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Time Out of Mind: Our Collective Amnesia About the History of the Privileges or Immunities Clause

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INTRODUCTION

Human beings who have experienced traumatic events often seek to suppress memories of those events and deny the continuing effects of this trauma. But, as a wise American wrote nearly a century ago, "Those who cannot remember the past are condemned to repeat it."[1] This article examines one aspect of our collective denial regarding the trauma of slavery, which nearly destroyed our nation in the nineteenth century. We have failed to embrace the historical context surrounding adoption of the Privileges or Immunities Clause, and, consequently, we have not given effect to its central purpose: to constitutionalize federal habeas corpus review of race-based incarcerations. This failure, in turn, has resulted in unconstitutional statutes and judicially crafted rules that protect states against claims that they have denied citizens their liberty based upon impermissible consideration of race, thereby condemning us to repeat our history of race-based incarcerations.

In his groundbreaking work, *The Bill of Rights: Creation and Reconstruction*,[2] Akhil Reed Amar challenged future scholars to scrutinize the largely unexamined nineteenth-century Freedman's Bureau habeas corpus and Freedman's Bureau records.[3] This article is, in part, a response to

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[1] 1 GEORGE SANTAYANA, THE LIFE OF REASON, OR THE PHASES OF HUMAN PROGRESS, 284 (2d ed. 1936). This maxim of the great American philosopher George Santayana has been so often quoted, misquoted, and paraphrased that it may seem to lack contemporary relevance. However, its use, perhaps even overuse, is more a recognition of its continuing vitality, rather than its triteness.

[2] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

[3] *Id.* at 303–04.

that challenge. These and other sources cited in this article make one point clear: the debate between and among Professor Amar, Raoul Berger, and other scholars concerning the original intent of the Framers of the Fourteenth Amendment cannot be resolved through recourse to traditionally constrained examinations of legislative debates and textual deconstruction. These methods are useful to a point, but ambiguity remains. This ambiguity can only be resolved by examining the history of the amendment and its various clauses in light of the great political and social forces shaping our nation at that critical juncture. When the Privileges or Immunities Clause is so examined, it is clear that the clause was intended primarily to constitutionalize federal habeas corpus review of claims that states were denying individuals their liberty based upon race. From this often–ignored history, this article will also conclude that some statutes, such as the Anti–Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[4] and judicial doctrines purporting to allow states to default such race–based claims are themselves unconstitutional.[5]

This article examines the unique role that race has played in our constitutional history, particularly in the intersecting histories of federalism, habeas corpus, and the Fourteenth Amendment. This history, reflected in the surviving court records of habeas proceedings, challenges much of the conventional wisdom surrounding habeas corpus.[6] This article will focus specifically on the complex relationship between principles of federalism and a state's ability to shield from federal habeas corpus review its decisions to incarcerate individuals in a manner consistent with state law that, nevertheless, are alleged to be based upon impermissible considerations of race.

Section I provides a brief history of habeas corpus and its unique role in defining the federalism balance. Section II details the effect of the Civil War

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[4] The provisions of the AEDPA are codified in various places in the United States Code. Those relating to federal habeas corpus for state–court prisoners upon which this article will focus are the amended provisions of 28 U.S.C. § 2254 (1996) and 28 U.S.C. § 2261 (1996) for capital cases.

[5] Moreover, modern Supreme Court pronouncements limiting the Suspension Clause's application to federal prisoners are incorrect, for the Privileges or Immunities Clause extended the Suspension Clause's reach to federal habeas jurisdiction over claims that a prisoner's liberty has been deprived due to considerations of race. The Supreme Court has repeatedly indicated that the Suspension Clause applies only to the federal writ sought on behalf of federal prisoners, and Congress may, therefore, abrogate this right as it applies to state prisoners. *See, e.g.*, Felker v. Turpin, 518 U.S. 651, 659–61 (1996); McCleskey v. Zant, 499 U.S. 467, 477–78 (1991); *see also* Stone v. Powell, 428 U.S. 465, 474–75 (1976).

[6] One of the conventional beliefs challenged by these records concerns the scope of relief available under the writ prior to 1867, particularly its availability to litigate claims of actual innocence. Those particular issues will be reserved for future writings.

and the adoption of the Civil War Amendments upon the distribution of power between the national government and the several states. This section will focus specifically on the Fourteenth Amendment's Privileges or Immunities Clause and its relationship to habeas corpus and the protection of newly freed slaves. Section III examines the resurrection of antebellum notions of federalism and their effect on habeas corpus review of state–court convictions. This section will analyze the constitutionality of provisions of the AEDPA, along with some judicially crafted rules of preclusion, and briefly discuss the persistence of race–based problems in our society at large and the role these problems play in decisions to incarcerate. Section IV will demonstrate the unconstitutionality of legislation (including the analyzed provisions of the AEDPA) or court–adopted rules (such as adequate and independent state–court grounds for denying relief) that purport to deny federal court jurisdiction to hear claims predicated upon race–based deprivation of liberty.

I. FEDERALISM, SLAVERY, AND HABEAS CORPUS

Our Constitution is properly regarded as one of the most brilliantly conceived political documents in history.[7] Its conception, however, was tainted by its explicit acceptance of racial bias in one of its most abhorrent forms.[8] The "temporary" acceptance of slavery by the Constitution cemented within our principle founding document state–sanctioned deprivations of liberty that were based solely upon race.[9] These slavery provisions were

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[7] *See, e.g.*, CAROL BERKIN, A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION (2002).

[8] There are four provisions in the original Constitution that reference slavery. The U.S. Constitution, art. I, § 2, cl. 3 (the so–called "Three–Fifths Clause") counted each slave as worth three–fifths of a person for purposes of apportioning taxes and representation in the House. Article I, § 9, cl. 1 forbade Congress from prohibiting importation of slaves before 1808. Article IV, § 2, cl. 3, the "Fugitive Slave Clause," explicitly prevented free states from interfering with the property rights of slave owners in their slaves. Article V forbade amendment of the Constitution to effect importation of slaves or capitation tax before 1808. Some historians include additional provisions of the Constitution among those pertaining to slavery. *See, e.g.*, HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875, at 89–90 (1982).

[9] While these provisions do not specifically reference race, they incorporated slavery into the structure of the Constitution. Slavery, as practiced in the states at this time, was indisputably based upon race. The explicit recognition of race as the basis for slavery, which is found in many state laws in the eighteenth and nineteenth centuries, was explicitly acknowledged in the Constitution only through the Civil War Amendments. See, for example, Virginia Slave Law, December 1662:

> Whereas some doubts have arisen whether children got by any Englishman upon a Negro woman should be slave or free, *be it therefore enacted and declared by this present Grand Assembly,* that all children born in this country shall be held

controversial from their inception.[10] Strong disagreement existed as to whether the slavery provisions were wise or moral.[11] To understand how these provisions came to be included in the Constitution and the lengthy battle for their removal, one must examine them within the federalism context in which they find their expression. State–sanctioned slavery, abhorrent to many even in the late eighteenth century,[12] was tolerably enshrined in the Constitution as an expression of states' rights.[13] The provisions of the Constitution that concern slavery are expressions of the federalist principle that the various states would be free to enact laws of their choosing without interference from the national government or other states.[14]

To note that the state–sanctioned deprivation of African slaves' liberty enshrined in our Constitution was an issue of federalism is to state the obvious.[15] These two issues, federalism and enslavement due to race,

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bond or free only according to the condition of the mother; and that if any Christian shall commit fornication with a Negro man or woman, he or she so offending shall pay double the fines imposed by the former act.

11 WILLIAM WALLER HENING, STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 170 (Richmond, Va. 1809–23), *available at* http://www.usconstitution.com/VirginiaSlaveLaws1660s.htm. Pennsylvania's altruistic laws also demonstrate

> [t]hat all persons, as well Negroes and Mulattoes as others, who shall be born within this State from and after the passing of this act, shall not be deemed and considered as servants for life, or slaves; and that all servitude for life, or slavery of children, in consequence of the slavery of their mothers, in the case of all children born within this state, from and after the passing of this act as aforesaid, shall be, and hereby is utterly taken away, extinguished and for ever abolished.

An Act for the Gradual Abolition of Slavery (Penn. 1780), *available at* http://www.yale.edu/lawweb/avalon/states/statutes/pennst01.htm.

[10] *See, e.g.*, A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 377–89 (1978).

[11] *Id.*; *see also* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 481–93 (Max Farrand ed., 1966).

[12] *See, e.g.*, Benjamin Franklin, Address to the Public from the Pennsylvania Society for promoting the Abolition of Slavery, and the Relief of Free Negroes, unlawfully held in Bondage (Nov. 9, 1789) *available at* http://www.usconstitution.com/AddresstoPublicConcerningSlaveryBenFranklin.htm. ("Slavery is such an atrocious debasement of human nature, that its very extirpation, if not performed with solicitous care, may sometimes open a source of serious evils.").

[13] Michael P. Mills, *Slave Laws in Mississippi From 1817–1861: Constitutions, Codes & Cases*, 71 MISS. L.J. 153 (2001).

[14] *See supra* note 8. Article I, § 9, cl. 1 and Article V concerned the distribution of power between the states and the national government, while Article IV, § 2, cl. 3 concerned the ability of one state to enforce its laws without interference from other states. Article I, § 2, cl. 3 concerned representation in the House of Representatives.

[15] Of course, Article I, § 9 reflected a compromise position among the pro– and anti–slavery forces concerning the ability of the federal government to limit the importation of slaves into any particular state. The time limitation found in section nine is unique among

combined to trouble this nation like no other. Pro–slavery and abolitionist forces fought their battles on a field whose boundaries were defined by federalism. While the Civil War was the most dramatic and bloody expression of the conflict, it was by no means the only way in which this battle was fought. The most common legal tool used to fight this battle[16] was the writ of habeas corpus.[17] Both sides used the writ to their advantage,[18] but the principle use of the writ in this context was to define the limits of national and state power within the federal system.[19]

The role of habeas corpus in giving contour to the form of federalism did not end with the onset of the Civil War. That war was fought to redefine the federalism balance, at least insofar as a state's ability to secede from the Union and to deprive a person of liberty based upon race.[20] Following the surrender of the rebel forces at Appomattox, the states ratified the Thirteenth Amendment.[21] Congress followed this by passing the Civil Rights Act of 1866.[22] The following year, Congress amended both the Habeas Corpus Act

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those provisions of Article I that seek to limit the scope of federal power. The Framers intended to leave for the future the precise distribution of power concerning a state's ability to import slaves within the federal system. It is this federalism dynamic as it relates to race–based deprivations of liberty that is at the heart of this article.

[16] Of course, the legal battle was not the only one fought. Slavery was appropriately contested as a moral and political issue as well. *See generally* HIGGINBOTHAM, *supra* note 10.

[17] *See, e.g.*, Habeas Corpus Case Records, 1820–1863, of the U.S. Circuit Court for the District of Columbia, 1820–1863, microfilm publication M434, Roll 2 (Nat'l Archives & Records Serv., Gen. Servs. Admin., Washington, D.C. 1963); Records of the U.S. Circuit Court for the District of Columbia Relating to Slaves, 1851–1863, microfilm publication M433, (Nat'l Archives & Records Serv., Gen. Servs. Admin., Washington, D.C. 1963); *see also* Marc M. Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners*, 70 TUL. L. REV. 1 (1995).

[18] For an illuminating discussion of the sometimes surprising uses of the writ in this context, see Arkin, *Ghost at the Banquet*, *supra* note 17. Abolitionist forces frequently used the writ to secure the release of fugitive slaves, while slave owners used the writ to secure the release of individuals arrested while seeking to return escaped slaves to slave owners. *Id.* at 33–41.

[19] *See* Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 562–63 (1992).

[20] While some scholars debate whether the Civil War was fought over slavery or states' rights, *see* Sheryl G. Snyder, *A Comment on the Litigation Strategy, Judicial Politics and Political Context which Produced* Grutter *and* Gratz, 92 KY. L.J. 241, 242–43 (2003), it cannot be rationally argued that the federalism dispute was brought to the point of war over whether states could merely secede from the union rather than submit to national policies antithetical to state–sanctioned slavery. *See infra* Part II.A.1.

[21] "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. Ratification by the requisite number of states occurred on December 18, 1865, eight months following the surrender at Appomattox.

[22] Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C.

and the Judiciary Act[23] and passed the Reconstruction Act of 1867.[24] The effect of these legislative acts was to expand federal court review of state–court decisions to imprison individuals and to mandate that all states in rebellion ratify the Fourteenth Amendment.[25] That amendment was ratified the following year, constitutionalizing the expansion of federal habeas corpus review to state–court incarcerations allegedly based upon race.[26] The Thirteenth and Fourteenth Amendments, like the original constitutional provisions concerning slavery, are inextricably tied to issues of federalism and designed to reorder the federalism balance regarding a state's ability to oppress persons due to their race.

Because these amendments cannot be properly understood without reference to their history, their application today should never be completely divorced from their original purpose. In recent years, under the banner of "federalism," our courts and political leaders alike have ignored the original intent of the Civil War Amendments generally and the Fourteenth Amendment particularly. This reversion to conceptions of federalism espoused at the time of the adoption of the original Constitution represents an unconscionable desecration of one of the most costly and hallowed principles this nation has ever embraced.

Like the antebellum battle over slavery, this revisionist battle has also been fought with the writ of habeas corpus. Through the use of "adequate and independent" state–court grounds for denying relief, statutory and court–adopted limitations upon federal habeas corpus currently permit a state to abridge the writ and shield deprivations of liberty based upon race from federal review, so long as state procedural rules sanction such incar–cerations.[27]

For the most part, the scholarly debate over the Privileges or Immunities Clause has tracked the earlier debate concerning the Due Process Clause.[28] The arguments have focused on the extent to which, if at all, the Privileges or Immunities Clause was intended to "incorporate" the Bill of Rights,

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§ 1981 (1991)).

[23] Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385; Judiciary Act of 1867, ch. 28, § 2, 14 Stat. 385.

[24] Reconstruction Act of 1867, ch. 153, 14 Stat. 428.

[25] *Id.*; Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385; *see also* Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights,* 51 EMORY L.J. 1397 (2002).

[26] U.S. CONST. amend. XIV, § 1.

[27] *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 750 (1991).

[28] *See, e.g.*, Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar's Wishing Well*, 62 U. CIN. L. REV. 1 (1993); Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1197 (1992).

thereby making those provisions applicable against the states.[29] Some argue that the clause incorporated the Bill of Rights wholesale.[30] Others maintain that none of these amendments were meant to apply to the states.[31] More recently, Professor Akhil Reed Amar has argued for "refined incorporation."[32]

This debate has been largely academic because, in the *Slaughter–House Cases*,[33] the Supreme Court determined that the Privileges or Immunities Clause incorporated none of these amendments against the states. Nevertheless, the arguments have been heated, with positions so strongly staked out that those involved have overlooked the importance of two points commonly espoused by most commentators and every justice who decided the *Slaughter–House Cases*: 1) the primary purpose of the amendment was the protection of freed slaves; and 2) habeas corpus was one of the privileges or immunities of federal citizenship that the states were forbidden to abridge. Lost in the incorporation debate is the fact that the very essence of the Privileges or Immunities Clause was not rendered a nullity by *Slaughter–House*. The Privileges or Immunities Clause was intended to constitutionalize federal habeas corpus review of any state attempts to deprive an individual of liberty based upon race. On this narrow issue, this article submits that the federalism balance was indisputably meant to change in response to this amendment. Recent attempts to revert to antebellum notions of federalism, permitting states to procedurally default a claimant's access to federal habeas corpus review of any claim of race–based deprivation of liberty, offend the Privileges or Immunities Clause and therefore are unconstitutional.[34]

A. Origins and Development of the Privilege

At its most fundamental, the writ of habeas corpus is a device used to define the structural boundaries of power between and among competing divisions of government. The writ has properly been described as "the traditional common–law weapon in intragovernmental warfare."[35] From its inception, habeas corpus has been a tool that permitted the empowered agent (usually a judicial officer) to order the release or transfer of an individual

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[29] *See, e.g.*, Berger, *supra* note 28; Amar, *supra* note 28.

[30] *See* David S. Bogen, *Slaughter–House Five: Views of the Case*, 55 HASTINGS L.J. 333 (2003).

[31] *See* Berger, *supra* note 28.

[32] *See* Amar, *supra* note 28; AMAR, *supra* note 2.

[33] 83 U.S. 36 (1872).

[34] While strong arguments are made that the balance of federalism was intended to shift to a broader range of issues, that subject is beyond the scope of this article.

[35] Arkin, *Ghost at the Banquet*, supra note 17, at 41.

who was being held in custody by another agent of government (usually a judicial or executive officer).[36] The writ originated in the common law as a method through which the King's Bench established primacy over lesser courts and quasi–judicial consular bodies.[37] The supremacy of the King's Bench over the Court of Requests, the Court of Admiralty, and the Court of High Commission was eventually realized in part through the use of habeas corpus, which permitted the King's Bench to act as a check on the jurisdiction of those rival courts.[38] Later, during the seventeenth century, the writ took on its more familiar character as a judicial protection against unjust incarceration at the hands of the executive.[39] Through the centuries, the development of the writ has altered its scope and application but not its fundamental role in defining the power relationships between divisions or branches of government.

The great debates about habeas corpus have essentially concerned the distribution of political power. Without demeaning the individual's stake in proceedings under the "Great Writ of Liberty,"[40] the determination of whether vindication of this liberty interest will be available has always been inextricably bound up in structural battles over the proper repository of and limitations on political authority. Frequently, the battle to decide this political distribution was fought by "recourse to the ancient weapon in intragovernmental squabbles: the writ of habeas corpus."[41] Over the course of centuries, concern for individual liberty has sometimes been deemed subservient to the political distribution question and sometimes been placed on equal footing with it, but the two questions have never been separated. They cannot be distilled from one another because they are of one element, not separate parts of a compound. In no era has this elemental connection been more apparent than during the great struggle over slavery that spanned most of this nation's first century.

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[36] *See id.* at 1–7; *see also* Michael O'Neil, *On Reforming the Federal Writ of Habeas Corpus*, 26 SETON HALL L. REV. 1493, 1496 (1996).

[37] *See* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 970–71 (1998); Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2521 (1998).

[38] *See* Neuman, *supra* note 37, at 970–71; Hafetz, *supra* note 37, at 2521.

[39] *See* Neuman, *supra* note 37, at 971.

[40] The writ of habeas corpus is often referred to as "the Great Writ of Liberty" by both academics and courts alike. *See, e.g.*, ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY (2002); *see also* Burns v. Wilson, 346 U.S. 137, 148 (1953) (Frankfurter, J., writing separately).

[41] Arkin, *Ghost at the Banquet*, *supra* note 17, at 33.

B. Slavery, Antebellum Notions of Federalism, and Habeas Corpus

Slavery weakened the moral foundations of this nation long before the nation itself existed. Slavery's impact, however, was not confined to the moral sphere. Had it been so contained, reason and moral discourse might have eliminated this scourge at a much earlier time.[42] Economic benefits derived from the slave trade and subsequent reliance upon forced labor created a powerful incentive to reject calls for abolition.[43] Slavery would prove to be the strongest strand in a thread of southern economic interests that, when woven together with the political self-interests inherent in a federalist system, created a rope powerful enough to bind this nation to a destiny of conflict, rebellion, and civil war. The manner in which this rope was braided is of critical importance in adequately understanding the original intent of the Framers of the Fourteenth Amendment. In particular, we must examine how slavery and antebellum notions of federalism were interwoven to comprehend the manner in which the struggle over slavery was fought, the importance of habeas corpus to that struggle, and the way the Fourteenth Amendment was designed to alter the federalism balance.

1. *Slavery and Federalism under the Original Constitution*

The "peculiar institution" of slavery was established long before the Constitutional Convention ("the Convention") opened in Philadelphia on May 25, 1787.[44] Slaves were forcibly brought to the Americas as early as 1619.[45] By the time of the Convention, an estimated 600,000 people of African descent were enslaved in the lands governed under the existing

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[42] Certainly there was no shortage of early discourse on the morality of African enslavement. *See* DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE (1988); *see also* DAVID BRION DAVIS, IN THE IMAGE OF GOD: RELIGION, MORAL VALUES, AND OUR HERITAGE OF SLAVERY (2002).

[43] See generally ROBERT W. FOGEL & STANLEY L. ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY (W. W. Norton 1995) (1974), for a discussion of slavery as providing an economic foundation for this country and the insidious effects this exploitative origin have had on subsequent developments in U.S. history. *See also* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (identifying the perceived economic necessity for slave labor in the South and the essential role the compromise over slavery played in the drafting and ratification of the Constitution). *But see* THOMAS DILORENZO, THE REAL LINCOLN (2002).

[44] *See* The U.S. Constitution Online, The Convention Timeline, *available at* http://www. usconstitution.net/consttime2.html.

[45] *See, e.g.*, Martha L. Wharton, *A Peculiar Institution: A Primer on American Slavery*, *at* http://www.thenorthstarnetwork.com/news/heritage/181507-1.html (last visited May 22, 2005).

Articles of Confederation.[46] It is safe to say that no consensus existed among the delegates to the Convention as to either the wisdom or morality of permitting slavery under the constitutional form of government proposed.[47] Disagreement over slavery threatened to undermine any chance for a governmental system with a national authority possessing more than the nominal powers granted under the Articles of Confederation.[48]

The Convention debates highlight how slavery was enmeshed within the structure of our government from its intellectual conception.[49] Compromises made between pro–slavery and abolitionist factions at the Convention would bind the structural divisions of power under our Constitution with the locus of authority to determine the lawfulness of race–based deprivations of liberty. Although the origins of federalism as a political theory have more noble roots[50] and its advocates in this nation's history have in large measure been motivated by purer things,[51] slavery, upon ratification of the Constitution, became permanently rooted in the debate over the proper distribution of power in a federal system of government.

The nature of the compromise reached at the Convention involved slave states ceding to Congress the authority to forbid importation of slaves

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[46] Approximately 575,000 slaves resided in the United States in 1781. *Africans in America, Part 3, available at* http://www.pbs.org/wgbh/aia/part3/map3.html (last visited Mar. 22, 2005).

[47] *See, e.g.*, HYMAN & WIECEK, *supra* note 8, at 89.

[48] *Id.* at 89, 117–18. For the most thorough contemporaneous reproduction of the role of slavery in the debates of the Constitutional Convention, see 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 366–77 (Max Farrand ed., 1966). *See also Prigg*, 41 U.S. at 539. Even prior to the adoption of the Constitution, states such as Pennsylvania and Massachusetts had determined to abolish slavery. In 1780, Pennsylvania passed "An act for the gradual abolition of slavery." *See* An Act for the Gradual Abolition of Slavery (1780), *in* 10 THE STATUTES AT LARGE OF PENNSYLVANIA 1682 TO 1801, at 67–69 (1904). In 1780, Massachusetts abolished slavery outright with the adoption of its Declaration of Rights. *See* Mass. Declaration of Rights of 1780, amended by MASS. CONST. pt. 1, art. 1. ("All men are born free and equal."); *see also* John C. Eastman, *Re–evaluating the Privileges or Immunities Clause*, 6 CHAPMAN L. REV. 123, 127 (2003). By the end of the Revolutionary War, most New England states had followed suit. Conflicts concerning fugitive slaves had been great sources of friction between states prior to the Convention and continued to plague interstate relations. For a discussion of this friction, see *Prigg*, 41 U.S. at 611–21. *See also* HYMAN & WIECEK, *supra* note 8, at 90–91.

[49] *See generally* Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423 (1999).

[50] I refer to federalism as a political theory not in the sense of Federalists vs. Antifederalists, but rather to connote the distribution of power within a confederated republican form of government. *See generally* WILLIAM EVERDELL, THE END OF KINGS: A HISTORY OF REPUBLICS AND REPUBLICANS (2000); PAUL RAHE, REPUBLICS ANCIENT AND MODERN (1994).

[51] *See, e.g.*, THE FEDERALIST NO. 39 (James Madison).

beginning in 1808, in exchange for an abolitionist concession requiring cooperation in the return of fugitive slaves to their slave owners. This compromise over slavery at the Convention resulted in four constitutional provisions, all of which addressed the distribution of power within the new government. Three explicitly concerned the location of legal authority over the issue of slavery,[52] with the fourth counting slaves as three–fifths of a person for purposes of apportioning representatives in the House and for taxation.[53]

Of the three clauses which confirmed the federalism balance on the issue of slavery, the first is found in Article I, § 9, and provided that:

> The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.[54]

This clause limited congressional power to forbid the importation of slaves into any state that deemed it lawful. The slavery provision of Article V also directly implicated the location of authority to decide the lawfulness of such enslavement. This Article forbade until 1808 any amendment of the Constitution that would affect the above–quoted section of Article I, § 9.[55] Interestingly, both of these clauses explicitly recognized the balance in the federal system on this issue as temporary.[56] Article IV, § 2, cl. 3 was carefully designed to circumscribe a free state's ability to manumit someone who had escaped from slavery in another state. The Fugitive Slave Clause required other states to respect the slave state's laws and return any escaped slave found in its jurisdiction.[57]

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[52] U.S. CONST. art. I, § 9, cl.1 (forbidding Congress from prohibiting importation of slaves before 1808); U.S. CONST. art. IV, § 2, cl. 3 (the fugitive slave clause requiring other states to return fugitive slaves to slave state); U.S. CONST. art. V (forbidding amendment of the Constitution to affect importation of slaves or capitation tax before 1808).

[53] U.S. CONST. art. I, § 2, cl. 3.

[54] U.S. CONST. art. I, § 9, cl. 1.

[55] U.S. CONST. art. V. This provision also forbade until 1808 any amendment that would affect the direct capitation provision found in Article I, § 9, cl. 4.

[56] It should also be noted that this provision was an exception from the federalism principle that vested authority "to regulate Commerce with foreign Nations" in Congress. U.S. CONST. art. I, § 8, cl. 3. Recognizing the temporary nature of the prohibition of congressional power to legislate in this area in no way altered the authority of a state to support or condone slavery under its own laws.

[57] U.S. Const. art. IV, § 2, cl. 3 ("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.").

These three clauses' clear (if not explicit) references to slavery in the original Constitution cemented that issue within the structural delineations of power in our founding document. While the debates about slavery had many facets, political arguments concerning abolition could no longer be conceived without reference to the constitutional distribution of power in our federal system.

Despite the Convention's compromise on slavery and passage of the Fugitive Slave Act of 1793, Northern states, such as Pennsylvania, adopted statutory provisions designed to frustrate the return of slaves and the kidnapping of free men to be sold for profit.[58] Slave states aggressively pursued what they deemed to be the lawful property rights of their citizens. Not surprisingly, conflicts spilled over into state and federal courtrooms. One of the primary weapons used by both sides was that which had long been used to delineate governmental power—the writ of habeas corpus.[59] Habeas corpus was seen as a weapon that could be used to exploit some of the ambiguities left by the Fugitive Slave Clause and its enabling legislation, the Fugitive Slave Act of 1793. As Professor Arkin noted, "One result of the 1793 [Fugitive Slave] Act's weakness was . . . increased use of state habeas corpus to test the legality of the slaveholder's claim to the person detained."[60]

C. *Habeas Corpus and Slavery in the Early Years of Our Republic*

Habeas corpus occupies a unique position in our system, as a common law procedure specifically mentioned in the original text of the Constitution.[61] Moreover, the manner in which it is mentioned, prohibiting Congress from suspending the privilege except during times of rebellion or invasion, provides evidence of its exalted stature in the eyes of the Framers. Further evidence of the writ's importance to the Framers was provided by the First Congress, whose membership included many of those involved in drafting and ratifying the Constitution. That Congress explicitly included the writ of habeas corpus within the jurisdiction of all federal courts in the Judiciary Act of 1789.[62] This act, promulgated the same year the Constitution was ratified, was the first in an unbroken string of Judiciary Acts providing

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[58] *See, e.g., Africans in America, Part 3, Kidnapping in Pennsylvania, available at* http://www.pbs.org/wgbh/aia/part3/3p325.html (last visited May 22, 2005).

[59] See generally Arkin, *Ghost at the Banquet*, *supra* note 17, for an informative exposition on the use of habeas corpus by both sides in this great conflict.

[60] *Id.* at 35.

[61] U.S. CONST. art. I, § 9, cl. 2.

[62] Judiciary Act of 1789, ch. 20, 1 Stat. 73, 81–82 (1789).

for federal habeas corpus jurisdiction.[63] The scope and application of the privilege would change during the first century of this nation's history, as slavery and federalism shaped its use.

In the early years following adoption of the Constitution, habeas corpus practice bore scant resemblance to the present–day writ.[64] Habeas corpus practice at this time reflected the federalism balance that had been achieved at the Convention.[65] Initially, the writ was sought and obtained predominantly in state courts.[66] This would change, however, as the fight over slavery intensified.[67]

Consistent with the compromises reached on the slavery issue at the Constitutional Convention, Congress sought to implement the Fugitive Slave Clause with enabling legislation in the form of the Fugitive Slave Act of 1793.[68] The support for this act was far from universal.[69] In part, this disdain stemmed from moral opposition to slavery and, in part, from the fact that slave traders were kidnapping free blacks and selling them into slavery.[70] In

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[63] The act provided federal courts with "power to issue writs of . . . habeas corpus" to prisoners "in custody, under or by colour of the authority of the United States." *Id.* § 14.

[64] *See, e.g.*, Arkin, *Ghost at the Banquet*, *supra* note 17, at 9. Both the traditional common law scope of the writ, applying only to unlawful custody without proper adjudication, and the statutory limitations imposed by Congress, which were consistent with the common law practice, contributed to the infrequent use of the federal writ during the late eighteenth and early nineteenth centuries. Examination of the federal circuit court records does not bear out the oft–asserted proposition that use of the writ remained so constricted until 1867. Some "re–litigation" of state convictions was occurring in the mid–nineteenth century. *See, e.g.*, Habeas Corpus Case Records, 1820–1863, of the U.S. Circuit Court for the District of Columbia, 1820–1863, microfilm publication M434 (Nat'l Archives & Records Serv., Gen. Servs. Admin., Washington, D.C. 1963).

[65] "The first federal habeas act reflected the importance of state power at the time of the framing . . . ." Arkin, *Ghost at the Banquet*, *supra* note 17, at 9.

[66] *See id.* at 10. Some commentators have noted the possibility that the Suspension Clause was aimed at preventing Congress from suspending the state writ. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 155 (1980). The historical evidence, however, does not clearly support such an interpretation. *See* Jordan Steiker, *Incorporating the Suspension Clause: Is there a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 865 (1994).

[67] Frequently, the individuals seeking the writ in state court were abolitionists; this was unsurprising for several reasons. First, abolitionist state officers expected to receive a more favorable hearing in their own state courts. This was due not only to the perceived greater likelihood of predisposition toward the abolitionist position, but also to the fact that it was state law which arguably required the release of a fugitive slave. Second, the Federal Constitution and statutes offered little hope of relief. Finally, the use of a federal writ was uncommon at this time and would likely have been deemed unavailable to free someone from state custody.

[68] Fugitive Slave Act of 1793, ch. 7, § 3, 1 Stat. 302, 302–03 (repealed 1864).

[69] See James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 899–902 (2004), for discussion of resistance in Pennsylvania and other Northern states.

[70] *Id.*

response to what was perceived as an encroachment upon their own state sovereignty, many free states began passing and applying kidnapping laws to those agents who were seeking to return escaped slaves to their masters.[71] The slavery conflict, not surprisingly, was regionally divisive, with the Northern states seeking to frustrate the return of fugitive slaves.[72] As the debate over slavery intensified, habeas corpus was used more frequently, as both sides in this conflict more aggressively sought recourse with the writ.

Federal legislation during this period would shape the effectiveness of these various regional efforts to control the outcome of the slavery debate through habeas corpus. The most discernible trend in congressional enactments concerning habeas corpus during the first century after adoption of the Constitution would be the protection and exaltation of federal power. For, while the initial Judiciary Act in many ways confirmed the primacy of state habeas power as understood at the framing, "each successive act extended national power over the states in order to protect a necessary federal function from state encroachments."[73]

Twice, prior to the Civil War, Congress extended the habeas corpus jurisdiction of federal courts to reach prisoners held pursuant to state–court criminal procedures. In 1833, Congress granted federal courts the authority to intervene in state criminal proceedings on behalf of federal officers arrested for acting in conformity with federal law.[74] Nine years later,

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[71] *See* THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780–1861, 16–19 (1974); *see also* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 608–09 (1842); Stephen J. Safranek, *Race and the Law, Or How the Courts and the Law Have Been Warped by Racial Injustice*, 48 WAYNE L. REV. 1025, 1031 (2002).

[72] The War of 1812 cooled the heat of regional debate over slavery as the nation united to fight a common enemy. Following the war, however, slavery once again became a source of regional friction. As Professor Arkin noted:

> 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 . . . .

Arkin, *Ghost at the Banquet*, *supra* note 17, at 33.

[73] *Id.* at 9. Arkin notes that most modern commentators assume that the 1833 and 1842 acts did not enlarge the types of custody embraced by the writ; they simply extended existing federal practice to a new group, a limited class of persons in state custody. *Id.* (citing Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 659 (1948)). Professor Arkin's discussion of cases in Section V of *Ghost at the Banquet* refutes this view. *See* Arkin, *Ghost at the Banquet*, *supra* note 17, at 42-59.

[74] Habeas Corpus Act of 1833, ch. 57, § 7, 4 Stat. 634 (1833); *see also* Herbert Wechsler, *Habeas Corpus and the Supreme Court: Reconsidering the Reach of the Great Writ*, 59 U. COL. L. REV. 167, 168 (1988).

Congress passed the Habeas Corpus Act of 1842, which extended federal habeas jurisdiction:

> [T]o 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.[75]

These two legislative extensions of federal habeas corpus to reach into state-court criminal proceedings tracked the trend of judicial decisions exalting federal judicial power over state-court proceedings and presaged the more dramatic shift in the federalism balance that followed the Civil War.[76]

D. *The Federalism Balance and Habeas Corpus in the Antebellum Nineteenth Century*

The effect of the slavery compromise at the Constitutional Convention created a rough equilibrium that would last as long as the number of slave and free states remained somewhat balanced.[77] At the ratification of the Constitution, there were six slave states and seven "free" states.[78] As states joined the Union, continual compromises were reached to maintain that balance. This distribution was vitally important for the federal/state balance. Both sides sought, at a minimum, to protect their relative voting influence in Congress. Slave states not only feared losing their ability to effect federal legislation such as the Fugitive Slave Act,[79] but they also recognized that the

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[75] Habeas Corpus Act of 1842, ch. 257, 5 Stat. 539 (1842) (codified at 28 U.S.C. § 2241 (c)(4) (1993)).

[76] *See* Alan Clarke, *Habeas Corpus: The Historical Debate,* 14 N.Y.L. SCH. J. HUM. RTS., 399–405 (1998).

[77] *See* Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment,* 66 TEMPLE L. REV. 361, 374 (1993).

[78] The original slave states were Maryland, Delaware, Virginia, North Carolina, South Carolina, and Georgia. The seven remaining states had either abolished slavery or were in the process of outlawing slavery when the Constitution was adopted. These "free" states were Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, and New Hampshire. *See Africans in America, Part 3, Narrative, Map: The Growing Nation, available at* http://www.pbs.org/wgbh/aia/part3/map3.html (last visited Mar. 22, 2005).

[79] The Fugitive Slave Acts of 1793 and 1850 were considered by some to represent a blow to state sovereignty in that they permitted slave owners to enter a free state, seize a

continued admission of free states without additional slave states to balance them out could lead to the passage of a constitutional amendment prohibiting slavery outright.

The slavery conflict intensified, therefore, as new territory was acquired by the federal government. Between 1791 and 1821, six new slave states were added to the union: Tennessee, Kentucky, Missouri, Mississippi, Louisiana, and Alabama. During this same period, five additional free states also joined: Indiana, Illinois, Ohio, Vermont, and Maine.[80] These additions brought the number of slave and free states to thirteen each. The wrangling over whether each new state would be free or slave was bitterly fought and was emblematic of the slavery conflict throughout the first half of the nineteenth century. The land obtained in 1803 by the federal government as part of the Louisiana Purchase would become one of the early focal points of this battle over the addition of states carved from newly acquired territory. Missouri's application for statehood in 1819 triggered fear among partisans on both sides of this divide. Abolitionists vowed to keep Missouri free, while pro–slavery forces were driven to expand their power through the addition of another slave state. Eventually the "Missouri Compromise" was reached, through which Missouri entered the union as a slave state, while the State of Maine was carved from Massachusetts and admitted as the balancing free state.[81] Through this compromise, an imaginary line was drawn at 36 degrees 30 minutes north latitude, above which slavery would be prohibited in this territory.[82]

In the Northern states resistance to the Fugitive Slave Act of 1793 continued to be strong. Kidnapping statutes were being used to arrest slave–catchers acting under authority of this federal law. Consequently, Southern states resorted to the federal writ to free their agents who were being incarcerated for actions authorized under existing federal law.[83] At the same time, the Northern states were resorting to state–court writs in an attempt to

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suspected runaway slave, and bring the slave before a judge who, upon proof of ownership, would issue a certificate allowing the slave owner to return to the slave state with his "property." Slave states, however, saw these laws as absolutely essential to their own sovereignty.

[80] *See Africans in America*, *supra* note 78.

[81] *Id.*

[82] *Id.* After thousands of slave owners from Missouri and other southern states poured into Kansas and voted for a pro–slavery congressional delegation, the resulting Kansas legislature adopted in toto the slave codes of Missouri. The Kansas pro–slavery laws mandated death or imprisonment of hard labor for anyone aiding a runaway slave. *See id.* The Compromise of 1850 was abrogated by the Kansas–Nebraska Act of 1854 and declared invalid by the Supreme Court in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by* U.S. CONST. amend. XIV.

[83] Arkin, *Ghost at the Banquet*, *supra* note 17, at 38–42.

wrest control of escaped slaves from their captors. In time, the United States Supreme Court eventually asserted the dominance of federal courts over those of the several states.

Prigg v. Pennsylvania[84] is a complex decision in which the Supreme Court established federal supremacy over the fugitive slave issue.[85] In a case that, not surprisingly, divided the Court so strongly that seven separate opinions were issued, the Court upheld the Fugitive Slave Act of 1793,[86] and struck down the Pennsylvania Personal Liberty Law of 1826.[87] While not a habeas case, this was the first case heard by the Supreme Court under the Fugitive Slave Act. Its decision 1) upholding the validity of federal law and 2) declaring unconstitutional a state law placing limitations on the federal constitutional and statutory fugitive–slave provisions had important repercussions for the balance of power and the uses of habeas corpus in our federal system.

The implications of the *Prigg* decision for habeas corpus proceedings would become clearer with the Court's ruling in *Ableman v. Booth*.[88] Booth was a Wisconsin abolitionist who had assisted a fugitive slave in escaping. He was subsequently prosecuted in federal court. Wisconsin courts were thrice presented with petitions for a writ of habeas corpus on the grounds that the Fugitive Slave Act of 1850 was unconstitutional. The first and third of these writs were granted. The Supreme Court reversed the Wisconsin court's decision to grant the writs, holding that state courts could not issue a writ of habeas corpus to free one held under authority of federal law.[89] As Professor Arkin noted:

> [*Prigg* and *Booth*] 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.[90]

While slavery was the issue about which both sides were fighting, and habeas corpus was the weapon of choice in this battle, the battlefield itself

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[84] 44 U.S. (16 Pet.) 539 (1842).

[85] For an interesting discussion concerning the difficulties that *Prigg* has engendered, see Paul Finkelman, *Sorting out* Prigg v. Pennsylvania, 24 RUTGERS L.J. 605 (1993).

[86] Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (1793).

[87] Personal Liberty Law of 1826, ch. L, 1826 Pa. Laws 150 (1826).

[88] 62 U.S. (21 How.) 506 (1858).

[89] *In re* Booth, 3 Wis. 1 (1854); *Ex parte* Booth, 3 Wis. 145 (1854); *see* James Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725 (2003).

[90] Arkin, *Ghost at the Banquet*, *supra* note 17, at 41.

was our nation's system of federalism. The nation's westward expansion put the federal system under great stress. The intertwined strands of slavery and federalism frayed greatly as the nation struggled to incorporate vast tracts of land divided into new states: would they be admitted as slave or free states? While the country's expansion through the second decade of the nineteenth century caused some stress and strain through a process of compromise that carefully balanced slave and free states, some semblance of stability was maintained. After California and Texas were acquired, however, a nation which had walked a delicate high wire upon that braided rope of slavery and federalism tottered and threatened to collapse with the addition of unbalancing new territories.

The acquisition of Texas and California dramatically increased the area under the control of the U.S. government. The number of states that might be created out of these territories—and, more importantly, whether they would permit slavery—caused the simmering debate over slavery to boil. The Compromise of 1850 admitted California as a free state but adopted the powerful Fugitive Slave Act of 1850.[91] Even after the issues of California and Texas were temporarily resolved, the dispute would spill over into open conflict regarding the Nebraska Territory. The 1850 Act, coupled with the *Dred Scott* decision handed down in 1856, would radicalize many anti-slavery forces and give birth to the Republican Party.[92] This party, officially opposed to the spread of slavery, would become the political home of many abolitionists who would become a legislative force during the following decade.[93]

The Fugitive Slave Act of 1850[94] contained greatly enhanced powers to capture and return runaway slaves.[95] That act mandated procedures for returning escaped slaves to their states of enslavement,[96] including the use of federal officers to take custody of the escapees and transport them back to

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[91] Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864). This act, with its increased powers to seize fugitives and return them to their former owners, would trigger greater recourse to habeas corpus and further define the limits of power in our system of federalism. *See also* Ableman v. Booth, 62 U.S. (21 How.) 506 (1859) (upholding the constitutionality of the Fugitive Act of 1850).

[92] *See* A. Christopher Bryant, *Stopping Time: The Pro–Slavery and "Irrevocable" Thirteenth Amendment*, 26 HARV. J.L. & PUB. POL'Y 501, 516–18 (2003).

[93] *See id.* at 518–19.

[94] Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864).

[95] *See id.*; *see also* Rebecca E. Zietlow, *John Bingham and the Meaning of the Fourteenth Amendment: Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 722 (2003).

[96] They were to be returned both to the geographical state from which they fled and to the condition of involuntary servitude.

the slave state from where they had escaped.[97] Slave states believed the Fugitive Slave Act to be not only consistent with the Fugitive Slave Clause of the Constitution but also necessary to give effect to the divisions of power that formed part of the original Constitution. Conversely, many in the free states not only felt that the return of fugitive slaves was immoral, but they also believed that this act represented an affront to their own rights under the system of federalism.[98] Free states began resorting to state–court writs of habeas corpus to gain release of recaptured slaves. Slave states responded by seeking federal writs of habeas corpus to free their agents imprisoned by the free states. The federal writ was also increasingly used by free blacks who were unjustly taken into custody as runaway slaves.[99]

For instance, an examination of the habeas corpus records from the federal district courts at this time provides ample evidence of free blacks resorting to the writ in an effort to thwart slave–traders seeking to enslave them again.[100] Some freed slaves used the writ to establish their freedom as early as 1831. For instance, one Levi Snow, also known as Levi Reed, was "discharged on proof of freedom this 26[th] July 1831."[101] Increasing numbers of freed men and women also challenged their detention in this manner, including Horace Gales, "free colored man,"[102] John Young, "a mulatto,"[103] and Julia Thompson, "a free Negro woman."[104] Some, such as Levi Snow, John Young, and one "Negro Sally Jones,"[105] were explicitly ordered freed following habeas proceedings.[106]

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[97] Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864).

[98] This might be one of the few things that abolitionists and slave owners had in common concerning the issue of slavery. In some sense, each felt aggrieved that their own state sovereignty was being diminished. The Fugitive Slave Act, while a victory for slave owners, in one way represented a blow to state power in that it permitted slave owners to enter a free state, seize a suspected runaway slave and bring the slave before a *federal* judge, who, upon proof of ownership, would issue a certificate allowing the slave owner to return to the slave state with his "property."

[99] *See, e.g.*, Habeas Corpus Case Records, 1820–1863, *supra* note 17, Rolls 1 & 2; Records of the U.S. Circuit Court for the District of Columbia Relating to Slaves, 1851–1863, *supra* note 17.

[100] *See, e.g.*, Habeas Corpus Case Records, 1820–1863, *supra* note 17, Rolls 1 & 2; Records of the U.S. Circuit Court for the District of Columbia Relating to Slaves, 1851–1863, *supra* note 17.

[101] Habeas Corpus Records from Habeas Corpus Case Records, 1820–1863, *supra* note 17, at Roll 1, 0198.

[102] *Id.* at Roll 1, 006–07.

[103] *Id.* at Roll 1, 064, 067.

[104] *Id.* at Roll 2, 027–28.

[105] *Id.* at Roll 1, 149.

[106] One of the interesting things about these habeas records is that they show that, on some occasions, federal courts were looking beyond the facial validity of the return, even following state judicial proceedings, and conducting a hearing to determine "actual innocence" of the offenses charged.

These uses of habeas corpus not only concerned individuals asserting their rights, they also directly implicated the federal–state distribution of power. Each state jealously guarded its own prerogative to remain slave or free and, through habeas corpus, sought to have its internal laws on this matter respected by sister states. The manner in which the various states used the writ of habeas corpus affected the federal–state balance of power in a number of sometimes counterintuitive ways.

The important lessons to be learned from this history are the following: 1) habeas corpus was a weapon of choice among those who were fighting the legal battle over slavery, 2) all parties who used habeas corpus in this struggle did so while asserting authority to determine the lawfulness of an escaped slave's servitude, and 3) the consistent trend in federal court rulings in these cases was the exaltation of federal authority over state–custody determinations and the concomitant diminution of state authority regarding similar federal custody determinations.

II. THE CIVIL WAR AND THE POSTWAR CONSTITUTIONAL AMENDMENTS

The metaphorical habeas battles in state and federal courts soon became real battles fought across the divided country. Although some have insisted the Civil War was fought over only slavery or only "States' Rights,"[107] it was fought over the intertwined issues of slavery and federalism. Historical study has confirmed these facts, and it is not my purpose to provide a compelling new look at the history of that great conflict.[108] Instead, this section will examine some of the economic and political interests that defined the struggle over abolition and the roles that habeas corpus and federalism played in that struggle, a struggle which led to the Civil War and the constitutional amendments that fundamentally altered the distribution of power regarding slavery.

A. Economic and Political Interests in Slavery

It is well known that antebellum Southern society was agrarian, with an oligarchy of rich white plantation owners who dominated the economy.[109] While the Southern interests in slavery were strong at the time of the Constitution's adoption, the economic reliance upon forced labor increased

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[107] *See* Snyder, *supra* note 20, at 242–43.

[108] *See generally, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1988).

[109] *See, e.g., Africans in America, Part 2, Freedom and Bondage in the Colonial Era, available at* http://www.pbs.org/wgbh/aia/part2/2narr1.html (last visited Mar. 22, 2005).

dramatically in the decades following its ratification. This was due largely to the invention of the cotton gin in 1793.[110] The total value of the U.S. cotton crop rose from $150,000 to over $8 million in the first ten years after the cotton gin was used.[111] With increased planting of cotton came an increased need for labor. The slave population nearly doubled from approximately 575,000 in 1781 to 900,000 in 1801.[112] Despite this increased reliance upon slavery, Congress eliminated importation of slaves in 1808, the first year that Congress had constitutional authority to do so.[113] However, this did not curb the demand for slaves; it merely increased their monetary value.[114] The number of slaves more than doubled again in the first thirty years of the nineteenth century, to more than two million by 1830.[115] Cotton quickly became the nation's number–one cash crop,[116] and this economic engine was fueled by the blood and sweat of slaves. The robust Southern economy (and the privileged place of the plantation owners) depended upon slave labor.[117]

States also had a direct economic interest in the institution of slavery.

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[110] *See Africans in America, Part 3, Eli Whitney's Cotton Gin, Douglas Egerton on Cotton, available at* http://www.pbs.org/wgbh/aia/part3/3i3124.html (last visited Mar. 22, 2005). This might at first blush seem to be counterintuitive. The cotton gin, a labor–saving device, actually increased the demand for labor because it made cotton enormously more profitable. Before the invention of the gin, the cleaning of cotton was so labor intensive that other uses for land produced equal or more profit. With the invention of the gin, however, vast plantations were devoted exclusively to cotton, requiring more and more field hands to plant and harvest the crops.

[111] *See Africans in America, Part 3, Growth and Entrenchment of Slavery, available at* http://www.pbs.org/wgbh/aia/part3/3narr6.html (last visited Mar. 22, 2005).

[112] "In 1781, the estimated population of the United States was 3.5 million. About 575,000 of these were slaves. In 1801, the year Thomas Jefferson became president, the population of the United States was 5,308,000, with 900,000 slaves." *Africans in America, Part 3, The Growing New Nation, available at* http://www.pbs.org/wgbh/aia/part3/map3_txt.html (last visited Mar. 22, 2005).

[113] *See* Act of March 2, 1807, ch. 22, 2 Stat. 426.

[114] The value of slaves in Virginia in 1800 was approximately $333 for a healthy young male field hand and as much as $500 for a literate or highly skilled slave. That figure rose to $700 to $800 for a "good" or "fair" field hand in 1849. *See Africans in America, Part 3, List and Inventory of Negroes on Plantation, available at* http://www.pbs.org/wgbh/aia/part3/3h503.html (last visited Mar. 22, 2005).

[115] *See Africans in America, Part 3, The Growing Nation, available at* http://www.pbs.org/ wgbh/aia/part3/map3.html.

[116] *Id.*; *see also* DOUGLAS C. NORTH, THE ECONOMIC GROWTH OF THE UNITED STATES, 1790–1860, at 62–68 (1961).

[117] *See* M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L. & POL. 445, 451 (1991). The Southern economy was truly an oligarchy, where a relatively few plantation owners reaped all of the wealth. Seventy–five percent of Southern whites did not own slaves. Of those who did own slaves, 88% owned twenty or fewer. Most slaves were owned by the large plantation owners, who stood to lose most if slavery were abolished. *See Africans in America, Part 4, Conditions of Antebellum Slavery, available at* http://www.pbs.org/wgbh/aia/part4/4p2956.html (last visited Mar. 22, 2005).

For slave states, "poll taxes and levies on slaves, luxuries, commercial activities, and professions provided the bulk of revenue."[118] In addition to tax revenues, states sometimes directly profited from the slave trade. For instance, a South Carolina law permitted the state to seize and hold any free blacks on a ship that entered its ports. If the captain left the port without reclaiming them, South Carolina could then sell the free blacks for profit.[119] Thus, efforts to abolish slavery were deemed threats to the economy of the Southern states, particularly to its privileged plantation owners. Not surprisingly, these plantation owners resented and resisted efforts at abolition, and their privileged place in Southern society enabled them to assert their political will regarding the issue.

1. *The Civil War*

It became increasingly apparent that the conflict over slavery posed a threat to the system of federalism with which it was so intertwined. Freedom of travel, rights to personal "property," and the comity upon which a federal system depends were all undermined by the inability to resolve the issue of slavery. What succumbed to this strain was the Union itself. Slavery was not just an issue of the federalism conflict that led to war, it was the issue that brought this nation to the brink of destruction. Slavery's preeminence in this conflict is evident in the numerous declarations of secession which specifically identified slavery in the context of state's rights as a basis for dissolution of the Union.[120] The war that ensued took a higher percentage of

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[118] FONER, *supra* note 108, at 206. The economic benefits of the institution of slavery, however, were not confined to the Southern states. Numerous industries based in the Northern states also reaped profits from both slave trading and cotton. For details of this economic benefit of slavery, see Derrick Bell, *The Civil Rights Chronicles*, 99 HARV. L. REV. 4 n.2 (1985).

[119] *See* Elkison v. Deliesseline, 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4,366) (holding the South Carolina law unconstitutional).

[120] *See, e.g.*, Confederate States of America, Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union, December 24, 1860, *available at* the Avalon Project at Yale Law School, http://www.yale.edu/lawweb/avalon/csa/scarsec.htm. The Constitution of the United States, in its fourth Article, provides as follows: "No person held to service or labor 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 labor, but shall be delivered up, on claim of the party to whom such service or labor may be due." This stipulation was so material to the compact, that without it that compact would not have been made. *Id.* For a general discussion on the role slavery played in secession, see also *Africans in America, Part 4, William Scarborough on the Civil War and Emancipation, available at* http://www.pbs.org/wgbh/aia/part4/4i3095.html (last visited Mar. 22, 2005). (identifying the continued insistence by many Southerners that economic differences and issues of states' rights, not slavery, led to the

U.S. lives than any war in U.S. history. Approximately 600,000 individuals died and hundreds of thousands were injured fighting over these issues.[121] No war the United States has fought has been more catastrophic or more essential to our moral well being. It is important to note that, even during open conflict, habeas corpus continued as a weapon in this battle over morality and federalism.

At the outset of the Civil War, following the bombardment of Fort Sumter, President Lincoln took a series of dramatic steps to preserve the Union. None of the steps taken by Lincoln was more dramatic, or more vigorously condemned, than the suspension of the writ of habeas corpus.[122] Lincoln suspended the writ in part due to the failure of local authorities to respect his call for state militias to join the fight against secession, and he simultaneously arrested thousands of Confederate sympathizers. Eventually over 18,000 people would be arrested under executive order.[123] Lincoln took these actions after Baltimore officials burned bridges and Baltimore mobs attacked trains carrying U.S. soldiers headed to Washington.[124] The continuing animosity of local police, politicians, and judges led the president to conclude that he had to suspend the writ of habeas corpus to prevent it from being used by rebels to free Confederate sympathizers.[125] Yet, even in the face of direct hostile action, Lincoln understood the sanctity of this procedure. In Lincoln's order to Lieutenant–General Scott, dated April 25, 1861, he was clearly more reluctant to suspend the writ of habeas corpus than to order the bombardment of Maryland's cities. Lincoln, fearing that the Maryland legislature was about to secede, ordered General Scott to "adopt the most prompt and efficient means to counteract, even, if necessary, to the bombardment of their cities and, *in the extremest necessity*, the suspension of the writ of *habeas corpus*."[126] This "extremest necessity" came to pass, and on eight separate occasions Lincoln suspended the writ of habeas corpus.[127]

Civil War).

[121] Most accountings indicate that the Civil War cost more U.S. lives than World War II. *See Casualties in the Civil War*, *available at* http://www.civilwarhome.com/casualties.html. Precise statistics on casualties from the Civil War are difficult to find. This author located various statistics indicating the number of dead during the Civil War to be between 497,821 and 700,000. In any event, the Civil War was clearly the most catastrophic and costly in terms of deaths as a percentage of the U.S. population as a whole.

[122] HYMAN & WIECEK, *supra* note 8, at 232–35.

[123] *Id.* at 233.

[124] WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 15–25 (1998).

[125] HYMAN & WIECEK, *supra* note 8, at 238; *see also* REHNQUIST, *supra* note 124, at 22–25.

[126] REHNQUIST, *supra* note 124, at 24 (emphasis added).

[127] *See* ABRAHAM LINCOLN, *Proclamation Suspending the Writ of Habeas Corpus* (1862), *in* THE COLLECTED WORKS OF ABRAHAM LINCOLN 436–37 (Roy P. Bolger et al. eds.,

A notorious secessionist, John Merryman, challenged the suspension of habeas corpus. Merryman was arrested for recruiting and training troops for the Confederacy. Housed in the Fort McHenry guardhouse with access to a lawyer, Merryman petitioned U.S. Supreme Court Chief Justice Taney, a fellow Marylander, for a writ of habeas corpus. Taney issued the writ, ordering Merryman to be produced.[128] The commander of the fort, upon authority of the president's order suspending the writ, refused. Taney issued a stinging opinion in which he stated that the president had no authority to suspend the writ of habeas corpus and called upon Lincoln to honor his constitutional duty to enforce the laws.[129]

Lincoln's suspension of the writ during the war and his subsequent explanation and justification for doing so serve to highlight the writ's importance. In his July 4, 1861 message to Congress, Lincoln criticized Chief Justice Taney's decision in *Ex parte Merryman*,[130] suggesting that Taney's decision would allow "all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated."[131] In this battle between federal branches, President Lincoln acknowledged the primacy of habeas corpus as an instrument to define the boundaries of constitutional power.

2. *The War's Aftermath*

With the surrender of the Confederate forces at Appomattox, the formal armed conflict over slavery ceased.[132] Lincoln was killed on April 14, 1865, only five days after the surrender.[133] We now know that President Lincoln was not eager to pursue a complete and immediate emancipation, preferring a plan of more gradual transition.[134] Initially Lincoln, and then President Johnson, was responsible for much of what was done to "reconstruct" the South following the war. With the cessation of hostilities, the states in rebellion wer e effectively in legal limbo. They were states without state

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1953).

[128] HYMAN & WIECEK, *supra* note 8, at 238–39.

[129] REHNQUIST, *supra* note 124, at 33–35.

[130] *Ex parte* Merryman, 17 F. Cas. 144 (C.D. Md. 1861) (No. 9,487).

[131] *Id.* at 38; *see also* LINCOLN, *supra* note 127, at 436–37.

[132] David F. Forte, *Spiritual Equality, The Black Codes, and the Americanization of the Freedmen*, 43 LOY. L. REV. 569, 596 (1998).

[133] *Id.*

[134] While Lincoln wanted to end slavery, he favored a more gradual approach. *See* Avalon Project at Yale Law School, *The Problem of Reconstruction*, *available at* http://www.yale.edu/lawweb/avalon/treatise/andrew_johnson/chap_01.htm. (last visited Mar. 22, 2005).

governments, and so fell under the control of the federal government. Presidential power to reconstruct was justified under both the commander-in-chief authority and—oddly—under his pardon power.[135] Thus, when the war ended, a time of "Presidential Reconstruction" began. Neither Lincoln nor Johnson proposed the idea of universal emancipation. The Emancipation Proclamation, signed on January 1, 1863, freed only the slaves who resided in the areas of rebellion, but it did not abolish slavery in its entirety.[136] With the war drawing to a conclusion, on March 13, 1865, President Lincoln signed a joint resolution granting freedom to all who had served in the Union army and their families.[137] This action, while a significant step, fell short of complete abolition.[138]

In the same month that Lincoln signed the joint resolution freeing black soldiers and their families, Congress created the Freedmen's Bureau. In "An Act to establish a Bureau for the Relief of Freedmen and Refugees," passed on March 3, 1865, Congress authorized the president to appoint a commissioner whose office, established in the War Department, would

> continue during the present war of rebellion, and for one year thereafter, a bureau of refugees, freedmen, and abandoned lands, to which shall be committed, as hereinafter provided, the supervision and management of all abandoned lands, and the control of all subjects relating to refugees and freedmen from rebel states, or from any district of country within the territory embraced in the operations of the army, under such rules and regulations as may be prescribed by the head of the bureau and approved by the President.[139]

The Freedmen's Bureau was originally intended to remain in existence for the duration of hostilities, plus one year.[140] While the scope of power granted to the executive under the act is clearly broad, there is a noticeable lack of specificity in this mandate. Subsequently, Congress expanded both the time limits initially placed upon the Freedmen's Bureau and the directives it provided to the executive. In a subsequent amendment of this act, over President Johnson's veto, Congress directed the president and his agents to secure the rights and immunities of all freedmen against unequally

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[135] *Id.*

[136] HYMAN & WIECEK, *supra* note 8, at 253–54.

[137] *See id.*

[138] *Id.* The proclamation was actually issued on September 22, 1862 but gave states in rebellion the opportunity to rejoin the Union before January 1, 1863. No rebel states took advantage of that opportunity. *Id.*

[139] Act of March 3, 1865, ch. 90, § 1, 13 Stat. 507, *reprinted in* 13 STATUTES AT LARGE, TREATIES, AND PROCLAMATIONS OF THE UNITED STATES OF AMERICA 507–09 (Boston, 1866).

[140] *See id.*

applied laws.[141]

The Thirteenth Amendment abolishing slavery was adopted on December 6, 1865.[142] That amendment, however, contains an important exception that permits involuntary servitude for those convicted of crimes.[143] Given their consistent resistance to abolition, Southern states reacted with predictable hostility and obstructionism. Mississippi even refused to ratify the amendment.[144] Several former slave states enacted a series of laws that became known collectively as the "Black Codes."[145] These laws sought to circumvent the Thirteenth Amendment and replace the individual slave holder with the state as master of this servant race. For instance, a portion of the Black Code of Mississippi, although styled as "An Act to Confer Civil Rights on Freedmen, and for other Purposes," read as follows:

> Section 6. [A]ll contracts for labor made with freedmen, free negroes and mulattoes for a longer period than one month shall be in writing, and a duplicate, attested and read to said freedman, free negro or mulatto by a beat, city or county officer, or two disinterested white persons of the county in which the labor is to be performed, of which each party shall have one: and said contracts shall be taken and held as entire contracts, and if the laborer shall quit the service of the employer before the expiration of his term of service, without good cause, he shall forfeit his wages for that year up to the time of quitting.
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> Section 7. Every civil officer shall, and every person may, arrest and carry back to his or her legal employer any freedman, free negro, or

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[141] Act of July 16, 1866, ch. 200, 14 Stat. 173, 176–77 (1866).

[142] U.S. CONST. amend. XIII.

[143] *Id.* The Thirteenth Amendment permits slavery for those lawfully convicted of crimes. The Black Codes attempted to capitalize on this exception and upend the new order brought about by the Civil War and this subsequent constitutional amendment. As discussed in more detail, *infra*, Congress responded by passing the Civil Rights Act which took aim at these codes. An additional constitutional amendment, the Fourteenth Amendment, however, proved necessary to prevent recalcitrance and to cement within the Constitution the new distribution of power over race-based deprivations of liberty. Federal habeas corpus was necessary to remove these determinations from the states which had repeatedly shown themselves to be incapable of protecting minority rights.

[144] *See Amendments to the Constitution*, *at* http://www.law.emory.edu/erd/docs/usconst/amend.html (last visited Mar. 22, 2005). Other states, including New Jersey, Delaware, and Kentucky, originally refused to ratify this Amendment but did so later. Only Mississippi has refused to ratify it to this day.

[145] *See, e.g.*, Bill Quigley & Maha Zaki, *The Significance of Race: Legislative Racial Discrimination in Louisiana, 1803–1865*, 24 S.U. L. REV. 145, 147–53 (1997). For a discussion of Texas' Black Codes, see *The Handbook of Texas Online, Black Codes*, *at* http://www.tsha.utexas.edu/handbook/online/articles/view/BB/jsb1.html. (last modified Mar. 8, 2005).

> mulatto who shall have quit the service of his or her employer before the expiration of his or her term of service without good cause; and said officer and person shall be entitled to receive for arresting and carrying back every deserting employee aforesaid the sum of five dollars, and ten cents per mile from the place of arrest to the place of delivery; and the same shall be paid by the employer, and held as a set off for so much against the wages of said deserting employee: Provided, that said arrested party, after being so returned, may appeal to the justice of the peace or member of the board of police of the county, who, on notice to the alleged employer, shall try summarily whether said appellant is legally employed by the alleged employer, and has good cause to quit said employer. Either party shall have the right of appeal to the county court, pending which the alleged deserter shall be remanded to the alleged employer or otherwise disposed of, as shall be right and just; and the decision of the county court shall be final.[146]

Congressional Republicans recognized that many of the actions taken to secure the liberty of the newly freed slaves, including the joint resolution freeing families of Union soldiers, the creation of the Freedmen's Bureau, and even the Thirteenth Amendment, would prove ineffective without some mechanism of enforcing black citizens' liberty in the face of the Black Codes. The day after the Thirteenth Amendment became effective, the House of Representatives passed a resolution requiring the Judiciary Committee

> to inquire and report to the House, as soon as practicable, by bill or otherwise, what legislation is necessary to enable the courts of the United States to enforce the freedom of the wives and children of soldiers of the United States under the joint resolution of March 3, 1865, and also to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery.[147]

When reported out of the Judiciary Committee, this request took the form of a "bill to secure the writ of Habeas Corpus to persons held in slavery or involuntary servitude contrary to the Constitution of the United States."[148] This bill, in altered form, would eventually become the Habeas Corpus Act of 1867. While the language of the act would change, its purpose to "enforce

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[146] *Black Code of Mississippi of 1865*, *available at* http://www.usconstitution.com/BlackCodesofMississippi.htm. (last visited Mar. 22, 2005).

[147] CONG. GLOBE, 39th Cong., 1st Sess. 87 (1865); *see also* Clark D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered,* 70 NOTRE DAME L. REV. 1079, 1109 (1995).

[148] *See* Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 34 (1965–66).

the liberty of all persons under the operation of the constitutional amendment abolishing slavery," would remain unchanged.[149]

Histories of the Reconstruction period have long recognized that the Black Codes were designed "to put the state much in the place of the former master."[150] White plantation owners believed that only through forced labor could the production of cotton and its profitability be resumed and maintained. The singular focus of these most powerful Southerners was to adopt sweeping laws regarding labor, property rights, and the administration of criminal law that would, in effect, combine to reinstate slavery.[151] The states and all their legislative, executive, and judicial offices would serve as a buffer between the plantation owner and the former slave.

Henceforth, the state would enforce labor agreements and plantation discipline, punish those who refused to contract, and prevent whites from competing among themselves for black workers. The codes amply fulfilled Radical Benjamin F. Flanders' prediction at a meeting of the assembled Louisiana legislature: "Their whole thought and time will be given to plans for getting things back as near to slavery as possible."[152]

Much to the chagrin of Republicans in Congress, President Johnson did little to enjoin the recalcitrant states' efforts. President Johnson repeatedly moved to thwart the Radical Republican agenda, vetoing all significant pieces of legislation related to protection of the freedmen, including the Civil Rights Act of 1866 and the acts creating the Freedmen's Bureau and expanding its jurisdiction.[153] In rejecting the act which would continue in existence while extending the powers of the Freedmen's Bureau,[154] Johnson articulated a view of events in the South that diverged substantially from the facts on the ground and the reports being heard by Congress:

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[149] A fuller discussion of the Habeas Corpus Act and its purpose in granting protection to persons incarcerated due to impermissible consideration of race follows in Part II.C.3.

[150] FONER, *supra* note 108, at 198; *see also* WILLIAM W. DAVIS, THE CIVIL WAR AND RECONSTRUCTION IN FLORIDA 425 (1913).

[151] FONER, *supra* note 108, at 198.

> As William H. Trescot explained to South Carolina's governor in December 1865, "you will find that this question of the control of labor underlies every other question of state interest." The ferment in the countryside, the history of other societies that had experienced emancipation, and ideologies and prejudices inherited from slavery, combined to convince the white South that only through some form of coerced labor could the production of plantation staples be resumed.

Id.

[152] *Id.* at 199 (quoting letter from Benjamin F. Flanders to Henry C. Warmoth (Nov. 23, 1865)).

[153] Freedmen's Bureau Act of 1865, ch. 90, 13 Stat. 507 (1865); Act of July 16, 1866, ch. 200, 14 Stat. 173 (1866).

[154] Act of July 16, 1866, ch. 200, 14 Stat. 173, 176–77 (1866).

> Let us not unnecessarily disturb the commerce and credit and industry of the country by declaring to the American people and to the world that the United States are still in a condition of civil war. At present there is no part of our country in which the authority of the United States is disputed. Offenses that may be committed by individuals should not work a forfeiture of the rights of whole communities. The country has returned, or is returning, to a state of peace and industry, and the rebellion is in fact at an end. The measure, therefore, seems to be as inconsistent with the actual condition of the country as it is at variance with the Constitution of the United States.[155]

President Johnson's apparent ignorance of the reports being made by Freedmen's Bureau agents could be interpreted benignly. Other statements in his veto message, however, raised deeper concerns among the Republicans in Congress. Johnson indicated, at best, an inability to understand the conditions affecting the recently freed slaves:

> His condition is not so exposed as may at first be imagined. He is in a portion of the country where his labor can not well be spared. Competition for his services from planters, from those who are constructing or repairing railroads, and from capitalists in his vicinage or from other States will enable him to command almost his own terms. He also possesses a perfect right to change his place of abode, and if, therefore, he does not find in one community or State a mode of life suited to his desires or proper remuneration for his labor, he can move to another where that labor is more esteemed and better rewarded. In truth, however, each State, induced by its own wants and interests, will do what is necessary and proper to retain within its borders all the labor that is needed for the development of its resources. The laws that regulate supply and demand will maintain their force, and the wages of the laborer will be regulated thereby. There is no danger that the exceedingly great demand for labor will not operate in favor of the laborer.[156]

This statement not only showed a failure to understand the conditions under which the newly freed slaves existed, but it contained assertions that were empirically and obviously false. For example, the Black Codes in virtually every state forbade freedom of movement and contract.[157]

President Johnson's veto statement also sent a strong signal to both

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[155] President Johnson's Freedmen's Bureau Veto Message, February 19, 1866, *available at* http://itw.sewanee.edu/reconstruction/html/docs/freedveto.htm. (last visited Mar. 22, 2005).

[156] *Id.*

[157] Black Code of Mississippi of 1865, §§ 6–7, *available at* http://www.usconstitution.com/BlackCodesofMississippi.htm. (last visited Mar. 22, 2005).

Congress and the states that the president would permit states to restrict the very rights he claimed were already possessed by freed black citizens. By characterizing as "necessary and proper" that which each state, "induced by its own wants and interests" would do "to retain within its borders all the labor that is needed for the development of its resources,"[158] Johnson sided squarely with the proponents of the Black Codes.

Mississippi and South Carolina were among the most forthright in their legislation, as their codes were explicitly aimed at freed blacks.[159] The Mississippi legislature declared all penal codes defining crimes by slaves and free blacks "in full force" unless specifically altered by law.[160] Mississippi required freed plantation workers to enter into labor contracts and restricted the freed person from moving away from the plantation to the city.[161] If the laborer sought to leave his job before the term of his contract was completed, he would forfeit all previously earned wages under the contract.[162] In addition, blacks who "violated" these employment contracts and attempted to move were subject to arrest by any white citizen.[163] The punishment for this crime was forced labor on the plantation. These restrictions on the right to contract, the ability to move, and the right to own any substantial property (when coupled with the power to arrest and sentence to forced labor) resulted in the continuation of slavery under a new master. These codes aimed to exploit the exception in the Thirteenth Amendment permitting involuntary servitude for those convicted of crimes. Not surprisingly, the

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[158] President Johnson's Freedmen's Bureau Veto Message, February 19, 1866, *supra* note 155.

[159] *See* Donald G. Nieman, *The Freedmen's Bureau and the Mississippi Black Code*, 40 J. MISS. HIST. 91 (1978). When discussing the Freedmen's Bureau Bill, Senator Wilson argued that the black codes of South Carolina, Mississippi, and Louisiana were "codes of laws that practically make the freedman a peon or a serf." CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866).

[160] FONER, *supra* note 108, at 200.

[161] *Id.* at 199. Like Mississippi, South Carolina's code was explicitly racist. One definition of "vagrant" found in the South Carolina Code was "unemployed black." *Id.* at 200. Severe penalties were imposed for vagrancy, usually forced labor on the plantation and potentially physical punishment. *Id.* at 198. Other states were equally aggressive at keeping the freed population under control. "Louisiana and Texas, seeking to counteract the withdrawal of black women from field labor, mandated that contracts 'shall embrace the labor of all the members of the family able to work.' Louisiana also provided that all disputes between the employer and his laborers 'shall be settled . . . by the former.'" *Id.* at 200–01. The calls for such laws were commonplace and came from many quarters. One New Orleans newspaper called the desired result a "new labor system . . . prescribed and enforced by the state." *Id.* at 198. Former slave owners sought every opportunity to use the law as a means of ensuring a ready supply of forced labor.

[162] Black Code of Mississippi of 1865, § 6, *supra* note 157.

[163] *Id.* § 7.

black population considered any attempt to limit its economic independence to be an attempt to continue the condition of slavery. Freed blacks resisted efforts to enslave them again; white landowners feared an uprising. Considerable violence characterized the period after the War.

Additionally, apprenticeship laws permitted recently freed young persons to be taken from their families, with or without permission, and forced to labor for white landowners:

> [C]ourts bound out individuals for uncompensated labor who could hardly be considered minors; one tenth of the apprentices in one North Carolina county exceeded the age of sixteen, including an "orphan" working at a turpentine mill and supporting his wife and child. To blacks, such apprenticeships represented nothing less than a continuation of slavery.[164]

These laws governing apprenticeships and labor in every form were common to most states in the former Confederacy.[165] Former slaves were taxed heavily and therefore felt compelled to find work.[166] The threat of vagrancy and de facto slave labor loomed over the heads of all who resisted the new "legal" slavery.[167] Florida went so far as to criminalize disrespect and impudence,[168] while Mississippi chose to make criminals of those who "misspend what they earn."[169] The Freedmen's Bureau records are replete with former slaves pleading for assistance to recover family members seized by this state–sanctioned enslavement.[170]

Unfortunately, the heart–wrenching destruction of families and lost hope naturally engendered by the stolen promise of freedom were not the worst of

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[164] FONER, *supra* note 108, at 201; *see also id.* at 202 (quoting Sidney Andrews, *Three Months Among the Reconstructionists,* ATLANTIC MONTHLY, Feb. 1866, at 244 ("The statutes regulating labor and apprenticeship, in the words of Northern reporter Sidney Andrews, 'acknowledge the overthrow of the special servitude of man to man, but seek . . . to establish the general servitude of man to the commonwealth.' The same was true of new criminal laws designed to enforce the property rights of landowners against the claims of their former slaves.")).

[165] DONALD G. NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865–1868, at 73–98 (1979).

[166] Conversely, land taxes remained extremely low. In many cases, the head tax paid by the "legally" enslaved worker exceeded the entire tax burden paid by the large plantation owner where the freedman was forced to labor. *See* FONER, *supra* note 108, at 206.

[167] These laws were supplemented by statutes punishing any landowner who sought to pay a fair wage to the freedmen. *See, e.g., id.* at 200. Thus, the laws sought to control both blacks and whites.

[168] *See id.*

[169] *See* An Act to Amend the Vagrancy Laws of the State, § 1, *available at* http://www.toptags.com/aama/docs/bcodes.htm. (last visited Mar. 22, 2005).

[170] See generally, e.g., Freedmen's Bureau Online, *at* http://www.freedmensbureau.com (last visited Mar. 22, 2005), for detailed case studies and documents attesting to the debilitating power of the Black Codes.

what was happening to the recently freed slaves. There was widespread violence in the South against freed blacks.[171] The Black Codes and the accompanying violence were a direct attack on the Thirteenth Amendment and an attempt by the rebellious states to retain dominion over the authority to determine the lawfulness of race–based deprivations of liberty within their borders. Congress reacted by passing, again over the president's veto, the Civil Rights Act of 1866.[172] This landmark piece of legislation reasserted federal dominance over this issue with provisions designed to give life to the Thirteenth Amendment. The Civil Rights Act has frequently been described as primarily concerned with economic rights, not "civil rights" as we have come to use that term in the late twentieth and early twenty–first centuries.[173] This is true insofar that the Civil Rights Act did not grant suffrage or other modern civil rights to freed slaves. However, it is a mistake to think of the Civil Rights Act as being some sort of law and economics bill unconcerned with restraints placed upon the physical liberty of the Freedmen. To the contrary, the economic rights addressed by the Civil Rights Act were precisely those rights infringed upon by the Black Codes.

The Civil Rights Act concerned itself with the freedom of contract and the rights to purchase, lease, and convey real property precisely because the Black Codes had permitted the continuation of slavery in the absence of these rights.[174] The economic aspects of liberty, however, were not the only

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[171] The historical record is bursting with accounts of massive criminal bloodletting as white southerners unleashed a reign of terror designed to crush emancipation before it took hold. With President Johnson effectively giving a green light to Southern intransigence:

> In some areas, violence against blacks reached staggering proportions in the immediate aftermath of the war. In Louisiana, reported a visitor from North Carolina in 1865, "they govern . . . by the pistol and the rifle." "I saw white men whipping colored men just the same as they did before the war," testified ex–slave Henry Adams, who claimed that "over two thousand colored people" were murdered in 1865 in the area around Shreveport, Louisiana. In Texas, where the army and Freedmen's Bureau proved entirely unable to establish order, blacks, according to a Bureau official, "are frequently beaten unmercifully, and shot down like wild beasts, without any provocation. . . ." In 1866, after "some kind of dispute with some freedmen," a group near Pine Bluff, Arkansas, set fire to a black settlement and rounded up the inhabitants. A man who visited the scene the following morning found "a sight that apald [sic] me [.] 24 Negro men woman and children were hanging to trees all round the Cabbins [sic]."

FONER, *supra* note 108, at 119 (quoting letter from Alfred Dockery to R. J. Powell (Nov. 13, 1865)). *See also* Freedmen's Bureau Online, *supra* note 170.

[172] Civil Rights Act of 1866, ch. 31, 14 Stat. 27–30 (codified as amended at 42 U.S.C. § 1981 (1991)).

[173] *See, e.g.*, William E. Mahoney, Jr., Comment, *Section 1981 and Discriminatory Discharge: A Contextual Analysis*, 64 TEMPLE L. REV. 173, 202 (1991).

[174] *See supra* note 152 and accompanying text.

rights protected under the Civil Rights Act.

With the passage of the Civil Rights Act, Congress explicitly linked protection of the freedmen from discriminatory application of state law with the protection of federal court review through habeas corpus. This was clear from the Civil Rights Act's protection of physical liberty, requiring "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."[175] In providing for "full and equal benefit of all laws and proceedings for the security of person," Congress was granting the freed slaves the protection of federal court review of unlawful detentions, through removal and habeas corpus review. Section 3 of this act makes this clear:

> And be it further enacted, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance . . . concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, . . . such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty–three, and all acts amendatory thereof.[176]

Some scholars have focused on the removal provisions of the above-quoted section of the Civil Rights Act.[177] Clearly, removal to federal court was provided for under the Habeas Corpus Act of 1863 and was incorporated by the Civil Rights Act. The Civil Rights Act, however, invoked both the 1863 act "and all acts amendatory thereof" while granting federal courts "cognizance . . . of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals

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[175] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27–30 (1866) (codified as amended at 42 U.S.C. § 1981 (1991)). The Freedmen's Bureau was understood to be temporary, so Congress adopted the Civil Rights Act, ordaining federal habeas corpus as the preferred method of freeing someone being held pursuant to a race–based application of state process and law.

[176] *Id.* § 3.

[177] *See, e.g.*, Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965).

of the State . . . any of the rights secured to them by the first section of this act."[178] Congress provided *both* removal and habeas review. Removal is a remedy that substitutes a forum for trial, rather than providing review after trial. The Habeas Corpus Act of 1863 provided relief in both forms. Defendants could obtain removal before or during a trial in which the state court failed to adequately protect federal guarantees[179] and seek de novo review subsequent to state–court proceedings.[180]

Congress clarified this intent when it amended the Habeas Corpus Act one month after passage of the Civil Rights Act, specifically providing for habeas corpus review after the final judgment on proceedings in state court.[181] Since the language of the Civil Rights Act specifically references both the Habeas Corpus Act of 1863, "and all acts amendatory thereof" as providing the mechanism of federal court jurisdiction over these cases, the amended Habeas Corpus Act was undoubtedly meant to provide federal habeas corpus review of claims cognizable under the Civil Rights Act of 1866.

These acts, passed in 1866, presaged the further expansion of habeas corpus power ten months after passage of the Civil Rights Act.[182] Congress articulated this habeas power of review even more clearly,[183] extending federal review "to 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."[184] As will be discussed more fully, the habeas provisions in the 1867

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[178] Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (1991)).

[179] Habeas Corpus Act of 1863, ch. 81, 12 Stat. 755 (1863).

[180] *Id.* at 757. ("[A]nd the said circuit court shall thereupon proceed to try and determine the facts and the law in such action, in the same manner as if the same had been there originally commenced, the judgment in such case notwithstanding.").

[181] Act of May 11, 1866, 39th Cong., Sess. I, ch. 80 (1866). The full title of the act is "An Act to Amend an Act Entitled 'An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases,' approved March third, eighteen–hundred and sixty–three." This often neglected Habeas Corpus Act of 1866 provided for federal habeas corpus review of state–court convictions deemed to offend the Civil Rights Act.

[182] The amended Habeas Corpus Act of 1867, ch. 80, § 3, 14 Stat. 385 (1867), must be read in conjunction with Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (1867), which was approved on the same day. The acts together expand habeas jurisdiction to "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, 14 Stat. 385 (1867). Technically, the expansion of habeas corpus under the Act of Feb. 5, 1867, ch. 28, 1 Stat. 385 (1867), was not an act amendatory of the Habeas Corpus Act of 1863 and is not discussed as such here. There was an act passed that same day that did amend the 1863 Act. *See* Act of Feb. 5, 1867, ch. 27, 1 Stat. 385 (1867).

[183] Act of Feb. 5, 1867, ch. 28, 1 Stat. 385, 385 (1867).

[184] *Id.*

act would more expansively cover claims arising after ratification of the Fourteenth Amendment.[185]

B. States' Reactions to the Civil Rights Act of 1866

Once again, the states reacted with predictable hostility to what they viewed as federal intervention in local affairs, and they continued to pass Black Codes, albeit with more carefully scripted "race-neutral" language. The relative sophistication of the legislative response did not signal a correlative moderation in enforcement or brutality.

If employers could no longer subject blacks to corporal punishment:

> [Courts] could mandate whipping as a punishment for vagrancy or petty theft. If individual whites could no longer hold blacks in involuntary servitude, courts could sentence freedmen to long prison terms, force them to labor without compensation on public works, or bind them out to white employers who would pay their fines. The convict lease system, moreover, which had originated on a small scale before the war, was expanded so as to provide employers with a supply of cheap labor. In Texas in 1867, blacks constituted about one third of the convicts confined to the state penitentiary, but nearly 90 percent of those leased out for railroad labor.[186]

Apprenticeship laws also were embraced with increasing vigor throughout the South. In some states, such as Maryland and North Carolina, courts ordered black children to be bound for labor to white "employers" without the permission or knowledge of the children's parents.[187] Records compiled by the Freedmen's Bureau in those states indicate a virtual deluge of requests for assistance in obtaining the freedom of children enslaved through "lawful" state-court action.[188] Of course, the state-court actions in these cases were inconsistent with federal law, and the resulting involuntary servitude of these children was a violation of the Thirteenth Amendment.

The aggressive state action against the freedmen was deeply unsettling to Republicans in Congress not only due to the extent of abuse, but also due to the role being played by the state courts established under Presidential Reconstruction:

> In much of the South, the courts of Presidential Reconstruction appeared

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[185] For a more complete discussion of the history of the Habeas Corpus Act of 1867, see *infra* Part II.C.3.

[186] FONER, *supra* note 108, at 205; *see also* J. THORSTEN SELLIN, SLAVERY AND THE PENAL SYSTEM 145–62 (1976); A. Elizabeth Taylor, *The Origins and Development of the Convict Lease System in Georgia*, 26 GA. HIST. Q. 113, 113–15 (1942).

[187] *See* FONER, *supra* note 108, at 201.

[188] *See id.*

> more interested in disciplining the black population and forcing it to labor than in dispensing justice. "The fact is," one of Florida's few white Radicals commented shrewdly early in 1867, "custom with them [local whites] has become the law."[189]

Congressional Republicans lost faith not only in President Johnson's commitment to Reconstruction but also in the willingness or capability of state courts to protect the rights of freed blacks. This belief in the failure of Presidential Reconstruction and state courts would shift the center of gravity in the Republican Party toward the radical wing of that party.[190]

The Radical Republican agenda was defined by a much more aggressive approach to ensuring the equality of freed blacks. Radicals were agitating for greater political rights for freedmen and, as is evident by the Civil Rights Act of 1866, for greater federal protection of personal liberty and property.[191] The continued resistance to federal control over the liberty of freed blacks swelled the ranks of those embracing the Radical agenda. This political movement was fueled in part by continuing reports of violence and lawlessness being sanctioned by state courts:

> Arrested by white sheriffs, tried before white judges and juries, blacks understandably had little confidence in the courts of Presidential Reconstruction. There, a group of Charleston blacks complained early in 1867, "justice is mocked and injustice is clothed in the garb of righteousness."[192]

Reports from Freedmen's Bureau officials echoed those of Southern blacks. "Blacks, a [Freedmen's] Bureau official concluded, 'would be *just as well* off with no law at all or no Government,' as with the legal system of Presidential Reconstruction."[193] Bureau officials believed that blacks would be "just as well off with no law" because the state courts were helping to enslave black children, in a manner that was consistent with state law but offensive to the Thirteenth Amendment and the Civil Rights Act. Even by 1867, Bureau agents and local justices of the peace released black youth from apprenticeships.[194]

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[189] *Id.* at 205; *see also* JERRELL H. SHOFNER, NOR IS IT OVER YET 105 (1974); H.R. REP. NO. 30 at 272 (1865–66).

[190] FONER, *supra* note 108, at 238.

[191] Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (1991)).

[192] FONER, *supra* note 108, at 205.

[193] Letter from Nelson G. Gill to O. O. Howard (Oct. 14, 1866), *quoted in* FONER, *supra* note 108, at 205.

[194] FONER, *supra* note 108, at 201.

While the Civil Rights Act forbade this form of racial discrimination, hostile courts interpreted race–neutral state statutes as constitutional and enforced their provisions.[195] "[I]t was well understood, as Alabama planter and Democratic politico John W. DuBois [sic] later remarked, that 'the vagrant contemplated was the plantation negro.'"[196] With neither the Civil Rights Act nor Presidential Reconstruction serving to protect the rights of the freedmen, Congress, increasingly dominated by proponents of the Radical Republican agenda, moved to constitutionalize the redistribution of power to determine the lawfulness of race–based deprivations of liberty within our federal system.

C. The Fourteenth Amendment and the Privilege of Habeas Corpus

In response to the ongoing recalcitrance of the Southern states and the failure of Presidential Reconstruction to counter the assertions of antebellum notions of federalism effectively, Congress proposed the Fourteenth Amendment. Congress passed the joint resolution proposing the Fourteenth Amendment to the states on June 16, 1866.[197] It would be ratified and become part of the Constitution in July of 1868. Through the amendment's Privileges or Immunities Clause, the Framers intended to constitutionalize the process for securing the liberty of the freed race and place it beyond the power of state legislatures and courts. The previously fluctuating federalism balance solidified and changed in one specific way: states no longer retained the ability to determine whether it was lawful to deprive a person of liberty based upon race, and the privilege of habeas corpus, a privilege of federal citizenship, would ensure that federal courts would have the last say. Reading the Fourteenth Amendment along with the other enactments passed by Congress at this time, including the Habeas Corpus Act of 1867, the Reconstruction Act of 1867, and the Judiciary Act of 1867, compels this conclusion.

There are two points that the historical record clearly establishes. The

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[195] *See* Stephen Plass, *Dualism and Overlooked Class Consciousness in American Labor Laws*, 37 HOUS. L. REV. 823, 841–43 (2000).

[196] FONER, *supra* note 108, at 201, *quoting* JOHN W. DUBOSE, ALABAMA'S TRAGIC DECADE 55 (James K. Greer ed., 1940).

[197] The joint resolution submitting the Fourteenth Amendment to the states passed the Senate on June 8, 1866 and the House of Representatives on June 13, 1866. CONG. GLOBE, 39th Cong., 1st Sess. 3148–49, 3042 (1866). This action followed slightly more than two months after Congress passed the Civil Rights Act of 1866. This might seem like too short a time for Congress to have assessed the reaction to that Act. But, as one of the leading Radicals in Congress observed: "These are no times of ordinary politics . . . . These are formative hours: the national purpose and thought grows and ripens in thirty days as much as ordinary years bring it forward." Letter from Wendell Phillips to Charles Sumner (Mar. 24, 1866), *cited in* FONER, *supra* note 108, at 239.

first is that the Fourteenth Amendment was primarily concerned with protecting the freed slaves.[198] The second is that among the privileges or immunities of federal citizenship is the privilege of habeas corpus.[199] What is somewhat astonishing is that the import of these two points has remained largely unrecognized. Scholars and judges alike have interpreted the Supreme Court's *Slaughter–House* ruling as one which eviscerated the Privileges or Immunities Clause.[200] While criticism that the Court unjustifiably narrowed the scope of the privileges or immunities of federal citizenship is valid, *Slaughter–House* did nothing to diminish the primary purpose of that clause. A careful reading of the amendment within its historical context confirms that the original intent of the Framers was to protect the liberty of freed slaves by explicitly providing in the Constitution recourse to the privilege of federal habeas corpus.

1. *Interpreting the Amendment*

Any serious analysis of a constitutional provision, of course, must begin with the language of that provision. Interpretation of any clause must, where possible, be read as consistent with the larger constitutional framework. While the normal rule of construction should be applied to analyzing the Fourteenth Amendment, there remains ambiguity in the language, ambiguity that is not rendered clear by resort to the legislative history. Scholars who have examined this history have reached strongly divergent conclusions.[201] This difference of opinion concerning the Framers' intent in drafting the amendment cannot be resolved by looking exclusively at the *Congressional Globe,* for many of the statements are contradictory. The debate over this issue has, at times, become quite heated.[202] The Framers' intent, however, must be analyzed within its historical context. Doing otherwise is separating

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[198] *See, e.g.*, AMAR, CREATION AND RECONSTRUCTION, *supra* note 2, at 162; *see also* Slaughter–House Cases, 83 U.S. (16 Wall.) 36 (1872).

[199] *See* 83 U.S. at 79–80; 83 U.S. at 115 (Bradley, J., dissenting); *see also* 83 U.S. at 96–98 (Field, J. dissenting) (citing *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230), for appropriate delineation of privileges and immunities, which includes habeas corpus among them).

[200] *See, e.g.*, Douglas G. Smith, *The Politics of Separation: Review of Philip Hamburger's* Separation of Church and State, 36 U.C. DAVIS L. REV. 967, 987 (2003); *see also* Larry Catá Backer, *Race, "The Race" and the Republic: Reconceiving Judicial Authority After* Bush v. Gore, 51 CATH. U. L. REV. 1057 n.143 (2002).

[201] *Compare* AMAR, *supra* note 2, *with* Berger, *supra* note 28. In recent years, members of the Supreme Court have indicated a willingness to revisit the scope of the Privileges or Immunities Clause, if not reexamine the holding of the *Slaughter–House Cases*. *See* Saenz v. Roe, 526 U.S. 489 (1999).

[202] *Compare* AMAR, *supra* note 2, *with* Berger, *supra* note 28.

analysis from reason.

The first section of the Fourteenth Amendment reads as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[203]

The analysis in this article will focus primarily on this clause, examining its plain meaning and its relationship to the rest of the Fourteenth Amendment and the larger Constitution, as illuminated by the historical contextual evidence of the Framers' intent.

a. Citizenship

The first sentence of the Fourteenth Amendment defines citizenship. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[204] The plain meaning of the clause is to define citizenship broadly to include "all persons, born or naturalized in the United States" irrespective of race. This language contradicts several clauses of the original Constitution, through implication and interpretation, rather than by direct force of contradictory language. This sentence was designed to conflict with the "Three–Fifths Clause" of Article I, § 2 and the Fugitive Slave Clause of Article IV. These original constitutional provisions were obviously intended to yield to the latter. This fact is not disputed by scholars or courts and is readily discernible from the historical record. The language of this first sentence was explicitly designed to overturn the Supreme Court's definition of citizenship articulated in *Dred Scott*.[205] *Dred Scott* denied the status of Illinois citizenship to a slave who had traveled with his slave owner into the free state of Illinois and then to a territory of the United States (present–day Minnesota), before returning to the slave state of Missouri.[206] The Court, in so ruling, distinguished between personhood and citizenship, the distinction used by the Framers of the original Constitution.[207] While many have criticized the *Dred Scott* decision as morally indefensible, the decision was

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[203] U.S. CONST. amend. XIV, § 1.
[204] *Id.*
[205] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1856).
[206] *Id.* at 427.
[207] *Id.* at 404.

not without constitutional support. Several provisions of the original Constitution lend credibility to the decision. Both the "Three–Fifths clause," which distinguished between personhood and citizenship, and the Fugitive Slave Clause support the legal definition of a slave as something less than fully human—as property of an owner.[208] Based upon the slavery provisions of the original Constitution and the federalism balance enshrined therein, the Supreme Court held that a free state could not define citizenship to include slaves taken as property into that state.[209] In doing so, the Court explicitly referenced how the privileges or immunities of citizenship would interfere with the application of race–based criminal laws.

> [I]t cannot be believed that the large slaveholding States regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished . . . .[210]

Taney's decision, however, went even further. Referring to the compromises reached by the Framers of the original Constitution, Taney found that people of African descent "had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever profit could be made by it . . . ."[211] The *Dred Scott* Court proceeded to declare the Missouri

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[208] While Chief Justice Taney deserves criticism for the *Dred Scott* decision, he did not author these provisions of the Constitution. Nor was he the first to describe the enslaved race as comprised of beings with attributes of property. *Federalist No. 54* discusses whether slaves are property or human beings, and its author concludes: "Let the compromising expedient of the Constitution be mutually adopted which regards them as inhabitants, but as debased by servitude below the equal level of free inhabitants, which regards the slave as divested of two fifths of the man." THE FEDERALIST NO. 54, at 284 (James Madison) (George W. Carey & James McClellan eds., 2001).

[209] *Dred Scott*, 60 U.S. at 416. Moreover, the decision prohibited a state from making any person of African descent a citizen.

[210] *Id.* at 416–17.

[211] *Id.* at 407.

Compromise an unconstitutional infringement upon the property rights of slave holders, making explicit reference to both the Fugitive Slave Clause and the original limitation upon Congress' ability to prohibit the importation of slaves into any state.[212]

The *Dred Scott* ruling galvanized much of Northern public opinion and led to fiercer opposition to the expansion of slavery.[213] This decision would become a rallying cry for abolitionists and instrumental both in Abraham Lincoln's run for the presidency and in his formation of constitutional theory, evidenced in his historic "House Divided" speech.[214] So, when the opportunity presented itself, with the first words of the Fourteenth Amendment, Congress took careful aim at *Dred Scott*'s definition of citizenship. To hit their target, however, they had to cut the entwined strands of slavery and federalism which still fettered this nation to the ugly spectacle of human bondage.

b. Privileges or Immunities

The Fourteenth Amendment attacked the federalism–bound slavery provisions of the Constitution in its second sentence. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[215] While focusing on the first clause of this sentence, this discussion will not, as it should not, divorce this clause from the rest of the sentence, the rest of the Fourteenth Amendment, and the historical context in which the Framers of this amendment were acting.

As noted above, the dialogue surrounding the Privileges or Immunities Clause is both robust and relevant.[216] However, by examining the areas of agreement among the debaters and applying the essential means of constitutional interpretation outlined above, it becomes clear that the central purpose of the Privileges or Immunities Clause was to shift from the states to the federal government the power to determine the lawfulness of deprivations of liberty alleged to be based upon the newly impermissible

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[212] *Id.* at 451–52.

[213] *See e.g.*, *Africans in America, Part 4, Dred Scott's Fight for Freedom, at* http://www.pbs.org/wgbh/aia/part4/4p2932.html (last visited Mar. 22, 2005); *see also* Lisa Cozzens, *A Hard Shove for a "Nation On the Brink": Impact of Dred Scott, at* http://odur.let.rug.nl/~usa/E/dred_scott/ scott01.htm (last modified May 22, 2003).

[214] ABRAHAM LINCOLN, *A House Divided: Speech at Springfield, Illinois (June 16, 1858), in* 2 COLLECTED WORKS OF ABRAHAM LINCOLN 461 (Roy P. Basler ed., 1953).

[215] U.S. CONST. amend. XIV, § 1.

[216] *See* Amar, *supra* note 28; Berger, *supra* note 28.

classification of race. One of the principle ways the Framers of this amendment sought to protect this new distribution of power over the issue of slavery was that weapon used for centuries to set the demarcations of power in intragovernmental struggles: the writ of habeas corpus.

That the Fourteenth Amendment was primarily designed to protect the freed slaves is not readily disputable; no serious scholar or jurist contends otherwise. It is both the extent of this new protection and the manner in which it was to be assured that generate controversy. At a minimum, scholars and the courts agree that the Framers were concerned about protecting the liberty of the newly freed slaves. While there exists a significant body of evidence from which one could conclude that the Framers intended the Fourteenth Amendment to protect against state interference with a broader array of rights,[217] the arguments supporting this position are not airtight.[218] This debate, however, need not be resolved to conclude that the privilege of habeas corpus to challenge race–based deprivations of liberty was included as one of the privileges of federal citizenship that states could not abridge.[219]

The language of this second sentence forbids states from making or enforcing any law which shall abridge the privileges or immunities of U.S. citizens. This language on its face is neither detailed, nor particularly clear. There are some meanings, however, that we can derive from the language itself. The first lessons we can draw are from the other uses of the terms "privilege" and "immunity" in the Constitution. The most obvious place to begin this textual analysis is with the original Privileges and Immunities Clause of Article IV.[220] This provision is very similar to that found in the Fourteenth Amendment, but with some important differences.[221] The

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[217] *See, e.g.*, Amar, *supra* note 28; AMAR, *supra* note 2, at 215–31; *see also* Slaughter–House Cases, 83 U.S. 36, 84–111 (1872) (Field, J. dissenting); 83 U.S. at 111–24 (Bradley, J., dissenting) (arguing for broader incorporation of rights against the states).

[218] Amar, *supra* note 28, at 1260–62.

[219] Given the breadth of the language used in the amendment, one could also argue that the prohibition against the states forbidding abridgement of the privileges or immunities of federal citizenship extends more broadly to provide a general protection of federal habeas corpus jurisdiction. *See, e.g.*, Steiker, *supra* note 66. However, that is not the purpose of this article. The history of slavery, civil war, and constitutional amendment are indisputably concerned with securing the liberty of a racial minority whose members were being held in bondage pursuant to state law. This specific concern was the primary focus of the Framers and the one that must be embraced.

[220] U.S. CONST. art. IV, § 2, cl. 1. This is the only other place in the Constitution that the word "immunity" or "immunities" appears. The word "privilege," however, is found elsewhere; in the specific reference to the "privilege of the writ of habeas corpus" in U.S. CONST. art. I, § 9, cl. 2.

[221] The significant differences lie in the Fourteenth Amendment's articulation of the Privileges or Immunities of *federal* citizenship (and in the prohibition against abridging this

Framers of the Fourteenth Amendment chose to use the nearly identical phrase to that of the "privileges and immunities" clause, which was already found in Article IV of the Constitution.[222] The nineteenth–century understanding of the original privileges and immunities clause, therefore, is critical to any analysis of the Framers' intent in adopting the nearly identical phrase in the 1860s.

There is ample evidence from the nineteenth century that when the term "privileges and immunities" was discussed, the privilege of the writ of habeas corpus was uniformly regarded as being among those privileges. In *Corfield v. Coryell*, the court defined the privileges and immunities of state citizenship as including, inter alia, habeas corpus.[223] The *Corfield* decision is particularly important not only because it identifies habeas corpus as a privilege of citizenship, but also because it helps identify the exalted place that habeas corpus occupied in the minds of nineteenth–century lawmakers and judges. Like the eighteenth–century Framers of our Constitution who enshrined the writ as a nearly inviolable privilege, nineteenth–century jurists esteemed the Great Writ so highly as to include it along with inalienable natural rights.[224]

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privilege) and Article IV's protection of *state* citizenship. Both will be discussed in greater detail.

[222] The Fourteenth Amendment uses the disjunctive, rather than the conjunctive in referencing privileges *or* immunities; conversely, Article IV uses the conjunctive. This difference appears to be grammatical and not substantive. The provision in Article IV speaks in positive terms of entitlement: "The Citizens of each State *shall be entitled to all* Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1 (emphasis added). As such, it secures the privileges *and* immunities to the citizens of each state. In contrast, the Fourteenth Amendment's language is prohibitory, forbidding states from "abridging the privileges *or* immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1 (emphasis added). Both clauses, therefore, were designed to ensure that citizens enjoy both the privileges and immunities of citizenship without interference.

[223] Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

[224] The "full" list of privileges and immunities detailed in *Corfield* includes the following:

> Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking,

The *Corfield* decision was commonly known and, in fact, was discussed by the Framers in debating the Fourteenth Amendment.[225] Some of the Framers considered the privileges and immunities of federal citizenship to consist largely of natural rights,[226] while others clearly anticipated a much broader range of federal rights being made applicable against the states through the Privileges or Immunities Clause. Nevertheless, all included the privilege of habeas corpus among those privileges adopted.[227]

The Framers of the Fourteenth Amendment were well aware of the important role that habeas corpus played in the struggle over slavery. Many of them had been intensively involved in the abolitionist movement.[228] These men had chafed over the Supreme Court's ruling in *Dred Scott*. They not only disagreed with the morality of that decision, but they certainly understood the importance of how the Court had reached its decision. It is important to note that *Dred Scott* was a trespass *vi et armis* action decided on *jurisdictional grounds*.[229] Scott, along with his wife and children, was denied his freedom because he lacked standing to sue for his release in federal court. In framing the issue before the Supreme Court in *Dred Scott*, Chief Justice Taney defined the ability to invoke the jurisdiction of the federal courts as one of the privileges and immunities of citizenship, which Scott lacked:

> The question is simply this: Can a Negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and the privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States

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privileges and immunities . . . .

Id. at 551–52. This list is incomplete, as the court specifically stated that there were "many others" and that a detailed listing would be "more tedious than difficult to enumerate." *Id.* at 551.

[225] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2765–66 (1866).

[226] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1115–19, 1757, 1832, 2765, 2542–43 (1866).

[227] *Id.*

[228] See, e.g., FONER, *supra* note 108, at 228–29, for discussion of the role abolitionists played in the Republican–controlled Congress that drafted the Civil War Amendments. Thaddeus Stevens, one of the leaders of the Radical Republicans, helped draft the amendment. He was a famous, longstanding abolitionist, having represented many fugitive slaves in his law practice before coming to Congress. Others such as Henry Wilson, Horace Greeley, and Lynum Trumbull are just a few with long abolitionist careers before coming to office. *See id.*

[229] Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856) (reporter's note).

in the cases specified in the Constitution.[230]

The *Dred Scott* case was not a habeas corpus proceeding because it was an action brought against a private defendant. Nonetheless, the type of action in *Dred Scott*, a trespass *vi et armis*, is closely related to a petition for writ of habeas corpus, as is made clear by Blackstone's commentaries. Blackstone, in discussing habeas corpus, describes the trespass *vi et armis* as the appropriate remedy for false imprisonment in cases where the writ of habeas corpus is unavailable.[231] The Court's language, however, was not limited to actions in trespass *vi et armis*, but to "the privilege of suing in a court of the United States in the cases specified in the Constitution."[232] Of course, one of the "privileges" of suing in federal court that is explicitly mentioned in the Constitution is the privilege of the writ of habeas corpus.[233]

It is indisputable that the Framers of the Fourteenth Amendment were reversing the Supreme Court's definition of citizenship with the first sentence of the first clause of that amendment. They did not forget about *Dred Scott* when they wrote the next sentence. They also understood that, by conferring citizenship on the former slaves, they were granting them the privilege of invoking federal court jurisdiction over those cases specified in the Constitution, including the privilege of habeas corpus.[234] The Framers, however, were well aware that the privilege of federal habeas corpus could be effectively denied to freed slaves being "lawfully" imprisoned under the state laws of vagrancy and idleness. This was due to the Thirteenth Amendment's exception permitting involuntary servitude upon conviction for a crime. It is this loophole at which they aimed the Privileges or Immunities Clause. Without the express prohibition against state abridgement of this privilege, states would be free to continue flouting the spirit of the Thirteenth Amendment and the Civil Rights Act of 1866.

The Framers' intent to provide procedural protections to the liberty of newly freed slaves is made abundantly clear by viewing the Privileges or

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[230] 60 U.S. at 403.

[231] 3 WILLIAM BLACKSTONE, COMMENTARIES, ch. 8, *available at* http://www.yale.edu/lawweb/avalon/blackstone/bk3ch8.htm.

[232] *Dred Scott*, 60 U.S. at 403.

[233] 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." *Id.*

[234] The *Congressional Globe* and the popular press during the ratification period reveal that providing the freed slaves with access to the courts was one of the purposes of the Fourteenth Amendment. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1115–19, 1757, 1832, 2765–66, 2542–43 (1866); CHICAGO TRIBUNE CAMPAIGN DOC., June 30, 1866, at 9 (quoting the speech of General John Logan, a leading Republican: "The rights of a citizen are to sue and be sued, to own property, to have process of court, to have protection of life, liberty and property").

Immunities Clause in context. This context is provided not only by the rest of the Fourteenth Amendment but by the other actions of the same Congress that drafted this amendment.[235] The first place one can find additional support for this proposition is by looking at those words standing in closest proximity to the Privileges or Immunities Clause. The remaining clauses in this sentence make clear the Framers' intent: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[236] The Due Process and Equal Protection Clauses of the Fourteenth Amendment are separated by a semi–colon from the Privileges or Immunities Clause. Although they are contained in the same sentence, courts and scholars often discuss them as if they exist worlds apart from each other. While not synonymous, these clauses are related in important ways. When read together, in conjunction with the first sentence of the amendment, these two sentences clearly and forcefully bespeak of intent to place the liberty interests of freedmen on equal footing with those of white citizens. With equal clarity, these sentences tell us of the Framers' intent to provide these newly freed citizens with procedural protections to prevent state law from interfering with this newly granted liberty.

2. *Shifting the Balance of Federalism Regarding Race–Based Deprivations of Liberty*

Some have argued that the Framers never intended to alter the federalism balance so greatly.[237] Instead, these authors claim that the Radical Republicans in Congress were self–interested miscreants, not truly concerned for the welfare of the slaves but bent upon revenge against former colleagues with whom they had a political dispute.[238] The notion that the Framers were political opportunists who were unconcerned with the well–being of those enslaved, however, has long since been refuted by credible historians as an attempt to "whitewash" the horrific nature of a society whose economic and social structure depended upon the enslavement of an

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[235] The details of the Civil Rights Act have already been discussed, as has its relationship to the Fourteenth Amendment. There are other pieces of legislation that also help to define the Framers' intent with regard to the Privileges or Immunities Clause. These include the Habeas Corpus Act of 1867, the Reconstruction Act of 1867, and the Judiciary Act of 1867. These enactments will be discussed in more detail.

[236] U.S. CONST. amend. XIV, § 1.

[237] *See, e.g.*, Lawrence H. Cook, *Waste Not, Wait Not—A Consideration of Federal and State Jurisdiction*, 49 FORDHAM L. REV. 895, 900 (1981).

[238] *See* Robert J. Kaczorowski, *Searching for the Intent of the Framers of [sic] Fourteenth Amendment*, 5 CONN. L. REV. 368, 372 (1973).

entire race of human beings.[239] As historian Eric Foner states, "Rather than vengeance, the driving force of Radical ideology was the utopian vision of a nation whose citizens enjoyed equality of civil and political rights, secured by a powerful and beneficent national state."[240] Whatever one may think of the Radical conception of the federal government as benign, it is hard to dispute the historical evidence that this was in fact the ideal.

With the equality of former slaves paramount to Radicals, other political interests received less sympathy, including notions of federalism favoring states' rights. The Radicals believed that advocates of states' rights were obstacles to a Reconstruction plan that would adequately protect the rights of the newly freed black citizens. Although this position was initially unpopular, even within the Republican Party, the Radical agenda became increasingly associated with a more powerful national government, necessary for protecting the rights of black citizens.[241] The Radicals recognized that what they were calling for required others to accept a stark departure from established norms. Yet, they had traveled a lonely path before, only to find others persuaded to the righteousness of their cause.[242]

In securing the privileges or immunities of federal citizenship against any state encroachment, the Framers of the Fourteenth Amendment made clear their rejection of antebellum notions of federalism. At least insofar as those of African descent were concerned, states would no longer be able to decide the lawfulness of an individual's detention, when that detention was alleged to be based upon race.[243] This fact becomes even clearer when

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[239] *See, e.g.*, FONER, *supra* note 108, at 228–42; *see also* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 875–80 (1986).

[240] FONER, *supra* note 108, at 230.

[241] *Id.* at 230–32.

[242] *Id.* at 239:

> Time and again, Radicals had staked out unpopular positions, only to be vindicated by events. Uncompromising opposition to slavery's expansion, emancipation, the arming of black troops—all enjoyed little support when first proposed, yet all had come to be embraced by the mainstream of Republican opinion . . . . Everyone knew the Radicals were prepared for renewed agitation. Whatever the merits of legal and political equality for blacks, a correspondent of moderate Ohio Sen. John Sherman noted, "if you reconstruct upon any principle short of this, you . . . cause a continuous political strife which will last until the thing is obtained."

Id. (quoting letter from Thomas Richmond to John Sherman (Feb. 27, 1866)).

[243] Although the freed slaves were clearly the group that motivated the adoption of the Fourteenth Amendment, it is clear from the debate in Congress that the Framers of that Amendment believed it to cover other minorities, including "Chinamen," but not American Indians. Similar wide-reaching language in the Civil Rights Act of 1866 caused President Johnson to veto the bill. *See* CONG. GLOBE, Mar. 27, 1866, at 279–85, *reprinting* Veto Message of President Johnson, SENATE J., Mar. 27, 1866.

examining the Habeas Corpus Act of 1867 and related legislation Congress passed at this time.

3. *The Habeas Corpus Act of 1867*

As alluded to briefly in Part II.A.2, the bill which would eventually become the Habeas Corpus Act of 1867 was initially referred to the House Judiciary Committee by the House one day after the Thirteenth Amendment became law.[244] This bill was referred to the Committee specifically

> to inquire and report to the House, as soon as practicable, by bill or otherwise, what legislation is necessary to enable the courts of the United States to enforce the freedom of the wives and children of soldiers of the United States under the joint resolution of March 3, 1865, and also to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery.[245]

What emerged from the Judiciary Committee was a "bill to secure the writ of Habeas Corpus to persons held in slavery or involuntary servitude contrary to the Constitution of the United States."[246] This bill and its subsequent history in becoming the Habeas Corpus Act of 1867, make clear that Congress saw habeas corpus as indispensable to the protection of those recently emancipated from state encroachment upon their liberty. The history of this Act has been referred to as the "process by which the constitutional prohibition of chattel slavery was translated into actual emancipation."[247]

The manner in which this original proposal became the final product, the Habeas Corpus Act of 1867, is instructive and important to understanding the implications of the Privileges or Immunities Clause. The bill originally contained an exception identical to one in the Thirteenth Amendment, permitting involuntary servitude upon conviction for a crime.[248] In all other cases of someone held in slavery or involuntary servitude, habeas corpus was the method provided to discharge them.[249] Given the critical roles habeas

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[244] Mayers, *supra* note 148, at 31–34.

[245] *Id.* at 34. This resolution was dated December 19, 1865.

[246] *Id.*

[247] *Id.* at 32.

[248] *See* CONG. GLOBE, 39th Cong., 1st Sess. 87 (1865); *see also* Mayers, *supra* note 148, at 34.

[249] *See* Mayers, *supra* note 148, at 34. As Professor Mayers has pointed out, when the bill was referred to the Judiciary Committee, it read:

> Be it enacted . . . that all persons who are held in slavery or involuntary servitude otherwise than for crime whereof they are convicted shall be discharged on *Habeas Corpus* issued by and returnable before any court or judge of the

corpus played for different camps throughout the struggle over slavery, it made sense that Congress' first choice of weapon to secure the release of emancipated slaves still held in bondage was the privilege of the writ of habeas corpus.

The bill, however, would not make it out of committee in this form. While debate on the Habeas Corpus Act's amendment was pending, Congress attempted to use the Habeas Corpus Act of 1863 to provide relief for those imprisoned under the Black Codes. To accomplish this task, Congress passed an amendment to the Freedmen's Bureau Act in February of 1866. This act was vetoed by President Johnson.[250] The Radical Republicans regrouped in April of 1866 and passed the Civil Rights Act ("CRA") of 1866—this time overriding President Johnson's veto[251] and guaranteeing "full and equal benefit of all laws and proceedings for the security of person . . . ."[252] In section 3 of the CRA, Congress made clear that it provided habeas corpus review of all civil or criminal cases involving the denial of any rights secured by that act and of any matters arising from actions done in conformity with the Freedmen's Bureau Act.[253]

In passing the CRA, Congress explicitly referenced the Habeas Corpus Act of 1863 as the mechanism for federal court review of violations under the CRA.[254] Recognizing that revisions of the Habeas Corpus Act were under consideration, Congress included a provision for incorporating "all acts amendatory" of the 1863 act.[255] While the CRA provided a "punishment for crime" exception to the prohibition against unequal application of the law, that exception did not apply to deprivations inflicted upon an individual "by reason of his color or race."[256] The relevant provisions of the CRA, however, were drafted in an artless manner. Section 1 of the act purported to

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United States; and if the court or judge refuse the discharge the petitioner may forthwith appeal to the Supreme Court, which court if then sitting or if not at its next term shall hear the case on the first motion day after the appeal is docketed and discharge the petitioner if he shall appear to be held in slavery or involuntary servitude contrary to the constitution of the United States.

Id. He also notes that the bill was never printed. *See id.* at 34 n.16.

[250] *See* Adjoa A. Aiyetoro, *Formulating Reparations Litigation Through the Eyes of the Movement*, 58 N.Y.U. ANN. SURV. AM. L. 457, 460 (2003).

[251] *See* CONG. GLOBE, March 27, 1866, at 279–85, *reprinting* Veto Message of President Johnson, SENATE J., March 27, 1866.

[252] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (1991)).

[253] § 3.

[254] "[S]uch defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty–three, and all acts amendatory thereof." § 3.

[255] § 3.

[256] § 2.

confer citizenship and grant rights available to all persons, save those duly convicted of a crime.[257] Section 2 of the CRA punished those who deny equal application of this law "by reason of . . . race or color," irrespective of criminal conviction.[258]

State reactions to the CRA, detailed in Part.II.B, stirred Congress to propose the Fourteenth Amendment. The use of facially neutral criminal statutes to circumvent the spirit of the Thirteenth Amendment and the CRA impressed upon the Republican–controlled Congress the need to alter permanently the federalism balance concerning authority over race–based denials of liberty.[259] The result of this strengthened determination took the form of the Fourteenth Amendment,[260] the Habeas Corpus Act of 1867,[261] and the Reconstruction Act of 1867.[262]

The Fourteenth Amendment was proposed to the states on June 16, 1866.[263] Great hostility followed the passage of this proposed amendment in Congress. That hostility came from many quarters, but it was particularly virulent in the Southern states and the White House. President Johnson, having no formal role in the process of amending the Constitution, nevertheless denounced the proposed amendment in the strongest of terms.[264] He suggested that Congress had no authority to propose amendments while Southern states remained unrepresented in Congress.[265] Most Southern states initially refused to ratify the amendment.[266] With such

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[257] § 1.

[258] § 2.

[259] *See infra* note 172 and accompanying text.

[260] U.S. Const. amend. XIV.

[261] Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385 (1867).

[262] Reconstruction Act of 1867, ch. 153, 14 Stat. 428 (1867).

[263] *See 14th Amendment to the U.S. Constitution*, *at* http://www.nps.gov/malu/documents/amend.14.htm (last updated Oct. 25, 1997).

[264] See, e.g., The Avalon Project at Yale Law School, *The History of the Impeachment of Andrew Johnson*, *at* http://www.yale.edu/lawweb/avalon/treatise/andrew_johnson/johnson.htm, for a discussion of President Johnson's opposition to the Fourteenth Amendment and the role of his position during his subsequent impeachment.

[265] *See id.*

[266] Although the amendment was proposed to the states on June 16, 1866, it was not ratified by the necessary three–fourths of the states until July 21, 1868. Westlaw reports the history of ratification of the Amendment as follows:

> On July 21, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution, declaring that 'the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three–fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the Constitution of the United States, duly proposed by two–thirds of each House of the Thirty–

strong initial opposition to the proposed Amendment, Republicans in Congress realized that additional measures were necessary to protect the freedmen. On July 16, 1866, one month after proposing the Fourteenth Amendment, Congress passed a second amendment to the Freedmen's Bureau Act.[267] President Johnson, not surprisingly, vetoed this act as well.[268] Congressional reaction was swift; both houses approved the act over the president's veto the same day he exercised it.[269]

This act provided for the freedmen "full and equal benefits of all laws and proceedings concerning personal liberty," and for the first time Congress did not exempt from that benefit those who had previously been convicted of a crime.[270] In fact, the act specifically called for military protection and jurisdiction

> over all cases and questions concerning the free enjoyment of such immunities and rights, and no penalty or punishment for any violation of law shall be imposed or permitted because of race or color, or previous condition of slavery, other or greater than the penalty or punishment to which white persons may be liable by law for the like offense.[271]

Passed one month after Congress proposed the Fourteenth Amendment, this

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ninth Congress: Therefore, Resolved, That said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State.' The Secretary of State accordingly issued a proclamation, dated July 28, 1868, declaring that the proposed fourteenth amendment had been ratified by the legislatures of thirty of the thirty–six States. The amendment was ratified by the State Legislatures on the following dates: Connecticut, June 25, 1866; New Hampshire, July 6, 1866; Tennessee, July 19, 1866; New Jersey, Sept. 11, 1866; Oregon, Sept. 19, 1866; Vermont, Oct. 30, 1866; Ohio, Jan. 4, 1867; New York, Jan. 10, 1867; Kansas, Jan. 11, 1867; Illinois, Jan. 15, 1867; West Virginia, Jan. 16, 1867; Michigan, Jan. 16, 1867; Minnesota, Jan. 16, 1867; Maine, Jan. 19, 1867; Nevada, Jan. 22, 1867; Indiana, Jan. 23, 1867; Missouri, Jan. 25, 1867; Rhode Island, Feb. 7, 1867; Wisconsin, Feb. 7, 1867; Pennsylvania, Feb. 12, 1867; Massachusetts, Mar. 20, 1867; Nebraska, June 15, 1867; Iowa, Mar. 16, 1868; Arkansas, Apr. 6, 1868; Florida, June 9, 1868; North Carolina, July 4, 1868; Louisiana, July 9, 1868; South Carolina, July 9, 1868; Alabama, July 13, 1868; Georgia, July 21, 1868. Subsequent to the proclamation the following States ratified this amendment: Virginia, Oct. 8, 1869; Mississippi, Jan. 17, 1870; Texas, Feb. 18, 1870; Delaware, Feb. 12, 1901; Maryland, Apr. 4, 1959; California, May 6, 1959; and Kentucky, Mar. 18, 1976.

U.S. Const. amend. XIV (West, WESTLAW Historical Notes (2005)).

[267] *See* Act of July 16, 1866, ch. 200, 14 Stat. 173 (1866).

[268] *See id.* at 177.

[269] *Id.*

[270] *Id.* § 14.

[271] *Id.*

act indicated Congressional intent to close the loophole left by the Thirteenth Amendment without disturbing entirely a state's right to define and punish criminal behavior. Members of Congress recognized that the duration of this protection lasted only until such time as the rebellious state was readmitted into the Union, as the act provided military administration of areas previously in rebellion. The more permanent solution was the Fourteenth Amendment, which had not yet been ratified.

With the redrafting of the Habeas Corpus Act of 1867 and the Reconstruction Act of 1867, which would mandate passage of the Fourteenth Amendment as a condition of readmission to the Union, Congress solidified federal authority over the race–based deprivations of liberty. When the original "bill to secure the writ of Habeas Corpus to persons held in slavery or involuntary servitude contrary to the Constitution of the United States" actually became law on February 5, 1867, its language had been altered substantially. The new language closed the loophole concerning a state's ability to shield race–based deprivations of liberty from federal review.

In contrast, the new act, as passed, extended federal habeas jurisdiction to "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 . . . ."[272] This was a highly significant change in the habeas corpus power[273] but one that logically followed the Habeas Corpus Acts of 1863 and 1866, the CRA of 1866, and the Freedmen's Bureau Acts of 1865 and 1866.

The Habeas Corpus Act of 1867 would give the desired effect to the Privileges or Immunities clause. The scope of this language, on its face, is very broad.[274] There is no question that the Congress that adopted the 1867 act was concerned about the liberty of recently emancipated slaves. Congress

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

[273] The same act also provided for expanded federal power to review state–court violations of privileges or immunities

> where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission, or authority, may be re–examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error . . . .

Id. § 2.

[274] Some have argued that the Congress did not intend to allow all state–court convictions to be challenged under the 1867 Act, limiting the application of this provision to persons detained under the various state apprenticeships. *See* Mayers, *supra* note 148, at 43–44. Relying in part upon his belief that Congress did not want to alter the federalism balance, Professor Mayers argues that Congress intended to reach only state apprenticeships and vagrancy. *Id.*

intended habeas corpus to extend to the private apprenticeships, which were taking the place of slavery. However, Congress also sought to reach vagrancy, which the Black Codes punished as a criminal offense, with penalties including corporal punishment and forced servitude on plantations.[275] Only by extending habeas corpus to permit review of state criminal convictions could Congress ameliorate the egregious harm perpetuated under state Black Codes.

Proponents of the 1867 act clearly indicated that the Habeas Corpus Act was intended to reach freed slaves who were being unjustly deprived of their liberty pursuant to state laws. In introducing the measure in the House, Representative Lawrence described its purpose:

> On the 19th of December last, my colleague [Mr. Shellabarger] introduced a resolution instructing the Judiciary Committee to inquire and report to the House as soon as practicable, by bill or otherwise, what legislation is necessary to enable the courts of the United States to enforce the freedom of the wife and children of soldiers of the United States, and also to enforce the liberty of all persons. Judge Ballard, of the district court of Kentucky, decided that there was no act of Congress giving courts of the United States jurisdiction to enforce the rights and liberties of such persons. In pursuance of that resolution of my colleague this bill has been introduced, the effect of which is to enlarge the privilege of the writ of *hobeas* [sic] *corpus*, and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them. It is a bill of the largest liberty, and does not interfere with persons in military custody or restrain the writ of *habeas corpus* at all.[276]

It is also clear that the act was intended to reach state–court convictions. As Lynum Trumbull asserted:

> The *habeas corpus* act of 1789, to which this bill is an amendment, confines the jurisdiction of the United States courts in issuing writs of habeas corpus to persons who are held under United States laws. Now, a person might be held under a State law in violation of the Constitution and laws of the United States, and he ought to have in such a case the benefit of the writ, and we agree that he ought to have recourse to the United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States.[277]

The following year, during the debate about rescinding Supreme Court review of habeas actions, Trumbull made clear the relationship between the

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[275] *See supra* notes 169–96 and accompanying text.

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

[277] *See* Mayers, *supra* note 148, at 38–39.

Habeas Act of 1867 and the criminal convictions being obtained under the Black Codes:

> The act of 1789 authorized the issuing of all such [habeas corpus] writs in cases where persons were deprived of their liberty under authority or color of authority of the United States. Why, then, was the act of 1867 passed? It was passed to authorize writs of *habeas corpus* to issue in cases where persons were deprived of their liberty under State laws or pretended State laws. It was the object of the act of 1867 to confer jurisdiction on the United States courts in cases not before provided for, and it was to meet a class of cases which was arising in the rebel States, where, under pretense of certain State laws, men made free by the Constitution of the United States were virtually being enslaved, and it was also applicable to cases in the State of Maryland where, under an apprentice law, freedmen were being subjected to a species of bondage. The object was to authorize a *habeas corpus* in those cases to issue from United States courts . . . .[278]

Lewis Mayers, cautioning that these partisan statements should be taken in proper context, nevertheless stated the following:

> It may be significant, however, that Representative Hubbard of Connecticut, who strongly denounced the proposed repealer, agreed with the statement made by Wilson, Chairman of the Judiciary Committee and sponsor of the repealer, that the purpose of the measure was to protect the freedman from the apprentice and like laws of the former slave states.[279]

The same Congress which passed the 1867 Habeas Corpus Act passed the Reconstruction Act. The Reconstruction Act was introduced the day before the Habeas Corpus Act of 1867 became law.[280] This act mandated that all rebellious states seeking readmission of its members to Congress first had to ratify the Fourteenth Amendment:

> when said State, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States, proposed by the Thirty–Ninth Congress, and known as article fourteen, and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in

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[278] CONG. GLOBE, 40th Cong., 2d Sess. 2096 (1868). Numerous statements made during the 1868 debate concerning repeal of the Supreme Court's appellate habeas jurisdiction strongly suggest that the Habeas Corpus Act was designed to protect freed slaves.

[279] Mayers, *supra* note 148, at 42 n.46 (citing CONG. GLOBE, 40th Cong., 2d Sess. 2168 (1868)).

[280] *Id.* at 51.

> Congress, and senators and representatives shall be admitted therefrom on their taking the oath prescribed by law . . . .[281]

This series of actions demonstrate that Congress was engaged in a full–scale and continuous effort to secure the liberty of the newly freed black citizens.

The Supreme Court has repeatedly held that the 1867 act extended federal habeas jurisdiction to state criminal convictions.[282] Prior to the adoption of the Fourteenth Amendment and the Habeas Corpus Act of 1867, only state criminal convictions allegedly obtained in violation of the CRA were removable and reviewable under the Habeas Corpus Acts of 1863 and 1866.[283] With the 1867 act, Congress extended habeas jurisdiction to freed slaves held as apprentices and convicted vagrants, whose only real crime was being black. Moreover, the idea that the Radical Republicans were so concerned about states' rights that they would not intend to permit federal review of state–court convictions strains credulity. Many of them had been engaged in conflict over this subject for decades; their opponents fought every battle under the raised banner of federalism. The most costly war in U.S. history had been fought over the hopelessly intertwined issues of slavery and federalism. To think that the Radicals, on the brink of realizing their long–sought goal, would suddenly concede final authority over this issue to the states, is to hold a belief in the absence of logic.

4. *The* Slaughter–House Cases

The Supreme Court, in the *Slaughter–House Cases*,[284] has validated the general principles identified in this article. Although it is widely asserted that the Supreme Court rendered the Privileges or Immunities Clause a nullity in that case,[285] a careful reading of *Slaughter–House* shows otherwise. While there is good reason to argue that the majority opinion in *Slaughter–House* both misconstrued the history of the Fourteenth Amendment and unnecessarily narrowed the scope of the protections intended under that amendment, it must be remembered that Justice Miller's majority decision, in listing the privileges or immunities of federal citizenship, included "the privilege of the writ of *habeas corpus*, [as one of the] rights of the citizen

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[281] Act of March 2, 1967, ch. 153, 14 Stat. 428, 429 (enacted over the president's veto).

[282] *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963); Towsend v. Sain, 372 U.S. 293 (1963); Brown v. Allen, 344 U.S. 443 (1953).

[283] Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (1991)).

[284] Slaughter–House Cases, 83 U.S. (16 Wall.) 36 (1872).

[285] *See, e.g.*, Jed Rubenfeld, *The Anti–Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1156 n.60 (2002).

guaranteed by the Federal Constitution."[286]

The Court went on to discuss the history of the Privileges or Immunities Clause and held the following:

> In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.[287]

As controversial as this decision was and as strongly as the justices disagreed about both the analysis and outcome of the case, they did agree on the core principles enumerated above.[288] All parties agreed that the primary purpose of the Fourteenth Amendment's Privileges or Immunities Clause was to provide protection for the recently freed slaves, and all sides agreed that habeas corpus was one of the protected privileges that states were forbidden from abridging.

5. *The Parameters of the Right to a Federal Forum*

The language that the Framers of the Fourteenth Amendment chose to use was direct and prohibitive in their restrictions placed upon the states. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[289] It is necessary to explore the meaning of these provisions with regard to the identified underlying purpose of providing a federal forum for habeas corpus review of race–based incarcerations. At a minimum, this provision prohibits states from acting in a manner that directly prevents someone from exercising his or her privilege of the writ of habeas corpus for race–based claims. A state law, therefore, that denied prison inmates access to the federal courts to file a petition for writ of habeas corpus clearly offends this provision. The proscription on state action forbids states from not only making laws which would deny habeas jurisdiction, it also forbids states from *enforcing* any law which would *abridge* the privilege. Clearly, some greater prohibition is therefore restricting state action. Yet, it must be asked what limits may be placed upon this privilege by virtue of the definition of the privilege as one of U.S.

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[286] 83 U.S. (16 Wall.) at 79.

[287] *Id.* at 81.

[288] See *supra* note 217 for the dissenting justices' discussion of purposes and scope of the Privileges or Immunities Clause.

[289] U.S. CONST. amend XIV, § 1.

citizenship. These two topics are closely related and the discussion of one necessarily involves the other.[290]

a. The Abridgement Prohibition

As established above, the Privileges or Immunities Clause was intended to remove from state purview the authority to determine the lawfulness of race–based deprivations of liberty. The privilege of habeas corpus was designed to be the mechanism through which federal authority was asserted over alleged race–based deprivations of liberty perpetrated by untrustworthy

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[290] While it was previously held in *Ex parte Bollman* that congressional action was necessary to grant habeas jurisdiction under Article III, *see Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), the language of the Fourteenth Amendment places an implicit limitation upon any attempt by Congress to deny a federal forum for a petitioner's race–based habeas corpus claim. Before examining the *Bollman* decision and discussing why that case does not permit Congress to abridge the writ of habeas corpus in these circumstances, note that the Supreme Court has previously held, and recently reaffirmed, that the Fourteenth Amendment limits congressional authority.

In *Saenz v. Roe*, 526 U.S. 489, 507 (1999), the Supreme Court stated that "we have consistently held that Congress may not authorize the States to violate the Fourteenth Amendment." The *Saenz* Court reaffirmed the principle that "Congress' power under § 5, however, 'is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.'" 526 U.S. at 508 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966)). Finally, the *Saenz* Court explicitly held that "Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation." *Id.* at 508. *Saenz* could not be clearer: Congress has no more authority to abridge this privilege of U.S. citizenship than do the states.

Bollman, however, is often cited for the proposition that Congress could simply refuse to authorize federal habeas corpus jurisdiction. *See, e.g.*, FREEDMAN, *supra* note 40, at 9–11. This is surely a debatable proposition in itself, for the Suspension Clause would be of little substance if Congress was permitted to deny all federal habeas jurisdiction in times other than during insurrection or rebellion. A careful reading of *Bollman* does not support this suspect assertion. Rather, that decision speaks of the Suspension Clause acting as an injunction, placing a positive legal obligation upon Congress to provide recourse for exercising the privilege. This understanding of the writ as constitutionally compelled was echoed by the Court in *Jones v. Cunningham*, 371 U.S. 236, 238 (1963), when the Court held that "[t]he habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available." Since the writ of habeas corpus has common law antecedents, the more likely intent of the Framers in drafting the Suspension Clause is the common sense understanding of that clause, i.e. the writ is available unless Congress explicitly suspends it, something which is possible only in times of insurrection or rebellion. *See, e.g.*, FREEDMAN, *supra* note 40, at 12–19; *see also* James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus / Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992); Gary Peller, *In Defense of Federal Habeas Corpus Relititgation*, 16 HARV. C.R.–C.L. L. REV. 579 (1982). The history Freedman cites makes it difficult for any party to maintain that the Suspension Clause did not anticipate a privilege that was independent of congressional approval.

states. In so providing, the Framers of the Fourteenth Amendment mandated that the states could not "make or enforce any law which shall *abridge the privileges or immunities* of citizens of the United States."[291] This language stands in contrast to the original Privileges and Immunities Clause found in Article IV of the Constitution in which the term "abridge" is absent.[292] Article IV, § 2, cl. 1 speaks in terms of entitlement to some body of privileges and immunities: "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." [293] The alteration adopted by the Framers of the Fourteenth Amendment is important because it was designed to reinforce the notion that the privilege of habeas corpus referenced in that amendment described the federal writ as it was then defined. Forbidding abridgment of a privilege presupposes definitive boundaries in a way that merely entitling someone to the privilege does not.

In choosing the term "abridge" instead of "deny" as used in the successive clause, the Framers undeniably meant to proscribe more carefully a state's power to affect enjoyment of these privileges and immunities. The term "abridge" was used in the nineteenth century much as it is today.[294] During the nineteenth century, "abridge" was defined in the following terms: "1. To make shorter in words, still keeping the substance; to epitomize; 2. To curtail; to reduce; to contract; to diminish; 3. To deprive of; to cut off from."[295] Legal dictionaries in use at the time confirm this meaning of the term. For instance, one defined "abridge" as "[t]o shorten a declaration or count by taking away or severing some of the substance of it."[296] Through use of the term "abridge," the Framers were referencing an existing privilege with boundaries that could not be diminished.

At the time of the ratification of this amendment, the federal privilege of habeas corpus included a federal forum.[297] The same Congress that wrote the

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[291] U.S. CONST. amend. XIV, § 1 (emphasis added).

[292] *Id.* § 2.

[293] *Id.*

[294] Today "abridge" is defined as: "to diminish," "shorten," or "reduce in scope." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 46 (9th ed. 1988).

[295] JOSEPH EMERSON WORCESTER, A DICTIONARY OF THE ENGLISH LANGUAGE 6 (Boston, Brewer & Tileston 1875).

[296] JOHN BOUVIER, A LAW DICTIONARY: ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION 45 (Philadelphia, G.W. Childs, 12th ed. 1868).

[297] I do not assert that Congress would have no ability to affect the structure of federal habeas jurisdiction in any manner. Congress has in the past altered the Supreme Court's jurisdiction in habeas cases. *See* CONG. GLOBE, 40th Cong., 2d Sess. 1859 (1868). *But see* INS v. St. Cyr, 533 U.S. 289 (2001) (requiring unambiguous expression of congressional intent to strip the Court of habeas jurisdiction). Congressional power in this area, however, is limited by the interaction of the Suspension Clause and the Privileges or Immunities Clause;

Reconstruction Act of 1867, mandating approval of the Fourteenth Amendment for states seeking readmission of their delegates to the Congress, had approximately thirty days earlier extended federal habeas review to include for the first time "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."[298] It is this privilege of habeas corpus that they constitutionally mandated to be available to the newly freed "citizens of the United States."[299] This extension of the writ to individuals in state custody brought with it the Suspension Clause's protection, as this privilege of U.S. citizenship was defined not only by the 1867 act extending its jurisdiction to anyone restrained of their liberty in violation of the Constitution but also by a constitutional protection against suspension by Congress.

In adopting the Fourteenth Amendment, members of Congress repeatedly referenced the privileges or immunities of federal citizenship in terms of fundamental rights, which were beyond the power of any government to rescind.[300] While these references clearly intended to evoke natural law rights, they also included habeas corpus. The inclusion of habeas corpus as one of the privileges or immunities was necessary because this clause sought to protect "the natural rights of all men or such auxiliary rights as were necessary to secure and maintain those natural rights."[301] The commingling of natural law rights and habeas corpus as privileges or immunities of federal citizenship highlights the exalted position of the writ and its inviolability in the eyes of Congress when framing the Fourteenth Amendment.

Whatever power Congress once had to abridge the scope of habeas corpus, that power was constitutionally restrained by the Fourteenth Amendment. *Saenz v. Roe* makes clear that congressional power is limited

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it cannot be exercised to eliminate a federal forum for claims asserting race–based deprivations of liberty by an individual state.

[298] Act of Feb. 5, 1867, ch. 28, 1 Stat. 385, 385.

[299] As has previously been noted, no serious scholar or court has ever disputed the fact that the first sentence of the Fourteenth Amendment was specifically designed to reference the freed slaves and overturn the *Dred Scott* decision. *See supra* Part.II.C.2.

[300] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1115–19, 2542–43, 2765 (1866). The same natural law language was used by members of Congress to explain the Privileges and Immunities Clause of Article IV. *See* CONG. GLOBE, 39th Cong., 2d Sess. 984 (1866).

[301] CHESTER JAMES ANTIEAU, THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT 37 (1981) (quoting JACOBUS TENBROEK, EQUAL UNDER LAW 236 (1965)). Antieau quotes tenBroek further:

> The privileges or immunities clause was regarded as reenacting the comity clause of Article Four into which United States citizenship and natural rights had been read . . . . The language of the clause . . . cannot be abstracted from the natural rights and national citizenship doctrines which constituted the foundation upon which it was based and which prompted its use.

Id.

by the Privileges or Immunities Clause. The Fourteenth Amendment not only proscribes the states from abridging the writ of habeas corpus for race–based deprivations of liberty, but it equally limits Congress from authorizing states to abridge this privilege.[302]

III. NEO–FEDERALISM: AN OLD WOLF IN NEW SHEEP'S CLOTHING

The strong desire for localized government did not end with the adoption of the Civil War Amendments. Nor were those amendments designed to shift the locus of authority over most governmental functions from the states to the national government. These amendments were not meaningless, however, and the shift that they were designed to influence raised fears among states–rights advocates, who continued to resist any encroachment on rights originally and traditionally vested in the states. This resistance was particularly widespread and vociferous concerning issues of the states' police powers. Following the death of Reconstruction and the apparent evisceration of the Privileges or Immunities Clause under the *Slaughter–House* ruling, the antebellum federalism balance largely returned to issues of police powers.

The motivations of those resisting change were not merely theoretical arguments concerning the proper repository of authority over police powers in a federated republic; nor were they entirely driven by economic concerns. Vitriolic racism infused the social and legal regimes used to oppress and exploit the labor of African–Americans in this country. Whether in the context of torturous interrogations[303] or circus trials,[304] states repeatedly proved themselves unwilling or unable to protect the rights of racial minorities.

The resistance to federal habeas review of state–court criminal convictions has continued until the present day. Judicial and legislative proponents of states' rights have unconstitutionally, though effectively, returned final authority over race–based deprivations of liberty to the states.

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[302] As previously noted, there are strong arguments that protection afforded by the Privileges or Immunities clause was intended to be more expansive. However, the core of the Fourteenth Amendment, generally, and the Privileges or Immunities clause, specifically, was for the protection of the newly freed slaves. As noted by many scholars, the actual language when drafted was deliberately written more broadly to encompass other racial minorities as well. *See, e.g.*, Angela M. Ford, *Private Alienage Discrimination and the Reconstruction Amendments: The Constitutionality of 42 U.S.C. § 1981*, 49 U. KAN. L. REV. 457, 463 n.48 (2001); *see also* CONG. GLOBE, 41st Cong., 2d Sess. 3 (1869); CONG. GLOBE, 41st Cong., 2d Sess. 3658 (1870) (remarks of Sen. Stewart).

[303] *See, e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936).

[304] *See, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932).

This has been done through legislation mandating federal deference to state-court legal determinations[305] and state-court findings of fact,[306] and also prohibiting a federal hearing due to the failure of state-court lawyers to sufficiently develop the factual claim.[307] It has also been accomplished through a complex set of judicial doctrines which have created barriers to federal habeas corpus review,[308] including exhaustion, abuse of the writ, procedural default, and the adequate and independent state-court grounds for denying relief (or the "adequacy doctrine").[309] Both legislation and the adequacy doctrine, which require deference to state-court factual or legal determinations, are unconstitutional insofar as they purport to allow state courts to make final determinations concerning race-based denials of liberty.

A. Valid Contexts for Assertion of States' Rights

The Civil War Amendments were not intended to create a wholesale shift of power from the states to the federal government. By and large, the powers previously exercised or retained by the states were intended to remain within each state's purview.[310] State authority to tax its citizens, to regulate health and safety, and to criminalize conduct were all largely left untouched. These amendments, instead, were intended to shift the federalism balance over a relatively narrow band. Within the core of this shifted band was the location of final authority over the lawfulness of a state's deprivation of liberty alleged to be based upon considerations of race. After the Civil War Amendments, authority over such claims rested with the federal government.

In the immediate aftermath of the Civil War and the adoption of the Civil War Amendments, the status of freed slaves and the roles they would play in American society remained a critical, and controversial, issue. As this issue was entangled with broader federalism concerns, many states-rights advocates continued to resent federal intrusion into matters they deemed to be local issues.[311] Due to a variety of forces, however,[312] the issue of federal

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[305] 28 U.S.C. § 2254(d) (2005).

[306] 28 U.S.C. § 2254(e)(1) (2005).

[307] 28 U.S.C. § 2254(e)(2) (2005).

[308] These doctrines have often been subsequently codified, creating an even more complex interaction between federal case law and statutes, both state and federal.

[309] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 735, 110 Stat. 1214 (1996).

[310] Leaving aside the question previously discussed of whether the Fourteenth Amendment was designed to incorporate the first eight Amendments against the states, it is clear that most state authority was left untouched by the Civil War Amendments.

[311] *See* FONER, *supra* note 108, at 346–92.

[312] *Id.* at 524–64. Foner points out that a combination of factors, including economic depression, racism, political resistance, and obstructionism frustrated the purposes of

protection of African–Americans faded from public consciousness. Issues of federalism did not so easily fade and continued to be a source of friction in the nation.

The argument over the proper distribution of power between the federal government and the states played out in various contexts over the century following Reconstruction, including continuation of conflicts dating from the time of Chief Justice Marshall in *M'Culloch v. Maryland*[313] and *City of New York v. Miln*.[314] These cases highlighted the tension between the extension of federal power over the states under the Supremacy Clause and the express reservation of power under the Tenth Amendment. This latter provision of the Constitution, and a state's traditional authority over the health and welfare of its citizens, created the strong and understandable resistance to any asserted federal authority to review the exercise of state police powers.

Litigants continued to use habeas corpus as an instrument to define the borders of governmental authority over deprivations of liberty in the twentieth century. Beginning with *Brown v. Allen*, the Supreme Court increasingly recognized federal court authority to review state convictions.[315] These decisions were based upon a strong foundation, resting initially with the Habeas Corpus Act of 1867.[316] A number of interrelated factors influenced this assertion of federal power. Counsel in state–court proceedings was increasingly made available both at trial and on direct appeal.[317] Moreover, the creation of legal service organizations, law–school clinical programs, and the civil rights movement all increased the availability of counsel willing to litigate issues on behalf of indigent clients.[318] These factors expanded the number of federal habeas corpus cases being litigated before the federal courts of appeal and the Supreme Court. In turn, this

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Reconstruction.

[313] M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[314] City of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837). Although *Miln* was argued before Chief Justice Marshall's death, it was decided after he died. *See* Mary Sarah Bilder, *The Struggle Over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 800 (1996).

[315] *See* Brown v. Allen, 344 U.S. 443 (1953); *see also* Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

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

[317] *See* Gideon v. Wainwright, 372 U.S. 335 (1963). The provision of counsel in early stages of proceedings itself increased the likelihood of success in habeas proceedings. More issues were likely to be preserved, defendants were more likely to be made aware of their options under the writ, and they were more likely to receive some guidance in filing the writ, even if they were not actually represented by counsel.

[318] However, the expansion in litigation does not mean that adequate counsel is being provided to all criminal defendants in need. *See generally* Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to the Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986).

resulted in more federal decisions outlining procedural and substantive rights available to state–court prisoners seeking to challenge the lawfulness of their incarcerations.

Also increasing at this time was the number of habeas cases involving prisoners sentenced to death. Those challenges frequently raised the issue of racial disparity in applying the ultimate punishment.[319] Initially, the Court's jurisprudence and related congressional action on these issues resulted in an increased availability of the federal habeas remedy to state convicts.[320]

With a change in membership among the federal judiciary and an increasing hostility to federal review of state–incarceration decisions, federal courts began to retreat from more expansive federal habeas corpus provisions. Federal courts adopted various doctrines as ways to limit a federal habeas litigant's ability to obtain a hearing in federal court and, having once obtained that hearing, to win on the merits. These doctrines include the following, several of which are interrelated: procedural default, exhaustion of state–court remedies, deference to state–court findings of fact, increased deference to state–court determinations of law, abuse of the writ, and adequate and independent state–court grounds for denying relief. Each of these doctrines can be complex in its own right, but together they create a litigation maze which causes great difficulty for any litigant attempting to weave her way through to daylight. Supreme Court justices have repeatedly recognized the complexity of litigating in this area and the near impossibility for a pro se litigant to navigate this maze successfully.[321] These judicially crafted doctrines were eventually codified under the Antiterrorism and Effective Death Penalty Act of 1996.[322]

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[319] *See, e.g.*, Brown v. Allen, 344 U.S. 443 (1953) (claim of racial discrimination in jury selection during rape trial resulting in death sentence); *see also* Davis v. Davis, 361 F.2d 770 (5th Cir. 1966); Mitchell v. Henslee, 332 F.2d 16 (8th Cir. 1964). For discussions of the effect of race on cases during this same period, see *Coker v. Georgia*, 433 U.S. 584 (1977), and *Furman v. Georgia*, 408 U.S. 238 (1972).

[320] This increase was in the form of both substantive review and the procedural protections afforded to the federal habeas petitioner. See Townsend v. Sain, 372 U.S. 293 (1963), for an example of how the Court's expansion of procedural protections was followed by congressional action that wrote these protections into substantive statutory law. *See* Brian M. Hofstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 957, 962 n.55 (2000).

[321] *See, e.g.*, Callins v. Collins, 114 S.Ct. 1127, 1130 (1994) (*cert. denied*) (Blackmun, J., dissenting) (announcing that due to fairness being undermined by procedure, he "no longer shall tinker with the machinery of death"); *see also* Walton v. Arizona, 497 U.S. 639, 714–15 (1990) (Scalia, J., concurring) (seeing an irreconcilable conflict between the requirement of guided discretion in *Gregg v. Georgia*, 428 U.S. 153 (1976), and the command in *Lockett v. Ohio*, 438 U.S. 586 (1978), to consider any factor favoring a noncapital sentence, Justice Scalia announces that he will no longer apply *Lockett*).

[322] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 735, 110 Stat. 1214 (1996).

Some of these procedural mechanisms were appropriately adopted by the Court. For instance, the requirement of exhaustion stresses the need for comity in the federal system and respects a coordinate branch of government. Abuse of the writ, while troubling in some of its manifestations,[323] has considerable merit concerning the efficient use of judicial resources.[324] But the most troubling development of doctrines designed to limit federal habeas jurisdiction over state deprivations of liberty comes in the context of the "adequate and independent" state–court grounds for denying relief. Under this theory, states can procedurally default a litigant based upon a substantive or *procedural rule* requiring the issue to be raised at a particular stage in the state–court proceeding.[325] If the litigant fails to raise the issue at the appropriate time in state court, he is forever barred from raising the issue in federal court. For an indigent defendant, this doctrine effectively places the availability of federal habeas corpus jurisdiction in the hands of counsel appointed by the state.[326] In the context of race–based deprivations of liberty, this doctrine is unconstitutional because it offends the Privileges or Immunities Clause's guarantee of a federal forum to hear the validity of such claims.

B. "Adequate and Independent" State Grounds for Denying Federal Habeas Review

The use of "adequate and independent" state grounds for denying federal jurisdiction over federal claims has a history related, but not identical, to that of habeas corpus under the U.S. Constitution. While habeas corpus was inextricably tied to notions of federalism in our system, the doctrine of adequate and independent state grounds is an even more direct expression of these principles. There are important differences to keep in mind when

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[323] Abuse of the writ, designed to prevent repeated filings of federal habeas corpus petitions, is particularly troubling as applied in some of the federal court rulings concerning the intricate relationships between newly discovered evidence, ineffective assistance of counsel, and the cause–and–prejudice standard.

[324] Since the courts have held that, in certain contexts, a habeas litigant has no constitutional right to the effective assistance of counsel, the cause–and–prejudice standard cannot be met to excuse the abuse of the writ. *See, e.g.*, Murray v. Giarratano, 492 U.S. 1 (1992).

[325] *See* Michel v. Louisiana, 350 U.S. 91, 93 (1955); *see also* 2 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26 (3d ed. 1998).

[326] Giving states authority over race–based claims whenever local counsel, appointed by state authorities, fails to challenge the racial bias of the state criminal justice system creates a perverse incentive to appoint lawyers who will not challenge racial bias. It is absurd to argue that the Fourteenth Amendment's protections were so inadequately structured that state actors could so easily defeat them.

discussing some of the historical intersections of common law habeas corpus, federal habeas review of race claims, and a rule of construction sometimes used to limit the availability of federal habeas.

These critical differences are evident in the fundamental character of each. Habeas corpus, the Great Writ of Liberty, is a constitutionally mandated privilege with venerable ancient roots. The adequate and independent state grounds doctrine, while implicating basic principles of constitutional interpretation, is a judicial construct with disputed con–stitutional and statutory foundations. Unlike habeas corpus, the adequate and independent doctrine is not explicitly provided for in the Constitution, nor is its suspension con–stitutionally prohibited.[327] This doctrine is also not tied to any particular procedure; rather, it is a judicial mechanism to control the dockets of the federal courts, while giving life to a particular federalism balance.

1. *Development of the Doctrine*

The doctrine of adequate and independent state grounds has mutated substantially since its earliest uses in direct appeal cases coming to the U.S. Supreme Court from the supreme courts of the various states. In its original form, the doctrine did not serve as a limitation on the power of federal courts to decide issues of federal law when faced with otherwise adequate and independent state grounds. Rather, in *Murdock v. City of Memphis*,[328] the Supreme Court first reviewed questions of federal law before turning to the question of whether the state–court rulings, based on state law, provided adequate and independent grounds for the decision. The 1874 *Murdock* decision is an affirmation of federal power to decide federal issues even when presented in concert with arguably adequate and independent state grounds. *Murdock* permitted federal courts to affirm a state–court judgment on state–law grounds but did not bar review of either federal or state–law claims. Not until *Eustis v. Bolles*,[329] decided two decades after *Murdock*, would the Court use the adequacy doctrine to bar a review of federal issues. This shift was accompanied neither by fanfare in its pronouncement nor, arguably, by a constitutional or statutory basis.

The metamorphosis of this doctrine to one which limits federal court jurisdiction over federal claims has certainly sparked a great deal of controversy and debate. At this point, a brief exploration of the asserted

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[327] At best, it may be inferred from the structure of government created by the Constitution and through an interpretation of Article III and the Tenth Amendment. This argument will be discussed in further detail, *infra* Part.III.B.

[328] Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874).

[329] Eustis v. Bolles, 150 U.S. 361 (1893).

bases for the adequacy doctrine is required before continuing with a discussion concerning how these bases, even if valid in some contexts, do not justify application of this doctrine to deny federal court review of race–based deprivations of liberty.[330]

2. *Theoretical Bases for Adequacy Doctrine*

Courts and scholars have located the source of the adequacy doctrine in a variety of places. Constitutional, statutory, and common–law bases for this doctrine have been asserted. Regardless of where one locates the justification for the adequacy doctrine, these bases cannot justify its current application to claims of race–based deprivations of liberty.

The arguments that a constitutional basis exists for the adequacy doctrine rest upon implication. That is, there is no explicit constitutional command requiring the federal courts to forego review of federal claims in the face of adequate and independent state–court grounds for a decision. These constitutional arguments instead rest upon three general bases. First, there are arguments based upon the cases and controversies requirement of Article III and the related prohibition against issuing advisory opinions. Second, arguments supporting the adequacy doctrine center on the tension between the Supremacy Clause and the Tenth Amendment. Finally, some rely on the general structure of federalism embodied in the Constitution.

Article III, § 2 extends the federal judicial power to all cases and controversies arising under the Constitution, treaties, and other laws of the United States.[331] This jurisdictional requirement has been interpreted to mean that federal courts are forbidden from announcing advisory opinions.[332] Federal courts, therefore, are deemed to be unable to declare the merits of any issue that is not an active dispute before that court.[333] Proponents of Article III as a basis for the adequacy doctrine argue that

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[330] Other scholars have fully examined the historic justifications for the adequacy doctrine. *See, e.g.*, Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9 (1986); Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291 (1986).

[331] U.S. CONST. art. III, § 2; see Brian A. Stern, *An Argument Against Imposing the Federal "Case or Controversy" Requirement on State Courts*, 69 N.Y.U. L. REV. 77 (1994), for discussion of the "cases and controversies" requirement of Article III.

[332] See *Stovall v. Denno*, 388 U.S. 293, 301 (1967), for discussion of the advisory opinion ban.

[333] See Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603 (1992), for an illuminating discussion of mootness. Courts developed doctrines of mootness and ripeness to explain certain subsets of cases in which the parties do not present a true case or controversy to the court.

federal courts lack a true case or controversy whenever a state court determines state substantive law or procedural rules in a manner that adequately decides a case independent from any federal issue raised in that case.

The second purported constitutional basis for the adequacy doctrine rests upon the Tenth Amendment. In particular, the adequacy doctrine relates to state judicial authority over that broad range of undefined power that is neither delegated to the United States nor constitutionally proscribed to the states.[334] The Tenth Amendment may be viewed as either a truism, designed to reiterate that which was already stated elsewhere in the Constitution, or it may be viewed as a counter–Supremacy Clause.[335] Under either view, it is this tension between the Supremacy Clause and the Tenth Amendment that gives rise to the second purported constitutional basis for the adequacy doctrine.

According to this view, state law that does not conflict with the Constitution (by entering upon one of the specific enumerated areas of federal power) must be given its full effect and not made subservient to unrelated federal law. From the time of Chief Justice Marshall's death and the decision in *City of New York v. Miln*[336] until relatively recently, this view of state–federal relations remained dominant. In particular, *Miln* identified the state police powers as being the area where state authority was

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[334] U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[335] The Supremacy Clause is found at U.S. CONST. art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

[336] City of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837):

> A state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive.

Id.

"complete, unqualified and exclusive."[337] This understanding of the police power as properly residing with the states is well–founded and touches deeply held principles of self–governance. It is unsurprising, therefore, that states would cling most tenaciously to the adequacy doctrine where federal review of state criminal convictions is concerned. It is in this area that states most strongly assert that federal courts lack jurisdiction to review state convictions whenever a state court determines state substantive law or procedural rules in a manner that adequately decides a case independent from any federal issue.

The final purported constitutional basis for the adequacy doctrine greatly resembles that of the Tenth Amendment, but instead of relying solely upon that provision, rests upon the structure of the Constitution. The division of power between federal and state authorities, enumerating specific powers to be exercised by the federal government[338] without a corresponding enumeration of powers granted to the states, supports the conclusion that the large body of unenumerated powers is properly vested in the states. Disputes arising under these subject areas are properly left to the states to decide, and federal power should not be used to override proper state–court decisions. Within the confines of these structural justifications arise doctrines of comity (respect for the decisions of co–equal courts) and finality (states should have a predictable understanding of when litigation on a particular matter will end).

One thing that all of these purported justifications have in common is that none of them can overcome the explicit constitutional command that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of federal citizenship,"[339] including the privilege of habeas corpus. Even if these arguments are accepted as accurate,[340] the adequacy doctrine fails to pass constitutional muster when applied to race–based deprivations of liberty. A brief examination of each basis proves this point.

The ban on advisory opinions, premised on the cases and controversies provisions of Article III, will not suffice to ban federal habeas review of race–based deprivations of liberty in the face of the Fourteenth Amendment's mandate that "[n]o State shall make or enforce any law which shall abridge this privilege" of habeas corpus.[341] Even when the advisory opinion ban is deemed to have constitutional origins, to trigger the ban state

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[337] *Id.*

[338] *See* U.S. CONST. art. I, § 8; art. II, § 2; art. III, § 2.

[339] U.S. CONST. amend. XIV, § 1.

[340] This author recognizes that serious flaws exist in each argument asserting a constitutional basis for the adequacy doctrine. *See generally, e.g.*, Berger, *The Supreme Court and Defense Counsel*, *supra* note 331.

[341] U.S. CONST. amend. XIV § 1.

law must be capable of rendering the federal question moot. Since the Fourteenth Amendment explicitly prohibits the states from making or enforcing any law that has this effect, the lawfulness of a petitioner's claim that race impermissibly influenced the deprivation of liberty must be determined by the federal courts. A federal court decision on the merits of such a claim will never amount to an advisory opinion. Use of the adequacy doctrine in such circumstances is itself unconstitutional, as no federal court can decline jurisdiction granted to it by the Constitution. Nor can Congress through legislation eviscerate the effect of a provision of the Constitution.

The Tenth Amendment rationale for the adequacy doctrine is similarly insufficient since the powers reserved to the States are explicitly those powers "not delegated to the United States by the Constitution, nor prohibited by it to the States."[342] With the vesting of this authority in the federal courts and the explicit prohibition against the states making or enforcing any law that abridges this jurisdictional vesting, the Tenth Amendment's residual rights simply do not encompass the power to decide the lawfulness of race-based deprivations of liberty.

Finally, the Constitution's structure of federalism cannot reserve this power to the states. While the power to decide whether race-based deprivations of liberty were lawful did reside with the states prior to the adoption of the Fourteenth Amendment, the core purpose of that amendment was to shift the federalism balance on this narrow issue. Therefore, applying the adequacy doctrine to deny federal court jurisdiction over habeas claims of race-based deprivations of liberty is both anachronistic and unconstitutional.

3. *Statutory Bases for the Adequacy Doctrine*

No statute existing prior to the adoption of the Fourteenth Amendment nor promulgated since that time can negate the effect of a constitutional amendment. The statutory basis for the adequacy doctrine has been located in the Judiciary Act of 1789. Specifically, the Court in *Murdock v. City of Memphis* argued that the Judiciary Act of 1789 forbade federal court review of claims decided on state-law grounds.[343] The Court went on to note that the restrictive language found in the 1789 act had been removed by the amendment of 1867.[344] Despite this amendment, the Court found that Congress did not intend to expand the jurisdiction of the federal courts beyond the traditional limit of examining state-court rulings for erroneous

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[342] U.S. CONST. amend. X.

[343] Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 630 (1874).

[344] *Id.*

statements of federal law.[345]

First, language once existing in the Judiciary Act of 1789 would not and could not defeat a grant of federal jurisdiction provided through subsequent constitutional amendment. Moreover, constructively reinserting a provision into the Judiciary Act and construing it in opposition to the Fourteenth Amendment flies in the face of congressional intent. For the same Congress that passed the Fourteenth Amendment, the Habeas Corpus Act of 1867, and the Reconstruction Act of 1867 also deleted this language when it passed the Judiciary Act of 1867.[346] This constellation of actions by the 39th Congress leaves no doubt about the Framers' intent in adopting the Fourteenth Amendment and about Congress' limitations in controlling federal jurisdiction over race–based claims in the face of the Fourteenth Amendment.

4. *Federal Common Law Basis for the Adequacy Doctrine*

The adequacy doctrine is also justified on the basis of the courts' inherent common law power to place limitations on the size of its docket. This is perhaps the most persuasive argument for the existence of the adequacy doctrine. Of course, while this argument may be persuasive in providing a rationale for the adequacy doctrine, it does nothing to establish its legitimacy in the face of a constitutional provision granting federal jurisdiction over specific claims to the federal courts. It is axiomatic that federal courts cannot deny jurisdiction over claims properly vested there by the Constitution.[347] While federal courts may possess common law authority to manage the courts' dockets, powers exercised under that authority can never contravene the Constitution.

C. *AEDPA Provisions*

A variety of provisions of the AEDPA work to transfer authority over federal claims back to state courts. These include the provisions found in 28 U.S.C. § 2254 (d), (e):

> (d)
>
> An application for a writ of habeas corpus on behalf of a person in

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[345] *Id.*

[346] *See* Matasar & Bruch, *supra* note 331, at 1316–22.

[347] *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1)

resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2)

resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1)

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2)

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A)

the claim relies on –

(i)

a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii)

a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B)

the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[348]

[348] 28 U.S.C. § 2254(d), (e) (2004).

The deference to a state–court determination of law found in § 2254(d) and the heightened deference to state–court determinations of fact under § 2254(e)(2) are unconstitutional insofar as they purport to place these limitations on race–based claims. These provisions offend the Privileges or Immunities Clause of the Fourteenth Amendment both in their adoption and in their enforcement.

As discussed more fully in Part III, the Fourteenth Amendment provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[349] Nothing in that grant of authority to *enforce* the Fourteenth Amendment permits Congress to abrogate its provisions. In the *Civil Rights Cases*, the Supreme Court held that the purpose of clause five was to enable Congress "to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment."[350] Deferring to state courts on issues of law where denials of liberty are based upon race is not only a perversion of the Fourteenth Amendment, but it is a desecration of the incalculable sacrifices made to eliminate slavery. Likewise, creating a heightened form of deference, unheard of in 1868, to findings of fact by those courts that were instrumental in the unequal and racially biased application of the Black Codes offends the principles underlying the amendment and its explicit commands.

These provisions of the AEDPA are also offensive to the Privileges or Immunities Clause in their enforcement. The Fourteenth Amendment explicitly commands that "No state shall make *or enforce any law* which shall abridge the privileges or immunities of citizens of the United States."[351] States cannot enforce any law that abridges the privilege of habeas corpus, particularly in relation to the immunity from race–based deprivations of liberty that lies at the heart of the Fourteenth Amendment. Thus, in the context of the AEDPA provisions that purport to limit access to federal habeas review of race–based claims, even if the enactment of these provisions is deemed constitutional, their enforcement by states cannot be. To the extent that the AEDPA provisions are deemed to be lawfully enacted, states cannot insist on exhaustion of race–based claims. By insisting on exhaustion, which is not constitutionally mandated, states are enforcing a law that abridges the privilege of habeas corpus.

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[349] U.S. CONST. amend. XIV, § 5.

[350] The Civil Rights Cases, 109 U.S. 3, 11 (1883).

[351] U.S. CONST. amend. XIV, § 1 (emphasis added).

1. *Effects on Race–Based Claims*

The use of the adequacy doctrine and the application of the AEDPA have effectively permitted states to reassert final jurisdictional authority over claims of race–based deprivations of liberty, contravening the intent of the Framers of the Fourteenth Amendment. At this point, the reader might ask whether this contravention matters outside a purely academic realm. Have we not progressed as a society far enough to trust that states are not depriving people of their liberty on the basis of race? Can we not trust the states to correct any racial bias within their own systems? An examination of the evidence suggests that race is still playing a critical factor in many decisions to incarcerate.[352] Moreover, the environment that permits race–based incarcerations to occur also virtually assures that many of these cases will proceed through state courts without the issues being challenged or preserved for federal habeas review.[353]

The case of *McCleskey v. Kemp* demonstrates this fact. In *McCleskey*, the Court rejected a habeas petitioner's claim that statistical data, purporting to show racial bias in application of the death penalty in Georgia, provided a

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[352] Statistical evidence shows that race is an excellent predictor of a male's likelihood of being incarcerated. A study conducted by Human Rights Watch in 2002 documented some startling disparities in state–incarceration rates among various racial groups. For instance, in twelve states, black men are incarcerated at rates between twelve and fifteen times the rate for white men. HUMAN RIGHTS WATCH PRESS, RACE AND INCARCERATION RATES IN THE UNITED STATES (2002), *available at* http://www.hrw.org/backgrounder/usa/race.html. The same study showed that in ten states, Latino men are incarcerated at rates between five and nine times greater than white men. In fifteen states, black women are incarcerated at rates between ten and thirty–five times greater than the rates for white women. In eight states, Latina women are incarcerated at rates between four and seven times greater than white women. In six states, black youths under the age of eighteen are incarcerated at rates between twelve and twenty–five times greater than white youths of the same age. In four states, Hispanic youths under eighteen are incarcerated at rates between seven and seventeen times the rate of white youths of the same age. *See id.*

[353] The effects of this disproportionate incidence of incarceration are devastating on African–American and Hispanic family structures. An African–American child is nine times more likely to have a parent incarcerated than is a white child. *See* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, RESPONSIBILITY, REHABILITATION AND RESTORATION: A CATHOLIC PERSPECTIVE ON CRIME AND CRIMINAL JUSTICE (2002), *available at* http://www.usccb.org /sdwp/criminal.htm. A Hispanic child is three times more likely than a white child to have a parent imprisoned. *Id.* Yet, each case does not necessarily evidence deprivations of liberty that are predicated upon race. While statistical data can provide important clues about decision trends, it often provides little help in determining whether a particular decision to incarcerate a particular individual was impermissibly influenced by race. As the Supreme Court made clear in *McCleskey v. Kemp*, 481 U.S. 279 (1987), statistical data alone is an insufficient basis upon which to conclude that racial animus influenced any individual decision.

sufficient basis to overturn McCleskey's sentence.[354] Instead, the Court held that the Fourteenth Amendment's equal protection clause required petitioner to prove that the individual decisionmakers in his case acted with racial animus.[355] At a minimum, claims asserting that particular decisionmakers in an individual case were racially biased are placed by the Privileges or Immunities Clause beyond the purview of states courts. However, the history of the Fourteenth Amendment and related provisions that have been detailed in this article make clear the Framers' intent to reach claims such as that raised by *McCleskey*. The Framers were motivated by a desire to ensure that the newly emancipated black citizens were not subjected to punishments they would not receive if they were white. This history calls into question the validity of the Supreme Court's decision in that case. The Court rejected McCleskey's claim because, in part, it "challenges decisions at the heart of the State's criminal justice system."[356] If the heart of a state's criminal justice system is racially biased, that is precisely what the Privileges or Immunities Clause permits an incarcerated citizen to challenge.

Regardless of whether *McCleskey* itself is re–examined in light of the history which motivated the Fourteenth Amendment, many challenges related to racial bias in individual cases are not being examined by the federal courts. Racial animus on the part of police, prosecutors, and judges in individual cases, resulting in improper convictions or increased punishment, provide the kind of claims that *McCleskey* challenged lawyers to bring. These claims and others, including those arising under *Batson v. Kentucky*,[357] must have a federal habeas forum if they are to be given a full and fair hearing. State courts should not be trusted to handle these matters fairly and cannot be given the authority to do so consistent with the Privileges or Immunities Clause of the Fourteenth Amendment.

There is a failure to examine these claims in federal court because the current procedural system requires local state–court practitioners to challenge the system of which they are a product and upon which they are dependent for their professional and economic welfare. This statement is not meant to impugn the integrity of these practitioners. Rather, it is a realistic assessment of the difficulty in expecting local counsel to challenge "decisions at the heart of the State's criminal justice system."[358] It is always

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[354] McClesky v. Kemp, 481 U.S. at 292.

[355] *Id.* at 297.

[356] *Id.*

[357] Batson v. Kentucky, 476 U.S. 79 (1986) (holding that the practice of challenging potential jurors solely because of their race violates the Equal Protection Clause of the Fourteenth Amendment). *Batson* and *McCleskey* claims are mentioned as examples of types of claims cognizable in habeas proceedings but should not be construed as an exhaustive list.

[358] *McCleskey*, 481 U.S. at 297.

difficult to see one's own prejudices, and those with whom one is close. Many race–based claims are not raised, most likely because local counsel do not perceive the problem. In addition, when they do see the problem, economic, social, and political constraints often prevent lawyers from raising these claims in the courtroom in which counsel regularly appears. More importantly, it is a fact that the Framers of the Fourteenth Amendment intended to locate the authority over these decisions at the federal level through the writ of habeas corpus. Permitting the federal jurisdiction over such claims to turn on the vagaries and parochial practices of county lawyers and judges undermines the entire redistributive purpose of the Fourteenth Amendment.

IV. CONCLUSION

Race still matters. Historically, in this nation, race was the best predictor of whether someone was held in slavery. Compromises made at the start of this great republic wedded the issue of racial slavery to the defining structure of federalism in our Constitution. Entwined together into an unholy rope, slavery and federalism bound our nation to destruction as surely as our slaves were bound to misery. Habeas corpus, the Great Writ of Liberty, was used by slave traders, slave owners, abolitionists, and slaves either to fasten the rope tighter or to loosen its grip. The complexities of its use cannot mask its preeminence as a tool in the struggle over slavery and in the proper location of governmental authority over this peculiarly evil institution. Throughout the first half of the nineteenth century, even as pro–slave forces more effectively used the federal writ to free slave traders from state custody, the strength of the federal writ increased, upsetting the pro–state federalism balance so important to the slave states. In playing its ancient part, the Great Writ defined the boundaries of intragovernmental power.

The use of habeas corpus increased as the struggle for abolition intensified. The westward expansion of our nation, with the accompanying disputes over the character of the new territories, fueled passions surrounding this great moral, economic, and political crisis. With the Fugitive Slave Act of 1850, violence erupting in Kansas, and the Supreme Court's decision in *Dred Scott*, the nation was faced with tragic choices. Unable to reach a consensus, battles were waged with a variety of weapons. Habeas corpus was used by both sides to define the boundaries of lawful authority to declare a human slave free and to articulate the parameters of the federal–state relationship.

Following the Civil War, the Republican–controlled Congress moved to protect the freedmen. The Thirteenth Amendment was ratified and then undermined by the explicitly racist Black Codes. The CRA was passed, only to be weakened by modified Black Codes that used race–neutral language

and took advantage of the Thirteenth Amendment's exception for criminal–convict servitude. In response, Congress passed the Fourteenth Amendment, which constitutionalized the CRA and closed the Thirteenth Amendment's loophole with a guarantee of federal habeas review. With the adoption of this amendment, final determinations over race–based deprivations of liberty were categorically removed from state control. States were forbidden to abridge this privilege in any way. They could neither make a law that would do so nor enforce one passed by Congress.

Sadly, but not surprisingly, under the banner of states' rights, unrepentant slave owners and traders continued to resist lawful equality and federal authority over the issue of slavery. Modern jurists and legislators, tragically, have hoisted this same banner of federalism in a misguided and unconstitutional campaign to revert to antebellum demarcations of power. In doing so, they have offended not only the Privileges or Immunities Clause but one of the most costly and hallowed principles this nation has ever embraced.