193. The author reviewed every volume of Federal Cases, compiling reported lower federal court cases from 1789 through 1880, and reviewed each case listed in the index under the topic "habeas corpus." Even with a generous construction, there are surprisingly few such reported cases—less than 50—before 1867. Research has failed to disclose any reported habeas cases raising the Force Act in its original context, the Nullification Crisis, presumably because, as a result of President Jackson's strong action, no federal agents were then imprisoned by state authorities for enforcing the tariff that occasioned the crisis. There seem to be no reported cases invoking the Force Act in any other context before mid-century. Although it is difficult to prove a negative, internal evidence in a number of the post-1850 cases indicates that the Force Act was a legal novelty, not well known to counsel or the courts. For example, in *Ex parte Jenkins*, counsel for the abolitionist interests acting as amicus curiae argued as if the case were about the applicability of the 1789 Act, either unaware of the difference between the two or hopeful that the court was unaware of the distinction. 13 F. Cas. 445, 447 (C.C.E.D. Pa. 1853) (No. 7259).

One reason for this obscurity may be that counsel failed to recognize, at least until 1850, that the Force Act's habeas provision was more broadly applicable than the removal provisions of the same Act. The latter provided for removal of all suits or prosecutions against officers of the United States or other persons commenced on account of any acts done *under the customs laws*. Act of Mar. 2, 1833, 4 Stat. 632, 633-34; *cf.* Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198 (providing for the removal of actions brought against officers of the United States for acts done under laws allowing seizure of dutiable goods aboard vessels). As observed in *Hart & Wechsler's Federal Courts*,

> Prompted by New England's resistance to the War of 1812, Congress inserted in an act for the collection of customs duties a provision . . . for the removal to the federal circuit court of any suit or prosecution begun in a state court against federal officers or other persons as a result of enforcement of the act.

BATOR ET AL., *supra* note 120, at 1336.

194. *Jenkins*, 13 F. Cas. at 445-46. Peller cited *Jenkins* in support of his thesis that federal courts engaged in extensive relitigation before the Civil War. Peller, *supra* note 1, at 617-18 n.202.

succeeding resistance cases. Four federal marshals attempted forcibly to seize a fugitive slave, who managed to escape them. On the evidence of a friend of the fugitive, a Pennsylvania state court issued a warrant charging the marshals with assault and battery with intent to kill. They were then arrested and detained in state jail. Federal authorities sought the marshals' release by invoking the habeas provisions of the 1833 Act and arguing that the marshals were in state custody because of their efforts to enforce federal law, the Fugitive Slave Act.

The petition for habeas corpus came before Justice Robert C. Grier of the United States Supreme Court, sitting on circuit in his home state. Grier was a northern Democrat who tended, in his personal politics, to be opposed to the antislavery movement, if not actually proslavery. Appointed to the Supreme Court in 1846 at the age of fifty-two by President James K. Polk, Grier had previously served as a state judge. In 1853, he took the nationalist position of his party. By 1857, he had sufficiently hardened in his views, and was sufficiently caught in the sectional cross-currents, that he was one of only two justices to join Justice Taney's *Dred Scott* opinion without elaboration.[195]

In *Jenkins*, Justice Grier first restated the inviolability of the federal interests represented by the Fugitive Slave Act.[196] A commissioner's finding that a person was a fugitive gave the slaveholder an uncontestable right to transport the fugitive from the state of capture to a slave state.[197] Thus, Justice Grier asserted, a writ of habeas corpus—either state or federal—was not available to prisoners held by legal process emanating from the Fugitive Slave Act.[198]

Justice Grier then turned to the nationalist interests behind the 1833 Force Act. Congress passed the Act in order to secure federal supremacy over the states.[199] When state and federal policy clashed, state interests would have to give way. Justice Grier wrote:

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195. 60 U.S. (19 How.) 393, 399 (1859).

196. *See, e.g.*, MCPHERSON, *supra* note 84, at 172-73, 179 (discussing, among other things, pressure placed on Justice Grier by President-elect Buchanan, a fellow Pennsylvanian, to join Taney's opinion).

197. *Jenkins*, 13 F. Cas. at 446-47.

198. *Id.* at 447.

199. *Id.* at 447-48.

> This act was passed when a certain state of this Union had threatened to nullify acts of congress, and to treat those as criminals, who should attempt to execute them; and it was intended as a remedy against such state legislation. If the state of Pennsylvania had, by act of legislature, declared that the fugitive law should not be executed within her borders, and had directed her officers to arrest and imprison those of the United States who should attempt to execute it, would not this court have been bound to treat such act as unconstitutional and void, and discharge their officers from imprisonment under it?[200]

Aside from the fact that the *Jenkins* writ was directed to state authorities on behalf of state prisoners, Justice Grier was at pains to show that his use of habeas powers was procedurally routine: "A warrant of arrest issued by a justice of the peace has none of the characteristics of a judgment of a court of record, and is therefore not conclusive evidence that the prisoner is rightly deprived of his liberty." "It is every day's practice,"[201] Grier observed, to inquire into the sufficiency of an arrest warrant.[202] "If this could not be done," he stated, "the writ of habeas corpus would little deserve the eulogies which it has received as a protection to the liberty of the citizen."[203] He then ordered the release of the marshals on the ground that they fell within the terms of the 1833 Act because they were enforcing a federal law when arrested.[204]

Antislavery proponents then brought a state civil suit on behalf of the fugitive for trespass *vi et armis* against the four marshals. The marshals were again arrested and jailed, this time on a warrant issued by a Pennsylvania Supreme Court justice. Once again, the marshals brought a federal petition for habeas corpus; this time their case came before Judge Kane of the same court.[205]

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200. *Id.*
201. *Id.* at 447.
202. *Id.*
203. *Id.*
204. *Id.* at 448.
205. *Id.* at 449. Justice Grier was absent at the time, presumably in Washington. Judge Kane already had a rather checkered career in this line of cases. In the so-called "Christiana affair," the killing of a slavecatcher by armed blacks near Lancaster, Pennsylvania, there were forty-one treason indictments, largely at the behest of Judge Kane. At the trial of the first two defendants, however, the jury returned not guilty verdicts after a strong charge by Justice Grier to the effect that treason required more than armed resistance to the enforcement of a particular statute. United States v. Hanway, 26 F. Cas. 105, 121 (C.C.E.D. Pa. 1851) (No. 15,299); *see* MCPHERSON, *supra* note 84, at 84-85; *see also* COVER, *supra* note 9, at 215 n.* ("Kane also jailed Passmore Williamson and was the

Here, the players switched positions. Counsel for the fugitive claimed that, under the common-law practice that governed habeas corpus, the court was unable to inquire into the facts underlying the return, even though that document simply recited the plaintiff's carefully tailored version of the facts, with the arrest warrant attached.[206] Counsel for the marshals wanted the court to accept evidence about the purported assault. Judge Kane took the middle ground. He at once ridiculed the suggestion that the court's evidentiary powers were so limited and discharged the prisoners based on a technical defect in the affidavits supporting the plaintiff's papers.[207]

Undaunted, Pennsylvania authorities again arrested the marshals, this time under a state indictment for riot, assault and battery, and assault with intent to kill. The indictment failed to mention that the rioters were federal officers discharging federal duties. Once again, the marshals petitioned Judge Kane for release. With breathtaking persistence, once again opposing counsel told Judge Kane that he lacked jurisdiction to hear evidence disputing the return, which stated a legally sufficient cause for detention. Again, Judge Kane stated that, in order to discharge his duties under the 1833 Act, he was entitled—even obliged—to hear evidence outside the return.[208] In no other way could he learn whether the detainees were in fact engaged in the execution of federal laws when they committed the alleged assault.[209]

Judge Kane then announced his understanding of the court's obligations under the 1833 Act:

> My duties are performed when I have released the prisoner from unlawful imprisonment; for that imprisonment is unlawful, however formal it may be, that affects to punish for an act enjoined or justified by the supreme law of the land; or when I have remanded him to abide his sentence, or to take his trial.[210]

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primary target for Richard Hildreth's *Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression.*").

206. *Jenkins*, 13 F. Cas. at 448. The irony in this case is obvious. Antislavery forces had expended considerable effort to convince state courts to go behind the return and even to provide jury trials in habeas and related proceedings on behalf of fugitives.

207. *Id.* at 450. Judge Kane found that the plaintiff's affidavits were insufficient as a matter of law to connect the defendants to the complained-of violence.

208. *Id.* at 452.

209. *Id.*

210. *Id.*

Judge Kane read the 1833 Act to grant all evidentiary powers necessary to dispose of the petition accurately; thus, if he found that the prisoner had a valid federal defense that the state trial court had ignored, the Act empowered him to discharge a prisoner from custody under sentence of a state court. This is the first indication that federal courts would interpret the 1833 Act to permit them to assess the viability of all federal defenses, and if necessary, to overturn the final decision of another court of competent jurisdiction for a trial error.

The next reported petition under the 1833 Act came from Wisconsin, as part of the so-called *Sherman Booth Affair*, a long series of cases that ultimately yielded the Supreme Court decision, *Ableman v. Booth*.[211] A year after *Jenkins*, a Wisconsin federal district court faced *United States ex rel. Garland v. Morris*.[212] Garland claimed he owned Glover and, with the aid of a federal marshal, Garland captured Glover and had him jailed. Several things then happened more or less simultaneously. Some of Glover's friends obtained a writ of habeas corpus from a Milwaukee county judge, directing the marshal and the county sheriff to produce Glover in court; a mob rendered resort to legal process moot by rescuing Glover; the mayor of Racine issued a warrant charging Garland with assault and battery; and Garland himself was jailed.[213] Garland then petitioned the federal court for habeas corpus under the 1833 Act. The district court ordered Garland's discharge on the ground that his seizure of Glover was sanctioned by the Fugitive Slave Act.[214]

As in *Jenkins*, the decision turned on two related issues: The court's power independently to determine the matters asserted in the return and federal supremacy. Again, the court reasoned that its jurisdiction to issue the writ under the 1833 Act entailed the power to

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211. 62 U.S. (21 How.) 506 (1859). For a discussion of the *Sherman Booth Affair*, see COVER, *supra* note 9, at 186-87.

212. 26 F. Cas. 1318 (D. Wis. 1854) (No. 15,811). Peller cited *Garland* as an example of relitigation. Peller, *supra* note 1, at 617. Once again, however, Peller failed to note that *Garland* involved a pretrial petition for the writ.

213. *Garland*, 26 F. Cas. at 1318.

214. *Id.* at 1319. The court stated that the 1850 Act "gave the relator Garland, the choice to apprehend his fugitive slave either with or without a warrant, and to take him before a judge or a commissioner for hearing. In this case he was aiding the marshal in the service of a warrant, at the officer's request. He was acting under a law of the United States, and also aiding the marshal, or officer, in the service of process of the United States. The relator is clearly a person within the act of the 2d March, 1833, upon which this writ was allowed." *Id.*

examine whatever evidence was necessary to decide whether the petitioner had a valid federal defense.[215] In reaching its conclusion, the court waved the flag of federal supremacy:

> The law under which the fugitive was apprehended, is a law of the United States, adopted in pursuance of the constitution, and must be enforced. The judges, commissioners, marshals, or claimants are not to be interfered with, in its administration or execution, by state courts or officers.... The sovereignty of the government, asserted through the process from its courts, shall not be affected or nullified by resistance, or by the arrest of officers or men engaged in the service of such process.[216]

Again, however, the court's exercise of habeas power—testing the validity of a pretrial detention—fit well within the traditional habeas model in criminal cases. The court's assertion of its ability to reach state prisoners was based on statute; its ability to determine all matters that were part of the proceeding was based on the need to effectuate the interest of federal supremacy asserted in the 1833 Act.

By 1855—a year after the passage of the Kansas-Nebraska Act and three years after the publication of *Uncle Tom's Cabin*—the national mood had turned intransigent. Northern resistance to the rendition of fugitive slaves hardened, fueled by fears of the expansionist aims of the slave power and the belief that the Pierce administration favored southern interests in order to preserve the Union.[217] In this atmosphere, federal courts quietly established a new line of precedent in habeas corpus proceedings, granting discharge to petitioners under state sentence of imprisonment after a final adjudication of contempt.[218]

Fittingly, the first case, *Ex parte Robinson*,[219]—known to history as the "Rosetta case"—was decided by Supreme Court Justice John

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215. *Id.* at 1319-20.

216. *Id.* at 1319.

217. *See* MCPHERSON, *supra* note 84, at 145-69.

218. *See, e.g., Ex parte* Kearney, 20 U.S. (7 Wheat.) 38, 42-45 (1822) (holding that habeas corpus under the 1789 Act was unavailable to overturn a final contempt decision).

219. 20 F. Cas. 969 (C.C.S.D. Ohio 1855) (No. 11,935). Although Peller cited the later *Robinson* case, *Ex parte* Robinson, 20 F. Cas. 965 (C.C.S.D. Ohio 1856) (No. 11,934), he failed to pick up this earlier case, significant in two respects: first, it was decided by a Supreme Court Justice sitting on circuit, and second, it was the earliest instance of relitigation after a final judgment in the federal courts. *See* Peller, *supra* note 1, at 617.

McLean,[220] sitting on circuit in his home state of Ohio. Although originally a Democrat, McLean would turn Republican by 1857, and his presidential ambitions were something of an embarrassment to the Court. McLean was the most strongly antislavery of the justices—he dissented in *Prigg*[221] and in two years would be one of two dissenters in *Dred Scott*.[222]

Yet, McLean was also strongly committed to the constitutionality of the Fugitive Slave acts as a proper exercise of federal power, to the exclusivity of federal power to regulate the return of fugitives, and—at the time of his dissent in *Prigg*—to the position that state officials were morally and constitutionally obligated to enforce the fugitive slave laws. On the other hand, McLean believed that states could protect free blacks within their borders. Thus, when he faced the case of Rosetta Armstead, Justice McLean was a man in some intellectual discomfort.[223]

Rosetta Armstead was a black child whose master had brought her into Ohio. Free blacks obtained a writ of habeas corpus on her behalf from a local probate judge, who held Rosetta was free because her master had voluntarily brought her into Ohio, a free state. The court ordered her discharged from her master's custody and appointed an antislavery activist, Lewis Van Slyke, as her guardian.

Shortly after Rosetta's discharge, her master had the child seized and jailed on the warrant of a fugitive slave commissioner. Van Slyke then petitioned the Hamilton County court of common pleas for a writ of habeas corpus, securing an order for Rosetta's release in reliance on the determination of the probate court that she was free. Briefly out of jail, Rosetta was seized a second time on the fugitive slave commissioner's warrant. The common pleas judge then ordered her released a second time. When Hiram Robinson, the federal marshal charged with executing the commissioner's order, refused to obey the state court order, the judge held him in contempt and jailed him.

Robinson then petitioned the federal court for a writ of habeas corpus under the 1833 Act. Counsel for Ohio argued that Robinson's conduct was outside the Act's protections because the commissioner,

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220. For a further discussion of Justice McLean's background and his participation in the cases arising out of the slavery crisis, see COVER, *supra* note 9, at 101-03.

221. 41 U.S. (16 Pet.) 539, 658-74 (1842) (McLean, J., dissenting).

222. 60 U.S. (19 How.) 393, 529-64 (1857) (McLean, J., dissenting).

223. *See* COVER, *supra* note 9, at 183-85.

whose orders Robinson was executing when he disobeyed the state court, had "no authority to act judicially, as he was not appointed as judges are required to be appointed by the constitution."[224] Ohio, thus, claimed that the Fugitive Slave Act was unconstitutional because it conferred Article III powers on non-Article III personnel. The commissioner's acts were therefore void. Accordingly, the marshal was not confined for an "act done or omitted to be done in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof"[225] as the 1833 Act required.

This might have played better if Justice McLean had not previously rejected the constitutional claim in another Ohio case.[226] As it was, he gave the argument short shrift. On the other hand, Justice McLean realized that Rosetta's case did present a genuine problem: What effect should he give the Ohio probate court's finding in the first habeas proceeding that Rosetta was free under Ohio law?[227] If the probate court's decision was a final judgment, then Rosetta had a colorable claim that it barred the proceedings before the commissioner.[228]

Rather than face the preclusion issue squarely, Justice McLean concluded that the Hamilton County judge exceeded his jurisdiction by relying on the probate decision to free Rosetta.[229] The Justice found the Hamilton County decision tantamount to the state exercise of

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224. *Ex parte* Robinson, 20 F. Cas. 965, 970 (C.C.S.D. Ohio 1856) (No. 11,934).

225. *Id.* (quoting the Act of Mar. 2, 1833, 4 Stat. 634).

226. *See* Miller v. McQuerry, 17 F. Cas. 335, 339 (C.C.D. Ohio 1853) (No. 9583). Robert Cover argued that Justice McLean's position regarding the constitutionality of the Fugitive Slave Act hardened after the *McQuerry* decision. COVER, *supra* note 9, at 185. As Cover stated,

> [I]t should be noted that in *McQuerry* the earlier tendencies became a sharply focused argument. McLean had gone from constitutional bargain to social contract. He had escalated the basis for enforcement of the Fugitive Act from the terms upon which the Union was formed—itself a dubious proposition—to the consensual basis of ordered society. In *McQuerry*, McLean concerned himself not with a law, but with law as antithesis to anarchy.

*Id.* at 183.

227. *Robinson*, 20 F. Cas. at 972.

228. *Id.* ("Every one who examines the authority in this country and in England, will find that there have been diversity of judgments on the point whether the decision on a habeas corpus is final . . . ."). Justice McLean, however, chose not to take sides in that debate, although the weight of modern opinion fails to accord preclusive effect to judgments in habeas corpus proceedings.

229. *Id.* at 971-72.

appellate review over a federal tribunal, the commissioner's court.[230] Rather, Justice McLean held that the commissioner's court was the proper forum to resolve the res judicata effect of the probate decision, not a collateral proceeding in state court: "If the commissioner did wrong, does that authorize the state judge to interpose by writ of habeas corpus, and withdraw the case from the federal jurisdiction?"[231]

The common pleas court thus had acted "without any authority of law," and its attempt to wrest Rosetta from the proper jurisdiction of the commissioner was "against law, and ... the proceedings are void."[232] As a result, Justice McLean announced, "I am bound to treat them as a nullity."[233] He then discharged Robinson from custody.[234]

Justice McLean's reasoning does not withstand scrutiny. The issue was not the preclusive effect of the probate judgment, but the marshal's treatment of the common pleas order. If that order were in error, the answer was not disobedience, but a writ of mandamus. Justice McLean, in effect, found that an error of law stripped the state court of jurisdiction, even of jurisdiction to protect the integrity of its own processes. The decision treats a state court as if it were a court of inferior jurisdiction, akin to a court martial, and it flies in the face of the reasoning underlying the collateral bar rule. Indeed, by the same reasoning, Justice McLean simply could have focused on the marshal's federal defense, which was colorable whether or not the commissioner or the common pleas judge correctly applied the rules of res judicata.

Justice McLean, however, no longer wished to decide the case on the narrowest available ground, but rather, wanted to make a statement about federal supremacy. In doing so, he ignored the fact that he offered Rosetta a hollow remedy for her procedural claim. There was substantial precedent[235] that even ex parte findings by a commissioner were not subject to challenge until the fugitive had been returned to a

230. *Id.* at 971.

231. *Id.*

232. *Id.* at 972.

233. *Id.*

234. *Id.* Notably, McLean failed to mention—or distinguish—*Ex parte* Kearney, 20 U.S. (7 Wheat.) 38, 45 (1822), in which the Supreme Court held that the 1789 Act did not grant jurisdiction to issue a writ of habeas corpus on behalf of a person imprisoned for contempt because contempt entailed a final judgment over which it did not have appellate authority.

235. *E.g.*, *Ex parte* Jenkins, 13 F. Cas. 445 (C.C.E.D. Pa. 1853) (No. 7259).

slave state. Thus, Rosetta was unlikely to find another forum for her res judicata claim, plausible though it might have been.

Within a year, Hiram Robinson was back in Ohio federal court testing the same issues in a case that yielded an even stronger decision overturning a state contempt judgment.[236] This time Robinson had custody of several fugitives awaiting a commissioner's decision regarding their status. A county probate judge issued a writ of habeas corpus on their behalf, and in his return, Robinson asserted that his custody was legal. The state habeas court then issued an order that the fugitives could not be removed from the jurisdiction until it resolved the matter. After being served with the state court order, Robinson delivered the fugitives to their master in Kentucky. The state court found him guilty of contempt and ordered him both fined and imprisoned.

Robinson then petitioned the federal court for habeas corpus under the 1833 Act. This time the petition came before District Judge Humphrey H. Leavitt.[237] A Jackson appointee to the federal bench, Leavitt had served as a state prosecutor, a state legislator, and a state judge as well as a member of the Ohio delegation to Congress. Leavitt entertained antislavery views, but like other judges, he also rigorously maintained the constitutionality of the Fugitive Slave Act.[238] Showing greater deference to state processes, Judge Leavitt tried to limit the inquiry to the existence of Robinson's federal defense, thereby hoping to avoid the appearance of overturning the state court's final decision:[239]

> In the consideration of this question, it is not necessary to inquire whether the probate judge could rightfully issue the writ of habeas

236. *Robinson*, 20 F. Cas. at 969. Peller discussed this case as a primary example of relitigation. Peller, *supra* note 1, at 617.

237. Appointed to the federal bench in 1834, Leavitt was born in Suffield, Connecticut in 1796 and died in Ohio in 1873. He was a distant cousin of the abolitionist, Joshua Leavitt.

238. Two years after the second *Robinson* case, he charged an Ohio jury, "Christian character was not the meaning or the intent of the fugitive slave law, and it would not therefore answer as a defence for violating the law." HENRY HOWE, 2 HISTORICAL COLLECTIONS OF OHIO 268 (1891). Leavitt later presided over the habeas suit of Clement L. Vallandigham, a prominent Ohio Copperhead, who was arrested, tried by a military commission, and sentenced to prison for the duration of the war.

239. To this end, Judge Leavitt announced, "I neither assert nor exercise the jurisdiction to review or reverse the action of the probate judge." *Robinson*, 20 F. Cas. at 968.

> corpus; neither is it necessary that this court should assert or exercise a power of revising or reviewing the sentence of the probate judge for the indefinite imprisonment of the marshal for the alleged contempt.[240]

"Indeed," Leavitt announced, "such a jurisdiction is distinctly disclaimed."[241]

Instead, Judge Leavitt framed the issue as whether, at the time the state court ordered Robinson to produce the fugitives, he was subject to "an imperative obligation resting on him by virtue of a law of the United States"[242] to perform the commissioner's orders, even to transporting the fugitives out of state in order to avoid a rescue.[243] Nevertheless, Judge Leavitt then proceeded to catalogue the probate court's misdeeds. First, he pointed to a long line of authority holding that a state writ of habeas corpus was not available to a fugitive once proceedings before a commissioner had begun.[244] Regretfully, he then expressed certainty that if the state court had obtained custody of the fugitives, it would have released them.[245]

As proof, Judge Leavitt pointed to the probate court's decision that the commissioner's proceedings were unconstitutional and therefore void.[246] From experience with other state courts, Judge Leavitt suggested that the probate court would next find that the fugitives were entitled to discharge because the commissioner's arrest warrant, arising from a void proceeding, was itself void.[247] Indeed, when state counsel urged the unconstitutionality of the Fugitive Slave Act, he earned Judge Leavitt's weary response, "The act referred to, whatever views may be entertained of its necessity and expediency, is a valid and constitutional law, and as such must be respected and enforced."[248]

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240. *Id.* at 966.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* Among the cases cited in *Robinson* were Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), as well as Norris v. Newton, 18 F. Cas. 322 (C.C.D. Ind. 1850) (No. 10,307), and the Rosetta case. *Ex parte* Robinson, 20 F. Cas. 969 (C.C.D. Ohio 1855) (No. 11,935). Despite his belief that the writ would not lie once the proceedings before the federal commissioner were underway, Judge Leavitt made every effort to demonstrate that Robinson had behaved respectfully to the state court and had not ignored or flouted its process. *Robinson*, 20 F. Cas. at 967.

245. *Robinson*, 20 F. Cas. at 968.

246. *Id.*

247. *Id.*

248. *Id.* at 969; *cf.* COVER, *supra* note 9.

The state judicial system—bench and bar alike—refused to be bound by a growing body of federal precedent upholding the Fugitive Slave Act. In reaction, Judge Leavitt's decision repeatedly referred to duty under federal law: the marshal's obligation to enforce the Act and the state's obligation not to interfere. The opinion concluded with an indication that, to Judge Leavitt, Ohio's behavior threatened nothing short of anarchy:

> No judge or other officer of the state or national government, or any citizen of either, so far as the rights of others are concerned, has a right to act on his private and individual views of the policy and validity of laws passed in conformity with the forms of the constitution. Until repealed or set aside by the adjudication of the proper judicial tribunal, they must have the force of laws and be obeyed as such. Any other principle must lead to anarchy in its worst form, and result inevitably in the speedy overthrow of our institutions.[249]

The people of Ohio apparently were unmoved. A year later—the year of the *Dred Scott* decision[250]—Judge Leavitt faced a more intransigent display of resistance in the often-cited case, *Ex parte Sifford*.[251] Once again, Judge Leavitt perceived the matter as a conflict between federal and state authorities, in which the federal interests were paramount.[252] In *Sifford*, federal agents had arrested four people on warrants charging that they had aided and abetted the escape of a fugitive slave and obstructed federal officers in the execution of the Fugitive Slave Act. A Champaign County probate judge issued a writ of habeas corpus directed at the federal officers, and the Clark County sheriff decided to serve it while the officers were transporting the prisoners through his territory. His idea of serving the writ, however,

249. *Robinson*, 20 F. Cas. at 969.

250. Although it is difficult to tell, and the case nowhere cites Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), it appears that *Sifford* was decided some months after the March 6, 1857 reading of the *Dred Scott* decision.

251. 22 F. Cas. 105 (S.D. Ohio 1857) (No. 12,848). Peller cites *Sifford* as an example of relitigation. Peller, *supra* note 1, at 617.

252. *Sifford*, 22 F. Cas. at 106. Judge Leavitt began his opinion by stating, "There is no cause to regret the indulgence which has been extended to counsel, in the presentation and discussion of this case, or the time, which, for reasons not necessary to be stated, has elapsed since the hearing commenced.... Every case of conflict between the national and state authorities casts upon the judge or court called to pass upon it a most responsible duty; and such cases are the more embarrassing and difficult when the jurisdiction of the judge or court is challenged, and a decision of that question becomes necessary." *Id.*

was "by taking possession of the four prisoners."[253] As Judge Leavitt dryly noted, the sheriff was "fully aware that the writ could not be served without bringing the authorities of the United States and the state of Ohio into direct collision, and that the issue to be settled was purely one of physical power."[254]

The federal officers resisted the attempt to relieve them of their prisoners and continued on their way. The state officers then swore out a complaint for assault against the marshals. A "large armed force" then seized the marshals and rescued their prisoners.[255] The marshals now found themselves in jail, and after some procedural wrangling, accused of assault on a sheriff with intent to kill. The Ohio courts discharged the fugitives pursuant to the state habeas corpus, and the federal government sought the release of the imprisoned marshals under the 1833 Act.

Ohio argued that the federal marshals were held under lawful state process, and accordingly, the federal habeas court lacked authority to evaluate independently the decision of the court that issued the warrant.[256] Relying on the earlier resistance cases, Judge Leavitt found that the 1833 Act necessarily encompassed the power to go behind the return—arguably lacking in the 1789 Act—in support of its mandate to enforce federal policy over the states.[257] As he said:

> Now, the point to be inquired into and determined by the judge issuing the habeas corpus is, whether the act for which the party is imprisoned has been done in the discharge of official duty, under the authority contemplated by the provision referred to [the 1833 Act]. But if the return to the writ, showing an imprisonment, under state process, shuts out all further inquiry, the act of congress is a dead letter and its purpose altogether defeated.[258]

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253. *Id.*

254. *Id.* at 110.

255. *Id.* at 107.

256. *Id.*

257. *Id.*

258. *Id.* Judge Leavitt continued, in response to the State's argument that the 1833 Act was limited to the nullification crisis surrounding the Tariff of Abominations:

> The occasion of the passage of the act of congress of 1833 has been referred to; and, it is contended in argument, that it must be limited in its operation to a state of things similar to that then existing; and was intended only to guard against nullification, when it appeared in the form of resistance by state authority, to the revenue laws of the United States. It was doubtless such threatened resistance that called the law into being. But, it has been permitted to remain on the statute book,

Without the power to scrutinize the state's version of the facts, "it is very clear the sovereignty of the United States is liable every day to be contemned and trampled upon."[259] The federal government would be at the mercy of "any one, corrupt enough to make a false oath against an officer of the United States, having charge of offenders against its laws, to procure their release, and most effectually to obstruct and nullify the legislation of the Union for the punishment of crime."[260] In the service of federal supremacy, Judge Leavitt unconsciously echoed the state judges attempting to limit federal recruitment fraud and antislavery advocates pleading the cause of free blacks.

Judge Leavitt did attempt to strike a conciliatory note,[261] minimizing the incursion on state interests represented by the expanded federal habeas powers. The challenge to regular state process "does not imply any invasion of the sovereignty of the state, whose process is thus treated. Nor is it based on any assumption or claim that a federal court or judge has any jurisdiction to revise or set aside, the judgments of the courts or magistrates of the state."[262] Instead, the 1833 Act merely continued the court's power "to inquire into the cause of imprisonment."[263] Nevertheless, contemporaries understood the issue in starker terms—the respect of one sovereign for another. The refusal to accept the state's legal process at face value

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in full force for upward of twenty-five years. This has not been the result of accident or inadvertence. It was obvious to the members of congress, and the statesmen, who have, since the enactment of the law, participated in the affairs of the country, that it was a wise provision and necessary to meet any subsequent case of improper interference by a state with the legislation of congress, in matters pertaining to the national government, and within the range of its exclusive powers.

*Id.*

259. *Id.* at 108.

260. *Id.* Leavitt attempted to separate the supremacy issue from the more volatile context of the Fugitive Slave Act, remarking, "It is easy to conceive, how not only the fugitive-slave law, but the laws for the protection of the post-office department, and laws punishing the making of spurious coins of the United States, may be defeated in their salutary operations, if the jurisdiction referred to does not exist." *Id.*

261. *Id.* at 112. The occasion for such conciliation was that "[m]uch has been said by counsel on the importance of the questions involved in this case. The danger of invading the sovereignty of the state of Ohio has been exhibited in most eloquent and forcible terms; and the court has been admonished of the fearful results of the exercise of jurisdiction in this case." *Id.*

262. *Id.* at 108.

263. *Id.*

was not simply an expression of federal supremacy, but of state limitation as well. Habeas corpus was now a key weapon in the federal arsenal, and Ohio was on notice that it would be used to enforce federal supremacy at the cost of state sovereignty.[264]

The line of authority represented by the Fugitive Slave Act cases filtered into other federal habeas opinions decided before passage of the 1867 Act. Perhaps the best known of these later cases is *United States ex rel. Roberts v. Jailer.*[265] Roberts was a federal marshal attempting to arrest a defendant for violating the federal tax laws, apparently by making moonshine alcohol. When the accused resisted arrest and attempted to shoot Roberts, the marshal returned fire and killed him. Roberts was then arrested and indicted for murder under state process.[266] He eventually obtained release under the provisions of the 1833 Act.

Characterizing the case as a clash between state and federal authority, the *Roberts* court notified the state's attorney so that he could appear to represent the state's interests in the proceeding.[267] His position provides an interesting insight into the time because the state attorney argued that the part of Kentucky in which the events took

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264. *Id.* at 112. The court stated,

> It is readily conceded that a federal judge or court should tread with cautious steps upon the line dividing the national and state sovereignties. But it should be remembered that sovereignty pertains to the government of the United States as well as to that of the states. The general government within its constitutional limits is supreme and its action is paramount to any opposing action on the part of the states. Every right thinking and right hearted American citizen will feel and admit the obligation resting on him to sustain the just powers of the Union as well as of the state in which he resides. A proper fealty to both is due from and demanded of every citizen; and these obligations are neither repugnant or inconsistent. Upon the just recognition of each depends the existence and perpetuity of our government.

*Id.*

265. 26 F. Cas. 571 (C.C.D. Ky. 1867) (No. 15,463). Peller cites *Roberts* as a further example of relitigation. Peller, *supra* note 1, at 617 n.202. The case relies heavily on the analysis in *Ex parte* Jenkins, 13 F. Cas. 445 (C.C.E.D. Pa. 1853) (No. 7259). In fact, *Roberts* demonstrates that the problem before the court is indistinguishable from the issues presented in the fugitive cases, including *Jenkins*, *Morris*, *Robinson*, and several other apparently unreported cases. *Roberts*, 26 F. Cas. at 575. While admitting that the relevant precedents all arose in the context of the Fugitive Slave Act, the district judge remarked, "But I suppose no one will assert that the rights of masters to their slaves are higher than the rights of the government to its revenue; or that the person of an officer when seeking to arrest a fugitive slave is more sacred than when endeavoring to arrest a criminal." *Id.* at 576.

266. *Id.* at 575.

267. *Id.* at 572.

place was so disordered that the decedent believed the people at his house were robbers and not law officers.[268] As the court's discussion indicates, however, the once-disputed question of whether the federal habeas court had authority to inquire into the circumstances of a facially regular detention was now settled in favor of the court's broad evidentiary powers.

On the wider issue of federal habeas corpus relief for state prisoners the court was more cautious: The district judge limited the circumstances in which state prisoners could invoke the federal habeas remedy to those implicating federal supremacy.[269] Accordingly, the court disclaimed any right to discharge the marshal on the basis of self defense, even if a state jury would have acquitted him on that ground.[270] Denying any "general supervisory jurisdiction" over the state courts and persons or property in their custody,[271] the court instead focused on the federal interests involved. The homicide justifiably occurred in the course of an attempt to make a valid federal arrest; the marshal was therefore entitled to release.[272]

In each of these cases in which federal courts ordered habeas relief to state prisoners, the court focused on governmental interests and not on the individual rights of the prisoners themselves. Thus, these decisions give scant comfort to those who would push the

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268. *Id.* at 575.

269. *Id.* at 576.

270. *Id.* The court stated, "A jury would probably acquit him on such ground . . . but I have nothing to do with such an inquiry. It belongs only to the state court. I have only to inquire whether what he did was done in pursuance of a law and process of the United States, and so justified, not excused, by that law and process." *Id.*

271. *Id.* at 577.

272. *Id.* The tone of the decision was decidedly more conciliatory toward the state bench than the fugitive cases:

> I have not been induced to arrive at this conclusion [that the prisoner must be released] by any apprehension that the relator would not, if remanded, have a fair trial for his alleged offense, in the county of Mercer. I have profound respect for the learning and integrity of the judge who presides in that circuit, and the argument and bearing of the able attorney for the commonwealth, before me, are sufficient assurance of his fairness and honor. If I myself were to be arraigned for any alleged offense, I know of no tribunal before which I could be tried with fuller assurance that enlightened and exact justice would be done me than in that in which these gentlemen are the chief officials. I discharge the relator from no apprehension that injustice would be done him by a trial in the state court, but because he has a right to demand his discharge at my hands under the laws of the United States, which I am bound to administer.

*Id.*

pedigree of a due process-oriented, broad habeas remedy before the passage of the 1866 Habeas Act.

## VI. THE RHETORIC OF HABEAS CORPUS: MILITARY DETENTION CASES DECIDED AFTER LINCOLN SUSPENDED THE PRIVILEGE OF HABEAS CORPUS

Every story deserves an epilogue—at least if the climax leaves important questions unanswered. And so it is with the story of the development of federal habeas corpus before the Civil War. The decisions that actually expanded the reach of federal habeas corpus are workmanlike, narrowly written, and almost deliberately colorless. Yet, advocates of the broadest historical reading of habeas corpus have pointed to fervid rhetoric in which federal courts claim that the writ was and remained the guardian of traditional due process rights; the same advocates cite these decisions as evidence of frequent relitigation of final judgments in order to reach due process violations embedded in the trial-court record.[273] If courts were as constrained in issuing the writ as the preceding discussion has shown, then the question is where did this rhetoric come from and how is it to be understood?

In fact, all the cases cited[274]—and a few with similar language that the legal literature has generally overlooked—were decided after April of 1861, after open hostilities between the Union and the Confederacy had begun.[275] The timing is critical. By April 27, 1861, the Lincoln administration had suspended the writ of habeas corpus to protect the military supply line between Philadelphia and the capital; on May 10, it suspended the writ in Florida; on October 14, the administration extended the northward suspension of the writ as far as Maine.[276] At the same time, the administration took the position that

273. Peller, *supra* note 1, at 612-13.

274. It should be noted that Peller cited only one case directly in support of his claim that "lower federal courts routinely permitted federal prisoners to relitigate their due process claims," and that any lower federal court could exercise the traditional power of habeas review and release any federal prisoner held in violation of the Due Process Clause—namely, *In re* MacDonald, 16 F. Cas. 17 (E.D. Mo. 1861) (No. 8751), a case with limited precedential value. Peller, *supra* note 1, at 612-18.

275. The firing on Fort Sumter, the symbolic act that began the war, took place on April 14, 1861. NEELY, *supra* note 20, at 4.

276. *Id.* at 8-14.

habeas corpus no longer applied in the territories in rebellion because they had abrogated their rights under the Constitution.[277]

As the war continued, the administration imposed further limitations on habeas corpus. In particular, in the late summer and fall of 1862—ironically enough, at the same time it was readying the preliminary Emancipation Proclamation[278]—the Lincoln administration announced that all persons resisting the draft, discouraging enlistment, or guilty of any disloyal practice would be subject to martial law, tried by military courts, and denied the writ of habeas corpus.

Contemporaries considered Lincoln's actions a dangerous usurpation of power by the executive, an unconstitutional series of acts that jeopardized the civil liberties of ordinary citizens.[279] In fact, not until March 3, 1863 did Congress authorize the executive to suspend the writ of habeas corpus, setting to rest that aspect of the controversy.[280] The irony is that the decisions commonly cited for their broad construction of habeas corpus were issued by courts who did not have habeas powers or feared losing them in a country in the middle of a civil war. What is more, the opinions appeared to have been written largely by judges who were out of sympathy with

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277. *Id.* at 10. Neely also describes a period of aggressive arrests of persons suspected of rebel sympathies, beginning in late 1861 and trailing off by 1863, despite the famous Vallandingham arrest. *Id.* at 18-23.

278. The Emancipation Proclamation was issued on September 22, 1862, five days after the battle of Antietam. It stated that it would free all slaves behind rebel lines as of January 1, 1863. On New Year's Day, Lincoln signed the final Emancipation Proclamation, making good the promise of three months earlier. MCPHERSON, *supra* note 84, at 557-58, 563.

279. The main issue was whether the executive branch could suspend the writ without prior congressional authorization. Chief Justice Taney's opinion in *Ex parte* Merryman, 17 F. Cas. 144, 147-53 (C.C.D. Md. 1861) (No. 9487), although otherwise suspect (see *infra* note 296), testified to the disquiet of the legal community in the face of Lincoln's actions. After discussing Lincoln's decision to suspend the writ, the Chief Justice stated,

> I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power . . . the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.

*Merryman*, 17 F. Cas. at 152; *see* LINCOLN THE WAR PRESIDENT: THE GETTYSBURG LECTURES 156 (Gabor Boritt ed., 1992); NEELY, *supra* note 20, at 7-9; JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 118-39 (2d ed. 1964).

280. NEELY, *supra* note 20, at 202.

Lincoln's conduct of the war. Under these circumstances, the decisions have limited value in determining the actual contours of the habeas remedy.

Consider, for example, the heavily cited *In re McDonald*,[281] an opinion issued by Judge Samuel Treat of the district court for the Eastern District of Missouri in the first half of May 1861. Previously unremarked in the legal literature, the background of *McDonald* is instructive. Both a slave and a border state, Missouri had substantial unionist sympathy as well as a substantial Confederate presence, and, by the spring of 1861, much of its elected government had decamped to join the Confederacy. Although not yet officially under martial law—the writ of habeas corpus was still formally in place—the state was extremely unsettled and military forces for both sides were present.[282] Judge Treat himself had been influential in Missouri Democratic politics for many years, opposing the various parties that coalesced into the pro-Lincoln Republicans.[283] In this turbulent atmosphere *McDonald* was decided.

On May 10, 1861, Union Captain Nathaniel P. Lyon captured a large body of Missouri militiamen—Confederate sympathizers—at Camp Jackson, where they were supposedly poised to capture the federal arsenal at St. Louis for the Confederacy.[284] Shortly afterward, Judge Treat issued a writ of habeas corpus, releasing one of the prisoners, Captain Emmett McDonald. General William S. Harney, the area's Union commander responded, saying that despite his desire "to sustain the Constitution and laws of the United States and of the State of Missouri, . . . I must take to what I am compelled to regard as the higher law, even [if] by so doing, my conduct shall have the

281. 16 F. Cas. 17 (E.D. Mo. 1861) (No. 8751). This is the case most heavily relied on by Peller for his claim that habeas corpus was a broad due process-oriented remedy during the nineteenth century. Peller, *supra* note 1, at 612-16.

282. *See, e.g.*, MCPHERSON, *supra* note 84, at 290-94 (describing divided allegiances in Missouri at the outbreak of the War).

283. Judge Treat was born in Portsmouth, New Hampshire in 1815 and died in Rochester, New York in 1902. He moved to St. Louis in 1841 and became active in Democratic politics, serving as judge of the St. Louis Court of Common Pleas from 1849 to 1857. He was appointed to the federal court in 1857 by the Democratic Buchanan administration, which had been elected largely by southern and northern conciliationists' votes.

284. *See, e.g.*, MCPHERSON, *supra* note 84, at 290-92 (describing the role of Lyon in the Missouri campaign; the federal arsenal at St. Louis contained 60,000 muskets and other arms, making it the largest in the slave states).

appearance of coming in conflict with the forms of law."[285] In other words, General Harney refused to obey because the area was under rebellion and was de facto, if not de jure, under martial law.

The opinion of the district court reflects this refusal in the politer terms of legal argument. Counsel for the military apparently demurred to the writ, arguing that the federal court lacked jurisdiction to entertain a petition for habeas corpus when the prisoner was not confined by any formal commitment. McDonald, for his part, maintained that he was entitled to the writ because he was held by color of the authority of the United States.[286] The first thing to notice, of course, is that McDonald never claimed to be held by virtue of judicial process—not even that of a military tribunal—so that the issue of relitigation did not even come up in the case.

These circumstances explain Judge Treat's oddly extended discussion of the underpinnings of the federal habeas power, as well as the strength of his rhetoric. Taking note of the situation in which he found himself, Judge Treat admiringly quoted an earlier judge who faced a petition for habeas corpus from a prisoner accused of fomenting rebellion against the federal government:

> In times like these, when the public mind is agitated—when wars and rumors of wars, plots, conspiracies and treasons excite alarm—it is the duty of a court to be peculiarly watchful, lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times more disastrous. The worst of precedents may be established from the best of motives. We ought to be upon our guard, lest our zeal for the public interest lead us to overstep the bounds of the law and the constitution; for, although we may thereby bring one criminal to punishment, we may furnish the means by which a hundred innocent persons may suffer. The constitution was made for times of commotion. In the calm of peace and prosperity, there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude.[287]

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285. NEELY, *supra* note 20, at 32 (quoting Harney and suggesting that this informal suspension of the writ would have troubled the Lincoln administration, had the matter come to its attention).

286. *In re* McDonald, 16 F. Cas. 17, 18 (E.D. Mo. 1861) (No. 8751).

287. *See id.* at 19 (quoting with admiration Judge Cranch's opinion in the circuit court case of United States v. Bollman). *Bollman* involved a petition for habeas corpus from

Judge Treat saw himself faced with nothing less than the collapse of national law, and with it, the civil rights of citizens. Emmett McDonald, whose fate is obscured by the rhetoric, was never released.

On the merits, Judge Treat upheld his jurisdiction both to resolve the jurisdictional issue itself and to hear the petition, reasoning that federal courts in exercise of their authority under the 1789 Judiciary Act had traditionally reached military detentions.[288] Judge Treat then discussed at length the history of the writ,[289] Supreme Court habeas case law,[290] and state and federal lower-court authority. It is *McDonald*, self-consciously decided under difficult circumstances, that presents one of the relatively few[291] extended judicial discussions in the federal case law linking habeas corpus not only with Magna Charta and the rights of Englishmen, but with "due process," as defined by the entire common-law tradition.[292]

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participants in Aaron Burr's planned rebellion against the federal government. United States v. Bollman, 24 F. Cas. 1189, 1192 (C.C.D.C. 1807) (No. 14,622).

288. *McDonald*, 16 F. Cas. at 21.

289. The case contains an extended, if unlikely, discussion of the history of the 1757 amendments to the English Act of 1679 in order to demonstrate that the Framers intended that the writ reach noncriminal detentions both in and outside of court sessions. *McDonald*, 16 F. Cas. at 22-23.

290. *Id.* at 23. *McDonald* also provided an interesting interpretation of the early Supreme Court decisions regarding habeas corpus. Because the Supreme Court believed that the writ was not part of its original jurisdiction, it construed habeas corpus as revisory or appellate in nature. As a result, the court could only issue the writ when the detention was by a court over which the Supreme Court had appellate power—"[i]t followed logically that it could not issue the writ where there was no commitment by any court; for there would then be no action of a court over which it had appellate jurisdiction, which could come before it for revision." *Id.*

291. It is difficult to prove a negative, but there does not appear to be any federal decision similar in extent and tone before *McDonald*. Moreover, there are a number of opinions in which such language might have been appropriate. *See, e.g.*, *Ex parte* Des Rochers, 7 F. Cas. 537 (C.C.D. Cal. 1856) (No. 3824). Des Rochers brought a petition on behalf of David S. Terry, a judge of the California Supreme Court, who was kidnapped to prevent him from fulfilling his judicial duties. The opinion, by Judge McAllister, described the writ as a remedy for every illegal imprisonment, including those by private persons. *Id.* at 537-38. Although *Des Rochers* stressed the importance of the writ's remedial powers, it also expounded at length on the limited federal power to issue the writ, including the restriction that the federal courts not issue the writ to prisoners held by state authorities. Despite this extended discussion, the *Des Rochers* court did not engage in the type of rights or due process talk attributed to *McDonald*. *Id.* at 538-39.

292. *McDonald*, 16 F. Cas. at 21. The critical passage on which so much has been made to rest is as follows:

> The power granted to the United States courts by that act [the Judiciary Act of 1789] is as broad as if it read: they "shall have power to issue the writs of scire facias and habeas corpus agreeable to the principles and usages of law"—

In elaborating its account of habeas corpus, *McDonald* relied heavily on the habeas cases decided in the context of state resistance to the Fugitive Slave Act.[293] These cases obviously recommended themselves to a federal court sitting in a slave state on the verge of secession because they showed that the federal government would enforce the rights of slaveholders.[294] As discussed in the previous section, these cases, pled under the 1833 Act—and *not* under the 1789 Act invoked in *McDonald*—also entailed the most extensive judicial view of federal habeas powers to be found in the antebellum period. But, it should be noted, their expansiveness drew from their different statutory foundation and purpose—namely, the enforcement of federal supremacy. By freeing those jailed on state process for enforcing the Fugitive Slave Act, habeas corpus preserved the rule of federal law

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> principles and usages as well understood as the meaning of the words "due process of law" in the fifth amendment to the constitution. And so on the Trial of Burr [Case No. 14,693], Chief Justice Marshall held: "The principles and usages of law mean those general principles and usages which are to be found, not in the legislative acts of any particular state, but in that generally recognized and long established law which forms the substratum of all the laws of every state."

*Id.*

293. *Id.* at 27-30. Among the cases discussed is *Ex parte* Jenkins, 13 F. Cas. 445 (C.C.E.D. Pa. 1853) (No. 7259). *McDonald* also contains an extended discussion of United States *ex rel.* Wheeler v. Williamson, 28 F. Cas. 682 (E.D. Pa. 1855) (No. 16,725), in which the "pure and able" Judge Kane "did not hesitate about what his official duty demanded" and issued the writ of habeas corpus on behalf of a petitioner whose slaves had been seized by a mob while they were traveling through Philadelphia. *McDonald*, 16 F. Cas. at 27. When the respondent, who was believed to be sheltering the fugitives, made an evasive return, Judge Kane imprisoned him for contempt. In this somewhat unattractive context, Judge Kane declared the following:

> Through the long series of political struggles which gave form to the British constitution, it [habeas corpus] was claimed as the birthright of every Englishman, and our ancestors brought it with them as such to this country. At the common law it issued whenever a citizen was denied the exercise of his personal liberty, or was deprived of his rightful control over any member of his household, his wife, his child, his ward, or his servant. It issued from the courts of the sovereign, and, in his name, at the instance of any one who invoked it, either for himself or another. It commanded, almost in the words of the Roman edict, "de libero homine exhibendo," that the party under detention should be produced before the court, there to await its decree.

*Id.* at 29-30 (quoting *Williamson*, 28 F. Cas. at 688).

294. In this regard, it is worth noting that General Fremont issued a proclamation on August 30, 1861 that attempted to free the slaves of Missouri rebels and threatened to execute Missourians found in arms against the United States. President Lincoln revoked the proclamation. NEELY, *supra* note 20, at 34.

against the states' challenge to federally protected property rights and upheld the authority of the federal courts.[295]

*McDonald* was a western forerunner of *Ex parte Merryman*.[296] Because of its focus on whether the President could suspend the writ without an act of Congress[297] or delegate the suspension power in the military,[298] *Merryman* is not generally known for its expansive rhetoric

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295. The citations to the fugitive cases in *McDonald* clearly demonstrate that this—and not sympathy with the slaves—was the court's concern. *McDonald*, 16 F. Cas. at 27-28. Taken in this light, the *McDonald* court's discussion of due process has a different flavor from that given it by Peller, albeit one that shows the emphasis on federal supremacy in habeas cases decided at mid-century. *See* Peller, *supra* note 1, at 616.

296. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). As Don Fehrenbacher has noted, there is a rather remarkable irony lurking behind *Merryman*. Whatever Chief Justice Taney's views regarding the legality or advisability of an executive suspension of the writ of habeas corpus, by 1861 the Chief Justice was firmly entrenched in his Southern sympathies. Nevertheless, he was unable to resign his position as Chief Justice because he depended on the salary and was the sole support of his two daughters, one of whom was a semi-invalid. Thus, until 1864, when Taney died, the Union had a Confederate sympathizer for its Chief Justice. FEHRENBACHER, *supra* note 148, at 286-88, 295-98.

The facts of *Merryman* closely mirror those in *McDonald*, save that the arrest took place in Maryland on May 25, 1861, after the Lincoln administration had issued an order suspending the writ of habeas corpus north from the capital to Philadelphia. Merryman was clearly a Confederate sympathizer, and to that extent his arrest and detention was warranted, considering that Maryland authorities had responded to the firing on Fort Sumter by burning one set of rail bridges linking Washington with the north. After his arrest, military authorities confined Merryman to Fort McHenry. Justice Taney, sitting on circuit, issued a writ of habeas corpus on his behalf. The military authorities refused to produce Merryman without even denying the facts in the petition.

*Merryman* apparently encouraged anti-Lincoln critics, particularly in the midwest and upper midwest, to resort to the courts to defend themselves and spawned a series of state law habeas corpus cases in the midwest. *See* FRANK L. KLEMENT, THE COPPERHEADS IN THE MIDDLE WEST 67-72 (1960) (containing a full description of a number of these cases and the controversies that surrounded them). "Copperhead" was an epithet, apparently used as early as the fall of 1861 by Ohio Republicans to liken antiwar Democrats to the venomous snake of that name. *Id.* at 1-4. By the fall of 1862, the term had gained wide usage. *See, e.g.*, MCPHERSON, *supra* note 84, at 494 n.8 (and sources cited therein).

297. *Merryman*, 17 F. Cas. at 149-50.

298. *Id.* at 150. As Chief Justice Taney said,

> [A] military officer, residing in Pennsylvania, issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears; under this order, his house is entered in the night, he is seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement; and when a habeas corpus is served on the commanding officer, requiring him to produce the prisoner before a justice of the supreme court, in order that he may examine into the legality of the imprisonment, the answer of the officer, is that he is authorized by the president to suspend the writ of habeas corpus at his discretion, and in the exercise of that discretion, suspends it in this case . . . .

*Id.* at 147-48.

describing the writ. Nevertheless, to underscore the outrage of Lincoln's executive suspension, Justice Taney reviewed the history of habeas corpus and its central role in maintaining civil liberties.[299]

Justice Taney linked the right to freedom from arbitrary arrest and imprisonment—the right to "due process of law"—with its enforcement mechanism, the writ of habeas corpus.[300] Later in the opinion, he returned to the theme, listing the constitutional guarantees that were violated by the military detention of the civilian Merryman: his Fourth Amendment right to be free of unreasonable search and seizure, Fifth Amendment right to due process, and his Sixth Amendment right to a speedy trial, all of which, like the writ of habeas corpus, were "suspended . . . by a military order, supported by force of arms."[301] But fulminate as he might, Justice Taney was forced to admit that "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."[302] The military refused to produce Merryman or to justify the detention. All that Justice Taney could do was to direct the record of the case be sent to the President as an embittered rebuke.[303]

The fervency with which the courts defended the writ of habeas corpus escalated as their power to issue it became, as a practical matter, more restricted. In the first place, judicial objection solidified Lincoln's unilateral suspension of the writ. In the second, in 1862,

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299. *E.g.*, *id.* at 150-51. ("The most exciting contests between the crown and the people of England, from the time of Magna Charta, were in relation to the privilege of this writ, and they continued until the passage of the statute of 31 Car. II., commonly known as the great habeas corpus act.").

300. *Id.* at 149. In speaking of the presidency's restricted powers, Taney wrote,

> [The President] is not empowered to arrest any one charged with an offence against the United States, and whom he may, from the evidence before him, believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power, for the fifth article of the amendments to the constitution expressly provides that no person "shall be deprived of life, liberty or property, without due process of law"—that is, judicial process.

*Id.* In the next paragraph, Chief Justice Taney discussed habeas corpus as the ordinary remedy for illegal detentions, as well as raising the constitutional guarantee of a speedy trial in criminal matters. *Id.*

301. *Id.* at 152.

302. *Id.* at 153.

303. *Id.* ("It will then remain for that high officer, in fulfilment [*sic*] of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced.").

Lincoln raised the stakes when he formally authorized both military detention and trial without access to habeas corpus for disloyal actions behind Union lines. In this situation, courts were both impotent and outraged, and their language elevated the power of the writ at the same time that they were unable to enforce their orders.

For example, after Lincoln's order of August 8, 1862, pacifist Campbellite preacher Judson D. Benedict of Aurora, New York, was arrested for discouraging enlistment.[304] Benedict's lawyers unsuccessfully tried to obtain a writ from the New York Supreme Court. Rebuffed, they turned to Judge Nathan K. Hall of the United States District Court for the Northern District of New York, a former law partner of Millard Fillmore, who had served as Postmaster General in Fillmore's Whig cabinet for two years, until his 1852 appointment to the federal bench.[305] There, in *Ex parte Benedict*,[306] they received sympathy, favorable language,[307] and even a writ—but all to no avail.

Before the writ could be served on his jailer, Benedict was spirited out of the district. Counsel then requested that the court issue an order discharging Benedict from custody and punishing the jailer for contempt.[308] As to the first request, the court held that its process could not run beyond its district and that it was unable to release the prisoner without first having him brought into court.[309] As to the second, the court found it unfair to subject the marshal to contempt sanctions for a situation not of his own making.[310] Moreover, Judge Hall suggested that a contempt citation presented other problems:

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304. *Ex parte* Benedict, 3 F. Cas. 159, 160 (N.D.N.Y. 1862) (No. 1292).

305. NEELY, *supra* note 20, at 202. Of course, this placed Hall in the Cabinet at the time that Fillmore, a die-hard unionist who believed in placating the South, signed the Fugitive Slave Act and the rest of the legislation that made up the Compromise of 1850, legislation that was passed during the term of the recently deceased Zachary Taylor. Fillmore was so tarred by his signing of the Fugitive Slave Act that he lost the 1852 Whig nomination to General Winfield Scott, who, in turn, lost the general election to Democrat Franklin Pierce. Fillmore—and presumably Hall—was extremely critical of Lincoln's conduct of the war.

306. 3 F. Cas. 159.

307. NEELY, *supra* note 20, at 202 n.49. Hall's opinion, supported with other documents, was widely circulated as a pamphlet, exhausting two editions of 10,000 and 8,000 each. *Id.* This tends to support the view that Hall remained closely allied with the Fillmore interests at the time he issued the decision.

308. *Benedict*, 3 F. Cas. at 160.

309. *Id.* at 172.

310. *Id.* at 175.

Because the process for contempt ran in the President's name, there was serious question about the court's authority to issue it under the circumstances.[311] The court had little recourse but to publish an angry advisory opinion.

The background of *Benedict* demonstrates the unsettled nature of war times, even well behind Union lines. According to Judge Hall, the arresting officer stated that the authority for Benedict's detention was a "slip cut from a newspaper, purporting to contain a copy of an order of the war department."[312] Benedict countered that he was entitled to release because he was not detained "by virtue of any process of any kind or description," and because, in any event, he was innocent of any disloyalty.[313]

On these facts, Judge Hall wrote, he would have granted the writ "at once,"[314] but for the fact that he ran across a newspaper copy of a second order—this one issued by the President—dated the same day as the first suspending the privilege of habeas corpus for all persons suspected of disloyal acts.[315] Judge Hall expressed dismay that the President's order extended the power of arbitrary arrest to "every policeman and military officer" in the loyal states and at the same time eliminated all remedy for such a detention.[316]

Although Judge Hall's opinion primarily argues that the writ could only be suspended by an act of Congress, he also felt compelled to explain the importance of this issue. This led him to a substantial discussion of the role of habeas corpus as a protector of personal liberty against government overreaching and as a guarantor of a

311. *Id.* at 171-76.
312. *Id.* at 160.
313. *Id.*
314. *Id.* at 161.
315. *Id.*
316. As the court stated:

> [T]he second order, in respect to the cases within it, extends the power [of arrest] to all deputy marshals and all military officers of the United States, and to all police authorities. These officers, many thousands in number, and of every grade of intelligence, are scattered over every portion of our country. To all of these arbitrary powers of arrest, without warrant, and without any prior legal inquiry, and without the slightest preliminary proof of guilt, is assumed to be given.

*Id.*

government of laws.[317] Thus, Judge Hall reminded his readers of the lessons of history, quoting at length from Blackstone's account of the Petition of Right and the enactment of the Habeas Corpus Act of 1679, and concluding on the ominous note that, as a result of Charles's violation of the rights of Englishmen, "his head was brought to the block by his oppressed and indignant people."[318]

Perhaps more interesting is the court's explicit linking of the withdrawal of all remedy for detention under the War Department order, the possibility of forced military service, and the constitutional right of due process:

> Was it intended, then, that every policeman and every military officer throughout the loyal states, and in localities far removed from the seat of military operations, should be authorized to arrest and imprison any citizen, and that if, on taking the party into custody ... such officer should declare that he made the arrest by virtue of the [War Department order] ..., he could keep him in prison, or in his own custody, or compel him to enter the military service, and also require all judicial officers, when the prisoner or his friends applied for a writ of habeas corpus, that the facts of the case might be judicially ascertained and the question of the legality of his arrest and detention considered, to say, "The privilege of the writ of habeas corpus is suspended, and you can have no relief?" Is every man supposed to be subject to militia duty, who has left or shall leave his county since the 8th of August last, and prior to the unknown day in the future when a draft is to be made ... to be punished by being forced into the military service for nine months, without any hearing, without any opportunity to show that he is exempt from militia duty, when the constitution

317. *Id.* at 165-71. The court described the Act of 1679 as "another Magna Charta of the kingdom," *id.* at 164, and quoted at length from, among other things, Chief Justice Taney's opinion in *Merryman*. *Id.* at 166-68. It is also indicative of wartime conditions that the district judge had difficulty determining whether Congress had passed an act authorizing the President to suspend habeas corpus:

> When the counsel for the petitioner, some days since, suggested that he desired to apply for a writ of habeas corpus to bring up the body of the petitioner, I had the impression that congress, at its last session, had passed an act authorizing the president to suspend the writ of habeas corpus, and that he had sanctioned the order of the war department under such authority. If this had been the case, I should have held it to be my duty to refuse a writ, in a case within the scope of the law of congress, and the order of the president; but having, since that suggestion was made, received the acts of the last session, I find that I was mistaken, and that congress has passed no law on this subject.

*Id.* at 165.

318. *Id.*

provides that "no person shall be deprived of life, liberty or property, without due process of law?"[319]

Here the court described habeas corpus as the remedy for due process violations. But in its proper context, those violations are military detentions of noncombatant civilians. Moreover, the opinion does not even intimate a right to relitigate the final determination of a judicial body of competent jurisdiction. Rather, the court focused on preventing government abuse either as detention without a hearing or presumably, detention on the finding of a military court without jurisdiction over the civilian detainee.[320]

Of the many other cases of military detentions, two others serve to round out the picture of courts employing florid rhetoric which, nevertheless, does not support a broad use of the habeas remedy. In *Ex parte Field*, for example, a Vermont federal circuit court faced a petitioner who was arrested for disloyalty by a federal marshal on the basis of an order from the Secretary of State.[321] Although the court found that Field was entitled to the writ at the time he originally petitioned the court, the intervening suspension of the court's habeas powers—and the marshal's contumacious delay in producing his prisoner—had robbed Field of a remedy.[322] Frustrated, the court's historical fancy turned to the rhetoric of the Revolutionary period—the British use of general warrants and the controversy surrounding the publication of *North Briton* No. 45—as it tied the "liberty of the kingdom" to a remedy for arbitrary imprisonment.[323]

Likewise, the case of William Winder, arrested for opposition to the federal government, led a federal court to issue a writ of habeas corpus.[324] Here, however, the federal marshal refused to serve the writ, and a local deputy sheriff who attempted service was met by a party of fifty armed men, all intent on preventing him from delivering the document to the commanding officer of the facility where Winder was

319. *Id.* at 161.

320. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 107-31 (1866) (considering the validity of the executive suspension of the writ of habeas corpus after it was too late to assist the wartime detainees).

321. *Ex parte* Field, 9 F. Cas. 1 (C.C.D. Vt. 1862) (No. 4761).

322. *Id.* at 3.

323. *Id.* at 4.

324. *In re* Winder, 30 F. Cas. 288, 294 (C.C.D. Mass. 1862) (No. 17,867).

held.[325] In a perverse way, this shows the esteem in which the writ of habeas corpus was held; however, it also demonstrates the writ's limitations. As the district judge stated,

> The court deeply regrets that officers of the United States should obstruct process out of a court of the United States, especially this process. But those officers are at present beyond the control of the law, and the court has not the command of the physical force needful to effect a service of this writ at the present time.[326]

Instead, like Justice Taney, the judge directed that the writ be placed on file to be served when practicable.[327]

Although the language of these decisions—and others like them—is stirring to twentieth century sensibilities, the cases themselves do not bear out a broad reading of habeas corpus powers. In reality, they involve a fairly pedestrian aspect of the core habeas function, protecting citizens against arbitrary imprisonment by the executive branch. They are interesting largely because the wartime measures of the Lincoln administration threatened that function.

Despite the courts' outrage at their impotence—real or impending—these cases occupy a fundamentally ambivalent posture. A nation at war with itself, motivated by revulsion at slavery, was attempting to contain the disunionists within its midst. On the one hand, stifling dissent is contrary to the constitutional tradition of free speech and civil liberties, particularly when done under color of

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325. *Id.* at 289-91. Winder was arrested in September, 1862, in Philadelphia on a charge of conspiracy to overthrow the government of the United States. Although those charges were dropped, Winder was then committed to the custody of a United States marshal by order of what purported to be a telegram sent by the Secretary of War and transferred first to New York and then to Fort Warren, near Boston. At no time, according to his petition, did Winder see any formal charges against him, the Secretary of War denied all knowledge of the telegram order, and not until Winder had been incarcerated for eight months did he learn that the cause of his imprisonment was "his correspondence and his writings for the newspapers." *Id.* at 291.

The Massachusetts district court agreed that this was a proper occasion to issue a writ of habeas corpus and put the government to the requirement of making a return and producing Winder's person. *Id.* at 294. Unfortunately, the United States marshal refused to serve the writ, leaving the matter to a local deputy sheriff. The military authorities refused to permit the sheriff aboard the regular boat going to Fort Warren, and when the resourceful officer hired a sail boat, he was met on shore by a party of fifty armed men, all with the express intention of preventing him from serving the commanding officer with the writ. Accordingly, Winder remained in military prison for the duration. *Id.*

326. *Id.* at 294.

327. *Id.*

summary military authority; on the other, the disunionist cause was hardly attractive, linked as it was with support for slavery. The modern reader would be ill-advised to draw any clear lessons regarding the nature of the habeas corpus remedy from these cases. Rather, they illustrate all too plainly the painful choices of wartime.

## VII. CONCLUSION

Indeed, what lesson can we draw from the strange transformation of federal habeas corpus for state prisoners from a weapon against the poor and oppressed into what its partisans argue is a weapon on behalf of the poor and oppressed? Or, for that matter, what can we learn from the more general expansion of habeas powers in the nineteenth century? First, the primary engine for the growth of habeas corpus in both the state and the federal courts was not individual rights—as it is now—but the interests of the respective governments and their mutual fear of overreaching. Second, from this jockeying between state and federal spheres emerges a fluid and unsettled picture of federalism in the early decades of the nineteenth century.

The states viewed themselves as repositories of common-law values and powers. The expansion of their habeas corpus jurisdiction took place first in reaction to federal military abuses and only later in reaction to unpopular federal policies regarding the rendition of fugitive slaves. In the federal system, the nationalist understanding of habeas corpus powered expansion during the late antebellum period as part of a general trend toward nationalist and centralizing policies aimed at offsetting the growth of sectionalism. In both state and federal courts, the ability to contradict the facts in the return developed as a weapon to challenge the authority of a coordinate system of government. The growth of this power signaled an erosion of deference to other repositories of governmental authority.

The story of the growth of antebellum habeas corpus has another lesson, beyond its implications for the development of federalism. It shows that mining the past for answers to modern questions is a risky business at best. Federal courts did seek to impose federal supremacy on state courts through habeas corpus, but not in the cases that partisans of extensive federal review generally discuss, and certainly not in a context that they—or almost anyone else—would care to claim as their ancestry. The final lesson, then, is that the past has a

way of playing tricks on all of us, particularly when we use it to claim the moral high ground.