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FREEDOM AND FEDERALISM, CONGRESS AND COURTS,

1861 - 1866

* * * * *

PATRICIA M. L. ALLAN

A thesis submitted to the University of Glasgow for
the Degree of Ph.D. in the Faculty of Arts.

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I N T R O D U C T I O N

'Another' piece of work on the American Civil War and Reconstruction perhaps requires a word of explanation. In recent years, a number of scholars have rewritten the history of the period, and found an honourable place for men and events once regretted or reviled. So successful have they been, that there is now no need to rescue 'Radical' Republicans from charges of trafficking in the politics of hate, or to defend their works from any other criticism than that they did not go far enough towards racial justice. The result of so much scholarly activity could have been to overwork or saturate the field. Instead, the debate has become more exciting, as the paths to yet unanswered questions become clearer.

This thesis is concerned with the transition from slavery to freedom. Again, it is a familiar theme. Some historians have been concerned with the question as one of politics, tracing the story from General Fremont's Proclamation to the Thirteenth Amendment; others have treated it as the central theme of Reconstruction, and documented the various Reconstruction acts as they affected the South, and the freedmen; still others have concentrated on the question as it relates to black history, and the unfulfilled promise of justice. It would hardly be possible to take up the theme without due attention to these aspects of it. But to concentrate on Reconstruction solely from a 'Southern' or 'black' angle is to isolate them from the wider process to which they belong - the adaptation of the whole federal system to cope with the transition from slavery to freedom.

Historians are coming more and more to realise how far the Reconstruction process was a national one. Most of the legislation from the Confiscation

Acts of 1861 and 1862 through to the 1875 Civil Rights Act applied to all parts of the Union. There were ills which had to be remedied in New York as well as South Carolina. Far from being an exclusive Southern disease, 'states rights' was the federal problem. Northern states defied the Fugitive Slave Law in the 1850's. During the war, states rights in the North jousted occasionally with the national authority, as when state courts exercised habeas corpus jurisdiction to release men from the Union army, or harassed federal officers in their courts for alleged offences against state law. For that reason, there is a place in this dissertation for a chapter on the Habeas Corpus Act of 1863. This act was passed to protect federal officers from state action by allowing them to transfer suits against them from state to federal courts.

So what does this have to do with the transition from slavery to freedom? Every step taken to free the slaves during the war sharpened the Republicans' awareness of the problems of making freedom permanent. The negative side of the work was to strike down the roots of slavery in state law. The positive side was to make freedom national and to maintain it against infringements by states or individuals. Slavery was 'black' and with the exception of the border states, a 'Southern' problem. But when the problem was not slavery, but freedom, it ceased to be either regional or racial in a narrow sense. Most historians ask what freedom meant for the newly emancipated slave. But the other side of the question, is what did freedom mean to Americans, white and black who were already 'free' and whose status would presumably be relevant to those who now joined their ranks for the first time? Chapter VI attempts some answers. The answers until 1866 came from the states. All questions touching the rights and duties of Americans were decided there. But the failure of the South to observe anything more than the emptiest form of freedom, defined

as the absence of slavery, brought the federal government into the area of individual rights. Rights said the Republicans, were inherent in freedom. In 1866, the Civil Rights Act attempted to define these rights, and extend to all Americans, the equal protection of them in law. The act was about a three-way federal relationship -- no longer about nation and state, but about nation, and state and individual. The situation and the formula was similar to that of the federal officer under the Habeas Corpus Act -- a right and a remedy guaranteed to the individual by the nation.

One of the connecting themes in all the pieces of legislation which I have examined is the nature of the remedy. To enforce the national authority, to protect those who represented it in the states, those freed by it, and those whose only hope of justice lay in its enforcement, Congress expanded the jurisdiction of the federal courts. My starting point is the Confiscation Acts of 1861 and 1862. In those acts, the federal courts were given jurisdiction of cases involving the confiscation of property. But more than that, the whole area of the nation-state relationship on the question of legal guarantees of freedom to the individual was explored for the first time. A remedy was suggested -- the guarantee to the freedman of a writ of habeas corpus from a federal court. As it was presented at the time, the remedy was insufficient, and the final act in 1862 left the role of the courts undefined. But it was only the beginning of the education of Congress to the nature of the problems, and the adequacy of the remedies.

The theme is followed up through the Habeas Corpus Act of 1863, the Wade-Davis Bill, the Thirteenth Amendment, the Freedmen's Bureau Act, and the Civil Rights Act of 1866 -- all of which are familiar to students of the politics of the period. But the ways in which they are inter-connected, both in their judicial features, and their implications for the Reconstruction

of the whole Union, are less well understood. When these acts are brought together and studied as part of a wider constitutional process, the results lend substance to the view expressed recently by Professor Harold Hyman, that Reconstruction begins shortly after the bombardment of Fort Sumter rather than after Appomattox, and that there is no magic dividing line at Lincoln's death.¹.

The use which successive Congresses made of courts, also demands the breaking down of some barriers between 'political' and 'legal' history. The history of these acts must not end with their passage. It fell to federal and state courts to interpret the acts, to discover the boundaries of their respective jurisdiction under them, and by reference, the boundaries of the nation-state relationship. Bench and bar thus find their place in Reconstruction. It is necessary to study both the legislative intention, and the judicial application.

Hopefully, from this perspective, familiar material will yield new light on the relationship between politics and law, Congress and courts, and state and nation in a period of transition.

1. Harold M. Hyman, ed., The Radical Republicans and Reconstruction. 1861-1870. (N.Y.: Bobbs-Merrill. 1967). Introduction.

FREEDOM AND FEDERALISM, CONGRESS AND COURTS

Successful reconstruction of the Union depended on somebody learning something from the American Civil War. To have adopted the conservative slogan of restoring "The Constitution as it is, the Union as it was" would have been to stand still, to wait until the next crisis rent both asunder. More thoughtful Americans addressed themselves instead to a study of what had gone wrong with the Constitution and Union, and to profiting from that study. In many ways it was a new experience for them to speak of flaws and defects. Americans, said E. L. Godkin in 1864, seemed to be under the impression that, "when the Federal Constitution was framed, the canon of political revelation was complete".¹ They congratulated themselves on having secured their liberties in constitutional government, but never stopped to analyse its component parts, or watch how it grew and changed. As a Kentucky lawyer put it in 1861,

they have sailed upon a smooth sea, without the experience of a single storm to waken serious apprehension for their safety, and have never examined the vessel which has borne them, to understand the great timbers and braces that hold it together.²

There had, however, been occasions in the past which might have suggested the need for such a study. But the fact that a compromise was worked out before the Hartford Convention, or the South Carolina Nullification Controversy broke the bonds of Union, delayed the nation's education. Though slavery was the one issue explosive enough to defy compromise and bring the constitutional structure to the point of collapse,³ the important questions it had been posing for federalism for many years beforehand had gone unanswered.

1. E. L. Godkin, The Constitution and its Defects, North American Review, July 1864, p.122. Hereafter cited as Godkin, The Constitution and its Defects.
2. Quoted in Harold M. Hyman (ed.) The Radical Republicans and Reconstruction 1861-1870, (N.Y.: Bobbs-Merrill, 1967) p.28. Hereafter cited as Hyman, The Radical Republicans.
3. See Arthur Bestor, The American Civil War as a Constitutional Crisis, American Historical Review, Vol. LXIX, Jan. 1964.

In all these strains on the system, a common factor might have been revealed. So much attention had been paid to ways/^{of}protecting liberty in the states by restraining the federal government, that the balance had gone too far in the other direction. Not "centralization", but an overbearing notion of "state" -- this was the flaw.^{1.} In the wake of the Nullification Controversy the government found difficulty in protecting its own revenue officers from harassment and prosecution in state courts for no other crime than enforcing the nation's laws. Over slavery, it was powerless to guarantee a free white citizen of Massachusetts the right to freedom of speech in South Carolina, or prevent Northern judges from issuing writs of habeas corpus to release prisoners detained under a federal law - the Fugitive Slave Law.^{2.} Secession confirmed that, though slavery was bad for the black man, its relationship to "State" was disastrous for federalism.

It was not quite true that no thinking had been done on the subject. The trouble was that the people who had thought about it, and come up with a proposal to revolutionise the balance between state and nation, were not the right sort of people, according to E. L. Godkin. Veneration for the Constitution he argued, had turned Americans into a nation of constitutional lawyers, at the expense of legislative science. Thus he went on,

the study of the law as it is has attracted all the keenest intellects in the country, while the consideration of what the law ought to be have been left, strangely enough to newspaper editors and clergymen - two classes singularly ill-fitted for the task.^{3.}

1. This is Godkin's conclusion in The Constitution and its Defects. See also Philip Shaw Paludan, Law and Equal Rights: The Civil War Encounter (Unpublished Ph.D. dissertation, University of Illinois 1968) p.20f.
2. Conflicts of Jurisdiction in these fugitive slave cases are discussed by Charles Warren, Federal and State Court Interference, Harvard Law Review, Jan. 1930.
3. Godkin, The Constitution and its Defects, p.122. John C. Hurd in Theories of Reconstruction, American Law Review, Vol. I, Jan. 1867 makes a rather similar point with respect to the Constitution, that it had been regarded as an object of legal knowledge, to be referred to like a statute, rather than as the instrument of a living political compact.

Prominent among these "ill-fitted" men were the abolitionists, whose constitutional thought has been the subject of important research by Jacobus Ten Broek and Howard J. Graham.¹ They find that the elements of the Republican attempt to adapt federalism to freedom in the Fourteenth Amendment, were directly descended from abolitionist thoughts on the subject as early as the 1830's. The abolitionists began with a moral precept, rather than a constitutional theory. When they looked at the slave, or the free black they saw a man, degraded, but possessing natural rights as a man. Broadly, these were the rights of the Declaration of Independence, and the Bill of Rights - of life, liberty, and the pursuit of happiness, with the means to secure and maintain them. When they looked at the Constitution and laws as they were, their response was not veneration, but anger at their sanction of injustice. The black man was deprived of his natural rights by positive state law. The white man whose voice was raised to protest was deprived of his fundamental rights by violence in the streets, or prejudice in the courts. Here was the denial of the Lockean principle that governments are instituted to protect fundamental rights. The abolitionists stressed that since these rights were held equally by all men, government owed them equal protection. Equal protection, argues Ten Broek, was understood as a double-edged concept; first, the negative duty of government not to pass laws abridging fundamental rights; second, and more important, the positive duty to provide full and ample protection, implying a "quality control", or substantive interest in legislation.² They placed this duty firmly with the national government. Implicit in this was the idea, vague as yet, of a national citizenship, to which attached fundamental rights and which included all persons. They found the power to make good the nation's protection of their rights against all-comers, in the Constitution. But it was not the Constitution so venerated by their fellow countrymen. Different anti-slavery writers stressed

1. Jacobus Ten Broek, The Antislavery Origins of the Fourteenth Amendment, (Berkeley & Los Angeles: University of California Press, 1951), hereafter cited as Ten Broek, Antislavery Origins. Howard J. Graham, Everyman's Constitution (Madison: State Historical Soc. of Wisconsin, 1968).

2. Ten Broek, Antislavery Origins, p.98.

different grants of power, the due process clause of the Fifth Amendment being the most common, as well as the preamble, the comity clause, the power to guarantee the States a republican form of government, and the "necessary and proper" clause. Here were the seeds of a federal revolution, standing in direct contrast to the accepted notions of relationships between state and nation, and the pronouncements of the Supreme Court.¹ They were proposing to alter the balance in favour of the national government, to clothe it with the power to protect its citizens against the states if need be, and enforce its laws.

Synthesizing the ideas of the abolitionists into the tidy formula of equality before the law, perhaps obscures the way they stumbled towards it, and the deficiencies of their blending moral outrage with constitutional theory. Similarly, making too facile a transition of these ideas from the "ill-fitted" clergymen and newspaper editors to the legislators, would obscure the more painful and haphazard education the latter endured through the needs of war. Clearly there are connections. In his speeches in the 1850's, John A. Bingham shared with the abolitionists the concept of natural rights/due process/equal protection. And he was the principal drafter of the Fourteenth Amendment which wrote that concept into the Constitution.² But Bingham arrived at the Amendment in the company of the North and the Republican Party as well as the abolitionists. They had come far, it seemed, from President Lincoln's Inaugural Address, and the Crittenden-Johnson resolutions of 1861, claiming preservation and not change as their goal. What happened in the middle, with respect to the transition of these ideas, has still to be documented.

It is important to establish, however, that an important difference

1. In *Barron v. Baltimore* 7 Peters 243 (1833), the Court held that the Bill of Rights was a limitation on the federal government, not on the states.
2. Bingham's speeches of 1856, 1857 and 1859 (Cong. Globe, 34th Cong., 1 sess., app. p.124; 3 sess., app., pp. 135-140; 35th Cong., 2 sess., pp.981-985) are used to relate his concept of equal protection and due process to the intention behind the Fourteenth Amendment in Howard J. Graham, The "Conspiracy Theory" of the Fourteenth Amendment, Yale Law Review 1938.

between the abolitionists and the Republican party in reaching some of the same conclusions, was the breadth of their concerns. The abolitionists were concerned with slavery and freedom, Congress with a very much wider field of politics and law, Union and Constitution. The comparative complexities of Congress' task can be illustrated by events which had no apparent connection with slavery. During the war, the government's ability to raise an army to defend itself was questioned by state courts in the North, notably in New York and Pennsylvania, who issued writs of habeas corpus for the release of their citizens from service in the Union Army.¹ Again, Union officers in the field found themselves prosecuted in state courts for often petty offences, allegedly committed under orders.² The villain was not the South and slavery alone, but the spirit of state anarchy in the nation as a whole. To cure the greater disease, a more comprehensive and national reconstruction than historians have commonly recognised had to be undertaken. The Habeas Corpus Act of 1863 designed to protect federal officers from state action, the Constitutional Amendments, and the 1866 Civil Rights Act applied to all parts of the Union, and were part of an attempt to bridge the gap between state and nation in the federal system as a whole.

This is not to put the Republican party in the position of selfless constitutional theorists, approaching war and reconstruction from the vantage point of Harvard Law School. They were politicians responding to public opinion, leading it, acted upon by events and shaping them, engaged in a present-minded political contest to assert majority rule - their rule - but concerned for the quality of the Union and Constitution they left to the future.

1. See, for example, *Kneedler v. Lane*, 45 Pa.238 (1863), discussed along with similar cases in Chapter III.
2. James G. Randall in Constitutional Problems Under Lincoln (N.Y.: D. Appleton & Co., 1926) pp. 193-194 says that there were 3,000 such suits pending by September 1865.

The most striking feature of the party was its ability to "grow". Not only is there a distance of understanding from the Crittenden-Johnson resolutions^{1.} to the Fourteenth Amendment, but a distance in the legislative expertise which E. L. Godkin found to be wanting before the war. Congress got through a staggering amount of business, ranging from equipping an army, to Homestead, and Pacific Railroad legislation. Where did their expertise come from? A glance at the composition of the Thirty-seventh Congress reveals that about half the Republicans had experience in state legislatures, perhaps a doubtful commendation. But fifty-four percent of the "young" Republican party, compared with only thirty-one percent of the Democrats, had previous experience of a national Congress. A high percentage of both parties were lawyers - approximately sixty-four percent in the House, eighty percent in the Senate.^{2.} Again the value of their legal training was doubtful. Many would receive a backwoods education in the law, amounting to not much more than a passing acquaintance with Blackstone. Donald Morgan also suggests that the individual, lawyer or not, was not asked to weigh constitutional principles, but was often quite unfamiliar with the detailed contents of the bills he voted on, having left such considerations to specialist committees.^{3.} These committees were the real schoolhouses of legislative expertise. During the war their numbers rose to thirty-seven in the House, twenty-two in the Senate. It was in committee, rather than in debate, that the real business of shaping and drafting legislation proceeded. Charles Sumner's importance was as chairman of the Senate Foreign Relations Committee, rather than as an eloquent Pied Piper for Radicalism on the floor. For the same reason, their

1. The resolutions, sponsored by Crittenden in the House, and Johnson in the Senate, were the first statements of Congress' views on the nature of the war. There was to be no interference with "the rights and established institutions of the States", but simply the preservation of Union and Constitution. In defence of it, Senator Johnson said the government had no more right to interfere with slavery than with the condition of serfs in Russia. Cong. Globe, 37 Cong, 1 sess., p.260 July 25 1861.
2. Compiled from A Biographical Congressional Dictionary 1744-1911 (Washington: 1913)
3. Donald G. Morgan, Congress and the Constitution: A Study of Responsibility (Cambridge: Balknap, 1966) pp. 134-136.

status on powerful committees, John Bingham, Lyman Trumbull, and William Pitt Fessenden were more prominent architects of reconstruction.

Continuity of both problems and personnel must have added to Congress' growing expertise. This carry-over is more evident between the Thirty-eighth Congress (1863-1865) and the Thirty-ninth (1865-1867), than between the Thirty-seventh (1861-1863) and Thirty-eighth. Only thirty-seven Republicans who served in 1861 were returned in 1863. Nevertheless, even that small group contained a group of twenty-five Republicans who would go on to serve in the Thirty-ninth Congress. It included the important parliamentarians John F. Wilson of the Judiciary Committee, Schuyler Colfax, Speaker of the House in the Thirty-eighth Congress, Henry Dawes of the Election Committee, Thaddeus Stevens of Ways and Means, Thomas Eliot, architect of the Freedmen's Bureau, George Julian of the committee on Public Lands and James Ashley from the important Committee on Territories. The real continuity, was the seventy-five Republicans who sat in both the Thirty-eighth and Thirty-ninth Congresses, the Congresses of the Wade-Davis Bill, the Thirteenth Amendment resolution, the Freedmen's Bureau Acts, the Civil Rights Act, and the Fourteenth Amendment. They became receptive to legislative patterns designed to meet familiar problems. What they learned about the difficulties of protecting Union officers in Kentucky courts, they would apply to the business of protecting freedmen and loyalists in Alabama courts.

Their understanding of the issues is a difficult transition to pinpoint. The flanks of the party moved at different paces and embraced a spectrum of opinion on the nature of the Union, the Constitution, slavery, and the priorities of the relationship of these things. It is beyond the scope of this dissertation to analyse these differences in terms of answering the question, "Who were the Radical Republicans?" The old view of a distinct, cross-eyed, club-footed core of Jacobins, presiding over a spiteful Reconstruction is, hopefully, well on its road to extinction.¹ Professor

1. The best historiographical essay is Harold M. Hyman's introduction to The Radical Republicans and Reconstruction 1861-1870, itself a significant contribution to the revision of old attitudes.

David Donald has pioneered an interesting approach to the question in The Politics of Reconstruction.¹ Analysing the voting performance of the Republican Party on specific issues, selected to test their radicalism, he finds the edges of that radicalism blurred, and the phenomenon related more positively to the size of constituency majorities than individual motivation. Radicals, he claims, had safer seats than moderates. There was, of course, a sense at the time that some Republicans were "purer" in motive than others, specifically on the slavery question. A list of these morally in favour, might be compiled with reference to the frequency with which certain Republicans were quoted in the antislavery Liberator. Republicans themselves seemed conscious of an unofficial order of merit, causing Representative Abram B. Olin to remark after a brush with Thaddeus Stevens, that he was "more than suspected by my friend from Pennsylvania of not being in regular standing in the Republican Church."² In the same way, Lyman Trumbull's temperament and zeal differed from Charles Sumner's. But the historian is still left with a long list of measures which found both men on the same side, along with other apparently incompatible colleagues. Important questions have still to be answered concerning divisions inside the party, how groups actually functioned, what influences they exerted on committees and so on. But equally important questions have to be answered about what kept the party together and moving in the same direction.

They did begin with a common belief that Republicanism was more than a political "mixed bag", flung up from the wreck of parties in the 1850's to meet the crisis of disunion. It was a party with an idea. As George

1. David Donald, The Politics of Reconstruction 1863-1867 (Baton Rouge: Louisiana State University Press, 1965)
2. Cong. Globe, 37th Cong. 2 sess. p.570 Jan. 28th 1863

Julian said in 1863,

Republicanism is not like a garment, to be put on or laid aside for our own convenience, but an enduring principle, which can never be abandoned without faithlessness to the country. It is not a succession of "dissolving views", brought on to the political stage to amuse conservative gentlemen, or to dazzle and bewilder the people, but the fixed star which should guide us through the shifting phases of American politics and the bloody labyrinths of war.¹

Broadly this principle, from the rhetoric of Republican speeches was "progress", "enlightenment", "humanity", "democracy", "the spirit of the nineteenth century", "Christian civilization", "free institutions", "liberty under law." Professor Donald suggests a cruder common factor of "simple antislavery zeal".² But really, it wasn't so simple. To understand the broader ground of the reconstruction they undertook, their antislavery position should be understood, as they themselves understood it, in the wider set of notions which shaped their course of action when their ideas collided with the exigencies of war.

President Lincoln regarded his paramount duty as the saving of the Union. And so, he said in reply to Horace Greeley's Prayer of Twenty Millions in August 1862,

if I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that.³

The idea of making such a priority of an empty form of government, relegating freedom to "military necessity" shocked some of his contemporaries.

1. Ibid., 3 sess. pp. 1064-1066 Feb. 18th 1863.
2. David Donald, "The Radicals and Lincoln", in Lincoln Reconsidered (New York: Vintage, 1961), p.126.
3. Roy P. Basler (ed.) Collected Works of Abraham Lincoln (New Brunswick: Rutgers Univ. Press 1953 9 vols.) V p.333-9 Aug. 22nd 1862 Hereafter cited as Lincoln Works.

But to Lincoln, the Union was more than a form of government. It was "the last, best hope of earth" - the great democratic experiment of the nineteenth century.¹ Unless it could be demonstrated that government for the people by the people could work in so large a territorial unit, the disappointment would be one for the hopes of "the whole family of man".² The Union was a place where opportunity and advancement were open to all, even a humble rail-splitter from Illinois. It was a place where the propertyless and the labourer had common cause with the man of property and capital, because he could so easily become his equal, with a bit of hard work and virtue! It was a land full of resources, and people with the energy to develop them. Looking to the day when America would be the foremost of nations in industry, commerce and power, Lincoln said, "The struggle of today is not altogether for today - it is for a vast future also".³ These were the benefits of Union that secession threatened to destroy. Emancipation, to preserve them was, to the conservative Lincoln, no debasing mix-up of priorities.

The same attachment of values to the idea of Union, took the Republican party in the same direction, if a little faster. Republican speeches are full of associations between the ideas of "free institutions", democracy and Union.⁴ For them, free presses, spreading education to the masses, along with freedom of expression, were the cornerstones of democracy. Slavery denied

1. Ibid., IV p.426 July 4th, 1861.

2. Ibid., VII pp.259-260 March 21st, 1864.

3. Ibid., V pp. 51-53 December 3rd, 1861. The Lincoln Works abound in similar statements to these on the nature of the Union.

4. The idea is well expressed by Senator Morrill, Cong.-Globe, 37th Cong., 2 sess., pp.1074-1077, March 5th, 1862, by Thad Stevens, Ibid., pp.439-441 January 22nd, 1862, and in George Julian's many Speeches on Political Questions (N.Y. Hurd & Houghton, 1872) But the implication is present in so many Republican speeches, that singling out a few of them is a fruitless task.

them to the whole Union. As Representative Lansing said,

the system (slavery) cannot live in the midst of free speech and a free press. Wrong is ever aggressive and violent. Slavery is a great wrong, and can only sustain itself by warring upon free principles and free institutions.¹

"Free Labour" was part of the idea, and an important lead into their antislavery position. 'Radical' Henry Winter Davis and self-styled conservative William Cutler agreed with the Republican ethic that there was a community of interest among all labouring people.² President Lincoln shared it, saying to the New York working men who had rioted in 1863, killing blacks,

None are so deeply interested to resist the present rebellion as the working people. Let them beware of prejudice, working division and hostility among themselves. The most notable feature of the disturbance in your city last summer, was the hanging of some working people by other working people. It should never be so. The strongest bond of human sympathy outside of the family relation, should be one uniting all working people, of all nations and tongues and kindred.³

The war was characterised then, as one of class against mass, aristocracy against democracy. Slavery degraded all labour by degrading that of the black man. Lest the white labourer should feel that idea a little remote, Henry C. Wright reminded them of the South's attitude to labour in general, quoting George Fitzhugh - "Slave labour, black or white, is right. Nature has made the weak in mind and body for slaves," or "Make the laboring man a slave and he would be far better off."⁴ Instead, the Republicans would elevate all labour, make consumers of former slaves, and expand man's mastery of his environment, towards the millenium when Henry Winter Davis

1. 37th Cong., 2 Sess., p. 2274 May 22nd 1862.

2. Examples are Davis speech, Cong. Globe 37th Cong., 2 sess., pp. 1107-1108 and Cutler's, Ibid., App. pp. 114-118 April, 23rd 1862.

3. Lincoln Works VII pp. 259-260 March, 21st 1864.

4. Henry C. Wright in the Liberator, October 7th 1864.

"would give each laborer, not a human, but an iron slave."¹.

Comparisons between the freedoms they cherished in the idea of Union, and the antithesis of them in Southern society led many Republicans to the point of view that self-preservation and the best security for the future lay in the reconstruction of a Union founded on harmonious principles.

Thaddeus Stevens agreed,

the principles of our Republic are wholly incompatible with slavery. They cannot live together. While you are quieting this insurrection at such fearful cost, remove the cause, that future generations may live in peace.².

Emancipation was seen as an avenue to other freedoms, the breaking down of what the Negro leader Frederick Douglass called the "Chinese wall" at the South, and by it, the creation of a more perfect Union.³.

That is not to make of their hopes and assumptions a pre-arranged plan to turn the war into one for emancipation, but rather that when the war created the opportunities and the converts, it found a party whose general philosophy of 'Union' disposed it to accept, even welcome the challenge. Nor is it to say that the Republicans were against slavery before they were for Union. The war made such a corollary of these things that Representative Martin F. Conway stood alone in posing them as a choice, when he declared in 1863, "I would sacrifice the Union to freedom any morning before breakfast."⁴.

Apart from relating slavery to Union, the Republicans did also find the idea of property in man abhorrent to their enlightened nineteenth century minds. Happily, their views pre-dated "scientific proof" of the inferiority

1. Cong. Globe, 37th Cong., 2 sess., p.1107 March 6th 1862.

2. Ibid., p. 441 Jan. 22nd 1862.

3. Frederick Douglass, Reconstruction, Atlantic Monthly Vol. XVIII Dec. 1866 p.764.

4. Martin F. Conway to the Editor of the New York Tribune, 29th May 1863 quoted in the Liberator, June 12th 1863.

of the Negro, and most Republicans shared with the abolitionists the view that the Negro was a man, whose capabilities had never been tested because of the prejudices which slavery had engendered both North and South. Thomas D. Eliot said of them,

their social degradation compelled by slavery, their trustful nature, their thirst for knowledge, their willingness to work for the wages of labor, their yearning after what the white man also covets - position and property which will secure position - we know these things. But we do not know, and will not until we give them the rights of man, what are their full capacities for that life which is above the material life and that "pursuit of happiness" which aims at ends beyond the horizons which slavery defines.¹.

They were optimistic that any race which could adapt itself to slavery, as Senator Pomeroy put it, could adapt itself to freedom.² Samuel 'Sunset' Cox and the Democrats were quite wrong in equating this optimism with a desire to amalgamate the races*in social equality. The Republicans were men of their times, as well as elected representatives of a prejudiced public. Replying to Cox's charges of 'miscegenation', Republican Hutchins fairly reflected the sentiments of his party when he said,

because we are willing to do justice to the humblest in society, does it follow that we are bound to extend to them the same social and political privileges which we enjoy? Because my colleague is disposed to pay his humble washerwoman a just compensation for her labor, shall I reproach him with the inclination to marry her, or invite her to his table?³.

Whatever their private views, they were all representatives of the people. Radicals, argues David Donald, were elected by larger majorities than moderates.⁴ They were goaded into action by their constituences, as well as being educators of them. Very soon after Sumter, the cry which abolitionists

1. Cong. Globe, 38th Cong., 1 sess., pp. 567-73 Feb. 10th 1864.

2. Ibid., 38th Cong. 2 sess., pp. 959-60 Feb. 21st 1865.

3. Ibid., 1 sess., pp. 567-73 Feb. 10th 1864.

4. David Donald, The Politics of Reconstruction.

had raised for emancipation as an act of justice was swelled by a public opinion, which though it did not always stem from purity of moral purpose, or even a perception of the relationship between slavery and federalism, did understand that there was a connection between emancipation and winning the war. The quashing of General Fremont's limited proclamation of emancipation in August 1861, brought a storm of popular disapproval. The North found a new, and less embarrassing public image for emancipation, based on patriotism rather than philanthropy. The people discovered that "salus populi est suprema lex" well before Lincoln immortalised the rule in the Emancipation Proclamation of 1863.¹

George Selden Henry, Jr., has demonstrated that many constituences, especially in the Northwest, were both antislavery and anti-negro.² The last thing that they wanted was an influx of freed negroes from the South, and because of geography, this was a more controversial issue in the north and mid-west than it was in New England. Against this background, Republicans had to emphasise 'necessity' and go cautiously on "equality". Whose to whom the argument of the dignity of free labour was directed had to be convinced that their jobs would be safe from black competition.³ Emancipation was, therefore, presented by no less 'radical' gentlemen than Thaddeus Stevens and William Kelley as a means of keeping the Negro in the South.⁴ His love of the sun became proverbial as the Republicans sought ways of securing freedom at the same time as side-stepping more searching issues of race relation:

The point at which 'Union', 'enlightenment' and 'justice' met with

1. This new public image was proclaimed by the N.Y. Tribune in the winter of 1861 - "this is no longer a question of morals, but one of common sense and common safety." Quoted in the Liberator, Nov. 22nd 1861.
2. George Selden Henry, Jr., Radical Republican Policy Toward the Negro During Reconstruction 1862-1872 (Unpublished Ph.D. Dissertation, Yale University 1863).
3. See also William H. Lofton Northern Labor and the Negro During the Civil War, Journal of Negro History Vol. XXXIV. Jly. 1949.
4. Cong. Globe, 37 Cong. 2 sess. p. 439-441 Jan. 22nd 1862; Ibid. p. 596 Jan. 31st 1862.

demands for action was the war. And the war was a "stern and terrible teacher".^{1.} As early as Bull Run in July 1861, Congressmen were able to ask, whether it was not like fighting with one arm tied behind their backs not to strike at slavery. The immediate result was the Confiscation Act of August 6th, 1861, which took the first hesitant steps towards emancipation, freeing slaves actually used in the rebellion. But the argument became more convincing as the Northern armies blundered through the first two years of war without much to show for their superior numbers and resources. Emancipation was urged to strike at the power of the rebellion, to lift Northern morale and win European sympathy by dignifying the conflict with a cause. Whatever arguments went on in Washington as to the powers of Congress to do anything about it, the advance of the army into parts of the seceded territory disrupted the relationship between master and slave and sent thousands of slaves flocking behind Union lines. But the relationship between the army and emancipation did not remain accidental. The first proclamation of emancipation for military reasons came from the generals - Fremont in August 1861, Hunter in May 1862. The army became a powerful complement of the party which cared about winning the war and lending them every support to do it - the Republicans.^{2.} And so the war took the Republicans from the Confiscation Act of August 6th 1861 to the Thirteenth Amendment.

Events, however, soon demanded that it would have to take them further. There was more to the question of dissolving the relationship between slavery and federalism than emancipation. As Frederick Douglass said in 1865, the war would end, and slavery would end, but the spirit of state anarchy would not

1. Frederick Douglass, Reconstruction, Atlantic Monthly Vol. XVIII Dec. 1866 p. 762.
2. Harold M. Hyman (ed.) Radical Reconstruction pp. 50-51.

end with it. He predicted,

That spirit will still remain, and whoever sees the Federal Government extended over those Southern States will see that Government in a strange land, and not only in a strange land, but in an enemy's land. A post-master of the United States in the South will find himself surrounded by a hostile spirit, a United States marshal or United States judge will be surrounded there by a hostile element.¹.

And of course if the South were left alone to determine the fate of the freedmen, there was no question what would happen to him surrounded by this "hostile spirit". In 1866 the Report of the Joint Committee of Reconstruction confirmed the worst fears of the Republicans, and Douglass' prediction.².

Black codes threatened to make freedom an empty word. Loyalists and federal officers were harassed. The South was unrepentant. The old argument which related emancipation to military necessity, was soon extended to relate positive safeguards of civil rights in law, to future security against disunion. The new relationship which had to be worked out was between freedom and federalism.

But what did the Republicans mean by freedom? In their wartime speeches, they assumed a body of "natural", and "inalienable" rights attaching to a man by reason of his existence. But it was only when events in the South demonstrated how alienable these rights were, that they had to spell them out, and think about how to make them less alienable. A black man was clearly not free if he could not own property, earn his own living, sue and be sued, travel freely, marry, or defend himself in court. Nor was a white loyalist or a Union officer able to enjoy his natural rights if he too could not expect a fair trial from his peers. The problem, then was not strictly a "black" one. It was the problem of extending the protection of the laws to all men

1. Frederick Douglass, Speech, quoted in George L. Stearns, (comp.), The Equality of All Men before the Law Claimed and Defended: In Speeches by William D. Kelley, Wendell Phillips, and Frederick Douglass, (Boston: Rand & Avery 1865) p. 37.
2. Report of the Joint Committee on Reconstruction at the First Session of the Thirty-Ninth Congress (Washington: Government Printing Office, 1866).

in the maintenance of their civil rights. The Civil Rights Act of April 1866 for the first time defined some of these rights, the rights of a free man, black or white, in Massachusetts as well as Georgia. For the first time the nation accepted responsibility for the protection of the rights of the individual. It made them adjudicable in the federal courts. The concept of equal protection of the laws had ceased to be a sermon, and become positive law. Justice demanded it. But so too did political expediency. In the South the state judges, juries and legislatures who denied the freedman justice and harassed the loyal, were their former enemies. The return of the old ruling class was to be avoided at all costs. Before the war, they had exercised too much power for the Republicans' liking. Now, with the vestiges of slavery removed from the Constitution by the Thirteenth Amendment, they might wield even more, since the freedman would count as one man, instead of three-fifths, for the purposes of representation. Such a possibility would be anathema to the Republican party, whose own political future would be dim indeed. To break the hegemony of a privileged class, loyal men, black or white, had to be independent, free from black codes, or prejudiced courts. He must, therefore, have recourse from the state to the nation in defence of his rights. And so the Civil Rights Act gave him access to the federal courts where he could get no satisfaction from the courts of the state.

This transition to the "equal protection" position of the pre-war abolitionists, was accomplished without casting the Constitution overboard (though the Democrats had their doubts!) Instead, they found in the Constitution an instrument powerful enough to hold the Union together on the basis of freedom where it had failed on slavery. By oath and by conviction, the Republicans were servants of the Constitution - or nearly all of them. Representative Albert G. Riddle had doubts as to the potential of that instrument to supply the power to save the nation, saying

I revere and venerate the Constitution, but I love my country a million times more. The one was formed and may be dissolved by the breath of men. The other is the creation

and the growth of God; and rather than that mere constitutional names should stand in the way of the nation's salvation, better a thousand times solemnly roll the Constitution up and lay it reverently away.¹.

He accurately added, "These too are not sentiments of my party." For they were not. An impressive list of statements in defence of the Constitution would include almost the whole party.

Even A. G. Riddle was really talking about what he would do if the possibility ever arose of the war leaving behind it an empty document and no nation. Most Republicans, including Lincoln recognised that it might be necessary to amputate a limb to save a life. As George Julian said, "Cases may arise in which patriotism itself may demand that we trample under our feet some of the most vital principles of the Constitution".². But the Republicans did not seek out such "cases" and very little "trampling" was done, even in the question of arbitrary arrests.³.

They were faced with the problem of deriving enough power to save and reconstruct the Union, from an instrument accustomed to supplying restraints. The only alternative would have been the "laws of war." Such a law was frequently referred to, and illustrated with quotations from the publicist Vattel but even Thaddeus Stevens only claimed it as a supplementary power to the Constitution.⁴. The problem with the "laws of war", or "the laws of nations" was that, however vague and sweeping, they were both temporary - and the province of the Executive and the Army! To maintain a more permanent interest in the peace as well as the war, and to assert the superiority of civil procedures over the military, the Constitution was much more satisfactory.

1. Cong. Globe 37th Cong. 2 sess. p. 499.
2. Cong. Globe 37th Cong. 2 sess. p. 329 Jan. 14th 1862.
3. Even James G. Randall, no friend of "emergency" legislation, concludes that there was no wholesale denial of Civil liberties. Randall, Constitutional Problems Under Lincoln, pp. 520-521.
4. Cong. Globe, 37th Cong., 2 sess. pp. 439-441 Jan. 22nd 1862.

The Constitution they invoked, however, was not that from which slavery drew its power, but a Constitution re-fashioned for a free people. The power to suppress insurrection was clearly constitutional - to raise and support armies, call forth the militia, to suppress insurrection, and repel invasion -- but so too was the power "to make all laws which shall be necessary and proper" to execute these other powers. And when the North decided that emancipation was both of these things, the power was there. To answer the question of the government's power to maintain that freedom, and the rights of all her citizens, they turned like the abolitionists, to interpret the Constitution in the light of its preamble, "to form a more perfect Union, establish Justice, ensure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity---." Other parts of the Constitution, the power to guarantee the States a Republican form of government, the comity clause and the Bill of Rights were complementary to this objective. When it came to reconstruction theory, whether they believed that the States had committed suicide, or were only temporarily out of their proper practical relation to the Union, the Republicans had something in common. They derived the power to set conditions for the return of the states to their proper relation to the Union, from the Constitution, and they agreed on the return of the states acknowledging a Constitution with the power to protect the equal rights of all citizens.^{1.}

The very nature of this objective ensured that reconstruction would be the business of both the lawyer and the legislator, of both courts and Congresses. The concept of equality of rights in law presumed adjudication of these rights in courts. Political considerations, of disloyalty in the South, and turbulence in the border states, demanded that these courts of law be federal, where justice could not be obtained in the states. It was

1. The relationship of the various theories to the Constitution, is discussed in John C. Hurd, Theories of Reconstruction, American Law Review Vol. I Jan. 1867.

impossible to station a federal officer at every crossroads. Wallace D. Farnham, in referring to the federal government as "a weakened spring" in the nineteenth century, is quite right to challenge the idea of wartime centralisation, saying that, "in this respect as in others the war brought fewer changes than it is now fashionable to believe."¹ War and Reconstruction brought the creation of no permanent bureaucratic machinery. The Freedmen's Bureau was temporary, and staffed mostly by regular army officers. Immediately after the war the army itself was reduced to its peacetime size of 16,000 men - a mighty occupation force! The enforcement machinery of reconstruction legislation was the federal courts - the only permanent presence of the nation in the States.

Until recently, historians were satisfied with the traditional interpretation of the Supreme Court's impotence during Reconstruction. According to Charles Warren and others, the Court never recovered its prestige after the torrent of criticism unleashed on it after the Dred Scott opinion.² In office, the Republicans set about getting their own back by packing the Court and reducing its influence. So successful were they that the Court played a weak and submissive role in the Reconstruction era. Stanley Kutler has offered a convincing reinterpretation.³ Without denying Republican dissatisfaction and anger with the Court over Dred Scott, he points out that Republicans distinguished between Taney's opinion and the institutional relevance of the Court itself. Senator John Hale, Representative Thaddeus Stevens and a few others, may have carried their annoyance to an attack on the Court itself, but they never carried the Republican party with

1. Wallace D. Farnham, "The Weakened Spring of Government": A Study in Nineteenth Century American History. American Historical Review April 1963, p. 680
2. Charles Warren, The Supreme Court in United States History (Boston Little Brown & Co. 1960 2 vols.).
3. Stanley J. Kutler, Judicial Power and Reconstruction Politics (Chicago Univ. of Chicago Press, 1968), hereafter cited as Kutler Judicial Power.

them in any designs to destroy, or significantly weaken the Court. What the party as a whole wanted, was to make the Court responsive to their own interests, and those of an expanding Union, rather than to the political demands of slavery, and an overrepresented South.

Republican Representative Albert G. Riddle reflected the attitudes of his party towards the Court, and especially their grasp of the national perspective of the problems they faced, when he said,

I know it (the Court) needs reconstruction. I believe it answers pretty well the purposes of a common-law and commercial court - or would, with an addition to its force. It certainly has, through some misfortune that I care not to discuss, fallen below the respect of the nation. Do you propose now to reconstruct the Federal judiciary? Why, sir, the very map is dissolving about us. The Government is a unit, it cannot exist in broken parts; and whoever strikes it down in South Carolina strikes it down in Massachusetts. If you cannot enforce its laws in New Orleans, it is idle to adjudicate them in New York. I know that by common consent we may continue to obey them; but the essential sanction, found only in national sovereignty is gone; so that a patriotism limited to the narrow boundaries of a State binds us to the inexorable necessity of restoring all the States under the national sovereignty; for it is only through that means that the integrity and safety of our own States can be preserved.¹

The Supreme Court might not be perfect, but as the editor of the Nation said, better leave questions of constitutionality to its jurisdiction, rather than to a Congress sitting in thirty-hour long sessions, its members often ignorant of what they were voting for.² Besides, Roger B. Taney died, somewhat unlamented, in 1864. A mood of optimism, that there would be no more Dred Scott decisions, greeted the appointment of his successor Salmon P. Chase, a former Republican Secretary of the Treasury, with a long history of attachment to the principle of equal rights under law.³

1. Cong. Globe, 37th Cong., 2 sess. p. 500 Jan. 27th 1862.

2. The Nation Vol. 10 p. 24 Aug. 15th 1867.

3. Chase Papers LC Vol. 93. Secretary of the Navy Gideon Welles, was less optimistic. He thought Chase a "sycophant", and "likely to use the place for political advancement". Gideon Welles, The Diary of Gideon Welles ed. by Howard K. Beale (N.Y.: Norton & Co. 1960 3 vols) II pp. 192-193 Dec. 5 1864.

But the new Chief Justice never linked his name to a Supreme Court opinion as notable for equal rights as Dred Scott was for slavery. The Court's record will be examined in the following chapters. It is sufficient to notice here that in the question of civil rights, the Court in the long run deferred to State police power. Stanley Kutler is probably right in arguing that, from a broader perspective on judicial business, the Court was not as "states rights" minded as historians have believed. In many other areas, admiralty jurisdiction, wartime licensing taxation, municipal bonds, and indemnification cases, it was willing to make a modest but "unprecedented" use of federal judicial power.^{1.} But they did not use it consistently in the service of equal rights. As a Court of law, the Supreme Court had to wait for cases. The State police power never slept. Wendell Phillips put the matter quite succinctly when he said of the "freedom" granted by the Thirteenth Amendment,

many abolitionists have said that, "with the prohibition of chattel slavery, and an abolitionist for the Chief Justice, the negro is safe." How unwise! On the other side the State fence is Robert Small and Governor Aiken. On this side is Salmon P. Chase and the Federal Constitution. Why, if Governor Aiken has got any brains, he can grind Robert Small to powder in nine hundred and ninety nine different ways without trespassing on the Anti-Slavery Amendment; and until he does, Salmon P. Chase cannot interfere.^{2.}

Finally they had their own conservatism to reckon with, having been educated in the tradition of judicial comity, and respect for the traditional (large) spheres of state jurisdiction.^{3.} Politically, although Chase retained his attachment to equal rights secured by impartial suffrage, in the late 1860's, he increasingly looked to the Democrats to secure it - with universal amnesty. He had tired of military tribunals

1. Kutler, Judicial Power, p.142

2. In George L. Stearns (comp.) The Equality of All Men before the Law Claimed and Defended (Boston: Rand-Avery, 1865) p.31

3, The principle of judicial comity is discussed by Charles Warren Federal and State Court Interference, Harvard Law Review Vol. XLVIII Jan. 1930.

in the states, felt that Congress was assuming dangerous hegemony in Johnson's impeachment trial, and he looked forward to a speedy restoration of the states.¹ There was nothing in these symptoms to make him a bad Chief Justice, just a fairly conservative one. And he was only one of nine men. Four of his colleagues in his first years as Chief Justice, Nelson, Grier, Wayne and Catron, had concurred with Taney in the Dred Scott opinion. Nathan Clifford was a Buchanan appointee, and regarded as something of a "doughface".² Although Lincoln's and later Grant's appointments helped redress this conservative balance, it still did not add up to a Court willing to undertake federal revolution.

It was the lower federal courts which became the real workhorses of Reconstruction, and the Republicans began their education on how to use them as early as the Confiscation Acts of 1861 and 1862. Thereafter, they became a regular feature of legislation. Twelve Acts were passed between 1863 and 1875 removing certain classes of cases from state to federal courts. It was not so surprising that Congress should react to conflict within the federal system, by enlarging the jurisdiction of the federal courts. Article III Section II of the Constitution contained a broad grant of federal judicial power, extended ".... to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made or which shall be made, under their Authority ...". The surprise perhaps, was how little this power had been used. The circuit and district courts dealt mainly with admiralty cases, and cases in which there was diversity of citizenship. In times of crisis, however, the government's response had been to enlarge their jurisdiction. In 1815, at the time of the Hartford

1. See Salmon P. Chase to Hamilton Fish. May 27th 1868, Chase Papers LC Letterbook Vol. 117 pt. 2 pp. 417-418 and Chase to August Belmont, May 30th 1868, Ibid., pp.408-413.

2. Kutler, Judicial Power pp. 14-20

Convention, Congress passed its first removal act since the Judiciary Act of 1789. Under it, revenue officers prosecuted in state courts could remove their cases to the federal courts. A similar act was passed in 1833, again as a response to a crisis in federalism, the Nullification Controversy. Once again, in 1855, a removal act was proposed, though not passed, to deal with violations of the Fugitive Slave Law.¹ In the past, when federal officers were unable to receive a fair trial because of hostility in the states to the laws they represented, the government made its courts the alternative. And this is exactly what they did in 1863, to protect Union officers under the Habeas Corpus Act, and in 1866, to protect negroes and Southern Unionists under the Civil Rights and Freedmen's Bureau Acts.

It put the federal courts in the front line of the nation - state conflict. Earlier crisis had come and gone without leaving very many precedents. The history of the federal court system had been one of avoiding, rather than joining conflicts. The courts of nation and state had generally refrained from interfering with each other's process and officials. While the judicial supremacy of the nation's courts in federal questions had been asserted under the nationalist Chief Justices Marshall and Taney, there were recognised limits, among them the prohibition on issuing writs of injunction to stay proceedings in state courts, and the duty of respecting state laws where they applied to cases in federal courts.²

There had to be mutual respect, while the judicial system were so inter-related, and the government relied on state courts to do much of its business. In 1884, a writer in the American Law Review looked back to

1. Charles Warren deals with the history of these acts in Federal and State Court Interference, Harvard Law Review Jan. 1930 and Federal Criminal Laws and The State Courts, Harvard Law Review March, 1925.
2. Ibid.

a time when,

... the doubtful policy of the founders of the government and of their successors, until a period comparatively recent, committed the execution of the Federal laws in part to the judicatories of the States; made the justices of the peace of the States the examining magistrates in criminal cases for the Federal tribunals; made the judges of the States Federal magistrates for the purpose of executing extradition treaties with foreign countries, for the purpose of naturalizing aliens, and in some cases for the purpose of executing the criminal statutes of the United States; and made the jails and prisons ¹ of the states the jails and prisons of the Federal Government.

With the removal acts of the 1860's, the federal courts were called upon to do more business normally within the jurisdiction of the state courts. Offences against state Criminal law by Union officers, negroes and others, cases between citizens of the same state, and cases involving the rights of citizenship, could be brought to the federal courts. Officers of State courts who refused to relinquish jurisdiction could be imprisoned -- after eight decades of mutual respect! Of course, the nation could still not afford to lose the services of the state courts in doing its business. The object of the legislation was to demonstrate the government's ability to have its laws enforced in the states - to teach the states a lesson when it was necessary - but preferring that they learn for themselves. The record of the federal courts in that respect will be examined in the following chapters. Like the Supreme Court, they did make use of their new powers, but never really crossed Wendell Phillip's "state fence" with respect to the Negro's equal rights under law.

Certainly, mutual respect between the courts of state and nation had broken down with secession and war. The federal courts were the Union's courts, staffed by an independent and generally better educated judiciary.

1. Thomson, Abuses of the Writ of Habeas Corpus, 18 American Law Review p.3 (1884) quoted in Warren, Federal and State Court Interference p. 353.

Attorney-General Bates had some scathing criticisms to make of the inefficiency of the federal courts, but generally they had a reputation for reliability.¹ Paid by the government and appointed for life, their traditional obligation was to the law. State court judges were elected for brief terms, and respect for them dwindled when it appeared that their obligation was to their constituencies rather than the law. The 'people' who elected them were the lawbreakers who seceded. They were the Copperheads in the border states who defied the government's attempts to raise an army and win the war. The judges who reflected them in their judicial opinions, were those who refused to transfer cases to federal courts under the removal acts, and denied the constitutionality of all measures designed to secure civil rights, so that a federal officer, a Southern Unionist, or a negro was denied justice in their courts. It had not always been so. Kent and Shaw belonged to an era of great state judges. But in 1870, a writer in the Saturday Review could write, "Few things are full of uglier omen for the future of the United States than that growing disrespect for the judicial body which seems to be spreading itself through the country."²

Professional journals at this time are full of laments for the effects of democracy on the state judiciary. Where the original state constitutions had provided mostly for the appointment of judges for life, or "during good behaviour", by the Governor and the legislature, by the 1880's, only New Hampshire, Massachusetts, Rhode Island, and Delaware retained this procedure. The rest had succumbed to the tides of the democratic urge to elect all public servants, including the judges.³ John F. Dillon found that the effects of this change on the standards of the state judiciary was one of the few

1. Edward Bates, The Diary of Edward Bates ed. by Howard K. Beale (Washington; U.S. Govt. Printing Office, 1933) p. 356.
2. Quoted in The Albany Law Journal, March, 19th 1870 p.219
3. W. Raymond Blackard, The Demoralization of the Legal Profession in Nineteenth Century America, 16 Tenn. Law Review, 1940 pp. 315-316 hereafter cited as Blackard, Demoralization of the Legal Profession.

blemishes in a century of American Law.¹ Contemporary critics agreed that it tied judges too closely to the interests of the people who elected them and stood in the way of the efficient administration of justice.² Not all comment was unfavourable. The Yale jurist Simeon Baldwin had enough faith in the people to think that although they might not choose more wisely than the legislature, they might choose more honestly.³ Secession after all, had not put state legislatures in any happier a light than "the people". Most of the new state constitutions altered the balance of power within the state by hedging in the legislatures with more restrictions. And so James Schouler felt that the direct election of judges made them more independent, and more efficient, by freeing them from the influence of the legislature.⁴ By the time he wrote, however, in 1897, the states were trying to temper democracy with "sober sense". New York's 1873 constitution extended the tenure of judges to fourteen years, and Pennsylvania's constitution of the same year to twenty-one.

There were, of course, exceptions to this blanket condemnation of state judges. Maxwell Bloomfield cites the career of Isaac F. Redfield, chief justice of the Vermont Supreme Court, as an example of a distinguished jurist, annually re-elected from 1835 to 1860 yet often opposing the political current of his state.⁵ Judges Sidney Breese in Illinois and Thomas McIntyre Cooley in Michigan had fine reputations. During the reconstruction period, there were even loyal judges in disloyal districts, but the evidence suggests that they were often "carpetbaggers", nominated to the court by governors or

1. John F. Dillon, A Century of American Law, 13 New York Bar Assoc. Journal (1890) p. 251.
2. Daniel Chamberlain, "The State Judiciary, Its Place in the American Constitutional System in Constitutional History of the United States as seen in the Development of American Law." (N.Y. 1889) George C. Barret, The Administration of Criminal Justice, Journal of Social Science, Transactions of the American Assoc., Vol. 2, 1870.
3. Simeon E. Baldwin, Recent Changes in Our State Constitutions, Journal of Social Science, Transactions of the American Association, Vol. 10 1879 p. 1
4. James Schouler, Constitutional Studies, State and Federal (N.Y. Dodd, Mead & Co. 1897) pp. 289-292.
5. Maxwell Bloomfield, Law Vs. Politics - The Self-Image of the American Bar (1830-1860), American Journal of Legal History, Vol. 12 Oct. 1968 p. 303 hereafter cited as Bloomfield, Law vs. Politics.

state conventions, rather than by direct vote of the people. One of these men, George Andrews, served on the Tennessee Supreme Court from 1869 to 1870, and endeavoured to serve the cause of impartial justice.¹ Albion Tourgee served on the North Carolina Supreme Court from 1868 to 1876, later describing his stand against political currents there as a "Fool's Errand."² There must have been variations, and a great deal more work on the lives of individual judges will have to be undertaken before a satisfactory judgement can be made on their competence. But there certainly was a widespread feeling that the integrity, perhaps more than the competence of the state judges had fallen lower than ever before.

The task of securing equal justice in law, involved the bar as well as the bench. Yet, says W. Raymond Blackford, the crisis of the mid-nineteenth century found the legal profession "demoralized" and ill-equipped to meet it. The Jacksonian "cult of incompetence" bred a hostility to professionalism in the law. Every right-thinking man could be his own lawyer, butcher, baker, or even President of the United States. Standards of admission to the bar, which were high in the Revolution period, were eroded in the first half of the Nineteenth century. Alexis de Tocqueville had observed in the 1830's that the lawyers were America's aristocracy, but by the middle of the century, it seemed to later observers, they merged with the mediocrity of "democratic" society. In Indiana, a prospective candidate for admission to the bar needed no professional qualifications. Elsewhere, property, age and educational standards were lowered. Lawyers meddled in politics. Deprived of the leadership of a respectable bench, they presented a sorry picture of incompetence. Blackard concludes that, "The lowest ebb in the downward course was reached shortly after the War between the States".³

1. Harold M. Hollingsworth, George Andrews; Carpetbaggers, Tennessee Historical Quarterly Vol. 28 1969 pp. 310-323.
2. Albion W. Tourgee, A Fool's Error, ed. by John Hope Franklin (Cambridge: Belknap, 1961).
3. Blackard, Demoralization of the Legal Profession.

Yet obviously this judgement conceals a wide difference in professional standards. Perry Miller points to the rising standards of law schools in the 1820's, and the fine leadership of Kent, Storey and Hoffman in legal scholarship, as a contrast to lax standards especially in the West.¹ This could not be so easily submerged by the democratic ethos of Jacksonianism. Maxwell Bloomfield has recently suggested some of the ways in which this professionalism was not lost, but grew between 1830 and 1860. Bar associations increased. So too did legal periodicals, which worked hard to promote a suitable professional image to allay popular fears of their mystique, or aristocracy. The image was one of hard work, integrity, utility, of a profession open to all, but demanding high standards. By 1860, the lawyers had acquired a new respectability, and a self-awareness. Only third-rate lawyers combined a legal and political career.²

These developments are worth noting. The professional pride of the 1870's exemplified by the New York Bar Association must have had roots in the past. An attempt to describe a trend in professionalism, either up or down, fails to take account of real variations in standards. De Bussy Professor of Law at Harvard, Emory Washburn was impressive, when he called upon the legal profession to fulfil its duty to the times. He said,

such a violence has been done to our institution such a strain has been made upon the strength of the common bond that bound us together as a nation, that it will require the wisest counsel, the calmest judgement, and the most devoted patriotism to restore the government again to anything like harmonious action.³

These were the qualities of the lawyer, rather than the politician or businessman.

1. Perry Miller, The Life of the Mind in America (N.Y.: Harcourt, Brace & World Inc. 1965) pp. 134-143.
2. Bloomfield, Law vs. Politics.
3. Emory Washburn, Reconstruction: The Duty of the Profession to the Times, 26 Monthly Law Reporter 278 (1864)

Incredibly, it is the same profession that Gilbert Pillsbury wrote about in a letter to Salmon P. Chase in 1867, when he asked his advice on drawing up a constitution for South Carolina. The convention, he said, "... will be composed, no doubt, mainly of loyal men; but we do not know a single loyal man of the legal profession in the state, who will be likely to participate in the deliberations of that body".¹ And surely not because they had all forsaken politics for legal professionalism! Another correspondent of Chase's wrote that the bar of Maryland was "generally disloyal", in a state which never left the Union.²

Policies conceived in distant Washington had to take their chance in the courts all the way down the system, and proverbially there was "many a slip 'twixt the cup and the lip." Justice depended on so many parts of the system working on its behalf, that Congress' legislative expertise and good intentions could quite easily be negated by a judge and court who came to interpret the Civil Rights Act, either ignorant of law, or hostile towards blacks. Aware of that possibility, the Republicans sought ways of avoiding the weakest part of the system - the state bench and bar. By expanding the jurisdiction of the federal courts, they gave the litigant an alternative means of securing justice, and the government a foot in the states to see to the execution of its laws - the execution of their reconstruction policies. The education of the Republican party in legislative possibilities, and/ the nature of the war, their own powers, the use of federal courts began very soon after the war began - with the Confiscation Acts of August 1861 and July 1862.

1. Gilbert Pillsbury to Chase, Sept. 24th 1867, Chase Papers LC Vol. 99 F.14959.
2. Hugh L. Bond to Chase, Nov. 13th 1865, Chase Papers LC Vol.96 f.14355.

C H A P T E R I I

CONFISCATION

Looking back on the Confiscation Acts of 1861 and 1862, Republican Senator John Sherman concluded that they had "little influence upon the result of the war".¹ Very little property was actually confiscated. The emancipation sections of the acts were quickly overshadowed by Lincoln's Proclamation, and the Thirteenth Amendment. Knowing this, historians have seemed unwilling to unravel the lengthy debates on an issue which consumed the energies of the Republican party for quite a long time. Those who have, notably James G. Randall, have come to the same conclusions about the ineffectiveness of the acts, as Senator Sherman, differing from him only in seeing confiscation as a vindictive, and ill-considered war measure.²

Yet it is perhaps because Republicans in the winter of 1861-1862 could not have known where events would take them, that the subject deserves close attention. Confiscation and emancipation provided the first real forum for a debate on the nature of the war. But because it involved asking questions about whether they were fighting enemies, or subduing traitors, persuading them back by offering them their old constitutional liberty, or reaching for a new constitutional liberty for all men as the fruits of victory, they were also talking about reconstruction. Perceptively, Republican Representative Albert G. Riddle recalled the first steps,

already the two Houses, twin giants, congenitally bound to act together, helpless when divided, all powerful when in harmony, were beginning to awaken and but half seeing in the twilight, were clumsily fumbling about, for the unaccustomed weapons, which they felt must be within reach somewhere.³

1. John Sherman, Recollections of Forty Years in the House, Senate and Cabinet (Chicago: The Wemer Co. 1895 2 vols) I pp.314-315.
2. James G. Randall, Constitutional Problems Under Lincoln (Urbana: University of Illinois Press, 1964) Ch.XII, hereafter cited as Randall, Constitutional Problems.
3. Albert G. Riddle, Recollections of War Times. Reminiscences of Men and Events in Washington 1860-1865 (N.Y.: G. P. Putnam 1895) p.75.

Confiscation was a belligerent right, exercised during the Revolutionary War with Britain, confirmed by the Supreme Court under Marshall,^{1.} and expounded by the publicists of the law of nations. Yet to admit that the United States was at war with an independent Southern Confederacy, was to recognise secession, and undercut the objective of restoring states to a Union from which such secession was argued impossible. But to exercise only the sovereign power, to conduct the war as a grand assize to bring individual traitors to justice was absurd. Looking to efficiency in waging the war, the Republicans in effect accepted the "dual status" theory later expounded by Justice Grier in the Prize Cases, that the United States possessed both belligerent and sovereign powers over the rebels.^{2.} The simplicity of the theory does not reflect the confusion of Congress in combining the two legal concepts in the one piece of legislation, as they did in the Confiscation Act of 1862.

Supporters of a vigorous confiscation policy, like Lyman Trumbull in the Senate, or Thomas Eliot in the House, could advocate it as a measure of co-ercion, justified under the war power of the Constitution, without waiving the sovereign power to deal with traitors by ordinary judicial process.³ The problem lay with the conservatives, Democrats and Republicans, who were more willing to use sovereign than belligerent powers over the Confederacy. It was not that they denied the power to confiscate - even slaves - in times of military necessity. But the power belonged to the executive as commander-in-chief of the armed forces, and confiscations made under his authority were temporary, the title reverting to the owner

1. Brown Vs U.S. 8 Cranch 143.

2. The Prize Cases 67 U.S. 635.

3. Leading speeches to this effect are those by Lyman Trumbull, Cong. Globe, 37th Cong., 942-944 February 25th, 1862, and Rep. Thomas Eliot, Ibid., p.2235 May 20th, 1862.

when the emergency was over. Otherwise, property could not be seized without due process, or compensation, or a jury trial over a certain amount. Rebels were subjects who retained their constitutional rights. If caught and found guilty of treason, then by the 1790 law, they forfeited their lives, but under the Constitution they kept their real estate. The Constitution stated that ".... no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted". Not all the rebels, conservatives like Browning and Cowan wisely insisted, should pay the ultimate judicial penalty. Looking to a forgiving peace, they sought to change the law of treason, to mitigate its penalty by providing alternatives of imprisonment and fines for lesser crimes, leaving discretion in its application to the courts. But since this was an exercise of sovereign power, its enforcement would have to wait until that power was re-established, and its courts open. It was no war measure. Thus, while armies were raised to shoot down rebels, compromise had to be made with those who would take lives, but not land and slaves without due process and the benefit of common law. That compromise, the Confiscation Acts of August 6th, 1861, and July 17th, 1862, was an unsatisfactory patchwork of the two concepts of sovereign and belligerent powers.^{1.}

A second area of confusion and conflict, was in the association of "confiscating" property and persons. The right to do both could be argued under Congress's war powers, of raising and supporting armies, making rules concerning captures on land and water, and doing all things necessary and proper to make these powers effective. Solicitor of the War Department, William Whiting argued that there was no legal distinction between different kinds of property, including slaves, in their liability to confiscation.^{2.}

1. Leading speeches on the conservative constitutional view are those by Edgar Cowan Ibid., pp.1050-1053, March 4th, 1862, and Orville Browning Ibid., pp.1136-1141, March 10th, 1862.
2. William Whiting, War Powers Under the Constitution (Boston: Lee & Shepard, 1871), p.60. Hereafter cited as Whiting, War Powers.

Some Republicans would argue that if an ox could be confiscated, why not a slave?¹. Nevertheless the acts made no attempt to confiscate slaves, or to transfer title in them to the government. The Confiscation Acts employed quite different machinery in the case of persons than property. The House argued emancipation in a separate bill from confiscation; the title of the original Senate bill was one "to confiscate the property and free the slaves of rebels". It was conservatives like Senator Garret Davis who lamented, "All that the Union slaveholders ask for slave property is, that it shall be treated by Congress and the Government and the Army impartially and equally like other property".².

For, while property was subject to condemnation in the federal courts, the freeing of the slaves rested on no judicial process. To have included slaves in confiscation proceedings would have been to recognise property in man, and make emancipation ineffective by subjecting slaves to the delays and uncertainties of judicial proceedings. The debate reveals quite clearly that the Republicans intended this emancipation to be irreversible, this national law to take precedence over all existing state or national law. And so in both acts they attempted to extend some kind of judicial guarantee to the freedman against re-enslavement. That they did so awkwardly and inadequately is not surprising. In this first contest between freedom and slavery, the legislators were entering a sensitive area of nation-state relations. Slavery existed under state law, until now immune from the government's interference. As yet there was no alternative of national responsibility for freedom. Congressmen were often confused therefore, about the legal questions involved in the emancipation sections of the

1. Fernando Beaman, Cong. Globe, 2 sess., App. pp.203-205, May 24th, 1862.

2. Ibid., p.1763, April 22nd, 1862.

Confiscation Acts. If title to the slave had not been transferred to the government, did it belong to the slave or the owner? In what courts, and against whom - the government or the slave - would an owner bring suit? Questions such as these remained with Congress until the Thirteenth Amendment permanently extinguished the owner's title to his slave.

Few Congressmen grasped the complexities of these issues when they passed the first Confiscation Act, which became law on August 6th, 1861. Most Republican members could accept the limited objective of confiscating property and divesting the title of owners to slaves actually used for insurrectionary purposes. There was no debate on the little-known judicial machinery which the act employed. After the President had caused property, anywhere in the Union, used for such hostile purposes, to be seized, its condemnation and forfeiture was to take place in federal district and circuit courts, and the property sold, the proceeds going to the Treasury. The proceeding was to be in rem, and not in personam - in other words an action against guilty property, not resting on the actual criminality of the owner. No jury trial was necessary to establish his guilt. The court was only concerned with the predicament in which the property was found. This machinery, drawn from revenue acts, was to become a major cause of disagreement in the debates on the second Confiscation Act. But in 1861, it passed unnoticed, perhaps because Congressmen foresaw no difficulty in the court's identifying the guilty predicament of property actually used in rebellion, or perhaps because they were so unfamiliar with the procedure.¹.

When Trumbull introduced the bill from the Senate Judiciary Committee

1. Defenders of the same procedure in the second Confiscation Act often made the point that there had been no objection to it in August, 1861. Representative B. F. Thomas, who had been on the Judiciary Committee, and voted for it then, opposed it in 1862, making the point that under the August act, the guilty predicament of property actually used in rebellion would be clear. Ibid., App. p.202, May 24th, 1862.

on July 20th, it contained no reference to slaves. The fact that his amendment to the bill, emancipating slaves employed in aiding or promoting insurrection, was adopted by 33 votes to 6 on July 22nd by a Senate deliberating the Johnson resolutions, can be partly attributed to the impact of the Bull Run disaster the previous day. Ten Eyck said that although he voted against the amendment in committee, the recent reverse had caused him to change his mind. Representative McClernand argued that if Confederate horses could be confiscated, why not slaves?¹.

But the judicial machinery for freeing a slave differed from that for seizing a horse. The House did not adopt Representative Kellogg's amendment to put the two on the same footing by "confiscating" claims to service or labour, rather than "discharging" the slaves in Senator Trumbull's original wording.² Section four of the Act, as finally amended by the House and accepted by the Senate, neither "discharged" nor "confiscated", but provided that when slaves were employed in any military or naval services whatsoever, the owner would forfeit his title to the slave, state or United States law to the contrary notwithstanding. Where the title went, was left unsaid. The slave, it seemed could not bring suit against his owner to establish his freedom under the act. It presumed escape. After that, the slave's guarantee of defending his freedom rested on the provision that it was sufficient answer to an owner's claim, to establish the use of the slave for the such hostile and insurrectionary purposes described in the act.³.

Conservative Senator Pearce noted that emencipation did not involve the legal sentence of any tribunal, and doubted what good it would do the

1. The amendment passed on July 22nd Cong. Globe, 1 sess., p.218 July 22nd, 1861; Ten Eyck's speech, Ibid., p.219 July 22nd, 1861; and McClernand's; Ibid., p.411 August 2nd, 1861.
2. Ibid., p.410 August 2nd, 1861.
3. 12 U.S. Stat. 319.

slave. He argued, quite perceptively in the light of later experience of conflict between federal and state law,

the state courts would undoubtedly set it at defiance. If you could cause the individual to be discharged in such a State, it is most probable that the State laws would immediately be put in operation against him and that he would be subjected to a procedure by which he would again be remanded to the condition of servitude.¹.

Against this, that section of the act making the fact of the use of the slaves for insurrectionary purposes an answer to the owner's claim for his services, seems a poor guarantee. In the priorities of the special session of Congress in the summer of 1861, the business of effectively suppressing the rebellion took precedence over emancipation, and much more so over a quest for its legal guarantees to the slave. The act passed both Houses with near-unanimous Republican support, and became law on August 6th, 1861. It was a limited undertaking, confined to places where the United States could assert its authority, and even there rarely enforced.² Senator Ben Wade later referred to it as "a scoff and a by-word of contempt throughout all rebelldom".³.

But events between August, 1861 and July, 1862, when Congress passed its second Confiscation Act, moved in favour of those who advocated sterner measures. Increasing military involvement meant that more slaves were coming behind Union lines. General Butler's use of the term "contraband" to describe those slaves the army had captured at Ft. Monroe, helped popularise the connection between emancipation and confiscation as twin war measures. Edward L. Pierce wrote in November, 1861

1. Cong. Globe, 37th Cong. 1 sess., p.219, July 22nd, 1861.
2. Enforcement of the act is best covered in Henry D. Shapiro, Confiscation of Confederate Property in the North (N.Y.: Cornell University Press, 1952) pp. 15-26.
3. Cong. Globe, 37th Cong., 2 sess., p.2203, May 19th, 1862.

the venerable gentleman who wears gold spectacles and reads a conservative daily prefers confiscation to emancipation His whole nature rises in insurrection when Beecher preaches in a sermon that a thing ought to be done because it is a duty, but he yields gracefully when Butler issues an order commanding it to be done because it is a military necessity.¹.

At a time when public opinion was clamouring for action from General McClellan, it seemed that he and Halleck were using the army for little more than rounding up escaping slaves to return to their masters. By contrast, generals like Fremont, Butler and Hunter, who freed slaves and confiscated property, won popular approval. They also won the tacit support of the War Department. Indeed, General Townsend claimed that Secretary of War Stanton had prepared a proclamation declaring forfeit all slaves and other property of persons engaged in rebellion. But because of confusion and friction over such military orders, he instead "... instigated the Second Confiscation Act".².

If the North was slow to take the war seriously, the South was not. In August 1861, the Confederate Congress passed a Confiscation Act which was less sensitive towards Northern property rights than the Union Congress' policy proved to be towards the rebels. Confederate Attorney-General Judah P. Benjamin proceeded to enforce it vigourously against loyal men.³. To the North, the policy of confiscation and emancipation, as weapons against a rebellion based on land and slaves commended itself more and more. It would also help to raise money to defray the cost of the war - though this was only a secondary argument.

Responding to these events, and the rising tide of public opinion in favour of emancipation, both Congress and the President moved to a more

1. Edward L. Pierce, The Contrabands at Fortress Monroe, Atlantic Monthly, Vol. VIII, November, 1861.
2. Benjamin P. Thomas and Harold M. Hyman, Stanton: The Life and Times of Lincoln's Secretary of War (N.Y.: Alfred A. Knopf, 1962), p.234-246.
3. The Confederate Confiscation Acts are printed in William Whiting, War Powers, pp.411-424; James G. Blaine in Twenty Years of Congress (Norwich: The Henry Bill Publishing Co., 1884, 2 vols.) I pp.348-349 cites it as a reason for the passage of a sterner bill in 1862.

vigorous policy. Republicans in the second session of the Thirty-seventh Congress passed an act for emancipation of slaves in the District of Columbia, an additional article of war prohibiting the armed services from returning fugitive slaves, and a resolution to aid emancipation in the border states. Though Lincoln's interest in emancipation was tempered by his concern for border state opinion, there was nothing to suggest that he was hostile to Congress's right to legislate on confiscation. Supporters of such a policy, like Loomis in the House of Representatives, and Wilkinson in the Senate could point to the fact that although Lincoln asked General Fremont to modify his proclamation of August 30th, it was to conform to the Confiscation Act of 1861.¹ Writing to Senator Browning of Illinois, the President objected to Fremont's permanent confiscation of titles to property and slaves as a political action, rather than temporary orders under military necessity. He said that he was not denying the propriety of Congress passing such an act, or even saying that as a member of Congress he would not vote for it, but

what I object to is that I, as President, shall expressly seize and exercise the permanent legislative functions of the government.²

By March 1862, Lincoln was making moves towards the border states to persuade them of the benefits of gradual, compensated emancipation. And although he revoked General Hunter's emancipation proclamation of May 19th, 1862, he took the opportunity of appealing to the border states to emancipate in the light of these "signs of the times".³

It was against this background that Congress debated the second Confiscation Bill. Despite public opinion in favour of strong measures,

1. Cong. Globe, 37th Cong., 2 sess., App. p.180, May 23rd, 1862; Ibid., pp.2990-2992, June 28th, 1862.
2. Roy P. Basler (ed.), Collected Works of Abraham Lincoln (New Brunswick: Rutgers University Press, 1953, 9 vols), IV pp.531-533 September 22nd, 1861. Hereafter cited as Lincoln, Collected Works.
3. Proclamation to the border states, Ibid., V pp.145-146, March 6th, 1862; revocation of Hunter's proclamation, Ibid., V pp.222-223, May 19th, 1862.

it took six months of debate, two Judiciary Committees, two Select Committees, and a Committee of Conference of the two Houses to produce the act. The final compromise was the bill which became law on July 17th, 1862. The first four sections related to punishments on conviction of treason, providing alternative, lesser penalties at the court's discretion for the crime of inciting, assisting or engaging in rebellion. This section, dealing with persons convicted of crime by regular judicial process, was an exercise of the sovereign power. It was also the contribution of a divided Senate to the bill. Sections five to eight set out procedures for the condemnation and forfeiture of the property of designated classes of rebels immediately after the passage of the act, and of all rebels who did not return to their allegiance after sixty days. As in the August 6th act, the jurisdiction of the federal courts was extended to these in rem proceedings against property. The guilt of the owner was not to be judicially ascertained. That part of the act rested on the war powers, later confirmed by the Supreme Court in *Miller Vs U.S.* in 1870.¹ It also represented the House contribution to the act. Sections nine to twelve dealt with slaves. Slaves of persons thereafter engaged in rebellion, escaping behind Union lines, deserted or captured were to be deemed "captives of war" and declared "forever free". Owners reclaiming their services were required to prove not only the validity of their claim, but past loyalty to the Union. A further section authorised the President to make provisions for the voluntary colonisation of slaves freed by the act. Lacking judicial proceedings to emancipate, it was, therefore, an exercise of the war powers. These sections, and an authorisation to the President to grant amnesty to rebels, represented areas of compromise between House and Senate. The act concluded with a grant of full power to the federal courts to carry these powers into effect.²

1. *Miller Vs. U.S.* 78 U.S. 268 (1870).

2. For the provisions of the act see 12 U.S. Stat. 589.

Senator Trumbull never intended such a patchwork affair. On January 15th, he reported a bill from the Senate Judiciary Committee, to which seven confiscation proposals had already been sent in the opening week of the session. Explaining this bill to the Senate on February 25th, Trumbull stressed that it was a measure for the vigorous suppression of rebellion, based not on "necessity" but on powers derived for this purpose from a quite adequate Constitution.¹ But it had nothing to do with treason. Respecting the constitutional limitation^{on}/attainder of treason working corruption of blood or forfeiture beyond the life of the person attainted, the bill proposed to leave traitors to the judgment of the courts where they could be tried. Where they could not be reached, he invoked the right of confiscation, by the army in disloyal areas, and by in rem proceedings in district courts where their property was situated in the loyal states. This procedure, already used in the August 6th act, was borrowed from revenue laws which extended admiralty jurisdiction over seizures of smuggled goods, without trial of the owner for crime. In the case of *The Palmyra* in 1827, Justice Story's made just the distinction between the concept of guilty property and the trial of persons, which Trumbull now made between confiscation and treason proceedings when he said,

the practice has been, and so the court understands the law to be, that the proceeding in rem stands independent of, and wholly unaffected by, any criminal proceeding in personam.²

Although Trumbull now proposed the extension of federal court jurisdiction to the condemnation, forfeiture and sale of property under a confiscation law, there was to be no enlargement of the courts' discretion. There were to be no juries, no trial of persons, and the bill mentioned

1. Cong. Globe, 37th Cong., 2 sess., pp.942-943, February 25th, 1862. The text of 5 151 is printed in the Globe, Ibid., p.1758, April 22nd, 1862.

2. *The Palmyra* 12 Wheaton 1 (1827).

no crimes. It was for Congress, not the Executive, the courts, or the army, to get a law on the subject. In an argument similar to that which Republicans would later draw on from the Supreme Court opinion in *Luther Vs Borden* to support congressional reconstruction policy, Trumbull cited Chief Justice John Marshall's opinion in *Brown Vs U.S.* that the right to confiscate resided in the sovereign power, and that the judicial department must give effect to its will.¹ Trumbull concluded

it does not lie in the mouths of the courts to question the right of the sovereign power to confiscate property. Then it resolves itself into a question of policy.²

There was a war on. This was essentially the case of those who ranged behind Trumbull as he opened the six-month struggle for an efficient law. Immediately, it became quite clear that the issue was a divisive one for the Republican party, as the debate opened out to a conflict over the nature of the war, rebel status, legislative powers, and reconstruction.

Conservative Senators Edgar Cowan of Pennsylvania, Jacob Collamer of Vermont, and Orville Browning of Illinois, were the most prominent opponents of the bill -- though not, they claimed, of confiscation. They agreed that under certain circumstances, it was necessary to confiscate under the jus belli. But to legislate on the subject, was to interfere with the President's sole power as commander-in-chief, to authorise such seizures by the army. Titles to property, of course, remained unaffected by temporary confiscation.³ A writer in the Monthly Law Reporter argued that all "respectable writers" recognised a broad distinction in the law

1. *Luther Vs Borden* 7 Howard 47 arose out of the Dorr rebellion and related to Congress' powers to determine what was a "republican form of government". Chief Justice Taney expressed the opinion that it was a political question to be decided by Congress; *Brown Vs U.S.* 8 Cranch 143 - opinion rendered by Chief Justice John Marshall in 1814, on a case concerning seizure of British cargo at the outbreak of the 1812 war.
2. Cong. Globe, 37th Cong., 2 sess., p.944, February 25th, 1862.
3. See speeches by Cowan, *Ibid.*, p.1053 March 4th, 1862; Browning, *Ibid.*, pp.1136-7, March 10th, 1862; and Collamer, *Ibid.*, pp.1808-1810 April 24th, 1862.

of nations between the capture of real and personal property. Only the latter could be seized under the power of the commander-in-chief. Title to land could not be extinguished without the constitutional safeguards of due process, jury trial and compensation.^{1.}

The proposed in rem proceeding violated the constitution on all these grounds. Senator Browning referred to "this newly-invented, India-rubber in rem proceeding". His colleague Collamer called it "hocus pocus". Garret Davis and Edgar Cowan both argued that the property itself yielded no clue to its guilt from appearances, without the trial of persons. Trumbull's bill, they said, was in fact about the guilt of persons - but it was a legislative assumption of this guilt, Congress having taken upon itself the functions of judge and jury.^{2.} Senator Carlile added that, in so reducing the discretion of the court,

it would seem as if the authors of the bill, conscious of the unconstitutionality of the proposed measure, purposely framed it so that its constitutionality could not be pronounced upon by the Supreme Court.^{3.}

It did, he said, what the Constitution prohibited - it executed itself.

The conservatives foresaw a different role for the courts. Clever in rem proceedings, they said, could not disguise the crime they were talking about. Only the courts could try the guilt of traitors. The accused was entitled to the safeguards of criminal law, and if convicted, to the constitutional prohibition on forfeitures of real estate beyond life.^{4.} It was not that they proposed a mass hanging. Since their reasoning was based firmly on the idea of not offending future neighbours, by taking their property, or their lives, they distinguished always between the guilty

1. Anon. The Power of Congress to Confiscate and Emancipate, Monthly Law Reporter, Vol 24, June, 1862.
2. Comments by Browning, 37th Cong. p.1859 April 29th, 1862, Collamer, Ibid., pp.1808-1810 April 24th, 1862, Davis, Ibid., p.1762 April 22nd, 1862 and Cowan, Ibid., pp.2959-2963 July 27th, 1862.
3. Ibid., p.1157 March 11th, 1862.
4. See especially the speech by Democrat Henderson, Ibid., p.1573 April 8th, 1862, and Republican Cowan, Ibid., pp.1052-1053 March 4th, 1862.

few who led the rebellion, and the "deluded masses" who followed.^{1.} To all they would offer their constitutional rights! This view would of course have negated confiscation as a policy for fighting the war. The courts in most rebellious districts were closed.

Point for point, supporters of a vigorous policy met these objections. Though they claimed the right of confiscation as legislative rather than executive, it did not necessarily imply conflict with Lincoln. To avoid the problems of each commander on the spot formulating his own policy, and to ensure the permanent transfer of title, Republican Senators like Trumbull, Howard and Morrill wanted a law on the subject. Indeed, Senator Howard saw the bill as coming to the rescue of the President in putting down the rebellion.^{2.} Solicitor William Whiting of the War Department recognized the powers of both branches of the government to confiscate and saw no need for conflict.^{3.} Senator Henry Wilson of Massachusetts, expressed a familiar Republican sentiment when he said he would "not allow any discrimination anywhere but in the law".^{4.}

The procedural guarantees of criminal law to the individual had to be weighed against the business of putting down a rebellion which threatened to destroy all law. They were at war, and the Constitution did not restrict them to fighting it according to common law. If that were the case, said William Whiting, the President ought to convert his armies into lawyers and juries and send "Greetings" instead of rifle shot.^{5.} Neither did the Constitution have to be thrown overboard. For, said a writer in the Monthly Law Reporter the "salus populi suprema lex applies to constitutional as to all other law". Whatever safeguards the Constitution contained, as to treason trials, due process, jury trials and so on, these existed side

1. A recurrent theme in conservative speeches, but typically expressed by Browning, Ibid., pp.1136-1137 March, 10th, 1862.

2. Ibid., pp.1714-1720 April 18th, 1862.

3. William Whiting, War Powers, pp.27-28.

4. Cong. Globe, 37th Cong., 2 sess., p.1897 May 1st, 1862.

5. William Whiting, War Powers, p.50.

by side with specific powers to put down rebellion. The document, he said should be understood as a whole, concluding

cry not peace, peace when there is no peace. Let us not hear the special pleading of the courts of judicature in the counsels of war.¹

Besides, Charles Sumner, Radical Senator for Massachusetts, was one of several Republicans who defended in rem proceedings as quite proper procedural due process in courts of law, and claimed that the rights which the federal government exercised against enemies did not negate their rights towards them as criminals, where common law safeguards would apply.² But, they insisted - this bill was not about treason.

If less sensitive towards the peacetime constitutional rights of rebels in time of war, supporters of a vigorous confiscation policy were no less aware than the conservatives, of the future role of rebels as neighbours and of the distinctions between the leaders and the led. The bill was amended on April 26th to make that distinction.³ Malice was not their intention. As Senator Howard said, "We conquer but to save".⁴ To the bill's supporters, it was a question of policy to accomplish a "democratisation" of the South which would benefit those with no active interest in preserving the rule of a privileged class. It was a rebellion led by landowners and slaveowners, with vested political and social privileges. Although there were many Southerners, quite apart from four million slaves, with no such interests or privileges, they could not take advantage of the technical democracy of having a vote where traditions of political leadership were firmly rooted in the hereditary ownership of land and slaves. Discussing the relationship between the war and democracy, Senator Morrill

1. Anon. The Right to Confiscate and Emancipate, Monthly Law Reporter Vol.24 September, 1862, p.648.

2. Cong. Globe, 37th Cong., 2 sess., pp.2188-2196 May 19th, 1862.

3. Ibid., p.1814 April 24th, 1862. The vote was 26 to 12.

4. Ibid., p.1720 April 18th, 1862.

proposed breaking the power of the ruling class by confiscation, and all other means. But to the people they had misled he would

give the assurance of amnesty, protection, and the privileges of free institutions, free schools, homesteads, even-handed justice and equality of political rights, privileges that enable and elevate the masses into the dignity of a sovereign people, and give to popular government a secure support.^{1.}

Senator Howard also talked about the parcelling out of these huge estates to small proprietors, drawing a comparison with confiscation during the French Revolution in teaching the world

that liberty and equality are no dream, and that there is no patriotism so strong as that which arises from a sentiment of brotherly kindness, and a consciousness of equality before the law.^{2.}

But these homestead suggestions were not followed up in practical terms in the Confiscation Act. In June 1862, an act for the collection of taxes on abandoned property proposed the sale of land taken under it, to loyal citizens and members of the armed forces. But Republicans like Charles Sumner later regretted that confiscation had been a lost opportunity for making lands available to freedmen. On this subject he wrote in 1865, "From the beginning I have regarded confiscation only as ancillary to emancipation".^{3.} But, quite apart from the way in which confiscation measures were watered down before they became law on July 17th, 1862, Sumner's idea of land for the freedmen, was never crucial to the debate. It lingered as the vision of a number of Republicans.

It was difficult enough to get a consensus on emancipation. Senator Browning would go so far as to admit that slaves could be confiscated, where military necessity demanded it.^{4.} But like temporary seizure of

1. Ibid., pp.1074-1077 March 5th, 1862.

2. Ibid., p.1715 April 18th, 1862.

3. Sumner to John Bright, March 13th, 1865, quoted in Edward L. Pierce, Memoirs and Letters of Charles Sumner (London, 1878 4 vols.) IV p.229.

4. Cong. Globe, 37th Cong., 2 sess., pp.1136-1137 March 10th, 1862.

property, there was no transfer of title. State laws, and state institutions were inviolable on any more permanent basis. Yet the Judiciary Committee's bill was drafted with a view to the non-return of the slaves freed by it. They were, after the commission of the act of forfeiture by the person claiming this service, "discharged therefrom, and become forever thereafter free persons". The onus was put on the slaveowner to prove both legitimacy of his title, and his loyalty during the rebellion. Once again, while confiscation and emancipation were argued together for the sake of self-preservation, urged under the same powers to suppress rebellion, and uttered in the same breath by supporters of both, the connection was deceptive. Senator Collamer charged that confiscation was being used only as a vehicle for abolition, and went on to draw attention to the difference in procedure under the proposed bill,

it is not provided that these slaves are to be taken or brought into any court or in any way adjudicated upon. There is not any proceeding in rem required upon them nor any other proceeding. If that is not depriving a man of his interest in a slave without any conviction of himself, and without any process of law, and operating as a punishment on him, and yet leaving him to be hanged, I do not understand it.¹

He was right. The government was not assuming title to the slave, and there was no question of proceeds from his sale going to the Treasury. Clumsily, Republicans were striking at state law, the support of slavery, without defining clear alternatives in federal law. What was emerging in the debate, however, were two quite different philosophies of constitutional law. Against what Browning, Cowan, Collamer and others were saying about depriving rebels of land and slaves without due process, other Republicans

1. Ibid., p.1811 April 24th, 1862.

were posing a different interpretation of due process, and deprivation of rights. Senator Howard argued that slavery existed under local law which the government need not observe in time of war. The slave was free, he said

for the local law having ceased he resumes his natural right of freedom, of which he cannot afterwards be deprived by the Government of the United States.¹.

For, while some Republicans would argue from Vattel, that whether slaves were considered property or men made no difference in their liability to "confiscation", in practice it made a considerable difference as to whether the owner or the owned had the benefit of due process. Charles Sumner put the case for the slave,

the slaves of rebels cannot be regarded as property, real or personal. Though claimed as property by their masters, and though too often recognized as such by individuals in the Government, it is the glory of our Constitution that it treats slaves always as "persons: At home, beneath the lash and local laws, they may be chattels; but they are known to our Constitution only as men".

And, Sumner concluded; "Being men they are bound to allegiance and entitled to reciprocal protection".².

Yet, what flimsy 'protection' they were being offered - hardly enough to justify the conservative response that the federal government was trampling state laws and constitutions underfoot.³ Any owner, seeking to enforce his claim to an escaped slave's service, had to establish his title and his loyalty. There was some confusion in Congress as to the precise effects of this section of the act. In April 1862, writing of the effects of martial law, the distinguished jurist Joel Parker argued that if a slave availed himself of the opportunity to escape, the master's claim would then be against the government, whose military operations

1. Ibid., pp.1714-1720 April 18th, 1862.

2. Ibid., pp.2188-2196 May 19th, 1862.

3. See comments to this effect by Senator Carlile, Ibid., p.1885 April 30th, 1862.

terminated the relationship, rather than against the slave. He could make no claim under the Fugitive Slave Law. But, he concluded, if the slave remained, and martial law ceased, emancipation would be temporary. The slave could assert no right of freedom under the laws of the United States.¹ What effect the proposed confiscation bill would have, is not clear, and was not clear at the time. The provision recurred in Senator Collamer's substitute bill. Unlike Joel Parker, he saw it as "a part, an addition, an amendment, of the fugitive slave law".² Charles Sumner, however, had insisted on the form of that section of the bill including the words "the trial" of the owner's claim to service, deliberately to avoid recognition of the Fugitive Slave Law.³ Either way, it was no sure guarantee of freedom. Like the August 6th act, it still presumed escape. It did not seem that a slave could sue for freedom under the act, although of course this was the necessary price of avoiding the delays and impracticalities of making emancipation dependent on the decision of a court, as property was. But at least they were making some attempt to ensure that once the slave took his freedom, he kept it.

Many would have preferred to remove the problem out of sight altogether. One section of the proposed measure contained a provision which was recurrent in nearly all the other emancipation measures they considered - the voluntary colonisation of slaves freed under the act. Colonisation was enjoying some support in Congress, and an appropriation for that purpose had been included in the act to emancipate slaves in the District of Columbia in April 1862. The President's support was well-known. It had, too, a practical advantage in drawing some moderate and conservative

1. Joel Parker, Constitutional Law, North American Review, Vol. XLIV April, 1862.

2. Cong. Globe, 37th Cong., 2 sess., p.1812 April 24th, 1862.

3. Ibid., p.946 February 25th, 1862.

Republican support, both because of antipathy to Negroes in their constituencies, and because it seemed less of an interference with the institution of slavery when state laws requiring the removal of freed slaves beyond their borders were at least partly respected. More honourably, Trumbull thought that abroad, Negroes would enjoy the rights and privileges of free men denied them at home.¹ But there was a good deal of opposition from Radicals on the grounds of principle. Senator Pomeroy suggested it would be more sensible to deport the slaveowners, whose presence would be least missed!² Democrats took the opportunity of accusing the moderates of hypocrisy in their philanthropy, and the radicals of a more sinister design to amalgamate the races! But on the whole their antipathy to taxation almost rivalled their antipathy to Negroes. Two attempts by Senators Willey and Doolittle to provide sufficient funds for the project were unsuccessful.³ An act, passed on July 16th, 1862, did include slaves freed under the Confiscation Acts in a general appropriation of \$500,000 for the purpose of colonisation. Nevertheless it did not seem that Congress in 1862 was seriously willing to finance what would have been an enormous task. Nor were they as yet ready to face the more positive questions about the nature of freedom, how to effect it, and how to maintain it. Most Republicans at this time, including those who voted for colonisation, believed that the title of the slave belonged to the slave as a man, that as a man he possessed natural rights of life and liberty; that the government had a duty to protect him. But there was a war to be won, before the need for more positive definitions would have to be met. None of the many substitute

1. Ibid., p.1604 April 10th, 1862.

2. Ibid., p.945 February 25th, 1862.

3. Ibid., p.1604 April 10th, 1862; Willey later withdrew the proposal. Also, Doolittle's proposal, and speech in favour of colonisation, Ibid., App. pp.94-101 April 11th, 1862.

21.
bills offered to the Senate in April proposed any firmer guarantee for freedom.

By April, the Senate was reaching deadlock. It seemed that every Senator who dissented from Trumbull's bill had written his objections in the form of a substitute bill, varying from Harris' moderate proposal extending in rem proceedings to areas in rebellion as well as in loyal areas, to Cowan's proposed outlawry procedures, or Collamer's bill imposing alternative punishments for treason, and forfeiting lands through fines.¹ Of this last proposal, around which conservative Republican support was crystallizing, Trumbull objected, "... just call it a fine, and you may take the real estate forever". Treason proceedings, he argued, were not what was needed to fight a war. The enforcement of such a bill as Collamer's would await peace, and the opening of the courts in rebellious districts. He went on,

I believe that no bill is worth the paper on which it is written that hesitates to take the property of traitors and rebels before they are convicted in your courts of justice. Why, sir, it is because you have got no courts of justice in the South that this war is upon us.²

Such was the confusion in attempting to cope with alternatives, and Trumbull's frustration with his conservative colleagues, that the Senate finally accepted Clark's motion to refer all the proposals to a select committee. Attempts to do this had begun as early as March 14th, but Browning recorded in his diary that this move, in caucus, had been defeated by the "ultras".³ A further attempt by Cowan was defeated on April 30th,

1. Sherman's substitute bill is published in the Globe, Ibid., p.1604 April 10th, Harris' p.1655 April 14th, Collamer's p.1814 April 24th and Cowan's informal proposal, p.1870 April 30th, 1862.

2. Ibid., p.1959 May 6th, 1862.

3. Theodore C. Pease and James G. Randall (eds.) The Diary of Orville Hickman Browning (Springfield: Illinois State Historical Library, 1929, 2 vols.) I p.534. Hereafter cited as Browning, Diary.

and agreement on May 6th to Clark's proposal was reluctant.¹ Trumbull's refusal to serve on the committee deprived it of the leading advocate of an effective bill. The new committee was chaired by Clark, who had distinguished himself by saying almost nothing on the subject. On May 14th, the battle for an efficient confiscation measure was finally seen to be lost in the Senate when Clark reported the Select Committee bill.

It was no war measure, no confiscation bill, but one to modify the punishment for treason through imprisonment, the loss of slaves, and fines, which on non-payment could result in forfeiture of property beyond life - the choice of penalty being left to the discretion of the court. Though property could be seized, transfer of title had to await judicial proceedings against the owner when he was caught, and the courts opened. An emancipation proclamation could be issued at the discretion of the President.² To Trumbull, Wade and others, this was a poor substitute for an efficient bill, not designed it seemed, to be executed, and only to be voted for as a last resort.³ It raised the problem of finding loyal judges and juries in rebellious districts, both problems avoided in Trumbull's bill by in rem proceedings in loyal areas. Trumbull asked,

and do you want to put it in the power of the judge of the district of Georgia, who yet holds his office, as I was informed to-day, and who has probably done no act for which you can impeach him - do you want to put it in his power to say whether he shall fine and imprison Mr. Toombs, or whether he shall make him answer to the scaffold for the atrocious crimes he has committed against his country?⁴

The question derived added force from the fact that Congress was

1. Cowan made two such proposals, Cong. Globe, 37th Cong., 2 sess., p.1846 April 28th, Ibid., p.1856. The motion was defeated on April 30th by 22 votes to 18. Ibid., p.1886. The final vote to refer it there was 24 in favour, 14 (all Republicans) against. Ibid., p.1965, May 6th, 1862. Though Charles Sumner came round to the idea that it was a necessary move, in view of the mass of alternatives, Trumbull had no faith in the venture, refusing to serve on the committee. He was replaced by Harlan. Ibid., p.1991, May 7th, 1862.
2. The bill is printed Ibid., p.2165 May 16th, 1862.
3. Comments by Trumbull, Ibid., p.2226 May 20th, 1862, Wade, Ibid., p.2203 May 19th, 1862.
4. Ibid., p.2172 May 16th, 1862.

at the same time impeaching a United States district court judge, West H. Humphreys of Tennessee, whose crimes included enforcing the Confederate Confiscation Act.¹ Debate on the substitute bill continued sporadically until May 21st, when Congress voted by 33 votes to 9 to abandon it in favour of the tax bill.²

Meanwhile the House of Representatives faced the same issues during these months of debate, in a separate attempt to legislate on confiscation and emancipation. Where the Senate Judiciary Committee had at least succeeded in reporting a bill, the House Judiciary Committee, to which several proposals had been referred in December 1861, reported only their disagreement on March 20th.³ John A. Bingham attempted to get House consideration of two substitute bills, one to institute in rem proceedings in federal courts against rebel property, the other to emancipate the rebels' slaves. The scant debate does illustrate a little of the confusion in Congress regarding the relationship between confiscation and emancipation proceedings. Though Bingham resisted the efforts of his colleague Porter to have the slaves included in the in rem procedure,⁴ doubts were expressed by Schulyer Colfax of Indiana that the courts would nevertheless associate property and slaves in the one process. Recalling the shame of the Supreme Court's pronouncement on slave status in the Dred Scott decision, he argued that such a construction should be settled by Congress and clearly put beyond the scope of the court's jurisdiction.⁵ When the Democrat McKee Dunn took up the argument, Bingham replied simply that although he regretted the Chief Justice's opinion, it was only an opinion, obiter dicta, not law - and it marred the career of a fine judge.

1. Report on the Impeachment of Judge West H. Humphreys, House Reports No.44 37th Cong., 2 sess. Vol. 3, and articles of impeachment, House Miscellaneous Documents No.76 37th Cong., 2 sess.
2. Cong Globe, 37th Cong., 2 sess., pp.2253-4 May 21st, 1862.
3. Ibid., p.1303 March 20th, 1862.
4. Ibid., p.1768 April 22nd, 1862. Bingham objected that his bill was about persons, not property.
5. Ibid., p.1789 April 23rd, 1862.

Bingham was "... willing to forgive, and would, if I could, forget his error of judgment" - but he would not make it an excuse for not legislating.¹ The House accepted Bingham's separate confiscation bill on April 22nd, 1862. The following day, it was unexpectedly tabled by 56 votes to 49 in a half-empty House.² The emancipation bill was not brought to a vote at the same time.

Like the Senate, the House had reached deadlock. Representative Olin's resolution to refer the matter to a select Committee was adopted by 90 votes to 31 on April 24th. Olin declined to serve as chairman, and Thomas Eliot of Massachusetts became the chairman of what Wickliffe described as "a well-selected committee", which in contrast to the Senate Select Committee, bore a more radical tinge than the original Judiciary Committee.³ Thus, on May 14th, the same day that the Senate produced its weak substitute for Trumbull's bill, the House committee presented from the twenty bills under consideration two separate measures for emancipation and confiscation which revived hopes for an efficient bill. They were debated together, confused with each other, and voted on separately.

The Confiscation Bill designated classes of rebels, whose property, wherever found could be forfeited, along with all rebel property in the loyal states. After a 60-day period of grace for rebels not listed in the bill to return to their allegiance, the President was authorised to confiscate their property too, anywhere in the Union. Forfeiture was again to be accomplished by in rem proceedings in the federal courts.⁴

Eliot and Noell, of the select committee, led the debate along

1. Ibid., p.1793 April 23rd, 1862.
2. Ibid., p.1771 April 22nd, p.1788 April 23rd, 1862.
3. The vote was taken on April 24th, 1862, Ibid., p.1820. The new committee had several strong friends of confiscation: Eliot, Hutchins, Beaman, Sedgwick and Noell (usefully, from the border states); Ibid., App. p.260 May 26th, 1862.
4. The bill is printed Ibid., pp.2232-2233, May 20th, 1862.

Senator Trumbull's well-worn path, disclaiming the bill as one to punish persons for treason, or any other crime. It was no attainder, simply a procedure - due process in its own right - against property. It was justified under the constitution and the war power, but left the sovereign power intact to deal with rebels. The ground by May of 1862, was so well-worn - a fact which neither deterred Congressmen from a relentless duplication of arguments, nor made in rem proceedings any clearer for them. To Babbitt, a friend of the bill, it meant the exclusion of a jury from the proceedings. His colleague Noell claimed that, according to Brightley's Digest, a jury trial was allowed if a man made a personal appearance.¹ One way or the other, the arguments did not convince conservative Benjamin F. Thomas that justice would be done. As a member of the Judiciary Committee, he had voted for the August 6th act which included the same procedure, but had now awakened to the scope of it, lamenting,

Magna Carta is soiled and worm-eaten. The Bill of Rights, the muniments of personal freedom, habeas corpus, trial by jury, what are they all worth in comparison with this new safeguard of liberty, the proceeding in rem?².

Congress may have been influenced by the co-incidence of the debate with the publication, in May, of the Report of the Joint Committee on the Conduct of the War. Representatives Loomis, Arnold and others used atrocity evidence to back up their arguments for sterner measures.³ On May 26th, 1862, the measure passed the House comfortably by 82 votes to 68.⁴

The bill to emancipate, significantly perhaps on a separate vote, was narrowly defeated on the same day by 78 votes to 74.⁵ Though

1. Among the more specific speeches in defence of these procedures, are those by Eliot, Ibid., pp.2233-2237 May 20th, Noell's, Ibid., pp.2237-2240, May 20th and Babbitt's, Ibid., App. pp.166-168, May 22nd, 1862.
2. Ibid., App. p. 220 May 24th, 1862.
3. Sargent, Loomis and Arnold all cited this evidence, Ibid., App.pp.175-179, 179-182, 182-184, May 23rd, 1862.
4. Ibid., pp.2360-2361, May 26th, 1862.
5. Ibid., p.2363 May 26th, 1862.

there was mounting emancipation sentiment in both Congress and the country, more conservative Republicans were still hesitant on the question of interfering with an institution, for so long surrounded by constitutional taboos. Again, the measure differed from its companion bill on confiscation, in that there were no judicial proceedings for divesting the owner of his title to the slave, or transferring it elsewhere. It simply declared the slaves of those engaging in rebellion forever free- that freedom guaranteed only by provisions making the insurrectionary activities of the owner an answer to suit for re-enslavement and requiring him to prove both ownership and loyalty.¹ Again there is evidence that Republicans intended that this law should permanently supercede all other law on slavery, and that the black man's title to himself should be inalienable. The Constitution, said Republican Hanchett, was the means of executing the Declaration of Independence, so that "American liberty is the rightful, God-given heritage of man, not because he is an American citizen, but because he is a man".² By whatever means the slave might win his freedom out of war, Samuel Fessenden was equally sure that it could neither be taken away nor regarded as anything less positive than freedom with rights and responsibilities. He said,

we propose to let them know that every husband may have his own wife, that every wife may have her own husband; that all parents may have their own children; that they may earn wages, and receive and demand wages, if withheld, which their labor entitles them to receive; that they may have all the benefits accruing from living under the administration of just laws, and that they may breathe God's free air as white men breathe this air.³

John A. Bingham was another who maintained the right of any natural born citizen to protection in his fundamental rights - as an American future.⁴ Not all Republicans believed it possible, and would have preferred

1. The bill is printed Ibid., pp.2232-2233 May 20th, 1862.

2. Ibid., App. p.209 May 26th, 1862.

3. Ibid., App. pp.148-150 May 22nd, 1862.

4. Ibid., App. p.193, May 24th, 1862.

that the freedmen be left to secure these rights in Africa or Central America. As in the Senate, an attempt was made to shelve the issue of race relations, by authorising the President to colonise slaves freed by the act, on a voluntary basis. But such a scheme, promoted by Francis Blair, and which included putting freedmen under a system of regulations until such arrangements could be made, was defeated 95 votes to 52 by a combination of Radicals and Conservatives.^{1.}

As in the Senate, however, the time had not come for serious consideration of civil rights. Behind the rhetoric lay confusion on the more pressing question of how to make emancipation effective against the owner's claim. Democratic Representative Clements insisted that since state laws remained in force, only the courts, not Congress, could take a decision on the validity of title. He asked,

the question will arise as to where the title to the slave exists. Is it in the rebels, in the Federal Government, or in the slaves themselves? This is a question, as the laws now are, that can only be decided by our courts. The Government cannot own slaves, and has no right to sell them. Then has a slave a right to bring suit against his rebel master for his freedom, or what right has the rebel master to claim his return under the laws he has taken up arms to destroy?^{2.}

But the House did consider these questions more fully than the Senate, and E. P. Walton proposed a bill which included a legal guarantee of freedom. Unfortunately it was attached to a confiscation measure which was more conservative than the select committee bill preferred by the House. Walton's bill provided that slaves freed under judicial proceedings for treason, or by a proclamation issued at the discretion of the President, should have a remedy in the federal courts, against re-enslavement. The court was to issue the slave with a certificate, valid in all courts, state

1. Ibid., p.2361 May 26th, 1862.

2. Ibid., App. pp.191-193 May 24th, 1862.

or federal. Any person thereafter illegally seized was to have his release on a writ of habeas corpus issued by any court or judge of the United States. The judge acting on the writ was to commit the would-be claimant for kidnapping. Without such a guarantee, Walton said, "Emancipation will be in vain if every slave state may again fasten the chain we have broken". But the conservative bill to which it was attached was defeated on May 26th by 121 votes to 29, the same day on which the Select Committee's emancipation bill was defeated.^{1.}

On Representative Porter's initiative, however, the bill was recommitted to the Select Committee on June 4th, 1862. The new bill reported by Eliot on June 18th narrowed the scope of emancipation to conform to the property section of the confiscation bill they had just passed. But it drew its enforcement procedures from Walton's bill, and a similar proposal by Representative Morrill. The President was to compile lists of the slaves affected by the act, and return them to the federal district courts. If owners did not appear in court to claim their slaves, or if they failed to prove their loyalty, the court was to issue certificates of freedom, valid in all courts. Conscious of the lack of guarantees in the August 6th, 1861 act, slaves and their descendants freed by that act were included in the right "always" to be entitled to release on a writ of habeas corpus in a federal court. The price of this judicial remedy to the slave, was of course that the giving as well as the defending of his freedom was linked to procedure in court. The President was also authorised to negotiate lands for voluntary colonisation. The bill was adopted on June 18th by 82 votes to 54.^{2.}

1. See Walton's bill, Ibid., p.2362, May 26th, 1862 and his comments on the need for legal procedures, Ibid., App. p.264 May 24th, 1862, and vote on the bill Ibid., p.2362 May 26th, 1862.
2. The text of the bill and the vote on its passage is in the Globe, Ibid., p.2793 June 18th, 1862.

Five days later, the Senate took up the House confiscation bill for consideration. Opponents of an efficient measure, like Browning, reiterated the principle of their original criticisms of Trumbull's bill, rarely touching on the specific provisions of the House bills. Wade, Trumbull, and Sumner, for the same reasons, urged the House bills. There was nothing new to be said.^{1.}

On the question of security for freedom, Sumner did propose an amendment allowing the testimony of Negroes in federal courts on all confiscation and emancipation proceedings. But it was defeated on June 28th by 25 votes to 14, without debate.^{2.} On the same day, Trumbull attempted to persuade the Senate to adopt the legal safeguards, contained in the House emancipation bill. On June 30th, he said that he would withdraw his proposal to substitute the House emancipation bill for the Senate confiscation bill if someone proposed an amendment, including these legal guarantees against re-enslavement. But no one did, including Trumbull. And he withdrew his proposal.^{3.} On June 30th, the Senate agreed by 28 votes to 13 to the Select Committee's weak treason bill in preference to the House bill. Trumbull voted "yea" because it was better than nothing, Sumner, because he hoped the House would stand firm.^{4.}

The House did stand firm, and on July 3rd, refused to concur with the Senate amendment. The Senate having refused to recede and agree to the House bill, a Committee of Conference was appointed. The result was the Confiscation Act of July 17th.^{5.} Its weakness came from the inclusion of the treason section from the Senate bill. It drew whatever strength it

1. See the remarks of those Senators, Ibid., pp.2919-2924, June 25th, pp.3000-3002 June 28th, pp.2971-2972, and 2963-2965 June 27th, 1862.
2. Ibid., p.2995 June 28th, 1862.
3. Ibid., p.3000 June 28th, p.3006 June 30th, 1862.
4. Ibid., p.3006 June 30th, 1862.
5. The House refused on July 3rd, Ibid., pp.3106-3107, and the Senate on July 8th, Ibid., p.3166. The House concurred by 84 votes to 42 on July 11th, Ibid., pp.3267-3268, and the Senate the following day, Ibid., p.3276. For provisions of the bill see 12 U.S. Stat. 589.

had from those sections borrowed from the House bill authorising the confiscation of property by in rem proceedings in the federal courts, and from its positive declaration of freedom to the slaves of rebels. (The Senate version only authorised the President to issue a proclamation of emancipation.) The judicial guarantee of freedom was ^{the} now familiar requirement that the claimant should prove both ownership and loyalty. The Conference Committee report yields no clue as to why the House guarantee of a writ of habeas corpus in a federal court was not included. The final section of the act, however, gave to the United States courts full power to institute proceedings, make orders and decrees, issue process and do all other things necessary to carry the act into effect.

James G. Randall argues that this was never intended to extend the judicial machinery of the federal courts to emancipation under the Confiscation Act.¹ There were, he says, no provisions for issuing certificates of freedom, the federal courts in the South were closed, and even when they opened, the courts could not hope to deal with the volume of complaints, or the slave afford to make them. Yet the provision does apply to the whole act. Another section - section 8 - gives the federal courts specific powers over the forfeiture and sale of property. It is unlikely that the Conference Committee would attach a second grant of power to the courts over the whole act if they did not mean the whole act. The House at any rate, had demonstrated its willingness to use the federal courts in the emancipation bill they had just passed. In terms of Professor Randall's practical objections, if the federal courts were closed for emancipation, they were equally closed for the treason proceedings included in the act. As for over-running the federal court dockets, there were no more slaves affected by the act than there were traitors! This is not to say that the Republicans deliberately designed that part of the act with a view to carrying actions under the emancipation sections into the federal courts. It was quite usual for Congress, faced with a crisis,

1. Randall, Constitutional Problems, pp.359-363.

to adopt a loose form of wording, leaving the responsibility for a more specific construction to the courts if and when an individual case came up to test the law.¹ Clearly there was a duality in the Republican attitude to the courts. It had been one of Lyman Trumbull's concerns that the federal courts, trying traitors in their own districts, should not have the discretion as to whether leading rebels should be hanged or fined. Schuyler Colfax and others in the House had expressed some fears that in the confusion over the relationship between proceedings involving property and slaves, the latter might be held as property. Nevertheless, by comparison with the presumed fate of the freedmen under State law and in State courts, the federal courts held out the greater probability of sympathy for national law. All that can be said at this stage in Congress's education was that they had not yet become familiar with the means of using the courts most effectively.

They may have had no clearer idea of the meaning of the last section of the Confiscation Act, granting full powers to the federal courts, than Joshua Tevis, the United States Attorney for Kentucky. In January 1865, he wrote Attorney-General James Speed, asking for a construction of that section. He wanted to know whether it authorised a proceeding in the federal court to establish the freedom of a Negro emancipated under the act, or whether his protection was left to the general laws of the land for the protection of other free Negroes, and finally, whether or not it meant that an original action or suit could be brought to secure any right granted by the act.² Unfortunately, the Letterbooks of the Attorney-general contain no reply. This is not surprising, in view of the volume of enquiries from district attorneys and private citizens on a wide range

1. Donald Morgan in Congress and the Constitution: A Study of Responsibility (Cambridge: Belknap Press 1966) makes a similar point.
2. Joshua Tevis to Hon. James Speed, Attorney-Generals Papers, Record Group 60, Nat. Archives, Letters Received (Kentucky).

of matters. Generally, the Attorney-General declined to answer, both because of the amount of business, and because his opinion could be sought officially only by government departments, that opinion carrying some legal weight. Nevertheless, the questions asked by the District Attorney for Kentucky, are worth the historian's asking, even to come to the same position as he did when he ended his letter with another question. "Ought not the act to be amended so as to secure the freedom of the slave?" The question of security for freedom, was a recurrent one until the ratification of the Thirteenth Amendment.

After six months of debate, the final hurdle for the bill's supporters was to escape President Lincoln's veto. Scheduled to finish the session on July 15th, Congress agreed to remain for a further two days at Lincoln's request. The President wrote Solomon Foot in the Senate, and Galusha Grow in the House to explain that he was considering the confiscation bill, and went on,

I may return it with objections, and if I should, I wish Congress to have the opportunity of obviating the objections, or of passing it into a law notwithstanding them.¹

Senator Browning had discussed the bill with the President on July 14th, and expressed his view that it ought to be vetoed.²

Knowing Lincoln's views, several senators took advantage of the fact that the House was now considering an explanatory resolution on the bill, to attach a modification along the lines of Lincoln's objections. On July 16th, claiming that he was "authorised" on the nature of these objections, Clark moved the amendment, "Nor shall any punishment or proceedings under said act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life".³ This objection

1. Lincoln, Collected Works, V p.325, p.326. July 15th, 1862.

2. Browning, Diary, p.558.

3. Cong. Globe., 37th Cong., 2 sess. p.3374 July 16th, 1862.

had been advanced to every proposal by opponents of confiscation. Trumbull had recognised it. But it was the insistence of the conservatives on having a treason bill that made the explanatory resolution necessary. Both Trumbull's original bill, and the House bill, had sought to avoid such objections through bills proceeding against property and not persons.

Apart from weakening the act, Trumbull thought that the circumstances surrounding the adoption of the amendment provided a bad precedent for relations between the executive and the legislature. Some signs of dissatisfaction with the Executive's use of power had become apparent in the last days of the debate on confiscation. In speeches claiming the power for Congress, both Trumbull and Howard had criticised the President's appointment of military governors, without the advice and consent of the Senate, as encroachments on the legislative powers.¹ Now Trumbull objected to the Executive shaping policy in Congress, through conversations with its members.² But the resolution passed on July 16th,³ and Lincoln signed the bill on July 17th, sending Congress a copy of his proposed veto message.

The message revealed that Lincoln liked in rem proceedings no better than the conservative opposition in Congress. But his major objection, to the forfeiture of real estate beyond the life of anyone attainted for treason, was obviated by the joint resolution Congress had just passed. As for emancipation, he found it "... startling to say that Congress can free a slave within a state". He would rather have had the title to the slaves transferred to the nation, prior to freeing them.⁴ But Lincoln himself was moving towards emancipation as a military necessity. A correspondent of the Liberator noted that the country's antislavery senti-

1. Ibid., pp.2972-2973 June 27th, 1862.

2. Ibid., p.3380 July 16th, 1862.

3. Ibid., p.3383 July 16th, 1862.

4. Lincoln, Collected Works V, pp.328-331 July 17th, 1862.

ment rose and fell in inverse proportion to its military success. He wrote sarcastically,

the disaster at Bull Run brought out the Confiscation Act of 6th of August, 1861 - a specimen of human folly which would disgrace an assembly of Hottentots ... A series of successes on the Mississippi, and we forgot our bondsmen ... And Congress labored three months, and labored in vain, to pass a more stringent confiscation act. Next comes McClellan's strategic movement from Richmond, a new fangled name for defeat, and the late confiscation act is born in a day.¹

The writer accurately forecast that it would never be effective. Lincoln used it only as a lever to persuade the states to return to their allegiance. On July 22nd, he presented his first emancipation proclamation to the Cabinet. On the 25th, he issued a warning to the rebels, based on the first section of that proclamation, that unless they returned to their allegiances, they would be subject to property forfeiture under the Confiscation Act. Lincoln made a similar use of the act when he issued his preliminary emancipation proclamation on September 22nd, which contained an order to the armed forces to enforce the emancipation clauses of the July 17th act. On January 1st, 1863, he issued the Emancipation Proclamation, which, despite exemptions in various areas, represented executive sanction for the principle of the act.² Its force depended equally on military success to free slaves beyond Union control. As an executive proclamation, it lacked even the uncertain judicial sanctions of the Confiscation Act. Addressing a delegation of Chicago Christians on September 13th, Lincoln said of the advisability of his issuing an emancipation proclamation,

is there a single court, or magistrate, or individual, that would be influenced by it there? (in the South). And, what reason is there to think it would have any greater effect upon the slaves than the late law of Congress, which I approved, and which offers protection and freedom to the slaves of rebel masters who come within our lines? Yet I cannot learn that that law has caused a single slave to come over to us.³

1. A "Radical Abolitionist" in the Liberator, August 22nd, 1862.
2. The proclamations are in Lincoln, Collected Works V, pp.336-7 p.341, pp.433-436, VI pp.28-30.
3. Ibid., V pp.419-425.

But it is unlikely that Lincoln issued his proclamation because he feared for the legal defects of the Confiscation Act. On the contrary, Republicans had more confidence in law than edicts - if only the President and his Attorney-General would enforce it!

During the confiscation debate, and before the issue of the Executive proclamation, Representative Samuel Blair said that the Supreme Court might sustain the President's power to emancipate by military edict, but thought it safer to "remove all doubts by needful legislation".¹ Taken together, however, the act and the proclamation marked the turning point of the war. Thereafter, Congress would become committed to finding the legal guarantees for permanent emancipation, which they had reached for in the various Confiscation bills, and which had remained unanswered in the Proclamation.

The treason and confiscation sections of the act were not enforced with vigour or regularity.² Confederate leaders, far less the led, did not hang. Although long lists of indictments for treason, and "aid and comfort" reached the Attorney-General's office and the newspapers, they were destined to be entered as "nolle prosequi" i.e. dismissed. The Government could afford neither the embarrassment nor the expense of prosecuting all these cases in areas where loyal juries were difficult to find. Politically, there were times when justice had to be tempered with mercy. Lincoln issued the first Proclamation of Amnesty in December 1863, which exempted those who took it from hanging for treason. Even where successful prosecutions could have been made, the "success" of winning the legal battle had to be weighed against the dangers of making martyrs

1. Cong. Globe., 37th Cong., 2 sess., p.2300 May 22nd, 1862.

2. The problems of enforcement are dealt with by James G. Randall, Some Legal Aspects of the Confiscation Acts A.H.R. Vol.18 October, 1912, and Henry D. Shapiro, Confiscation of Confederate Property in the North (N.Y.: Cornell University Press, 1962).

in troubled areas. As Attorney-General Bates wrote,

it is far better policy, I think, when you have the option to prosecute offenders for vulgar felonies and misdemeanours, than for romantic and genteel treason. The penitentiary will be far more effectual than the gallows.¹.

Yet political wisdom also demanded, that while order was difficult to maintain in areas coming under Union Control, and while federal officials trying to execute the laws were being harassed in State courts, at least a few cases be kept on hand against leading rebels. The authority, as well as the generosity of the federal government had to be demonstrated. The trial of Jefferson Davis - under the 1790 law of treason, not the July 17th, 1862 Act - was surrounded by such political considerations. But the amnesty proclamation of Christmas 1868 included all former rebels and brought an end to indictments and trials for treason.².

The implementation of confiscation was subject to many of the same political considerations, as well as a lot of confusion arising from the complex legal questions which the acts involved. Attorney-General Bates himself, whose duty it was by a Presidential order of November 1862, to supervise confiscation proceedings, seemed a little unsure about the in rem procedures to be drawn from admiralty and revenue cases. He wrote, requesting information, to four district attorneys with special knowledge of the subject.³. But although unfamiliarity with the procedure caused practical problems, the Supreme Court sustained the constitutionality of the Confiscation Act. When the property of Samuel Miller, a deceased Confederate officer was condemned by default under the acts of August 6th

1. Attorney-General Bates to R. J. Lackey, district attorney for western district of Missouri, January 19th, 1863, Attorney-Generals Papers, Letterbook 4. A typical letter of advice was sent to James Broadhead, also in Missouri, saying that for political reasons, he was in no hurry to prosecute. Ibid., April 10th, 1862.
2. Randall, Constitutional Problems, Chapter III - IV.
3. Bates to Richard Dana, E. D. Smith, George Coffey and William Price, Attorney-Generals Papers, Letterbook 4. 1st December, 1862.

and July 17th, the case was brought to the Supreme Court on a writ of error, alleging that Miller's loyalty could be proved, and that property could not be taken without a jury trial and so on. Justice Strong, delivering the opinion of the court in *Miller Vs United States* in 1870, reiterated Senator Trumbull's view that the Confiscation Act was a war measure, not a municipal regulation, and as such, was not subject to the limitations of the Fifth, and Sixth Amendments.¹ In rem proceedings against property could therefore be made against property without a jury trial of the personal guilt of the owner. Justices Field and Clifford dissented, arguing along the lines that Senators Browning and Cowan had taken, that the act was about treason. They opposed the legislative assumption of guilt involved in these in rem proceedings. Justice Davis also dissented, without giving reasons. The Court, however, again sustained the acts in *Tyler Vs Defrees* in 1870, and the Confiscation Cases in 1873.² But when a defendant actually turned up to assert his loyalty in *McVeigh Vs United States* in 1870, Justice Swayne held that the question of his guilt was material to the case, and that the district court of Virginia had been wrong in disallowing his appearance.³ In two other cases, the Chief Justice directed that new trials conform to the course of common law regarding trial by jury.⁴

But, despite judicial sanction for the acts, very little property was actually confiscated, though some successful suits were brought in the North, and the areas first brought under Union control, where the courts re-opened. The very inadequate statistics of the Solicitor-General for 1867, show that, under the Act of July 17th, 1862, only

1. *Miller Vs U.S.* 78 U.S. 268.
2. *Tyler Vs Defrees* 78 U.S. 331, *The Confiscation Cases* 87 U.S. 92.
3. *McVeigh Vs U.S.* 78 U.S. 259.
4. *Union Insurance Co. Vs U.S.* 6 Wall. 759, *Armstrong's Foundry* 6 Wall. 767.

\$129,680 was deposited in the Treasury, and the cost of proceedings reduced even this total.¹ The business of enforcing the act was left to district attorneys on the spot, as the Attorney-General constantly reminded those who wrote for his advice! Confused by the complex legal questions, the cost of proceedings, and the unpopularity of the task, local officers often declined to commence suits on their own initiative. Where they did, any advice they received from the Attorney-General was to go cautiously, to be sure of not embarrassing the Government by failure, and often, just to dismiss proceedings altogether. The Administration, both Lincoln's and Johnson's, did not seek wholesale confiscation at a time when they sought to inspire loyalty rather than hatred.²

The army showed more zeal for confiscation than the legal departments did. Of the \$129,680 deposited in the Treasury, over half was drawn from confiscations in Louisiana. This can be attributed to Louisiana's being one of the first states to be brought within Union Control, but also to General Banks' efficiency in drawing up lists of property to be used for confiscation proceedings.³ Conflicts between civil and military jurisdiction were frequent and arose in Louisiana, the District of Columbia, and Virginia. Attorney-General Bates advised "mutual forbearance and comity", but stressed the need for civil rather than jurisdiction over military.⁴ He suggested that Secretary of War Stanton order military commanders to deliver confiscable land over to the civil authorities.⁵ In 1864, he objected to General Lew Wallace's confiscation orders in Maryland, since they went beyond the recognised right of

1. Randall, Constitutional Problems, pp.288-291.
2. Typical of such advice are letters from J. Hubley Ashton to the district attorneys in Missouri and elsewhere to refrain from confiscate proceedings, April 22nd, 1865, Attorney-Generals Papers, Letterbook D, and Henry Stanbery to Bennett Pike in Missouri, August 14th, 1866, to the same effect; Letterbook F.
3. Banks general orders 71 and 76. War of the Rebellion: Official Records of the Union and Confederate Armies (128 vols., 1880-1901) Vol.15 pp.571-575.
4. Bates to Benjamin H. Smith, D.A. in Virginia, March 1862, Attorney General Papers, Letterbook 4.
5. Bates to Stanton, January 21st, 1863, Ibid.

the army to make temporary seizures, and assumed jurisdiction over titles to property. Bates drew the General's attention to the Confiscation Acts, advising him against any actions which would give rise to accusations that the President was above the law, to painful conflicts of jurisdiction, and eventually to a crop of suits against army officers for illegal actions. In reply, General Wallace offered to put his own books, detectives and so on at the service of the Attorney-General, so that he could enforce the Confiscation Acts.¹

Bates complained to Stanton about similar conflicts of jurisdiction with the army in East Virginia. There was, he said, no excuse for such conduct, since the United States district court was fully organized and holding sessions in Norfolk.² But Judge John C. Underwood, of the United States district court of Virginia was no happier than the army about the government's lack of vigour. On April 28th, 1865, he wrote of these matters to Chief Justice Chase,

... our great need is a vigorous administration of the laws punishing treason. It seems to me that a little vigor now would be worth more than much hereafter and I confess to considerable surprise and dissatisfaction, on reading what seems to me to be the gingerly and over cautious letter of the Attorney-General I send herewith - I cannot believe it reflects the views of the President, and taken in connexion with what the Attorney-General told me the day before the assassination of Mr. Lincoln - that he thought of sending a circular to the District Attorneys, forbidding the further seizure of real rebel property for purposes of confiscation, I really fear the judiciary may not be properly sustained or permitted to exert its due influence in the re-establishment of order and in suppressing the spirit of rebellion.³

Shortly afterwards the government did encourage the enforcement of confiscation in Virginia. Advising the district attorney of Norfolk to go ahead with one of these prosecutions, against the editors of the

1. Official Records of the Rebellion Ser. III, Vol.4 pp. 407-408, 413-415.
2. Bates to Stanton, April 7th, 1864, Attorney Generals Papers, Letter-book 5.
3. John C. Underwood to Salmon P. Chase, April 28th, 1865. Chase Papers, L.C.

Richmond Whig and Lynchburg Virginian, Attorney-General James Speed wrote an unusually strong letter, saying that though he had hoped Virginians had suffered enough, it appeared some had not. "Now", he added, "they must be taught that the Government and law are stronger than they are".¹.

Apart from the times when the government admitted the necessity for "teaching the rebels a lesson", there were no mass confiscations. Presidents Lincoln and Johnson, and their Attorney-Generals did not want it. It was expensive, and an embarrassment to their policy of a generous peace. The various proclamations of pardon and amnesty between 1863 and Christmas of 1868, did not necessarily exempt those who took them from confiscation proceedings, in the way that it did with respect to treason charges. In the Supreme Court case of Armstrong's Foundry, in 1867,² Attorney-General Henry Stanbery, appearing as special counsel for the United States, put the argument that a pardon had no effect on the proceedings, since, under the Confiscation Act, no criminal offence was involved - simply the guilty predicament of property. Chief Justice Chase, however, rejected the argument in giving the opinion of the Court. The effect of pardon was a question for judicial construction. The Attorney-General advised his departments that where the court held that a pardon relieved the defendant's property from confiscation, they should not make an appeal.³ Finally, in the light of the Supreme Court's decision on the Armstrong's Foundry case, and the granting of full amnesty to all rebels on December 25th, 1868, Attorney-General

1. James Speed to L. H. Chandler, D. A. Norfolk, Virginia, July 15th, 1865, Attorney-Generals Papers, Letterbook Vol.E. The Attorney-General also directed the marshal at Norfolk to go ahead with confiscation in the spirit of a recent presidential order regarding Virginia.
2. Armstrong's Foundry 6 Wall. 767.
3. James Speed to C. W. Hall, U.S. Attorney, Knoxville, Ten. January 11th, 1866. Attorney-General Papers, Letterbook Vol.E.

William Evarts notified the district attorneys to dismiss all confiscation proceedings.^{1.}

It took Congress six months to pass a law which in its emancipation features was eclipsed by an executive proclamation, and in its treason and property sections left largely unenforced. But the debates on the various confiscation bills provided a forum for defining the aims of war and peace, and the varying degrees of commitment to these aims inside the Republican party. Moreover, the volume of bills on the subject must have been an educating process for Congress in translating these aims into law. Significantly, the first steps were taken towards the extension of federal court jurisdiction. The fate of property, they discovered, was too important to be left to juries in disloyal districts. For some Republicans, so too, was freedom. Though the final Confiscation Act of July 17th did not contain the House Bill's extension of federal court jurisdiction to releasing freedmen on writs of habeas corpus, the procedure was not discarded. It was revived in the Wade-Davis Bill, and it was implicit in the Thirteenth Amendment.

1. William K. Evarts to all U.S. District Attorneys, March 2nd, 1869.
Attorney-Generals Papers Letters Sent.

CHAPTER IIITHE HABEAS CORPUS ACT OF 1863

As long as the federal government refrained from passing controversial laws, relations between state and nation could be amicable. But the war necessitated the passage of laws which could not meet this requirement, even in many of the loyal states. Confiscation was one such issue. Senator Trumbull and his colleagues had quite sensibly foreseen that here was a national law which stood small chance of impartial enforcement if it were left to the loyalties of state judges and juries in the areas where the property was situated. To avoid the possibility of a clash of jurisdictions between state and nation, the issue was taken out of the hands of the states altogether. The federal courts took exclusive jurisdiction of confiscation cases. Similarly, the question had been raised during the debate, that the emancipation of slaves under the Confiscation Act of July, 1862, required guarantees against the dissent of the states. Slavery was supported by state laws - laws by definition in conflict with this piece of national legislation. Unfortunately, but understandably in these early stages, the Republicans did not think the issue through. Unsatisfactory questions remained as to the degree of protection which the nation would afford the freedman, and the extent to which federal court jurisdiction could be asserted on his behalf against that of the states. But already in 1862, the right questions were being asked. The question was no less than whether the writ of the nation's government could run in the states, and upon the answer, the survival of the nation depended.

Confiscation was only the visible part of the iceberg. By late 1862, early 1863 the question was being raised in a different form, this time in

connection with the nation's ability to protect its armed forces against harassing suits in state courts. In law, servants of the federal government, from army officer all the way up to President, could be held responsible in civilian courts, for official acts leading to private injuries. Whatever ethical importance that principle has (and the Nuremburg or My Lai trials in recent times demonstrate the inadequacy of pleading "orders" as an escape from responsibility) - nevertheless there is a fine line between an honest civilian concern for the preservation of the rule of law and democracy, and the harassment of an army to the point where the democracy's ability to mobilise men in its defence is seriously undermined. The latter is more appropriate to the question of suits against federal officers during and after the American Civil War. James G. Randall's estimate that there were 3,000 suits pending by September 1865, is a clue to the nature of the problem.¹ Not gas chambers, but alleged thefts of chickens and pigs, temporary confiscations, trespass and false imprisonment were the most common charges on which federal officers found themselves indicted in local courts. These courts were the courts of the Union - or at least of those parts of the Union where Republican conduct of the war was strongly criticised. The cases came from three types of region - from Copperhead areas in the Midwest; from Kentucky, a special situation in the extent of disloyalty and proslavery sentiment in the state; and from states which were loyal, but under Democratic administration, like New York.

A further, and related problem for the federal government in protecting its army from state courts, was the practice of these courts to claim and exercise the right to issue writs of habeas corpus for the release of

1. James G. Randall, Constitutional Problems Under Lincoln (Urbana: University of Illinois Press, 1964) pp.193-194, hereafter cited as Randall, Constitutional Problems.

enlisted men, usually minors, from service in the Union army.^{1.} State sovereignty stood in need of discipline.

For guidance, the past history of the federal system threw only a little light on the subject. Federalism was a delicate instrument of government. The French observer Alexis de Tocqueville noted how its conflicts resolved themselves into judicial questions, or, as the more recent historians of American constitutional law, James Landis and Felix Frankfurter write of a more specific aspect,

the happy relation of State to Nation - constituting as it does our central political problem - is to no small extent dependent upon the wisdom with which the scope and limits of the federal courts are determined.^{2.}

In theory that scope was wide - wide enough to leave no doubt that such interference as many of the state courts were displaying, need not be tolerated. The Constitution provided that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish" and that this power "shall be extended to all cases, in law and equity, arising under this Constitution and the laws of the United States".

The past, however, had played down the 'scope' of this power, and emphasised its 'limits'. Although the framers of the 1789 Judiciary Act could have chosen to make the jurisdiction of all these questions exclusive of the state judiciaries, they did not.^{3.} Although Federalists at the time of

1. The question received exhaustive treatment in a Wisconsin case, *In re Tarble*, 25 Wis. 390 in 1870, where the judge claimed such a power of investigation and release on a habeas corpus writ from a state court. The judgment was later reversed by the Supreme Court, *in re Tarble*, 80 U.S. 397 (1871), and such state jurisdiction denied once and for all.
2. Felix Frankfurter and James M. Landis, The Business of the Supreme Court. A Study in the Federal Judicial System (N.Y.: McMillan & Co., 1927) p.2., hereafter cited as Frankfurter and Landis, The Business of the Supreme Court.
3. John Norton Pomeroy, An Introduction to the Constitutional Law of the United States (Boston & N.Y.: 1886 9th ed.) pp.621-622, hereafter cited as Pomeroy, Constitutional Law.

the debate on the Constitution and the First Judiciary Act might argue for a judicial power co-extensive with the legislative and executive arms of government, in practice both were limited by the fears of aggrandisement of central powers, displayed by states rights adherents from the Constitutional Convention onward.¹ The limited legislative powers of the nation were reflected in the limited jurisdiction of her courts. The whole range of rights of person and property belonged chiefly to the states, while the nation legislated chiefly on collective matters - treaties, revenue laws, admiralty business and so on. The courts of the states had jurisdiction in all areas of the law not expressly prohibited to them by the Constitution and laws. And in practice, Congress chose to allow the federal courts exclusive jurisdiction in only a few areas - cases arising under Treaties, cases affecting Ambassadors, other public Ministers and Consuls, cases of admiralty and maritime jurisdiction, controversies to which the United States was a party, and controversies between two or more states.²

These were not two separate and independent jurisdictions. They touched and overlapped to become a dual and compound system of judicature, whose boundary lines were neither clear or settled. In two all-embracing fields to which the judicial power of the United States extended - "Cases arising under the Constitution" and "Cases arising under the Laws of the United States" - jurisdiction was shared by state and nation. Between the two, the 1789 Judiciary Act built a bridge. For the sake of uniformity, and the supremacy of the national will, it was necessary that though jurisdiction was concurrent, the nation's judiciary should have a reviewing

1. Charles Warren, in New Light on the History of the Federal Judiciary Act of 1789, Harvard Law Review, Vol.37, 1923-24, demonstrates the compromises with states rights which form the backcloth to the framing of that act.
2. The relative extent of state over federal jurisdiction is well discussed in Daniel H. Chamberlain, "The State Judiciary. Its Place in the American Constitutional System" in Constitutional History of the United States as Seen in the Development of American Law (N.Y.: 1889)

power over the decisions of the states. Section 25 of the 1789 Judiciary Act provided for the removal of a suit from the highest state court to the Supreme Court of the United States where the validity of a treaty or law of the United States was drawn into question, and the decision had gone against their validity, or where a State law was held to be repugnant to the U.S. Constitution, and the decision had gone in its favour, or where the question was the construction of a clause of the Constitution, or a law of the United States where the decision went against the party claiming a right under such a law. Similarly, for the sake of uniformity, and so that a citizen of Massachusetts should have impartial justice in New York, Section 12 of the Judiciary Act provided for the removal of a suit by a citizen of one state against a citizen of another, from the state court in which it was commenced, to the federal circuit court. In the one case, federal court jurisdiction depended on the subject matter involved in the suit; in the other it depended on the parties. But in both, it brought state and national law, and the courts of each, into contact and possible conflict.^{1.}

To avoid collisions, in day to day business where jurisdiction was shared, the courts applied the rules of courtesy.^{2.} They developed the idea of judicial comity - that no court should interpose its process to take out of the hands of another co-ordinate court a cause of which the latter had taken prior jurisdiction. The federal courts for their part applied the early admonition which Congress gave in a law of 1793,^{3.} against interference with the state courts by issuing writs of injunction. The

1. See Pomeroy, Constitutional Law pp.621-632.

2. The subject is fully discussed in Charles Warren, Federal and State Court Interference, Harvard Law Review, Vol. XLVIII 1930, hereafter cited as Warren, Federal and State Court Interference.

3. 1 Stat. 335, Section 5.

other side of the coin was that the federal courts had to assert an equal right to freedom from interference by the state courts in matters affecting federal officials and causes. Here the arrangement did not prove entirely satisfactory. State courts claimed and exercised a right to issue writs of habeas corpus for the release of men held under the national authority. In the famous Booth case in 1859, Chief Justice Taney had to deliver a censure, and deny the right of a Wisconsin State court judge to release a fugitive slave held under a national law, the Fugitive Slave Act.^{1.} Taney's opinion did not stop the state courts from continuing to release men on writs of habeas corpus. The problem was at its worst during the civil war, when they invoked the right to release soldiers from service in the Union army.

If the federal courts nursed their grievances at times when the rules of courtesy broke down, the state courts had theirs. Though the Judiciary Act had provided for the removal of diversity of citizenship suits into the federal courts, the fears of the states as to possible judicial centralisation were allayed by the proviso that in these cases, "the statutes of the states and their fixed and received construction by the state courts are to govern the courts of the United States in administering the local law within the respective states".^{2.} But in the decades prior to the war, the federal courts in a number of cases had broken away from the rule in some circumstances, on the grounds either that there was no "settled" state law on the subject, or where that law was held to be in

1. In the Booth case, 3 Wis. 157 (1855) the judge of the state court authorised Booth's release from the custody of a U.S. marshal who had arrested him for helping a fugitive slave to escape. Chief Justice Taney denied such a right where a federal officer acted under orders or process from a federal court - 21 How. 506 (1859).
2. Section 34, Judiciary Act, 1789.

conflict with the Constitution.^{1.} The case which perhaps worried the states most was Swift v. Tyson, adjudicated in the Supreme Court in 1842. In this diversity of citizenship case over a negotiable bill of exchange, the Justice Story held that even if N.Y. court precedents had been settled on the subject, it was not necessary that the federal court should follow it, since decisions were not laws, but only evidence of the law. The provision of the Judiciary Act applied only to positive statutes of the states, and to titles having a permanent locality. The federal courts, then, were asserting an independent judgment in general commercial law - a departure which the state courts resented until the decision was reversed in 1938.^{2.}

But this was hardly judicial centralisation. The wonder was how few cases came within the jurisdiction of the lower federal courts. Originally, a much broader removal power had been proposed for the first Judiciary Act. One Senate version allowed a defendant sued in a state court in a case involving a Federal question, not only to remove the case before trial into a Federal Circuit Court, but also to appeal after trial to the Supreme Court on a writ of error. The 1789 diversity of citizenship clause restricting the power to parties rather than subject matter was a compromise.^{3.} Not until 1875, was this original proposal implemented. But in the intervening years the removal power was broadened in a piecemeal fashion.^{4.}

1. Thus in Groves v. Slaughter 16 Peters 449, the Supreme Court construed the Constitution of Mississippi as affecting the validity of a note given for the purchase of slaves imported to that state, since there were no state court decisions on that point at the time; and even after the state courts rendered decisions contrary to Groves v. Slaughter, the Supreme Court refused to conform to these decisions. In Rowan v. Runnels, 5 Howard 134, Taney held that a judicial construction adopted by the state court was in affect in conflict with the U.S. Constitution. Judge Grier in Pease v. Peck, 18 Howard 595, said, "when the decisions of the state court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions".
2. Swift v. Tyson 16 Pet. 1 (1842). For a discussion of the case, see Mitchell Wendell, Relations Between the Federal and State Courts (Unpublished Ph.D. dissertation, Columbia University 1949) pp.115-128, hereafter cited as Wendell, Federal and State Courts. The trend was followed up in 1864, by the important case of Gelpke v. Dubuque 1 Wall. 175, a municipal bonds case where a state statute was overridden by the Supreme Court, exercising an independent judgment. The decision in Swift v. Tyson was finally reversed by Erie Railroad Co. v. Tompkins 304 U.S. 64 (1938)
3. Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, Harvard Law Review, Vol. 37 p.62.
4. Ibid. pp 80-82

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But however much history of judicial federalism had been geared to avoiding, rather than joining conflicts, by avoiding exceeding the political possibilities of federalism - nevertheless the nation had never abandoned its potential judicial power under Article III Section II of the Constitution. The nationalist Chief Justices Marshall and Taney kept the possibilities within sight. As Marshall reminded the Court, and the country, in *Martin v. Hunter*,

it is manifest that the judicial power of the United States is unavoidably in some cases, exclusive of all state authority, and in all others may be made so at the election of Congress.¹

In 1861 and 1862, Congress had elected to put property confiscations in that class. The federal courts were given exclusive and original jurisdiction. Prosecutions of federal officers were in a slightly different category, since they involved questions of concurrent jurisdictions. These men were accused of violations of state law, and hence, prosecution already begun in the state courts. The situation, however, was not entirely unfamiliar, as the Senate Judiciary Committee quickly discovered in its search for precedents. Twice in fairly recent history, the removal power had been invoked beyond the familiar diversity of citizenship cases. In 1815, in the wake of the New England secessionist feeling after the Hartford Convention, and again in 1833, at the time of the South Carolina Nullification Controversy, the federal government had found difficulty in protecting its revenue officers from harassing suits in state courts for alleged offences while enforcing the national law.

In both these cases, Congress invoked a little of the dormant judicial power of the Constitution. The revenue acts of 1815 and 1833, allowed a federal officer, or innocent third party, prosecuted in a state court, in a civil or criminal case, to remove that case from the state court to the

1. *Martin v. Hunter*, 1 Wheat. 304 (1816).

federal circuit court.¹ The federal court was to proceed as though the suit had been brought there by original jurisdiction, and further proceedings by the state courts were null and void. The 1815 act provided no explicit machinery for co-ercing the states into handing over jurisdiction to the federal courts, but the 1833 act provided for the issue of a writ of habeas corpus to take the prisoner out of the hands of the state courts and into the federal court, should the necessity arise. There was fuel indeed for conflict. But the whole area of ultimate sanctions against delinquent states was not explored at that time. According to Charles Warren, only about ten cases came up under the 1833 act.² The judicial crisis passed when the political crisis which produced it passed.

The legacy of the past was this. There were few precedents for a sustained conflict between state and nation. Where conflicts arose, they were closely related to politics, specifically to the states rights challenge to national sovereignty. In 1815 and 1833, in circumstances very similar to the problem which now faced the government in protecting its army officers, Congress reacted by enlarging the jurisdiction of the lower federal courts, to take cases on the grounds of their involving a particular federal question - in other words on the grounds of subject matter rather than the citizenship of the parties. But no guidelines had been left on the perennial problem of enforcement. The federal judiciary was not an independent arm of government. Though they represented the nation inside the state, and hence the only machinery for the enforcement of federal law there, if the states courts could not be relied upon to

1. Acts of February 4th, 1815, 3 Stat. 195 and March 2nd, 1833, 4 Stat. 632.

2. Warren, Federal and State Court Interference, pp.366-370.

observe it, nevertheless, as Mitchell Wendell writes,

in the final analysis, whether federal law would be obeyed in the states depended on the extent of national power. This fact becomes plain when we remember that it was force that overcame the Whiskey Rebellion of 1794, the Nullification Movement in South Carolina, and the attempt at secession of 1861-1865.¹

Though force might remain the ultimate sanction of law over rebellion in any government structure, the Civil War Congresses sought to make federalism less susceptible to such confrontations by strengthening the machinery of the nation's laws inside the states - the nation's courts. Borrowing from the acts of 1815 and 1833, designed to protect revenue officers, these Congresses passed twelve acts between 1863 and 1875 increasing the range of federal questions which could be removed from state to federal courts.² As the nation's legislative power extended to matters once beyond its jurisdiction, to civil rights and conditions of citizenship, the judicial machinery was extended to see its laws enforced. The first of these acts was the Habeas Corpus Act of March 3rd, 1863.³

The first three sections of the act concerned the question, much debated by pamphleteers at the time, and historians ever since, as to when, and by whom the privilege of the writ of habeas corpus might be suspended. Eloquent speeches in Congress and outside, invoked the great principles of liberty contained in Magna Carta, and traced its misunderstood history through to the United States Constitution, to support Presidential or Congressional authority, to make the suspension.⁴ The first section of

1. Wendell, Federal and State Courts p.26
2. These acts are listed in Frankfurter and Landis, The Business of the Supreme Court pp.61-67.
3. 12 U.S. Stat. 756.
4. The Attorney General upheld the President's right to make the suspension 11 Opinions of the Attorney General 297. Horace Binney's pamphlet, The Privilege of the Writ of Habeas Corpus Under the Constitution (Philadelphia; Sherman & Son, 1862 2nd ed.) backed up the Executive in this, and sparked off a controversy, joined by numerous jurists and politicians. Among them, Sydney G. Fisher's reply, denying the President's power, is among the most relevant - Sydney G. Fisher, The Suspension of Habeas Corpus During the War of the Rebellion, Political Science Quarterly, September 1888. For a synthesis of the discussion, see Randall, Constitutional Problems Under Lincoln Chapter 6.

the Act ambiguously granted Congressional 'authority' to the President to suspend the privilege. The following two sections mapped out a safeguard procedure against lengthy detainments of prisoners without cause shown. The Secretary of State, and the Secretary of War were to supply the judges of the federal district and circuit courts with a list of those held under federal authority as political prisoners. Where a grand jury sat in such an area, and terminated its session without finding an indictment against such a person on the list, the prisoner was to be discharged, having taken an oath of allegiance.

But it is in the subsequent sections of the act, less familiar ground to historians, but in its broad implications no less important for liberty than the guarantees against arbitrary arrests, that the federal officer found his protection. It is not by accident that these sections reveal a strong resemblance to the removal acts of 1815 and 1833. Senator Jacob Collamer of Vermont, closely concerned with the drafting of the act, revealed in the course of the debate that these earlier acts had been followed as precedents.¹ The fourth section of the act provided that any order of the President, or more broadly "under his authority" should be a defence against suits for search, seizure, arrest or imprisonment committed under such an order or under any law of Congress. The following sections elaborated on the procedure for taking suits where such a defence was pleaded, from the state courts to the federal circuit courts. Where an action, civil or criminal, was begun in a state court against a federal officer, "or any other person" for such offences under the authority of the President or an act of Congress, the defendant could file a petition on those grounds, for the removal of his case into the federal court. That done, the state court must proceed no further in the case. The suit

1. Cong Globe., 37th Cong., 3 sess., pp.534-535 January 27th, 1863.

was to be tried as though it were an original suit in the federal court - in other words, tried both as to the facts and the law of the case. Such a removal could be made by the defendant while the case was pending in the state court, but either party could remove the case after final judgment in the state court to the circuit court (except in criminal cases where judgment went in the defendant's favour). An ultimate appeal could be made from the decision of the federal circuit court, to the Supreme Court on a writ of error. The act concluded with a two-year statute of limitation. Suits had to be commenced within two years of the wrong complained of.

Democratic critics of the act complained bitterly that here was an act designed to immunise, rather than indemnify federal officers for their actions in the course of suppresssing the rebellion, that it was railroaded through Congress before members realized what it contained or could voice their opposition, that in application it afforded no remedy to the injured party, and that it impinged on the judicial power of the states.¹.

Clearly, even the bare terms of the act refute some of these objections. It did not deny the plaintiff a remedy. Either party could remove the suit after final judgment in a state court, except in criminal cases where the verdict went against the plaintiff. Surely discrimination was less likely to be exercised against the plaintiff in a federal court than against the defendant in a state court. The balance was hardly over-corrected by placing most of the initiative for removal in the hands of the defendant. Secondly, to accept the charge of 'immunisation', the partiality of the federal court would have to be assumed. A defence of acting under orders was to be established there - not presented as a reason for stopping further investigation. As for the Republicans railroading the bill through Congress,

1. Ibid., p.535, 537, comments of Senators Powell and Bayard.

with members ignorant of its contents, there seems to be no grounds for this charge. The issue was sufficiently aired in both houses between December 1862 and March 1863 when it was passed. There was no reason for members to be any more or less ignorant of its contents than they were of any other bill they voted upon.

The necessity of passing some legislation to deal with a mounting crop of suits was clear by the time Congress tackled the problem in the winter of 1862. Frequent requests came to the Attorney-General's office from the War Department, to supply counsel in suits against officers. In January 1863, Attorney-General Edward Bates wrote to Lyman Trumbull of the Senate Judiciary committee, enclosing a copy of a bill on the subject, which he had drawn up, apparently at the request of several members of Congress. He wrote, "Some such bill is, I think, absolutely necessary for the judicial peace of the country, and for the reasonable safety of the officers of the Government".¹ By that time, however, the Congressional committees of House and Senate were working on the problem.

On December 8th, 1862, Thaddeus Stevens introduced a brief indemnification bill. It said simply that there had been occasions when the privilege of the writ had been suspended. Since there was some doubt as to which branch of the government might lawfully do this, all arrests made during these periods were confirmed and made valid. The President, Secretaries, and all persons concerned in making the arrests were indemnified and discharged from suits and prosecutions. The bill concluded with an authorisation to the President for future suspensions.² In some ways then, Stevens' bill was a limited undertaking, applying only to past arrests. In another sense, it was, more fittingly than the final act of

1. Edward Bates to Lyman Trumbull. January 7th, 1863. Attorney-Generals Papers, Letterbook 4 pp.310-311. Record Group 60, National Archives.
2. The bill is printed in Cong. Globe., 37th Cong., 3 sess., p.529 January 27th, 1863.

March, an 'immunisation' rather than an indemnification, since it contained no court procedure. What chance such an unsophisticated immunisation would have had in a state court, however, is open to serious question. Of this bill, a charge of railroading might also be made more justly, since it was passed by 90 votes to 45 on the day of its introduction, with virtually no debate.¹ Stevens himself insisted that it was not a bill to indemnify everybody who had committed a trespass in the name of the Government, but simply those who had made arrests at a time when the suspension of the habeas corpus privilege had possibly been illegal.² His protestations did not allay the misgivings of Thirty-seven Democrats, led by Clement Vallandigham, who signed a protest at the passage of a bill which "proposes to deprive the courts of the power to afford ... protection".³

Senator Trumbull, on January 16th, 1863, reported a substitute by way of an amendment to the House bill, - one which brought the courts back into the picture, though not in a way which would bring Vallandigham and the Democrats much comfort.⁴ The Senate version contained the essence of the final bill - the procedure for removing suits under a defence of Presidential authority, (or authority under an act of Congress as it was quickly amended to), from state to federal courts. Where Stevens bill had provided an extrajudicial procedure only for arrests made while the habeas corpus privilege was suspended possibly illegally, this bill extended protection to federal officers and third parties for future as well as past offences. Trespasses, seizures and so on fell within its scope, as well as arrests.

1. Ibid., pp.20-22 December 8th, 1862.

2. Ibid., p.22 December 8th, 1862.

3. Ibid., pp.165-166 December 22nd, 1862.

4. Ibid., p.321 January 16th, 1863.

During the debate considerable attention was paid to the technicalities of removal procedures which must have been unfamiliar to most Congressmen. Conservatives were quickly alerted to a danger of "judicial centralisation". Their alarm was sparked off by a proposed amendment of Senator Harris' on January 27th, to include criminal as well as civil cases in the removal procedure.¹ In fact this was not an innovation. The 1833 revenue act had explicitly included criminal cases. But, didn't such a proposal break the rules of non-interference between state and federal courts? Where the Supreme Court exercised a reviewing power over the decisions of state supreme courts, it adjudicated the law of the case. Where the federal circuit courts had diversity of citizenship jurisdiction, they were bound to apply the laws of the state in which the matter of controversy was situated, except in very exceptional circumstances. But this bill proposed to take cases of violations of state criminal law, out of the hands of the courts of the states, and into the federal courts. The federal court was to treat the case as though it had come there under original jurisdiction, to be tried both as to the law and the facts of the case. The case would be tried de novo in a federal court, with no guaranteed application of state law, and yet with no alternative federal laws to cover the situation. There was no federal law for example on the subject of murder, yet such a case was within the scope of the act. There had been, as Charles Warren demonstrates, many occasions when Congress had passed penal statutes which enlisted the state courts to enforce them. State courts had been accustomed to applying federal criminal law - but the federal courts were new to the business of applying state criminal law.² It was a monstrous intrusion on the states'

1. Cong. Globe, 37th Cong., 3 sess., pp.534-5 January 27th, 1863.

2. Charles Warren, Federal Criminal Laws and The State Courts, Harvard Law Review, Vol. 38 March 1925 - hereafter cited as Warren, Federal Criminal Laws. Warren traces the history of several federal laws in which state courts applied penalties for crimes of embezzlement, robbery of the mails etc.

criminal jurisdiction, the conservatives objected.

In 1855, the conservatives had taken a quite different position, when Congress considered a proposal to enforce the Fugitive Slave Act by removing cases against its enforcers from state to federal courts. Their proposal then included criminal cases, and brought forth this interesting protest from Republican Salmon P. Chase, to become Chief Justice in 1864,

it is a bill for the overthrow of State-Rights, to establish a great consolidated Federal Government, a step, or rather a stride, towards despotism .. There is scope enough for your experiment without usurping the criminal jurisdiction of the States. Do not undertake to arrest the sovereignty of the States when employed in its highest duty of investigating and punishing wrongs to life or property within its jurisdiction .. This bill is the monstrous birth of a bad time. The clearest and widest separation possible under the Constitution of the sphere of the National from that of the State judiciary is the true means of peace and harmony. But this bill expresses the very wantonness of contempt for this principle. It is framed as if its express design was to bring on a desperate conflict between the Courts of the States and those of the United States .. What if the State Courts refuse to grant a removal? The end of the road is ruin.¹.

But bad precedents on behalf of slavery made good ones on behalf of democracy, bad Democratic ideas, good Republican. Lyman Trumbull was one of the few who refrained from joining the 'about turn' of the parties. In 1855 he opposed such inroads into the state judicial power. In 1863, he continued to do so, on the grounds that there was no federal law on murder, etc., or provision for administering state criminal law in United States courts.² In defence of the amendment, Senator Harris quoted Chief Justice Marshall from Story's Commentaries, to the effect that federal court jurisdiction extended to both civil and criminal cases. His colleague Collamer agreed, resting the case on the revenue acts on which this bill was modelled.³.

1. Cong. Globe, 33rd Cong., 2 sess., App. p.211, quoted in Warren, Federal Criminal Laws.
2. Cong. Globe., 37th Cong., 3 sess., pp.534-5 January 27th, 1863.
3. Ibid.

Precedents, however, hardly satisfied opponents who were fearful for the consequences to the state judiciary. Democratic Senator Powell held, referring perhaps to the case of *Prigg v. Pennsylvania* that,

it has been decided by the Supreme Court that no jurisdiction over crimes against the United States has been delegated to the State courts; and, by parity of reasoning, it would certainly be held by any enlightened court that crimes against the States cannot be transferred to the jurisdiction of the United States courts.¹

Time would prove him wrong on that point of law. In 1879, the case of *Tennessee v. Davis* came up under the 1833 removal provisions of the revenue act. Justice Strong held that in this case, where a revenue officer was indicted for murder in the course of enforcing the revenue act, the removal power applied equally to criminal and civil cases, and that

it is in the power of Congress to give the circuit courts of the United States jurisdiction of such a case, although it may involve other questions of fact or of law.²

For the present, however, what compounded the sin for the bill's opponents, was not only the inclusion of criminal cases, but that removal of cases could be made both before and after final judgment had been rendered in a state court - to be tried again as to both law and fact. Senator Bayard objected that this

must lead necessarily to the entire destruction of the States as regards their own criminal jurisprudence.³

1. *Ibid.*, p.535 January 27th, 1863. Charles Warren writes that the state courts began to object to sharing the load of federal criminal jurisdiction. He cites cases in Connecticut, Kentucky and Missouri in the late 1820's, early 1830's to the effect that "no respectable Government ever yet undertook to execute the criminal code of another". In *Prigg v. Pennsylvania* in 1842, the Supreme Court held - simply that the states could not be compelled to enforce such laws - 16 Pet. 539. See Warren, Federal Criminal Laws pp.580-581.
2. *Tennessee v. Davis* 100 U.S. 257 (1879).
3. Cong. Globe., 37th Cong., 3 sess., p.537 January 27th, 1863.

Republican Orville Browning added the protest,

I do very much doubt the power in the first place, and very much more strongly the expediency, if the power exists, of going so far as to annul absolutely the final judgments and decisions of the State tribunals, take the case de novo into the Federal courts, and try the whole thing over again there.¹

On this point at least, the Supreme Court was to prove more sympathetic to the bill's opponents. The question at issue in the 1869 case of the *Justices v. Murray* was whether that part of the 1863 act allowing removal after final judgment was constitutional, and whether the Seventh Amendment, (that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to common law) applied to facts tried by a jury in a cause in a state court. Justice Nelson, for the Court, gave the opinion that it was, and that the part of the Habeas Corpus Act which provided for removals after final judgment was unconstitutional and void. The proper appeal from a final decision of a state court was a writ of error to the Supreme Court.² And so at least one branch of government would not ride roughshod over the states criminal jurisdiction! But removals could still be made before final judgment.

At the time of the debate, however, the Republicans were not intent on violating the Seventh Amendment, but rather on making provision for the enforcement of the constitutional authority of the United States inside the states. Working in new territory, they were not always sure of authorities and precedent. Despite objections, they carried the amendment to include criminal cases, by 27 votes to 15 on January 27th.³

1. *Ibid.*, p.539 January 27th, 1863.

2. *The Justices v. Murray* 9 Wallace 274 (1869). The original opinion of the federal circuit court in *Murray v. Patrie*, Fed. Cas. 9, 967 (1866) was to the contrary. There Judge Nelson cited *Martin v. Hunter*, 1 Wheat. 346-350, and *Osborn v. Bank of U.S.* 9 Wheat. 821-828, as authority for the correctness of removals after, as well as before judgment. In 1879, a federal court held in re Hurst (Fed. Cas. 6, 926) that a federal officer had been wrongfully imprisoned by the state court. The court held that the state court had no jurisdiction to try such a case, and that he was entitled to be discharged - although he was already undergoing sentence.

3. Cong. Globe, 37th Cong., 3 sess., p.538 January 27th, 1863.

To determine what exactly the Republican supporters of the bill did want, the whole context of war policy must be considered. For the debate spanned the whole range of Republican policy on arbitrary arrests, confiscation and emancipation. In the House debate, when Representative Wadsworth criticised George Julian for speaking generally of the war and causes of the rebellion, rather than sticking to the subject at hand, Thaddeus Stevens interpolated that the discussion quite properly was about the whole policy of the Government.¹

For in one straightforward sense, the avowed object of everything the Republicans did was to restore the integrity of the government, to see to it that the law was respected in the states, that the Union should be a viable instrument of government again. And to this end, the protection of federal officers was very relevant. In this vein, Senator Collamer explained the intentions behind the bill,

we think that a villain ought to be arrested; that a thief should be arrested, and all breakers of the law; and especially that that law in which the vital existence of the Government is involved should be enforced. Obedience must be enforced, or there is an end of Government.

Of federal court jurisdiction he went on,

if that provision of the Constitution which gives jurisdiction to the courts of the United States to decide those questions has any force in it, they are the proper tribunal; and the bill is drawn with a view to carry those questions there ... Gentlemen who really think that this Government should be preserved against violence by the use of governmental force, I take it, will assist us to perfect and carry through this bill.²

And so for Collamer a commitment to the existence of government and law was the only prerequisite for support of the bill. It did not imply consent to every specific policy of the Republican administration, nor

1. Ibid., p.1067 February 18th, 1863.

2. Ibid., p.536 January 27th, 1863.

was it to be a blanket of legality around every act. Conservative Republican Senator Cowan agreed. He said that though there were times he believed the law impolitic, he would obey it while he struggled for its repeal. The will of the individual must respect the will of the people, expressed in law by their elected representatives. Otherwise, government could not exist.¹

But the Democrats accused the Republicans of a more devious connection between "war policy" and "law". In both Senate and House, they argued that the bill must not be taken in isolation, but be seen for what it was - part of a wider plot to throw a curtain of legality around things which they believed illegal, to make permanent acts which their understanding of the law would have made very temporary. Senator Garret Davis of Kentucky connected the President's September 1862 Proclamation suspending the privilege of the writ, with the Emancipation Proclamation of 1863, as,

a comprehensive scheme devised ostensibly to aid in suppressing a great insurrection, and reducing the insurgents to obedience to the Constitution and laws, but in reality to abolish negro slavery everywhere.²

The Republicans were indemnifying the executors of that policy, and by implication giving these policies a firmer base. The fear of permanence of things done under military orders, or executive proclamation was the corollary. Davis went on,

it would strike everybody as absurd to say that the military occupation and use of land would extinguish the title and divest the property of the owner. It would be no less false to assume such a position in relation to slaves. To free them ... would not extinguish the title and divest the property of the owner, which the Constitution declares shall not be done in any mode than "by due course of law".³

1. Ibid., pp.1467-1469 March 2nd, 1863.
2. Ibid., pp.529-534 January 27th, 1863. A similar connection was made by Representatives Stiles in the House, Ibid., pp.1087-1088 February 19th, 1863. The jurist B. R. Curtis also wrote of these emergency measures that "they establish a system. They do not relate to some instant emergency - they cover an indefinite future", and went on to warn against indemnity for illegal acts. B.R. Curtis, Executive Powers (Boston: Little Brown & Co., 1862).
3. Cong. Globe, 37th Cong., 3 sess., pp.529-534 January 27th, 1863.

Of course proclamations and acts of Congress could not be legalised by indemnifying those who acted upon them. Individually they would have to stand the test of law. But the enforcement of the policy they represented was very closely related to the ability of the government to protect the agents of its laws. In that sense, the Democrats were right. There were no plots, but a concern for backing up wider Republican policy - a concern of which the Democratic version was a mirror, distorted but nevertheless a mirror. For that reason, Representatives Julian, Stevens, Walker and Van Horn did not regard their speeches calling for a vigorous war policy, and support for the army, as irrelevant to the bill under discussion.^{1.}

For different, but related reasons, the Republicans were unanimous in their support for a bill to indemnify federal officers acting under the national authority. For Cowan and Collamer, the inviolability of the government was the only argument which need be presented. Speeches in the House went beyond that to plead a wider policy of emancipation, confiscation, and vigorous support for the Union army in the field. But even common sense would be enough to attach Representative Francis Thomas of Maryland to the bill, on the practical, but convincing argument,

at all events, I think that in times like these State courts and State juries, summoned by the sheriffs elected by themselves, ought not to have exclusive power to determine questions involving the discharge of public duty of public officers acting under the authority of the Government of the United States.^{2.}

The Senate passed its Judiciary Committee's amendment to the original House bill on January 27th, 1863 by 33 votes to 7.^{3.} On February 19th, the House refused concurrence.^{4.} The debate does not reveal explicit

1. Ibid., pp.1064-1069 February 18th, 1863, Ibid., pp.1083-1086 February 18th, 1863, Ibid., pp.1074-1080 February 18th, 1863.

2. Ibid., pp.1080-1083 February 18th, 1863.

3. Ibid., p.554 January 27th, 1863.

4. Ibid., p.1107 February 19th, 1863.

objections, or preferences for Stevens original extra-judicial bill.

Perhaps some of the conservative amendments to the Senate bill were not to their liking. The Senate had accepted Cowan's amendment that probable cause for arrest must be shown as part of the defence, so that preventative arrests could not be made.¹ Certainly neither the principle of indemnification, nor the removal procedure was disapproved by the House, for when the Committee of Conference reported the final bill embodying that procedure, it was accepted by 99 votes to 44 on March 2nd.² The Senate accepted the conference report on the same day by a viva voce vote.³ The Habeas Corpus Act became law on March 3rd, 1863.

It had been duly considered and debated. It was not "Radical" legislation. Jacob Collamer, the Vermont Senator who had a hand in drafting the indemnification clauses of the bill has been variously styled a moderate, or conservative, but never an extremist. "Judicial centralisation" was not their objective, but rather to cut through anarchy and see that questions vitally affecting the federal government were adjudicated in its courts. Rather than, as Senator Davis charged, doing anything to encourage a neglect of anyone's right to "due course of law", they were concerned that the men who served the government should also have that right.

Perhaps they were a little naive in thinking that the Habeas Corpus Act secured that right. One subject which was not fully explored in the debate was what possible sanctions to apply against state courts if they simply refused to hand over jurisdiction to the federal courts. The 1833 Revenue Act had contained a provision for the issue of a habeas corpus writ to take the defendant out of the state court.⁴ But the Habeas Corpus Act

1. Ibid., p.554 January 27th, 1863.

2. Ibid., p.1479 March 2nd, 1863.

3. Ibid., p.1477 March 2nd, 1863.

4. 4 U.S. Stat. 632 Section 7.

simply required the court to stay proceedings, once a removal petition had been properly filed.

In the next few years, that, and other weaknesses of the act became abundantly clear, as state and federal courts came to interpret the act. The act of course applied equally to all part of the Union. Laws which Republicans expected to be obeyed in Georgia had to be obeyed in Massachusetts - and even in Kentucky! Suits under the act came mostly from the border states, where strong local prejudice was often directed against federal officers in the course of their duties. Conflicts of jurisdiction between state and federal courts were frequent, as some state judges, notably in Kentucky, refused federal court jurisdiction, and held the Habeas Corpus Act unconstitutional. Indeed the Kentucky legislature made it difficult for the courts there to do anything else but resist. In February 1866, they passed an enactment making it unlawful for a judge to dismiss a suit on the acceptance of a defence that the alleged wrongs were committed during the existence of martial law or the suspension of habeas corpus.^{1.}

One of the most prominent arguments put forward by state courts refusing federal jurisdiction, was to go beyond ascertaining whether a defence of national authority, or Presidential orders etc. was properly set up, to comment on the constitutionality of these orders. They presumed then, to pass judgment on the President's war powers. In Eifort v. Bevins,^{2.} an action against an officer for trespass and false imprisonment brought to the Kentucky supreme court in 1866, Judge Robertson held their "authority" ^{illegal.}

1. Randall, Constitutional Problems Under Lincoln p.197.

2. Eifort v. Bevins 1 Bush 460 (1866).

He argued,

The Constitution of the United States being supreme over the President, as well as over every other citizen, every unconstitutional act done by him must necessarily be illegal and void, and consequently, no citizen or soldier can shield himself from responsibility by pleading an unconstitutional order of the President, which being a legal nullity, could confer no authority.

In a sentence, perhaps, the Republican legislative intention is vindicated. If the unconstitutionality of the President's exercise of the war power was to be the issue which a federal officer was to risk imprisonment for, all vigorous action might be paralysed while troops pondered questions of constitutionality best left to the United States Supreme Court. What the judge was doing in this case, was using the court as a political platform from which to attack Republican policy. Judge Perkins followed suit in the Indiana case of *Griffin v. Wilcox*,¹ in 1863. In this case the defendant, acting under orders from the Provost Marshal, suspended the sale of liquor to enlisted soldiers. His arrest of the plaintiff, Griffin, for infringements of the suspension, resulted in his being sued for damages. The opinion in the case, barely touched upon the particularities of the defendant's orders, or present plight, but remained on the subject of the unconstitutionality of the Habeas Corpus Act itself, and a general attack on the President's use of the war power.

On the more specific technicalities of the Habeas Corpus Act itself, the loophole which the state courts made was in the phrase "order of the President". Choosing to neglect other phrases which gave the act a wider application, for example "or under his authority", or "any law of Congress", they demanded in some cases, that the defendant actually produce a written order of the President. Thus, it was not sufficient to plead, as the

1. *Griffin v. Wilcox* 21 Indiana 370 (1863).

See also *Short v. Wilson* 1 Bush 350 - *Hogue v. Penn* 3 Bush 663.

plaintiff did in *Skeen v. Huntington*,^{1.} on appeal to the Indiana supreme court in 1865, that his "authority" for making an arrest was by virtue of his position as deputy provost marshal under authority of the President. Nor did Judge Robertson in the Kentucky case of *Short v. Wilson*^{2.} in 1866 accept a plea of 'orders' from a captain in the federal army who seized a mare. 'Authority' had to be more specific. A narrow construction of Presidential authority was a severe limitation on the terms of the act. And, given the tendency of the courts to hold that authority unconstitutional, even where it was clearly given, the officer couldn't win. The double hazard is illustrated in the case of *Commonwealth v. Palmer*,^{3.} in the Kentucky Court of Appeals in 1866. General Palmer was indicted for helping a slave to escape under his General Order Number 32. His plea was that he had authority from the War Department. Judge Robertson, for the court, objected that he had only been authorised, not specifically ordered, and furthermore, "... had he pleaded a peremptory order, it could not have shielded him from the penal consequences of an illegal act of glaring usurpation".

The state courts defined military discretions, and responsibility under orders, by the Supreme Court opinion in *Mitchell v. Harmony* in 1851.^{4.} The case referred to property seizures during the Mexican War. The opinion of the court was that private property could be taken by a military commander in times of such danger that it would not admit of delay, or where action by the civil authority would be too late. But the officer making the seizure could not rely on pleading orders, for "An order to commit a trespass can afford no justification to the person by whom it was executed".

1. *Skeen v. Huntington* 25 Ind. 510 (1865).
2. *Short v. Wilson* 1 Bush 350 (1866)
3. *Commonwealth v. Palmer* 2 Bush 570 (1866).
4. *Mitchell v. Harmony* 13 Howard 115 (1851).

The case was widely cited and followed in the state courts.

State court judges may have been right in some cases. The mere fact of being a federal officer does not shield a man from all consequences of his action, or ensure that he will not step beyond the limits of discretion and commit illegal acts. The point however, was that such questions should have been adjudicated in the federal courts, once the proper steps had been taken to remove the case.

There are, however, some important qualifications to the idea of widespread intransigence on the part of the state courts, and to the idea that in no state court could a federal officer possibly secure a fair trial because of the prejudice of judge and jury. For one thing, in a number of cases where federal court jurisdiction was resisted, the highest court of the state was reversing a judgment of a lower state court, originally sympathetic to the defendant, and the Habeas Corpus Act. In the case cited above, of *Commonwealth v. Palmer* in the Kentucky Court of Appeals, the state circuit court had dismissed the case against General Palmer. Again, in the Kentucky case of *Farmer v. Lewis*,¹ Judge Hardin found that the lower court judge had been in error in instructing the jury to dismiss a case against federal officers, on the grounds that they had set up a defence of orders in the terms of the Habeas Corpus Act. The tale is similar in *Hogue v. Penn* in Kentucky, and *Griffin v. Wilcox* in Indiana. The most interesting case of such a reversal, however, is in *Short v. Wilson* in 1866, again in the Kentucky Court of Appeals. For that case was prosecuted, for the specific reason of obtaining a reversal of a lower state court decision to transfer a case against federal officers to the federal courts. It came up under authority of a Kentucky Statute of February 16th, 1866 which read,

1. *Farmer v. Lewis* 1 Bush 66 (1866).

either party to any suit in any court of this Commonwealth.. shall have the right of appeal ... from the order of any such court transferring ... a cause to any court of the United States, or staying proceedings ... with a view of transferring a cause to any court of the United States.¹.

Arrogant behaviour by some state supreme courts, then, suggests that it was they, and not necessarily all state courts, who, finding themselves in a new position where appeals by-passed their jurisdiction into the federal courts, reacted with alarm to the threat of "encroachment". But that suggestion is made cautiously, since there are also cases, discussed below, of state supreme courts accepting federal court jurisdiction, after reversing lower court decisions refusing to hand over such jurisdiction.

Such cases provide a further qualification to a picture of complete non-co-operation between the courts of state and nation. In these cases, judges neither demanded written orders of the President, nor called his policy into question. Their interest was confined to whether the defendant had set up a proper petition under the terms of the Habeas Corpus Act. If he had, there was an end to state court jurisdiction, and the case would be transferred.² This was the view of Judge Conyngham in the Pennsylvania case of *Kulp v. Ricketts*,³ one of the earliest tests of the act in 1863. He held that the federal court was the proper place for the adjudication of this case against Ricketts for alleged wrongful arrest under authority of the War Department. It was not his court's duty to pass upon the President's right to suspend the privilege of the writ of habeas corpus.

1. Quoted in Randall, Constitutional Problems Under Lincoln p.197.
2. According to Henry C. Black, A Treatise on the Laws and Practice Governing the Removal of Causes (St. Paul: West Publishing Co., 1898), pp.312-313, this was the correct behaviour. He says, "Issues of fact upon the petition cannot be raised in the state court. That court must take the facts to be as they are stated in the record and the petition; it has no jurisdiction to pass upon any such questions; that is the exclusive province of the federal court". On the other hand, "The mere filing of a petition for the removal of a suit which is not removable does not work a transfer". A case, he says must be made which, "on its face" shows that the petitioner has a right of transfer. But the federal court also has a question to decide if its own jurisdiction attaches to the cause, by reason of proper steps having been taken to remove the cause. "... the decision of the state court is not conclusive".
3. *Kulp v. Ricketts* 5 Philadelphia Reports 305 (1863).

They need only see that the case is set out as required by the Habeas Corpus Act. That act, he maintained, created no new jurisdiction - jurisdiction over federal questions already existed. It only provided arrangements for the particular court and process of implementing that jurisdiction.

As Judge Leonard put the matter concisely in the 1863 New York case of *Jones v. Seward*,¹ where the Secretary of State found himself answering charges of false imprisonment,

we have nothing to do with the validity of the law as a defence to the action. It is sufficient for the state court that the defence involves the construction and effect of a law of Congress. The case has then arisen when the courts of the United States may have jurisdiction, if Congress so directs.

And he concluded co-operatively,

it is not our duty to assert the independence of our State sovereignty and jurisdiction; for the final construction and effect of all acts of Congress may be brought before the United States courts by the express provision of the Constitution.

Even Kentucky's Court of Appeals produced such a case in *Edwards v. Ward* in 1866,² where Judge Williams followed these arguments, and sustained a lower court decision to transfer a case against a federal officer to the federal court.

To cloud the question of relationships between the highest state courts and the inferior state courts, some of these compliant state court opinions were reversals of lower court decisions originally taking an unfavourable view of federal court jurisdiction under the act. One such case is particularly worth noting, since it involved Ohio's Supreme Court's issuing a writ of mandamus to the county court to stay proceedings, in

1. *Jones v. Seward*, as reported in Edward McPherson, The Political History of the United States of America During the Great Rebellion. (Washington: 1865) pp.185-187.
2. *Edwards v. Ward* 2 Bush 606 (1866).

order that the case might be removed! The case was *The State v. Fairfield* Court of Common Pleas in 1864,¹ where federal officers filed a petition for removal of a case against them for imprisonment and assault, from the state court to the federal. When it was refused, one of the officers, Tod, brought an action in the Ohio Supreme Court for a writ of mandamus against the lower court. The higher court sustained both the constitutionality of the Habeas Corpus Act, and the right to stay proceedings in the lower court in this manner. No complete picture of the incidence of clashes between state courts, or the frequency with which one backed federal jurisdiction and the other didn't, is possible without more information. What is apparent, however, is that there was an irregular pattern in the behaviour of the state courts, which suggests that there was not a complete black-out of justice in all areas.

Regional differences account for some of these irregularities.

Kentucky was undoubtedly the worst offender. An assistant U.S. District Attorney wrote to the Attorney-General's office, in February 1866, hinting at the kind of judicial blackmailing tactics which he was forced to employ there. He suggested that pardons to Kentucky rebels be dealt out very sparingly in order to keep a sufficient number of treason proceedings hanging over their heads to affect prosecutions against Union officers and loyal citizens. Such tactics, he said, were helping to stave off an attempt by the legislature to impeach Judge Goodloe, whose crime was a

1. *The State v. Fairfield Co. Common Pleas* 15 Ohio St. 1864. Also in *Jones v. Seward*, the New York Supreme Court was reversing a lower state court decision refusing a motion for removal. And in *McCormick & Others v. Humphrey*, 27 Ind. 144 (1866), a motion for removal of this case for the arrest of a member of the Sons of Liberty was turned down by a lower court. Indiana's highest court reversed the judgment, and ordered the state court to proceed no further in the case.

willingness to hold a fair trial. He concluded, that

the Rebels of any Southern State can be trusted sooner than those in Kentucky.¹.

Even personal bias accounts for some of the irregularities. Judge Robertson of the Kentucky Court of Appeals delivered opinions consistently opposed to relinquishing jurisdiction to the federal courts. His colleague on that bench, Judge Williams was known to construe the law more sympathetically.² In the Pennsylvania Conscription Cases,³ an original opinion by Judge Lowrie denying federal court jurisdiction under the Habeas Corpus Act, was reversed several months later when Judge Strong, who had given a dissenting opinion in the case, replaced Judge Lowrie.

Regional differences, and personal bias, then, could affect the construction of the act in the state courts. But these things were exactly what the act was designed to counter - to remove the possibility of such a lack of uniformity by having the question adjudicated in the federal courts. And so the act had to stand or fall by the test of the blacksheep.

Once again, however, the picture which emerges from a study of the federal courts' construction of their powers under the act, is not a clear one. The arrival of a case on the federal court docket did not ensure an end to arguments of unconstitutional authority, or to a construction which demanded the production of a specific written order of the President. In the 1873 California case of McCall v. McDowell,⁴ the judge held that an order of the President must be presented. The defendant claimed authority

1. Col. B. H. Bristow, Asst. U.S. Attorney, Kentucky to the Hon. James Speed, February 9th, 1866, Letters Received, Attorney-Generals Papers, National Archives.
2. Compare Judge Robertson's opinion in Short v. Wilson, 1 Bush 350, with Williams' in Edwards v. Ward, 2 Bush 606.
3. Pennsylvania Conscription Cases, 45 Pa. 238.
4. McCall v. McDowell, Fed. Cas. 8673.

to make the arrest of the plaintiff McCall under Lincoln's proclamation of September 24th, 1862, suspending the privilege of the writ in certain circumstances. The judge overruled that as a defence, because, "...judicially I know that it was unauthorized and void". Even in the United States Supreme Court, Justice Field ruled in *Bean v. Beckwith*¹ in 1873 that the defendant's plea was defective in not setting forth any order of the President directing or approving the acts in question.

The important case of *the Justices v. Murray* in the Supreme Court has already been discussed. The judge held that the sections of the act authorising removals after the final judgment had been given in a state court, was unconstitutional. The Chief Justice gave a similar opinion the same year in *McKee V. Rains*,² again in the Supreme Court.

Despite these exceptions, however, where federal courts showed caution on the meaning of "authority", and of course where they came out absolutely against removals after final judgment, the federal courts in general gave a broad backing to the terms, and the intentions of the act. The constitutionality of the act was tested in 1867, in *Mayor v. Cooper* in the Supreme Court.³ Cooper sued the mayor and aldermen of Nashville, Tennessee for trespass on real estate. The defendants pleaded that they held their authority under the national government, and more specifically, that they acted under orders from the military governor, General G. H. Thomas, himself under authority of the War Department. The case had originally been dismissed in the state

1. *Bean v. Beckwith et. al.* 85 U.S. 515 (1873). Bean was charged with enticing soldiers to desert. Beckwith, as provost marshal, claimed authority for his arrest under Presidential authority. Justice Field held the plea defective, but the Supreme Court later in *Beckwith v. Bean*, 98 U.S. 289 (1878) ordered a retrial.
2. *McKee v. Rains* 77 U.S. 22 (1869). A case against McKee for eviction had gone against him in the state court. A petition for removal was filed, and the removal made, but the U.S. circuit court had remanded the case back to the state court, against which McKee now brought a writ of error. Chase said that the fatal objection to McKee's application for removal was that it was made after judgment.
3. *The Mayor v. Cooper* 73 U.S. 247 (1867).

circuit court of Tennessee, on the grounds that the Habeas Corpus Act was unconstitutional and void. It was brought to the Supreme Court on a writ of error. Mr. Justice Swayne in his opinion, reversing this decision, approved the constitutionality of the act, and amply reflected the spirit of the men who framed it. He emphasised the extent of the judicial power under the Constitution. Far from requiring actual orders of the President as grounds for removal, he asserted the government's right to have cases which included a federal question even as an ingredient, tried in federal courts. This right he said,

... is essential to the peace of the nation, and to the vigor and efficiency of the government. A different principle would lead to the most mischievous consequences. The courts of the several states might determine the same questions in different ways. There would be no uniformity of decisions. For every act of an officer, civil or military, of the United States, including alike the highest and the lowest, done under their authority, he would be liable to harassing litigation in the State courts. However regular his conduct, neither the Constitution nor laws of the United States could avail him, if the views of those tribunals and of the juries which sit in them, should be adverse. The authority which he had served and obeyed would be impotent to protect him. Such a government would be one of pitiable weakness ...

This lead was followed in many more federal cases.¹ Interpretations of what constituted a federal "ingredient" was enlarged beyond specific Presidential orders. In *Fisk v. Union Pacific* in 1869,² Judge Blatchford held that the right of removal pertained to a railroad company which had been organised under a law of the federal government. The Supreme Court held in *Mitchell v. Clark* in 1883,³ that this jurisdiction under the act extended to a case between two civilians where they were affected by federal orders during the rebellion. This case involved a suit by a lessor against

1. Including *Hodgson v. Millward* Fed. Cas. 6, 568; *Murray v. Patrie* Fed. Cas. 9, 967 (1866); *Mitchell v. Clark* 110 U.S. 633 (1883); *Clark v. Dick* 5 Fed. Cas. 865 (1870); *Beard v. Burt* 95 U.S. 434 (1877).
2. *Fisk v. Union Pacific* Fed. Cas. 4, 827 (1869).
3. *Mitchell v. Clark* 110 U.S. 633 (1883).

a lessee for rents which had been paid to the military authorities during the rebellion by order of the commanding general in Missouri. Judge Miller distinguished the case from *Bean v. Beckwith*, in that it was not necessary to set forth the language of the actual order of the commanding general. Such interpretations were in keeping with the terms of the act, which extended protection to officers, "or any other persons". In all these cases, the courts concerned themselves purely with the validity of the defence under the terms of the Habeas Corpus Act, leaving questions of the broader constitutionality of the President's war powers to be adjudicated elsewhere than by the federal officer - or by the state court!

But it was one thing for the federal courts to assert the extent of their jurisdiction, and another to compel state courts to accept it, and stay proceedings.¹ A statute of 1793 forbade injunctions to restrain the state courts, except in bankruptcy cases. Judge Johnson in *Martin v Hunter's lessees* in 1816, was of the opinion that it was proper for a federal court to issue a mandamus to a lower federal court. But he did not claim such a right for a federal court to a state court. The 1863 Habeas Corpus Act contained no machinery for enforcing federal jurisdiction if it was resisted. In many of the cases which came up under it, the judge cited the authority of *Gordon v. Longest*² against such state resistance. In this case a Pennsylvania captain was accused of taking a slave from Kentucky to Ohio, contrary to Kentucky law. He was sued in the Kentucky State Court. As a citizen of Pennsylvanie, he

1. The problem of enforcement of removal acts in general is discussed in Henry C. Black, A Treatise on the Laws and Practice Governing the Removal of Causes (St. Paul: West Publishing Co., 1898) Ch.15. He writes that further proceedings in a state court were void after removal was authorised. If the state court did proceed, the defendant could defend his case, without forfeiting his right to trial in a federal court. If the case went against him, he could take it to the Supreme Court on a writ of error, or file a transcript of the record in the U.S. circuit court and require the plaintiff to litigate there even while proceedings were going on in the state court. In special circumstances, he says, an injunction to the state court would be admissable.
2. *Gordon v. Longest* 41 U.S. 97 (1842).

attempted to exercise his right to have the case removed to a federal court, on grounds of diversity of citizenship. The state court refused. When the case came to the United States Supreme Court in 1842 on a writ of error, Justice McLean gave the opinion of the court that, when an application to remove the cause had been made in proper form, it was the duty of the state court to proceed no further in the case. Every step taken subsequently in that court, or the state court of appeals was coram non iudice. In 1842, the judge was able to refer to this as -

the first instance known to us, in which a state court has refused to a party a right to remove his cause to the circuit court of the United States.

But during the civil war it became a commonplace. *Gordon v. Longest* was only a precedent, not the machinery for taking action. In the 1866 case of *Murray v. Patrie*¹ in the federal circuit court, Judge Nelson issued a mandamus to the clerk of the New York Supreme Court for removal of the case to that court under the Habeas Corpus Act. But Judge Blatchford in *Fisk v. Union Pacific* in the federal circuit court in 1869, refused to grant a writ to stay proceedings in a New York court, on the grounds that a United States court had no jurisdiction to issue such a mandamus. Certainly it was evident that neither the courts, nor the Habeas Corpus Act as it stood, had the answer to this problem of how to enforce federal court jurisdiction where it was resisted.

The problem was equally evident in the related question of habeas corpus jurisdiction in conscription cases. The suspension of the privilege of the writ by Lincoln's Proclamation of September 1863 extended to men enlisted in the Union army. Under the terms of the first section of the Habeas Corpus Act, where the privilege was suspended, no military or other

1. *Murray v. Patrie* Fed. Cas. 9, 967 (1866).

officer need be compelled to make a return to the writ and produce the body of any person detained under authority of the President. On a certificate under oath that the prisoner was held under Presidential authority, further proceedings under the writ of habeas corpus should be suspended by the judge or court issuing the writ. Any further investigation and discharge was to await proceedings in the federal court. This, however, did not stop the state courts from claiming and exercising a right to issue writs of habeas corpus for the release of soldiers, usually minors, from service in the army, despite Section 9 of an Act of July 1866 which provided that only the Secretary of War could release minors. Not only that, but federal officers who obeyed the Habeas Corpus Act, and refused to make a return to the writ, might find themselves imprisoned for so doing, as in the case of Farrand¹. in the Kentucky courts.

Attorney-General Bates records a Cabinet discussion in September 1863, on the question of such conflicts of jurisdiction. President Lincoln, he recalls was

.. greatly moved - more angry than I ever saw him - declared that it was a formed plan of the democratic copperheads, deliberately acted out to defeat the Government, and aid the enemy. That no honest man did or could believe that the State Judges have any such power.².

Bates agreed, and suggested that the judge who issued the writ should be informed of the cause of imprisonment, that the officer should refuse to deliver the body, by force if need be. In cases of attempt to punish the officer for this course of action, the officer should be protected, "by force if need be". Sanctions against the state court judges must have

1. In re Farrand Fed. Cas. 4, 678 (1867) - the federal officer was jailed after he refused to hand over a recruit in answer to a habeas corpus writ from the State court.
2. Edward Bates, The Diary of Edward Bates, 1859-1866, ed. by Howard K. Beale (Washington: U.S. Government Printing Office, 1933) pp.306-307.

been discussed, for Bates goes on to say,

I resisted the idea, held out by some, of vengeance, or penal justice, by imprisoning the judge who issued the writ.¹.

The idea was to be reviewed three years later when Congressmen discussed an amendment to strengthen the Habeas Corpus Act.

Once again, as a qualification to a picture of universal truculence on the part of state court judges, some decisions declining such jurisdiction should be noted. In the important case of Spangler before the Michigan Supreme Court in 1863². - an action for the release of an enlisted minor - Judge Martin denied an application for a writ of habeas corpus. He ruled that the draft proceeded under a law of Congress, that enlisted men were held under the national authority, and that a state court could not issue a writ of habeas corpus to inquire into the legality of the imprisonment. Though the cases *In re Oliver* in Wisconsin in 1864, and *In re Shirk* in 1863³ were complicated by criminal offences by the enlisted man, the judges there also declined to issue writs of habeas corpus for their release. In many more cases, however, state courts claimed a tradition of concurrent jurisdiction in habeas corpus cases, a point of view eloquently argued in another Wisconsin case, *in re Tarble* in 1870.⁴.

In these matters, however, the federal courts showed little ambivalence. Of the cases which I examined, only one entertained the idea of concurrent jurisdiction.⁵. The others strongly asserted federal jurisdiction over state.

1. Ibid., p.307.

2. *In re Spangler* 11 Mich. 298 (1863).

3. *In re Oliver* 17 Wisconsin 681 (1864); *In re Shirk* 5 Philadelphia 333 (1863).

4. *In re Tarble* 25 Wis. 390 (1870), again the issue was a habeas corpus writ for the release of an enlisted man from service in the army.

5. This was *In re Reynolds*, Fed. Cas. 11, 721 in the New York circuit court in 1867. Here the judge was of the opinion that the state courts have jurisdiction to issue a writ inquiring into the cause of the prisoner's detention; may discharge the prisoner if it appears he is illegally held. Reynolds was discharged by the federal court.

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The case of *In re Farrand* in 1867 serves as an example.¹ A Kentucky state court had issued a writ of habeas corpus for the release of an enlisted man. When the federal officer refused to hand over the body of the prisoner, he was imprisoned. The judge of the federal district court held that the state court had no right to release the enlisted man, when the return to the writ showed that he was held under national authority. The validity of that authority was a question for the United States courts, and not those of the states. Finally the state court had no authority to imprison the federal officer for contempt, and he was entitled himself to a release on a writ of habeas corpus to the state court, under the provisions of the Revenue Act of 1833.

In these cases, the federal court judges cited the 1859 Supreme Court case of *Ableman v. Booth*,² to deny state court jurisdiction, just as they had cited *Gordon v. Longest* in the indemnification cases. Chief Justice Taney had held then that a Wisconsin judge had no authority to release a man in custody under the authority of the United States - in this case a man held by a United States marshal for helping a slave to escape, contrary to the Fugitive Slave Law. Again this was an opinion, not a means of stopping the state courts from issuing such writs. Certainly it was an opinion which gained ground in the federal courts during the war, and was capped by the opinion of the Supreme Court in 1871 in the case of *Tarble*,³ when they firmly denied the claims of the state courts. This effectively ended the practice.

Broadly, the pattern which emerged from the application of the Habeas Corpus Act was for state courts in many cases to resist federal jurisdiction,

1. *In re Farrand* Fed. Cas. 4, 678 (1867). See also *In Re Neill* Fed. Cas. 10,089 (1871) and *in re Fagan* Fed. Cas. 4, 604 (1863).
2. *Ableman v. Booth* 62 U.S. 506 (1858).
3. *In re Tarble* 80 U.S. 397 (1871).

and for federal courts in general to take a sympathetic view of the framers' intentions in legislating the act. There are several qualifications to the idea of outright conflict between state and federal courts, or to a denial of justice in all state courts. There were times when state courts took a sympathetic view of the act. Co-operation of course could not be assumed, and the act was designed to work without it if need be. But it was not designed either to discourage co-operation -- perhaps one reason why it lacked a severe enforcement mechanism. The idea was rather to demonstrate that the federal courts could take jurisdiction where the state courts could not be relied upon to adjudicate federal questions impartially. It seems unlikely that the federal courts in Kentucky would want jurisdiction in, or be able to cope with the 3,000 cases on the state court dockets. Nevertheless, by 1866, it was clear that a delicate balance between co-operation and the ability to demonstrate the nation's authority through its courts, was not being achieved.

A certain amount of trouble had been anticipated. An act of the same date, March 3rd, 1863, appropriated \$100,000 for defraying expenses of suits under the act. It was surely needed. The bulky files of correspondence between the War Department and the Attorney-General's office contain increasingly standardised requests for counsel. Endorsements were made on requests for defence counsel for top military men, like Philip Sheridan for "acts done in performance of his duties as Commander of the Department of the Missouri", General Grant, sued in the Supreme Court of Georgia, and General McDowell, answering charges in the California state court.¹ But it was not only generals who were fair game. The cases cover the whole

1. John A. Rawlins to the Attorney-General May 11th, 1869, Correspondence between War Department and Attorney-General V.9., Attorney-Generals Papers; Ibid., General U.S. Grant to Henry Stanbery February 13th, 1868; Ibid., Edwin Stanton to James Speed December 29th, 1865. See general correspondence between the War Department and the Attorney-General's office for further cases.

range of rank and officers. A fairly typical request came from Jackson, Mississippi in 1870, for a law officer to defend a second lieutenant of the Sixteenth Infantry in -

any action that may be brought against him on account of the part taken by him in recovering from Mr. E. Moody, of Jackson, Mississippi, the possession of a mule belonging to the United States.¹.

Sometimes, district attorneys were confident that such cases would be entered as nolle prosequi, or transferred to the federal courts under the Habeas Corpus Act. The United States attorney in North Carolina wrote of his difficulties in travelling miles between state courts to defend federal officers personally, but assured the Attorney-General's office that,

.. from what I know of the judges I feel assured that if Nolle Prosequis are not entered (which I believe will be the case) that they will all be removed into the Federal Courts.².

His optimism was the exception rather than the rule, however. In most areas, the patience of a beleaguered army was fraying. They began to look to their own protection, rather than to the Habeas Corpus Act. In 1866 Kentucky in a Deputy Provost Marshall, E. M. Angel was indicted by a Grand Jury in Greene County for providing passes for negroes. General Palmer, in charge of the department, and himself a frequent target of such suits, wrote to the sheriff of the county, to the effect that Angel acted under legal orders and was entitled to protection from illegal and oppressive arrests. Palmer concluded,

you are notified that Mr. Angel must not be arrested by you by virtue or under pretence or color of the writs issued on said Indictments. If he is he will be discharged by me and you yourself placed under arrest.³.

1. Belknap to Attorney-General, December 14th, 1870, Attorney-Generals Papers.
2. D. H. Starbuck to J. Hubley Ashton, October 8th, 1866, Attorney-Generals Papers. Letters received.
3. Ibid., John M. Palmer to the Sheriff of Hart County, January 27th, 1866.

It was one way of "staying proceedings", but hardly likely to commend itself to the civil authorities. General Palmer had asked the army's Adjutant-General to approve his action, in view of the frequency of these harassing suits.¹ The War Department preferred to use more regular channels, however, and requested the Attorney-General's office for counsel to defend Angel, pointing out that in the absence of martial law in Kentucky, General Palmer was not empowered to carry out his threat.²

A further illustration comes from Tennessee, where the district attorney arrived in court to petition for the removal of a suit against Major H. W. Smith to the federal courts - only to find that the suits had already been dismissed by order of Major-General Thomas to the plaintiff's attorney!³ (the order dismissed one of the suits in favour of the plaintiff). Commanding officers claimed the authority to intervene by reason of General Orders Number 3, issued by General Grant on January 12th, 1866. It charged commanders in rebel states (General Palmer wrongly pleaded the order as an excuse for his conduct in a loyal state), to issue orders to protect all persons under military authority from suits in state and municipal courts, and to protect coloured persons charged with offences for which white persons were not prosecuted in the same way.

For all the subtleties of the federal relationship, the question was raised again then - must the laws of nation over state rely on force? In 1866, Congress sought alternatives in law. On March 13th, Representative Cook introduced an amendment to the Habeas Corpus Act, designed to give it teeth.⁴ Explaining the need for an amendment to the law, Representative

1. Ibid., John M. Palmer to the Adjutant-General, January 27th, 1866.
2. Ibid., Adjutant-General Holt to the Attorney-General, 8th February, 1866.
3. Ibid., H. H. Harrison, U. S. district attorney to James Speed, March 2nd, 1866.
4. Cong. Globe, 39th Cong., 1 sess., p.1368, March 13th, 1866.

Cook of the House Judiciary Committee spoke of

evidence before the committee that the state courts in some border states have held, under Section 4 of the act of which this is an amendment, that the order of the President of the United States is necessary to justify the party doing the act.^{1.}

The amendment proposed a more liberal construction of orders to read -

any order, written or verbal, general or special, issued by the President or Secretary of War, or by any military officer of the United States holding ... command of the ... place within which such seizure ... or imprisonment was made.

Cook went on to draw attention to the difficulties which had been encountered in removing cases from state jurisdiction. The amendment provided that if a State court proceeded with a case after removal, the judges and other officers concerned might face damages and double costs - penal sanctions against judges after almost eighty years of building respect for each others' jurisdictions, and avoiding conflict!

The Democrats instantly objected to the amendment. Representative Harding of Kentucky protested that it was retroactive, giving defendants whose cases were now pending, a broader defence; the defence itself was too sweeping, putting the orders of a corporal on the same footing as the President; and finally, state judges ought to be free from prosecutions.^{2.} These charges, however, did not spark off much debate in the House. For the Republicans, McKee made the simple defence that the Government must be able to protect its men in the states, and have questions affecting them - and the existence of the government - adjudicated in its own courts.^{3.} Clearly the state courts could not be relied upon to see justice done. The amendment passed on March 20th, 1866, with a display of Republican unanimity, by 112 votes to 31.^{4.}

1. Ibid., pp.1387 -1388 March 14th, 1866.

2. Ibid., pp.1423-1425 March 15th, 1866.

3. Ibid., p.1526 March 20th, 1866.

4. Ibid., p.1530 March 20th, 1866.

It was taken up for discussion in the Senate on April 11th, and became the subject of a more spirited debate than it provoked in the House. Opponents raised the question of penal sanctions against state court judges, resulting in a motion by Senator Saulsbury to strike out the offending clause. Republican Senator Clark didn't mince words when he replied,

this Government must be obeyed, and it is not worth having if it cannot cause itself to be obeyed. This proceeding, if attempted to be carried on in a State Court, in defiance of the United States authority, should be void and the judges and everybody else who undertakes to set himself up in this way - for it will not be an honest authority - should be punished for so doing. We have had about enough of this State authority to teach it to yield respect and obedience to the laws of the United States.¹.

Strong words - but in 1866, the Republicans certainly had had enough of state authority. While they debated this amendment, the Joint Committee on Reconstruction was sitting in Washington, gathering a formidable array of evidence of State disobedience to United States law, and the hazards facing the minorities who did respect it. To jail a few judges did not seem so unreasonable in these circumstances. When Senator Hendricks of Indiana suggested that impeachment was a more appropriate censure of a judge,² Clark referred him to the situation in Kentucky. There a federal officer had recently submitted a resolution to the legislature that, since widespread amnesty had been granted to rebels, and would be used in court as a defence to proceedings, federal officers should have similar protection from proceedings in state courts. The legislature turned it down. "Now", said Clark, "talk of an impeachment of a judge in a state like that!"³ His colleague, Trumbull, cited precedents for penal sanctions against judges. He

1. Ibid., p.2052, April 20th, 1866. The amendment was defeated, without a recorded vote on the same day. Ibid., p.2063.

2. Ibid., pp.2053-4, April 20th, 1866.

3. Ibid., p.2054, April 20th, 1866.

referred to a provision of a New York State Statute, and to Kent's Commentaries.^{1.} But Senator Doolittle found himself in disagreement. He distinguished between the judicial and ministerial functions of the judge in these cases and his exemption from prosecution in the former capacity.^{2.}

But the Republicans on the whole had no qualms as to the constitutionality, or advisability of this measure. Several Senators spoke of the removal procedures in general, stressing the need to have federal questions adjudicated in federal courts.^{3.} Only conservative Edgar Cowan struck a discordant note, on behalf of the state courts, when he argued against the amendment,

this is a case where prima facie the State courts have not only clear, unquestionable jurisdiction, jurisdiction never before perhaps doubted, but where the United States, by the very terms of the instrument under which we govern the Union, have no such power.^{4.}

The Senate vote on the amendment on April 20th showed him to be outnumbered. It passed by 30 votes to 4.^{5.} Once again, however, conservatives had succeeded in attacking an amendment to which the House could not agree - a provision making the terms of the amendment operative only on future cases, and excluding from a defence of orders any acts done with malice, cruelty, or unnecessary severity (which, as Republicans argued would not be shielded by the act in any case, and only provide another loophole for the states).^{6.} But both Houses agreed to the report of the Conference Committee, and the amendment was approved on May 11th, 1866.

Passage of the amendment does not appear to have tamed the state courts. The Kentucky cases of *Commonwealth v. Palmer* and *Short v. Wilson*, denying

1. Ibid., pp.2055 - 6, April 20th, 1866.

2. Ibid. p.2059.

3. Speeches by Williams, Ibid., p.2055, Trumbull pp.2055-6, and Howard pp.2060-2061, and Johnson pp.2061-2, the most notable.

4. Ibid., p.2057 April 20th, 1866.

5. Ibid., p.2066 April 20th, 1866.

6. Ibid.

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federal jurisdiction, were adjudicated in the summer term of 1866, after the passage of the amendment. Numerous complaints from the army of harassment at the hands of state courts are recorded in correspondence between the War Department and the Attorney-General's office after 1866. I can find no instances of judges prosecuted under the amendment.

The amendment was probably responsible for a broader interpretation of the act in the federal courts. In the Supreme Court cases of *Beard v. Burt* in 1877, and *Mitchell v. Clark* in 1883, jurisdiction was held to extend to cases involving two civilians, affected by orders or actions of the federal army, since it constituted a federal question. The federal courts generally did interpret the terms of the act more broadly, both as to the meaning of "authority", and as to the parties who could claim the right of removal under it.

But the Habeas Corpus Act and its 1866 amendment were only links in a general trend of removal legislation. For all the problems of compelling state courts to accept federal court jurisdiction, the Republicans made the procedure an integral part of Habeas Corpus, Civil Rights, and Freedmen's Bureau legislation through the Reconstruction period. It was a device which Republicans rediscovered in time of federal crisis. Jacksonian Democrats had used it in 1833 to enforce the revenue laws. Pierce Democrats attempted to use it in 1855 to enforce the Fugitive Slave Act. In 1863 it was invoked for the protection of federal officers, and Republicans discovered in it, both its vital implications for the continued existence of government - any government - and also its potential for the implementation of their policies. Without the ability to protect its officers against harassing suits in state courts, no government could long maintain its integrity. Without the ability to have its laws enforced impartially, the policy of the administration counted for nothing.

Confiscation and emancipation measures would be a dead letter if state courts who disagreed with them could insist on their jurisdiction, and hold the enforcers of that "illegal" policy responsible in their courts. Of course, the state courts would not, and did not surrender without a fight. The Habeas Corpus Act ran a none-too-successful gauntlet in the state courts. Some of the difficulties arose out of the novelty of the situation, while others, as in Kentucky, from a determined attempt to embarrass the administration. In some areas, the state courts did co-operate, and justice was done. The federal courts on the whole fairly reflected the legislative intention of the act. But the problem of co-ercing the states was not solved. The army tried force. Congress tried threatening the judges with penal sanctions in the 1866 amendment. But the power was not used. The question of finding alternative in law to force remained. It was more than a question of perfecting judicial machinery. The solutions were political, and had to rest on the consent of the people to the laws. But the meeting ground of law and politics was in these areas of contested jurisdiction.

CHAPTER IV

RECONSTRUCTION: THE WADE-DAVIS BILL

The rhetoric of "state suicide" and "conquered provinces" has, in the past, misled historians into interpretations of Congressional plans for reconstruction, which centre on the punitive designs of the Radicals, rather than the constructive aims of the Republican party.¹ The Wade-Davis bill, passed by Congress on July 2nd, 1864, and pocket-vetoed by President Lincoln, became, in this scheme of things, a measurement of extremism, to be explained in terms of a Radical offensive against a moderate President in an election year. Lincoln offered the South generous terms for restoration. His Proclamation of Reconstruction and Amnesty of December 8th, 1863, looked to the establishment of loyal state governments, based on a nucleus of ten per-cent of loyal men, willing to take an oath of future allegiance to the Union and Constitution, and the wartime proclamations and acts of emancipation. Such a plan was too generous for the Radical dissidents of the party, who insisted that terms of reconstruction were for Congress and not the Executive to dictate, that by seceding, the Southern states had ceased to exist, that the vacuum left by their non-existence allowed the federal government to exercise powers over their domestic institutions and laws in an unprecedented invasion of states rights. The result was a deadlock between the President and the Radicals which "flared into open rebellion in 1864", when

the Jacobin bosses judged that the best way to control the process and machinery of reconstruction was to force the party to ditch Lincoln as its standard-bearer for 1864 and secure the nomination of an inexorable radical.²

While the Radicals looked for their 'inexorable radical', looking first to

1. See for example, T Harry Williams, Lincoln and the Radicals (Madison: University of Wisconsin Press, 1941), hereafter cited as Williams, Lincoln and the Radicals, and James G. Randall, The Civil War and Reconstruction (Boston: D. C. Heath & Co., 1953).
2. Williams, Lincoln and the Radicals, p.296.

Secretary of the Treasury Salmon Chase, and latterly, in the summer of 1864, to General John Fremont, they prepared an alternative plan of reconstruction. The Wade-Davis bill demanded harsher terms of the South. Where Lincoln envisaged a speedy restoration, the Congressional bill would demand a protracted one, until fifty percent would take an oath of loyalty to the Union. Only when such a loyal majority could be found, could they proceed to hold a state constitutional convention. Congress demanded terms of the constitution which they would produce - the most important of which was the permanent freedom of the slaves. Until that day, Congress would authorise the President to appoint a provisional government. T. Harry Williams does note that the bill was not the embodiment of every 'Jacobin' design. It restricted the suffrage to white males. It did not provide for the wholesale confiscations of plantations on which they were intent. And it did recognise that the seceded states still had some rights under the Constitution, although the 'Jacobins' believed in "conquered provinces". He surmises that for political reasons, in order to forestall Lincoln's plans, they were prepared to accept the best they could get for the moment, leaving a 'thorough reconstruction' till later.^{1.}

This view of the Wade-Davis bill does not lack support from contemporary sources. Secretary of the Navy Gideon Welles thought that one of the objects of the bill was to pull down the Administration. It was inspired by "earnest zeal on the part of some, and ambition and intense malignity on the part of others."^{2.} Representative Francis Blair styled it,

a bill for the permanent dissolution of the Union, to disfranchise the whites and enfranchise the Negroes, to prevent any of the states from coming back in time to vote for Mr. Lincoln for President and to promote the ambition of the Secretary of the Treasury.^{3.}

1. Ibid., p.319.
2. Howard K. Beale (ed.), Diary of Gideon Welles (N.Y.: W.W. Norton & Co., 1960, 3 vols.), II pp.95-96, hereafter cited as Welles, Diary.
3. Cong. Globe, 38th Cong., 1 sess., p.1829, April 23rd, 1864.

Neither observer was free from a bias of his own. On reconstruction, Secretary Welles clung to a view of the inviolability of states rights which kept him well at the rear of his party, and the demands of the times.¹ Francis Blair had his own political vendetta with the Radicals, and specifically with Henry Winter Davis, the bill's sponsor in the House of Representatives.² True, there were many Republicans who did seek an alternative Presidential candidate in 1864, many who felt that Lincoln's reconstruction plans fell short of a guarantee of future freedom to the slave, and peace to the Union, and some who fell into both categories.

But, to get beyond a partisan view of the bill, conservative or radical, towards an appreciation of what were the positive concerns of the Republicans who passed it in July 1864, it is necessary to begin the story shortly after the bombardment of Fort Sumter, rather than in the year preceding the election of 1864, and to end it rather later than the veto of the bill in July, and a successful election for Lincoln in November 1864. Professor Williams was right to observe that the Wade-Davis bill did not include anything as radical as universal male suffrage or wholesale confiscation, and that it was not based on any theory of state extinction. In the words of Representative Ashley, a supporter of the bill with a long interest in reconstruction measures it was not perfect but "the best we can get".³ It was the lowest common denominator acceptable to the party as a whole, after over two years of labour in committee, and debates which uncovered some of the depths of the reconstruction problem, but left no mark on the statute book. A recent volume by Herman Belz, Reconstructing the Union, has opened up new perspectives

1. Welles, Diary, Vol. 1 pp.412-413 when he discusses his views of state indestructibility as compared to the radicalism of other Republicans.
2. John G. Nicolay and John Hay, Abraham Lincoln, a History (N.Y.: 1917 10 vols.) Vol.9 pp.113-115 discuss the Blair-Davis feud in Maryland politics. Hereafter cited as Nicolay & Hay, Abraham Lincoln.
3. Cong. Globe, 38th Cong., 1 sess., p.1356, March 30th, 1864.

on the problems, by extending his investigation to the bills which were not passed between 1861 and 1864.¹ While giving due attention to the Reconstruction theory as a political issue for the Republicans in the North, Professor Belz investigates the evolution of theories of "territorialisation", and "the guarantee of republican government" as attempts to tackle political realities in the South, and find a working rationale for extending the federal government's power to cope with the novel problems which war and reconstruction posed for the federal system.

In practical terms, as parts of Louisiana, Arkansas and Tennessee returned to Union control, there were no loyal governors, loyal legislatures, judges and juries to meet the everyday demands of an ordered society. Such governments either had to be sent down from the North, or forged out of the loyal population in the South. But which? Such governments had to enforce the laws. But, by 1863, when the victors had committed themselves to a Union based on freedom, could they afford to say that nothing had changed since 1860, that local legislatures and judges could ignore the negro's freedom by the Confiscation Acts or the Emancipation Proclamation, and enforce only ante bellum state laws, in flagrant conflict with these national laws? Yet the states were responsible for the whole range of laws which affected the status of their citizens. There was then, a many-sided problem for the federal government. Whatever terms they demanded of provisional, or interim governments in the South would involve invading this area of the state's business, or rights. The war would be for nothing if the victors went South to be caretakers for black codes and slave constitutions. But, whatever theory the Republicans would invoke to give them the power to dictate conditions of restoration, they were all agreed that whenever the terms were complied with, and the states were re-admitted to the Union, they

1. Herman Belz, Reconstructing the Union: Theory and Practice During the Civil War (N.Y.: Cornell University Press, 1969), hereafter cited as Belz, Reconstructing the Union.

were admitted in full equality with the other states. Everything, then, depended on the permanence of terms which could be achieved while the power to demand them could be claimed and exercised. After that, could the nation maintain any permanent protective relationship with the individual, to assure his rights against infringements by the states?

In answer to these questions, and particularly to this last, it is worth considering not only the abortive reconstruction measures which Congress debated between 1861 and 1864, but also the Confiscation Acts and the Habeas Corpus Act, discussed at length in previous chapters. In so far as Republicans encountered in these acts, the problems of enforcing the nation's laws against conflicting state laws, or regional prejudice, the problems of entering the states to protect individuals under that national law and against that prejudice, and finally the problem of clothing the federal courts with the power to do it, they were engaged in a rehearsal for reconstruction. These acts applied to the whole Union. They used familiar and permanent machinery - the federal courts - to protect the individual in the states. It might be worth remembering for the day when the troops left the South and all extra-ordinary powers had to be surrendered.

Whatever terms the Republicans decided to impose, these questions of means and ends were inextricably woven. Ultimately, it was a political question. The Republicans had to reach a consensus on the quality of the Union which they would see rebuilt, and bring the South to an acceptance of their political terms. The business of enforcing the Constitution and laws in the states rested in the final analysis on consent and on harmony between state and nation in their interpretations of them. And so Reconstruction was about political power, about altering the balance of

power in the states to generate law - making and law-enforcing majorities there acceptable to the majority party of the victors' elected representatives.¹ The gains of the war must not be lost by the return of political power to a slaveowning oligarchy. But the enforcement of national law must also be made possible in the face of conflict. For that reason, Republicans had to become concerned with means as well as ends, with the machinery as well as the content of the law - in other words not only with political balance, but with the balance of jurisdiction as between the federal and state courts. This is perhaps, to be unduly theoretical, or at least to state the problems in a way which contemporaries would not have defined them in 1864. For their awareness of the problem came slowly, and often only partially as events forced them to shift their consensus on what qualitative conditions of restoration must be demanded, and political opportunities changed the possibilities of what could be demanded. But various stages in their education to the possibilities and problems between 1861 and 1864 can be usefully observed as a background to the Wade-Davis bill.

The Crittenden-Johnson resolutions of July 1861 should be used very cautiously as an index of the Republican party's views on the nature of the war. It does not signify a simple commitment to restoring the status quo ante bellum. The first part of the resolution assigned the responsibility for the war to the "disunionists of the Southern States". The second part ran,

1. John C. Hurd, Theories on Reconstruction, American Law Review, Vol.1, January 1867 contains an interesting argument on the relationship between politics and law. He thought that the Republicans were fooling themselves when they derived theories of reconstructions from the Constitution to enforce its provisions, of "natural rights", "republican government" etc. and claim that all they were doing was enforcing the laws. The Constitution, he said, was a political compact, not a legal document, and the debate was about the terms of the political compact, the sovereign will from which law emanated, rather than a pre-existing set of rules for enforcement.

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that this war is not waged upon our part in any spirit of oppression, nor for any purpose of conquest or subjugation, nor purpose of overthrowing or interfering with the rights or established institutions of those states; but to defend and maintain the supremacy of the Constitution and to preserve the Union with all the dignity, equality and rights of the several States unimpaired; that as soon as these objects are accomplished the war ought to cease.¹.

Seventeen House Republicans who were willing to vote for that part of the resolution which apportioned blame for the war to Southern disunionists, abstained from voting for the second part of the resolution. Others, reputedly in favour of abolition, like Fernando Beaman voted for both parts.² Its terms were loose enough to cover most consciences. The negative part of it, that it was not a war for interference with the rights and established institutions of the states might well be the point of emphasis for some. None could object to the positive part of it, that it was a war for the supremacy of the Constitution and the preservation of the Union. Many Republicans may have realised that time would quickly make these two parts of the resolution self-contradictory. At any rate it would not tie their hands in the future. While the political and military outlook of the North was so uncertain in these early days, with the Confederate Army's victory at Bull Run on July 22nd, and the border states shaky in support of the war, it would not have made political sense to raise suspicions of a planned interference with states rights. It was not planned. The divergent path between past assumptions as to the inviolability of states rights, and coming reality came as a response to practical issues. And it came soon.

In the same month as Congress debated the Crittenden-Johnson resolutions, the Senate Judiciary Committee produced the first bill directly concerned

1. Cong. Globe, 37th Cong., 1 sess., p.209 July 19th, 1861.

2. Ibid., p.223 July 22nd, 1861.

with reconstruction in the South. The bill, S33, for the Suppression of Insurrection was introduced by Senator Trumbull on July 30th.¹ It sought to establish a law to follow the army into rebellious districts which came under its control. The military authorities were authorised to make the necessary rules and regulations for the restoration of order. Already, questions were raised as to the relationship between even the most temporary form of law enforcing authority, and existing state law. Because the bill contained no clear guarantee that existing state law would be respected, it was amended by the Judiciary Committee to provide for the enforcement of such rules, "conforming as nearly as may be to previously existing laws and regulations". Two points are worth noting in the light of later developments. Although some Senators, notably Jacob Collamer denied that Congress could exercise control over such a military government, and that it was the province of the Executive as Commander-in-Chief,² nevertheless, Trumbull and other Republican supporters of the bill were claiming a Congressional interest in the government of rebellious districts.³ The debate over who should control the Reconstruction process, Congress or the Executive did not blow up suddenly in an election year three years later. Secondly, though the phrase "as nearly as may be to existing laws and regulations" by no means indicated a design to interfere at this stage with the established institutions of the states, it did hint at a practical problem. Some discretion would have to be allowed for in an emergency situation. The phrase "as nearly as may be" would call for more careful thought as the direction of the war changed, and the freedom the Union army fought for made it an impossible caretaker of the laws of slavery. The emergency summer

1. Ibid., p.337 July 30th, 1861.

2. Ibid., pp.374-375 August 1st, 1861.

3. Speeches of Trumbull, Ibid., p.337 July 30th; and especially, Baker, Ibid., pp.378-379 August 1st, 1861.

session of Congress ended in August, without a decision on the bill. And when Congress reconvened in December, changed circumstances brought changed proposals.

November 1861 brought the capture of the Sea Islands, and Union victories in North Carolina, Tennessee, Arkansas and Louisiana in the first six months of 1862 brought parts of these states under their control. Congress could now consider Reconstruction as a practical issue. So did Lincoln. He began the appointment of military governors - Stanley to North Carolina, Johnson to Tennessee - to meet the immediate needs for law and order. Meanwhile, between December 1861 and March 1862, the Congressional Republicans sought to go beyond the most temporary of military arrangements, and probe the possibilities of setting conditions for a more permanent restoration of law and order.

But, to assume the right to prescribe conditions, they somehow had to get round the problem of explaining the inability of the existing state to do so. In practical terms, there was general agreement that the state governments were not functioning, that they were in Lincoln's view, out of their proper practical relationship with the Union. But was this enough to warrant the federal government assuming the functions of the state? A more radical rationale commended itself to a number of Republicans, among them Fernando Beaman, John A. Bingham, and notably James Ashley, chairman of the Committee on the Territories. The theory of "territorialisation", that by seceding, the states had ceased to exist as states, and reverted to the status of territories, had the merit of investing Congress specifically with the power to prescribe terms, under their power to make rules and regulations for the territories. The government had jurisdiction over the land and the people, although the state governments had ceased to exist.^{1.}

1. For a full discussion of the theory, see Belz, Reconstructing the Union, pp.51-70.

Of a number of bills which were based on this principle in the spring of 1862, the most important was James Ashley's bill from the Committee on the Territories, introduced in March 1862.¹ It looked to the creation of entirely new states out of the old. It authorised the President to establish temporary civil governments, on the territorial model, with full legislative powers over the states - including the power to interfere with slavery. Far from denying the power to interfere with the established institutions of the states, or even enforcing their existing rules "as nearly as may be", Ashley's bill declared that laws and municipal institutions in conflict with the general welfare and the Constitution of the United States ceased to exist when the state governments were destroyed. Although the bill was tabled on March 10th, 1862, by 65 votes to 56, a two-thirds Republican majority opposed its tabling.²

Ashley's bill did go further than any other measure to date in its interference with established state laws and institutions. It provided governments which could override them and govern by alternative rules until such times as acceptable new state government were provided. The theory was radical - yet a majority of Republicans were willing at least to consider it. The theory had been invoked, not to shock, or to trample on the rights of the states in every respect, but for specific ends. The very limited debate in the House casts a glimmer of light on the positive aims of its Republican supporters. Behind Fernando Beaman's championship of territorialisation was a desire to enforce governmental jurisdiction for ends which were hardly extreme - "the obligation of protection and a just administration of the laws".³ When the states failed in this duty,

1. Ibid., pp.62-79.

2. Cong. Globe, 37th Cong., 2 sess., p.1193 March 12th, 1862.

3. Ibid., pp.1551-2 April 4th, 1862.

he said, the federal government must not. Moderate Republican John A. Bingham echoed these positive aims behind the apparently negative theory when he asked,

is nothing to be done beside sending conquering armies to burn and destroy as they go? That is a needful thing; but I would also send the white-robed ministers of justice. I would put them in the deserted temples of justice, and place in their hands the sacred scales, and bind them by an oath to do equal and exact justice to the poor and the rich, the stranger and the citizen.¹

An obligation of the government to protect its citizens, "equal and exact justice" - these things not only had ceased to exist by secession. They had never existed, because of slavery. And it was the growing commitment to seeing that they did exist in a reconstructed Union which led men like Beaman and Bingham to invoke some theory to give the government the power to do it. But the aim was the important thing. Theories changed. Territorialisation became less fashionable than the "guarantee of republican government" clause by 1864. But that too, like "state suicide", or "conquered provinces" allowed the power to insist on freedom as a condition of reconstruction. And that was the position, by 1862, towards which the Republican consensus was quickly moving.

One reason for the defeat of Ashley's bill might well have been that it went further than that, to abolishing racial qualifications for juries, and confiscating lands for loyal men, including negroes. But, that the powers it claimed to interfere with slavery had at least the tentative support of the party, is indicated by the fact that, when Lincoln himself moved towards an emancipation policy later in 1862, support for the territorialisation theory dwindled.² As long as emancipation was accomplished, it wasn't necessary to claim any more far-reaching federal

1. Ibid., p.1204 March 12th, 1862.

2. Belz, Reconstructing the Union, pp.81-83.

power over the states than was necessary. Further evidence of the growing Congressional commitment to emancipation was demonstrated by their passing the bill for Emancipation in the District of Columbia in April 1862, an additional article of war prohibiting the return of fugitive slaves by the army, and the second Confiscation Act of July 1862. By now, Republicans would have agreed with the Texan loyalist Alexander Hamilton when he addressed a crowd in New York with,

restore the Government, its Constitution, and its laws to all, fellow citizens. With all my heart. Restore the Union as it existed for the year just proceeding the rebellion. God forbid.¹

Yet they had no clear idea of the degree of change, or the means to employ to change the Union into something better. Their attempts to legislate came more as a response to events, than as the manifestation of a theory. A further attempt came in the Senate towards the end of the session, in June 1862. Though the Republicans as a whole welcomed Lincoln's first steps towards emancipation, with his appeal to the border states on March 6th, 1862, and were prepared to drop the territorialisation bills, events on the field began to alarm them. In May, General Hunter's emancipation proclamation was revoked by the President. Lincoln's military governor, Stanley in North Carolina allowed inhabitants who took an oath of allegiance to recover their slaves, and worse still, provoked Congressional wrath by closing down a school for negro children at New Bern. Executive action was unpredictable then, resting too much on the whim of the commander on the spot. It was no substitute for a law on the subject, a uniform policy for the restoration of order.

Senator Ira Harris of New York introduced a bill in June 1862 for the provision of interim civil governments to administer the laws until the states

1. Quoted in The Liberator, October 24th, 1862.

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were ready to return to the Union.^{1.} Though it employed a territorial model for the provision of governors and judges, it was not based on any theory of territorialisation, and in its form, tacitly acknowledged the existence of states. It rested instead on Congress's powers to guarantee the states a republican form of government. It contained no specific emancipation provision, and the interest of the debate was on the issue -- which laws were binding on the provisional government?

Charles Sumner feared that the Governor and judges would be required to execute and respect existing state laws -- black codes for example. He thus opposed the amendment of the Committee on July 7th which read,

and not interfering with the laws and institutions existing in such state at the time its authorities assumed to array the same against the Government of the United States further than shall be necessary to carry into effect the provisions of this act.

Senator Harris then proposed instead to empower the Executive to execute "the laws of the United States", which Sumner thought an important difference.^{2.} For moderate Republicans there was clearly a dilemma in this conflict between state and national law. Senator Trumbull agreed with Sumner that the black codes must not be enforced by the provisional government. And yet he was not happy about Harris' amendment either, in case it was construed as limiting the provisional government to administering only United States law. He wanted more than that, he said. Trumbull went on to express the view that a general interference with state law was not desirable, but he would make an exception of these particular laws. Yet, he concluded, it was dangerous to say that an Executive charged with carrying out the law, should be able to leave some laws unenforced.^{3.}

Supporters of the bill did not elaborate on the position of the provisional courts under these circumstances. These courts were invested with the powers of the United States district and circuit courts but they

1. Cong. Globe, 37th Cong., 2 sess., p.2651 June 10th, 1862. For contents of the bill, Ibid., p.3138 July 7th, 1862.
2. Ibid., p.3139 July 7th, 1862.
3. Ibid., p.3140 July 7th, 1862.

would be called upon to adjudicate cases arising on state law. Would they, like the Governor, in all circumstances, follow it? One of the bill's opponents, Senator Carlile, suspected the implication was that the courts would be able to try state cases de novo, and he denied the power of Congress to create tribunals which could adjudicate cases between citizens of the same state arising out of state law.¹ Senator Powell stated his suspicions of the bill more boldly,

the object, the scope, and the intention of it is to send judges and a Governor there for the purpose of indirectly abolishing the institution of African slavery, and overthrowing the domestic institutions of those states under the apparent shield and panoply of the law.²

If this was even partly true, in the future it would have to be more clearly stated and more efficiently executed. The bill left too many questions unanswered. The session ended without its coming to a direct vote. Lincoln could go ahead in the summer of 1862 with his plans for reconstruction, untrammelled by a Congressional alternative.

Lincoln's policy towards those portions of the seceded states which were coming under Union control, was closely related to his policy of military emancipation. By giving advanced warning of the issue of the proclamation, he gave these areas the opportunity to gain exemption from its operation by proof of loyalty. He wrote to the military authorities in Tennessee, Arkansas and Louisiana urging them to encourage elections before January 1st.³ He looked to a loyal nucleus in these areas, in practice anticipating his ten percent plan of December 1863. In four states, elections were held, and districts exempted from the Emancipation

1. Ibid., p.3146 July 7th, 1862.

2. Ibid., p.3142 July 7th, 1862.

3. See Lincoln to Shepley in Louisiana, November 21st, 1862 in Roy P. Basler (ed.), The Collected Works of Abraham Lincoln (New Brunswick: Rutgers University Press, 1953, 9 Vols.) V pp.504-505, hereafter cited as Basler, Lincoln Works.

Proclamation. Moral blackmail of this kind, however, was not to become an integral part of his reconstruction policy. It had its temporary uses as a means of fighting the war rather than guaranteeing the peace. But the policy of encouraging elections among the loyal minority to initiate the restoration of loyal state governments did continue even when it was too late to hold out the possibility of saving slaves as an incentive to loyalty.

For, after January 1st, 1863, when Lincoln issued the Proclamation, it does not seem likely that he ever contemplated abandoning it when the war ended. Avoiding what he considered the inflexibility, and embarrassment of a theory regarding the status of the rebel states, he worked on the reality that although states could not secede from the Union, in practice their governments were not functioning, and were out of their proper practical relationship with the Union. Rather than assuming direct powers over their domestic arrangements then, he would encourage the loyal inhabitants to change them themselves. Getting a workable loyal state government was the first priority. Conditions would come later. And so, in relation to his showpiece, Louisiana, his efforts in 1862 and 1863 were directed towards drawing up a loyal nucleus to form a state government. In August 1863 he wrote General Banks,

I would be glad for her to make a new Constitution recognizing the Emancipation Proclamation and adopting emancipation in those parts of the states to which the proclamation does not apply.

Conditions were not phrased as direct demands, however. For a guarantee of freedom, he could only suggest that they adopt

some practical system by which the two races could gradually live themselves out of their old relation to each other, and both come out better prepared for the new.¹

1. Basler, Lincoln Works, VI pp.364-365 August 5th, 1863.

In November he followed this up by saying that, with respect to the freedmen,

my word is out to be for and not against them on the question of their permanent freedom.^{1.}

Similarly, Lincoln prodded the governor of Tennessee to forge ahead with elections of loyal representatives there. In September 1863 he wrote Johnson,

get emancipation into your new State government Constitution - and there will be no such word as fail in your case.^{2.}

Republicans who would not countenance a reconstruction on the basis of slavery could also take comfort from the President's Springfield letter in August 1863, when he said that there must be no compromise on the promise of freedom, that "... the promise being made, must be kept".^{3.}

The Congressional Republicans were at least willing to give him the chance to fulfil the promise. Evidence of their co-operation can be deduced from their decision in February 1863 to admit Louisiana's newly elected representatives Flanders and Hahn.^{4.} This was not accomplished without objections being raised by a minority of Republicans. Bingham doubted whether Louisiana could have representatives in Congress, without a state government to authorise such an election there.^{5.} Porter agreed that elections instigated by a military governor were invalid, and further, expressed doubts as to whether the people were choosing representatives more agreeable to the President than to themselves. Without wishing to be cynical about the possibilities of building a state government from its

1. Ibid., VII pp.1-2 November 5th, 1863.

2. Ibid., VI p.440 September 11th, 1863.

3. Ibid., VI pp.407-409 August 26th, 1863.

4. The resolution to seat representatives from Louisiana passed on February 17th, Cong. Globe, 37th Cong., 3 sess., p.1036 February 17th, 186

5. Ibid., pp.862-866 February 11th, 1863.

loyal foundations, he understood that the South was still a "hot-bed of treason and rebellion" and in need of a strong arm.¹ Nevertheless, the passage of the resolution on February 17th was a tentative victory for Lincoln's efforts to build from the loyal. The forty-four representatives who voted against it included an unlikely combination of Democrats like Daniel Voorhees, and radicals like Thaddeus Stevens, brought together by fears of executive usurpation. Henry Dawes, chairman of the Committee on Elections compared the alliance to

that memorable conciliation between the rival houses of Herod and Pilate, which made common cause in their efforts to overthrow the true gospel.²

This victory for Lincoln did not signify an end to the Congressional interest in reconstruction. On March 3rd, 1863, Senator Harris introduced yet another bill to establish provisional government in the South.³ Based on the guarantee clause, it provided for temporary civil governments, administering state laws, until a State government was formed. But no law recognizing slavery was to be enforced. Additionally, and giving further evidence that many Republicans did attach to the idea of freedom, the idea of the right to equal treatment under the laws, the bill provided that laws for the trial and punishment of white men should be applicable to all. The point of departure from previous bills was that it contained a procedure for holding elections for a constitutional convention. The new constitution was to contain three conditions. Certain classes of Confederate officeholders were to be disqualified. The freedom of slaves was to be guaranteed. There was to be no recognition of the rebel debt. Congress was thinking

1. Ibid., pp.859-860 February 10th, 1863.

2. Ibid., p.1033 February 17th, 1863.

3. Ibid., p.1507 March 3rd 1863, and see discussion of it in Belz, Reconstructing the Union, pp.122-125.

then, about more long-term issues than the immediate problems of working out a relationship between a temporary government and existing state law. It moved to the problem of working out a more permanent relationship between nation and state, national law and state law. They could not invoke federal power forever to dictate terms to 'conquered provinces' or 'territories' or whatever. By shifting their emphasis to the guarantee clause, they were taking a route more palatable to a generation fearful of the extensions of federal power. They would still set the terms, but the appearance of the state would be preserved - the state would be regenerating its own government, and itself writing freedom into the constitution, even if in practice it had no other choice. For the moment, there was little thinking done about the day when they would have a choice, when Congress admitted their representatives and recognised their state governments. It was hoped that the exclusion of Confederate officeholders, and the freeing of the slaves would create a different balance of power in the states, one which would prevent the return to power of men who would amend free State constitutions. Time and events would provide many more opportunities to think about these loopholes. Harris' bill was not taken up for serious consideration at this stage. Though a motion to table it was defeated, on March 3rd Senator Wilkinson moved to set it aside, since it was too late in the session to get a consensus in both houses on such a controversial issue without a lot of debate.¹ And so the Thirty-Seventh Congress ended without a bill on the subject.

Their time, however, had not been wasted. They had had a chance to see some of the practical issues of reconstruction take shape in Louisiana,

1. Cong. Globe, 37th Cong., 3 sess., p.1509.

Arkansas, Tennessee and Virginia. They saw there some of the things they did not want in a reconstructed South. They did not want the federal government doing the work of slave governments until they were ready to do it themselves. They did not want to be too quick to recognise state governments of dubious loyalty which might once again threaten the peace of the Union, and lose the gains of the war. But, as they demonstrated in their tolerance of Lincoln's policies, they did not want to discourage loyal men from initiating state governments, and they would not be in a hurry to pick quarrels with their President just for the sake of it, while they themselves could offer no clear alternatives.

But already, some observations could also be made about some of the areas of Republican agreement. They did claim a Congressional interest in the terms of reconstruction - not to spite Lincoln, but because of a deeper faith in law. On confiscation, it will be remembered, they wanted a law on the subject which would transcend the irregularities and variations in executive military policy from area to area. Similarly, with respect to reconstruction, they could admit a temporary military interest in restoring law and order. But the sooner there was a return to civil government the better. And there, there was a need for uniformity - a law on the subject. Lincoln could issue edicts. Edicts could count on armies but not courts for their enforcement. Only Congress could pass acts with the force and above all the permanence of law. And so, Senator Charles Sumner fairly reflected the majority of his party who had tried to find answers in law, when he wrote in October 1863,

in short, if a new government is to be supplied, it should be by Congress rather than by the President, and it should be according to established law rather than accord^{ing} to the mere will of any functionary, to the end that ours may be "a ^{ing}government of laws, and not of men."¹

1. Charles Sumner, Our Domestic Relations: Power of Congress over the Rebel States, Atlantic Monthly, Vol. XII October 1863, p.499, hereafter cited as Sumner, Our Domestic Relations.

And this agreement - on the need for Congress to legislate at all, was intimately related to the second area of their agreement by the summer of 1863 - on freedom. Qualifications for jury service, for the exercise of the franchise, for freedmen's education, and for the distribution of lands to freedmen, were still the subject of disagreement. But they had reached a consensus on freedom, a point where they agreed with George Julian's stance of January 1862,

the rebels have demanded a "reconstruction" on the basis of slavery; let us give them a "reconstruction" on the basis of freedom. Under no circumstances should we consent to end the struggle on terms that would leave us where we began it.¹

There was room for disagreement on how radical a theory of federal power over the states need be claimed to achieve it. While moderates would argue freedom as a condition of reconstruction, they would shrink from Charles Sumner's 'state suicide' theory. But, more important, Charles Sumner would not insist on state suicide - as long as freedom was permanently guaranteed. He said as much in an article of October 1863, explaining his famous 'state suicide' resolutions of February 11th, 1862, when he said, "I discard all theory" - as long as Congress found the power under the Constitution to make freedom a reality, but find it they must, by the rights of war, or territorialisation, or the guarantee clause.² And it was this agreement on what they wanted the power for, rather than disagreements on theory, which is what mattered. Even in 1862, Congress had displayed its growing commitment to making emancipation irreversible, by experimenting in the draft Confiscation Acts, with judicial remedies for the freed slave - a writ of habeas corpus in a federal court. At that time, they had expressed

1. Cong. Globe, 37th Cong., 2 sess., p.329 January 14th, 1862.

2. Sumner, Our Domestic Relations, pp.527-539. This is also the essence of the influential work by the Solicitor of the War Department, William Whiting in War Powers Under the Constitution of the United States (Boston, & New York: Lee & Shepard, 1871 (ed.)).

doubts that an emancipation proclamation was enough to secure freedom. There was no guarantee that it would stand up to a Supreme Court test of constitutionality. The remedy lay in getting a law on the subject, with access to courts to guarantee it. It was this concern which was now projected from specific acts of wartime emancipation, to the question of permanent freedom in a reconstructed Union. It was the concern which informed both the reconstruction measures of the Thirty-eighth Congress which convened in December 1863, and their attempts to pass a resolution for a Thirteenth Amendment to the Constitution, abolishing slavery -- twin measures for a permanently free Union.

This was the point Congress had reached by December, 1863, when Lincoln issued his Proclamation of Amnesty and Reconstruction,¹ which made firmer policy out of haphazard beginnings. It was based on the pardoning power, and acknowledged the existence of the states, although their governments had been "subverted". When ten percent of persons entitled to vote in the 1860 Presidential election had taken an oath of future loyalty to the Union, and if they were qualified to vote under state law, they were to take the necessary steps to re-establish republican government. Acceptance of emancipation was a condition of the oath. In his accompanying Annual Message of December 8th, Lincoln repeated his commitment saying,

to now abandon them (the slaves) would be not only to relinquish a lever of power, but would also be a cruel and an astonishing breach of faith.²

The proclamation left it up to the states to provide suitable temporary arrangements for the freedmen. All this was offered in a spirit of

1. Basler, Lincoln Works VII pp.54-56 December 8th, 1863.

2. Ibid., p.51 December 8th, 1863.

flexibility, as a guideline for reconstruction, not to be considered exclusive of all other solutions.

And on the whole, the Republican party accepted it on those terms. There was no immediate criticism of ten percent governments as 'pocket boroughs' or flimsy foundations of loyal state governments. The Wade-Davis bill itself began its Congressional career with a similar provision, and was only amended to a fifty percent basis in May 1864. Most Republicans instead fixed on Lincoln's commitment to emancipation as something to be welcomed. The President's secretary, John Hay recorded in his Diary that:

men acted as though the millenium had come. Chandler was delighted, Sumner was joyous, apparently forgetting for the moment his doctrine of State suicide; while at the other political pole Dixon and Reverdy Johnson said the message was highly satisfactory.^{1.}

Charles Sumner wrote to the English liberal John Bright on December 15th, 1863,

the President's proclamation of reconstruction has two essential features, - (1) The irreversibility of emancipation, making it the cornerstone of the new order of things; (2) The reconstruction or revival of the States by preliminary process before they take their place in the Union. I doubt if the detail will be remembered a fortnight from now. Any plan which fastens emancipation beyond recall will suit me.^{2.}

So why the Wade-Davis bill? Lincoln himself had not phrased the Proclamation as the last word on reconstruction. It would have been strange if a Congress which had considered the issues for two years, and knew its complexities, would have accepted it as the last word. Where Lincoln's reconstruction policies were present-minded, part of his policy of fighting the war by encouraging rebels to return to their allegiance, Congress was concerned with the more permanent implications for future peace. When the

1. Quoted in Nicolay & Hay, Abraham Lincoln, Vol.9 p.109.

2. Edward L. Pierce, Memoirs and Letters of Charles Sumner (London: 1878 4 vols.) IV p.216. Sumner to Bright, December 15th, 1863.

House of Representatives accepted Henry Winter Davis' proposal to refer that part of the President's Annual Message to a select committee for the purpose of reporting a bill, it was a routine, rather than a hostile response to Lincoln's policy. The motion was supported by ninety-one members, and the committee which was subsequently appointed, reflected the broad spectram of their views on the subject.^{1.}

In addition to their long-term concerns, events in the early weeks of the session were to cause them to take a more critical view of Lincoln's policy outlined in the proclamation. In January, General Banks rejected the Free State General Committee's plan for a constitutional convention in Louisiana and ordered an election on the basis of the old constitution, whose proslavery sections he annulled first by military decree. He promised a constitutional convention after the government was formed, and not before, as the Radicals demanded. If federal powers of this extent were to be assumed over the domestic arrangements of the states, would it not be better to do it according to law, by Congress rather than by the arbitrary methods of a general?^{2.}

Furthermore, as blank books were sent out to Louisiana, Arkansas and elsewhere to collect the oaths of loyal men, many Republicans suffered a diminished faith in the oath's effectiveness as a test of loyalty, indeed in the extent of the loyalty which could be counted upon at all south of Mason-Dixon. Dr. Hyman's work on Confederate oathtaking substantiates many of the Republicans suspicions. If it was not a simple story of evasions

1. The vote to send that part of the President's Message dealing with Reconstruction to a select committee passed by 91 votes to 80. Cong. Globe, 38th Cong., 1 sess., p.34 December 15th, 1863. Professor Belz describes the balance of the committee as Davis (moderate), Ashley and Blow (radical), Gooch, Fenton and Smithers ("Administration"), English, Holman and Allen (conservatives). Belz, Reconstructing the Union, pp. 174-176.
2. This was the point made by Fernando Beaman, Cong. Globe, 38th Cong., 1 sess, p.1245 March 22nd, 1864.

and deceits, it was not a reliable indication of loyalty either. At best, it was "... less a conviction of conscience than a grudging acquiescence in the verdict of battle".¹ The Congressional Republicans had for a long time worried about the permanence of emancipation by an executive proclamation unlikely to stand the test of court decisions. Increasingly it seemed that these were feeble political arrangements to back up doubtful legal ones. A free state constitution could be made worthless by the too hasty return to power of those who were grudgingly loyal, far less those who were still openly disloyal. As a counterweight to such an eventuality, there was no national instrument of freedom, bar this doubtful emancipation proclamation. To this problem, political arrangements and legal guarantees at both ends, state and nation, the Wade-Davis bill addressed itself.

Henry Winter Davis reported the bill from the select committee on February 16th, 1864.² It was debated sporadically over the next few months, and finally passed on July 2nd. The bill rested on article IV Section 4 of the Constitution, authorising the United States to guarantee to each state a republican form of government. Congress claimed the power under it by virtue of Chief Justice Taney's opinion in the case of Luther v. Borden in 1849.³ Though Taney may have meant no more than Congressional authority under the clause to judge the validity of the election of its own members, his opinion was now interpreted more loosely by Davis and others to mean that Congress had political jurisdiction over reconstruction. It was a satisfactory formula for deriving power over the states, without embracing theories of state extinction or suicide.

1. Harold M. Hyman, Deceit in Dixie, Civil War History, V.3 March 1957, p.71.

2. Cong. Globe, 38th Cong., 1 sess., p.668 February 16th, 1864.

3. Luther v. Borden, 7 Howard 42.

The bill authorised the President to appoint a civil governor to administer State law until a State government was provided. But no law which held anyone in slavery was to be recognised or enforced either by the Governor or any court or officer in the state. As a positive correlation between slavery, and rights, the bill went on to charge the provisional government with the duty of enforcing laws for the punishment and trial of white persons equally to all persons. For more permanent political arrangements, the governor was to direct the marshal to supervise the enrolment of white male citizens in the state, and to request them to take an oath of loyalty to the Union, and the Constitution. When fifty percent had taken such an oath, the 'loyal white male citizens' were to elect delegates to a constitutional Convention. Known Confederate officeholders, and those who had voluntarily borne arms against the United States were prohibited from voting, even if they offered to take the oath. This convention was to produce a state constitution incorporating the terms set by the United States for guaranteeing a republican form of government. First, that no Confederate officeholder, civil or military should vote for or be a member of the legislature or governor. Secondly, slavery was to be prohibited forever, and freedom guaranteed. Third, no State or Confederate debt should be recognized or paid by the State. The constitution would then be submitted to the people for ratification. This done, with the consent of Congress, the President would recognise the state government. After that, the state could proceed to elect representatives to Congress.

In some respects, the Wade-Davis bill was not a radical departure from Lincoln's policy.¹ Both acknowledged the existence of states. Both restricted the suffrage to white males. Both initiated constitutional

conventions, and set oaths of loyalty a condition of their meeting. But

1. The bill provided a two-tier procedure for regenerating government, and different degrees of loyalty were demanded for the two stages. The first, i.e. the criteria for beginning the process was that 50% should take an oath of loyalty to the Union. The second i.e. the election of delegates to the convention was more restrictive. Voters had to be able to take the 'iron clad' oath of past loyalty to the Union.

2. Representative Kelley made it a complaint against the bill "because it is drawn too largely from the President's plan".

the Congressional bill did enforce more rigorous political arrangements for the creation of loyal state governments. A majority willing to swear loyalty to the Union was a more solid basis from which to build than a ten percent minority willing to swear future loyalty. It would take time to get such a majority, and the whole process of reconstruction would thus be protracted, long enough to make sure that the freedom they wrote into their constitution had a chance of staying there. This was the real *raison d'etre* of the bill. Its emphasis was on the permanence of freedom, not only in its tougher political conditions but also in its neglected legal provisions. It attempted to provide a judicial guarantee for freedom.¹

While the state convention adopted freedom as the law of the state, Section 12 of the bill looked after the national end of the business, replacing the emancipation proclamation with a law on the subject. It declared all persons held to involuntary servitude in these states forever free. If they or their descendants were subsequently restrained from their liberty, the federal courts would discharge them on a writ of habeas corpus. Any person convicted of such an attempt to hold such a person to slavery was liable to a fine and imprisonment. Once again then, the federal courts found themselves with expanded powers vis a vis the state courts. Already in the 1863 Habeas Corpus Act, their jurisdiction had been expanded to trying cases under state criminal law, de novo, not necessarily bound to follow the law of the state. Now they had habeas corpus jurisdiction with respect to persons held to slavery under state law. They were not asked to adjudicate the right of an owner to his slave under state law, or the validity of that law, but merely, to ascertain the facts of an attempt to re-enslave such a person, and release them.

1. The best outlines of the differences between the two plans is contained in Belz, Reconstructing the Union, pp.238-243, and, though partisan, the Wade-Davis Manifesto, in the New York Tribune, August 5th, 1864.

A constitutional amendment abolishing slavery would have secured the same right to a writ of habeas corpus in a federal court - on a surer foundation than a Congressional law of emancipation. It would have applied to the whole Union, where the Wade-Davis bill only applied to the rebel states. But part of the reason for the urgency behind the Wade-Davis bill was that in June, the resolution calling for such an amendment to the Constitution, which Congress was debating at the same time, failed to pass with the necessary two-thirds majority. Henry Winter Davis regarded that failure as an important reason for pushing through the bill since apart from establishing provisional governments, it proposed to,

emancipate all slaves, to give them and their paternity the writ of habeas corpus in the United States courts wherenow if free they could seek protection.¹.

Republicans felt that the session must not end, they must not go to the polls, without such a guarantee of a reconstruction based on freedom. That was important enough to risk a challenge to the Executive in an election year.

These priorities are reflected in the debate. It was not phrased as an attack on Lincoln's policies. The President's proclamation, said Fernando Beaman in the House, was a beacon light, and "What he has thus happily initiated we must fashion and complete".² Representatives Boutwell and Donnelly followed up this theme, praising the President for his growing commitment to emancipation, but - there were several important "buts".

1. Davis to Wade, June 21st, 1864, Wade Papers, quoted in Belz, Reconstructing The Union, p.216.
2. Cong. Globe, 38th Cong. 1 sess., p.1247 March 22nd, 1864. And Boutwell's speech, Ibid., pp.2102-2105 May 4th, and Donnelly's, Ibid., pp.2036-2039 May 2nd, 1864.

Many Congressmen did not share the President's optimism with respect to the loyalty of the defeated Southerners, on which the success of his policy depended. There was after all, no revolution in the South against going to war. The loyal masses did secede. That was the argument of Henry Winter Davis, when he doubted whether ten percent of men promising good behaviour in the future was a sound enough basis for controlling the other ninety percent. He argued,

there is no fact that we have learned from any one who has been in the South and has come up from the darkness of that bottomless pit which indicates such repentance. There is no fact that any one has stated on authority at all reliable that any respectable proportion of the southern states now in rebellion are willing to accept any terms that even our opponents on the other side of the House are willing to offer them.¹

Fernando Beaman pointed out that many Southerners might take the oath to avoid punishment, save their estates, or get control of the new government for their own purposes. He warned that, "the oaths of men whose hands are dripping with innocent blood should be received with great caution".²

Freedom rested on a shaky political basis then. Not only that, but, as Beaman said, the Reconstruction proclamation, although it exacted an oath of allegiance which included acceptance of the emancipation proclamation and Congressional acts did not specifically demand emancipation of the new state constitutions. There was no guarantee that the laws under which slavery existed would cease to exist. Nor would swearing of the oath prevent the slave trade. People in Arkansas who took it could buy slaves from Kentucky.³

Behind shaky political arrangements, there were no legal guarantees. There was an oath to respect a proclamation. But what legal standing did proclamation that have? Speech after speech queried what fate it would meet not only

1. Ibid., App. p.84 March 22nd, 1864.

2. Ibid., p.1246 March 22nd, 1864.

3. Ibid., pp.1243-1247 March 22nd, 1864.

at the hands of the state courts, but in the Supreme Court. The matter was expressed most succinctly by Henry Winter Davis, when he said,

it is therefore under the scheme of the President merely a judicial question, to be adjudged by judicial rules, and to be determined by the courts. It is a question whether each individual negro be free. It is a question whether the master has the right of seizure, or the negro can control himself. It is to be determined by the writ of habeas corpus. It is a question of personal right, not a question of political jurisdiction. Its fate in the State courts is certain. Its fate in the courts of the United States under existing laws is scarcely doubtful.

I do not desire to argue the legality of the proclamation of freedom. I think it safer to make it law.

He concluded,

the purpose of the bill is to preclude the judicial question of the validity and effect of the President's proclamation by the decision of the political authority in re-organizing the State governments.¹

Only Congress could exercise that authority. The President had a pardoning power, and good intentions. Congress had the power to set the terms for restored governments, and give them the magical force of law. On this, the bill's supporters were agreed. The debate revealed a range of theory, from Beaman's "state suicide" to the bill's Senate sponsor Ben Wade's "I hold that once a State of this Union, always a State".² But a theory of Congressional powers was played down. The difference, as Beaman said was one of "theory rather than of practice" - they were agreed that Congress had powers under the Constitution to set terms, and the only important question was how to use them.³ And so, on May 4th, 1864, the House eschewed theory, and voted against adopting Thaddeus Stevens' preamble to the bill which implied the non-existence of the states. Positive considerations were more important.

1. Ibid., App. pp.84-85 March 22nd, 1864.

2. Ibid., p.3449 July 1st, 1864.

3. Ibid., p.1247 March 22nd, 1864.

What Henry Winter Davis meant by making it a question of "political jurisdiction" was the exercise of these powers to regenerate governments resting on firm foundations of loyalty. And so the bill's supporters championed the firmer tests of the oath to past loyalty^(for voters), and on May 4th also accepted the sterner percentage of a majority willing to take a ^{loyalty} oath^(to initiate the process).¹ The bill set the political terms for restoration - the exclusion of Confederate officeholders from government, repudiation of the rebel debt, and most important, a free state constitution with guarantees of that freedom.

But Henry Winter Davis did not mean the exclusion of legal solutions by political ones. The two were inextricably linked. Permanent emancipation, and a sure writ of habeas corpus in a federal court could have been achieved by a legal solution on its own - the proposed thirteenth amendment to the constitution. But it was not only the fact that the resolution failed to pass in June with the necessary two-thirds majority which made the passage of this bill necessary. Davis, like most Republicans wanted both. But the amendment would not work changes in the political complexion of the states themselves. He explained,

if adopted it still leaves the whole field of the civil administration of the States prior to the recognition of State governments, all laws necessary to the ascertainment of the will of the people, and all restrictions on the return to power of the leaders of the rebellion, wholly unprovided for.²

The Wade-Davis bill attempted to encourage political arrangements which would make the states safe for the operations of the Constitution and laws. It contained a double guarantee for the permanence of freedom - first that

1. The original provision was that the oath should be taken by ten percent of the loyal men. The archconservative Samuel 'Sunset' Cox, even expressed a preference for the amendment, and a preference for the Wade-Davis bill over the President's proclamation because of it. Democrats and Radicals alike feared the use of 10% governments in the South as "rotten boroughs" in the November election, to re-elect Lincoln. Samuel S. Cox, Three Decades of Federal Legislation, 1855-1885 (Providence, R.I.: J.A. & R. A. Reid, 1885), p.435.
2. Cong. Globe, 38th Cong., 1 sess., App.p.84 March 22nd, 1864.

an acceptable state convention should write it into its constitution; second, that freedom, by Section 12 was written into national law, and the federal courts empowered to make it good by a writ of habeas corpus against re-enslavement.

It was this section which Democrat J. C. Allen, a dissenting member of the Select Committee found most threatening to states rights. For the federal courts were called upon only to adjudicate the fact of an attempt at re-enslavement, without reference to the validity of the claim under state law. He objected,

the twelfth section abolishes slavery in these states as far as an act of Congress can abolish it. It not only abolishes it, but it takes away from the courts, as far as an act of Congress can take away, the power of passing upon the right of Congress to abolish it.¹

The Habeas Corpus Act of 1863 had established a protective relationship with the individual inside the state, regardless of state laws or prejudice. It used the federal courts to do this. The Wade-Davis bill offered the freed negro the protection of the national law and the national courts over state law, and state courts. It occurred to Democratic Representative Denison, that it might well be part of one plot to rob the states of their reserved rights. He referred to the passage of the recent Habeas Corpus Act of 1863 as evidence of this invasion, and linked it with the present Wade-Davis bill, in that it too legalised the unconstitutional acts and proclamations of the President. Presumably he had in mind the Emancipation Proclamation.² For he was right. Henry Winter-Davis had welcomed Lincoln's proclamations, but thought it "safer to make it law". The Wade-Davis bill was the law on the subject.

The bill contained the minimum conditions of restoration acceptable to the Republican consensus. They could not afford to go further without exposing the differences inside the party. And so on May 4th when

1. Ibid., p.1739 April 19th, 1864.

2. Ibid., p.2039 May 2nd, 1864.

Representative Rice of Maine proposed to strike out the word "white" wherever it described electoral qualifications, Henry Winter Davis refused to yield the floor for that or any other purpose.¹ Many Republicans were prepared to embrace the issue of black suffrage. In the same session of Congress preliminary votes on Senator Wilkinson's amendment to strike out "white" from the electoral provisions in a bill to provide a temporary government for Montana, found twenty-two senators and fifty-four members of the House in favour. In the end, however, they would not risk passage of the bill for the sake of pressing a divisive issue.² And so it was with the Wade-Davis bill. Its emancipation provisions were too important to risk it for. The bill was pressed to a vote on the same day, May 4th, having avoided opening the suffrage question. Thaddeus Stevens' preamble to the bill, implying the non-existence of the states, and regarded as a test vote on the radicalism of its supporters was voted down by seventy-six votes to fifty-seven. The Republican majority clung to the safety of the less controversial contents of the bill, which passed by a comfortable seventy-three votes to fifty-nine on the same day. It was too mild for Thaddeus Stevens, who abstained from the vote.³

The bill ran into some trouble in the Senate. Senator Wade reported it from the Committee on the Territories on May 27th, with amendments. But it was not taken up for debate until July 1st, dangerously close to the end of the session.⁴ Like the House, the Senate resisted the suffrage issue, and on Ben Wade's initiative voted against the committee's amendment to

1. Ibid., p.2107 May 4th, 1864.
2. Ibid., p.1346 March 30th 1864, and Senate vote (22 to 17 in favour of Wilkinson's amendment), Ibid., p.1361 March 31st. The House vote was 85 to 54 against concurring with the Senate version, Ibid., p.1652 April 15th. There were so few negroes in Montana that it was perhaps dropped as an issue of principle at this time for lack of practical importance.
3. Ibid., pp.2107-2108 May 4th, 1864. The majority for the bill was 73 to 59 against.
4. Eben G. Scott in Reconstruction during the Civil War in the United States (Boston & N.Y.: Houghton & Mifflin & Co., 1895), p.301 carries the story that there was a deliberate attempt to prevent the bill coming up earlier, so that Lincoln wouldn't have to exercise a proper veto over it. Senator Doolittle had apparently written to a member of General Banks' staff in Louisiana to this effect. The story is unconfirmed.

strike out "white" from the electoral qualifications for the constitutional convention, by twenty-four votes to five.¹ Then events took an unexpected turn. B. Gratz Brown proposed a substitute, which would have had the effect of postponing all Congressional action on the subject until the next session.² It said simply that insurrectionary districts should not be allowed to cast votes for electors for President, Vice-President, Senators or Representatives until the inhabitants had returned to their allegiance. The passage of this substitute on July 1st,³ by twenty votes to thirteen was a surprise, representing, not a planned revolt against the bill, but a temporary loss of direction from Wade's committee. While the issue hung in the balance, Senator Sumner gave further evidence of the importance which the bill's supporters attached to its emancipation features. Fearing that the bill was lost, he offered a resolution "... to recognize as a statute the Proclamation of Emancipation, putting it under the guaranty and safeguard of an Act of Congress". The Senate, however, would not accept it in this form.⁴ Order was restored the following day when Wade re-asserted the authority of his committee. The Senate receded from its amendment and agreed to the House bill. The Wade-Davis bill passed on July 2nd.⁵

Everything waited on Lincoln's approval. John Hay records Lincoln's dialogue with Senator Zachariah Chandler, when the President pushed the bill away, without signing it. Lincoln objected that the bill had been placed before him just a few moments before Congress was to adjourn, and that it was too important to deal with so summarily. Chandler expressed again its

1. Cong. Globe, 38th Cong., 1 sess. p.3449 July 1st, 1864. Wade explained that he would rather the amendment was not adopted since it might mean sacrificing the bill.
2. Ibid., p.3449 July 1st, 1864. There is no evidence that support had been planned for it as an alternative, but it looked rather like a "maverick" which slipped in unexpectedly. At most it indicates a lack of wild enthusiasm for the bill - as in the House it was considered "the best we can get".
3. Ibid., p.3461 July 1st, 1864.
4. Ibid., pp.3460-3461 July 1st, 1864.
5. The vote was 18 for, 14 against, with the high absentee figure of 17. It was the end of session. Enthusiasms waned. Ibid., p.3491 July 2nd, 1864.

importance for emancipation, when he said,

if it is vetoed, it will damage us fearfully in the Northwest.
The important point is that one prohibiting slavery in the
reconstructed States.

But it was that point on which the President expressed doubts as to
Congress' authority.^{1.}

He expressed them again, on July 8th, when he issued a message
explaining his reasons for pocket-vetoing the bill.^{2.} He was not prepared,
he said, to commit himself inflexibly to one single plan of reconstruction,
or abandon the work which had already been done in Arkansas and Louisiana.
Nor was he prepared to "declare a constitutional competence in Congress to
abolish slavery in the states" - rather do that by constitutional amendment.
But then came the astonishing statement that,

... nevertheless I am fully satisfied with the system for restora-
tion contained in the bill as one very proper plan for the loyal
people of any State choosing to adopt it, and that I am and at all
times shall be prepared to give the Executive aid and assistance to
any such people ...

To many Congressmen, it was a strange idea of law that the President
should offer to execute a bill which, by his refusal to sign it, was not
a law - and to execute it, at that, only if the people preferred it to his
more lenient edicts! Small wonder that the message was greeted by an
outraged response from the bill's sponsors. The Wade-Davis Manifesto
was published in the New York Tribune on August 5th.^{3.} The President's
refusal to sign the bill had made an election issue out of the differences
between the two proposals for reconstruction. For that reason, the Manifesto

1. Quoted in Nicolay & Hay, Abraham Lincoln, Vol9, p.120.

2. Basler, Lincoln Works VII pp.433-434 July 8th, 1864.

3. The text of the Manifesto is reprinted in full in Harold M. Hyman (ed.),
The Radical Republicans and Reconstruction, 1861-1870 (Indianapolis &
N.Y.: Bobbs-Merrill Co., 1964), pp.137-147.

has the air of a Radical campaign broadside against the President. But in many ways it is a valuable reflection on the intentions of the framers.

It attacked the governments of Louisiana and Arkansas as "more creatures of his will", their free constitutions resting on the flimsiest of political arrangements, and on the will of the military. They preferred their sterner arrangements, and they preferred the rule of law. As the Manifesto said, "... the bill governs the states by law, equalizing all before it, the proclamation commits them to the lawless discretion of military governors and Provost Marshals". Lincoln's Reconstruction Proclamation, they went on, contained no guarantee of freedom, "leaving slavery exactly where it was by law at the outbreak of the rebellion". It exacted an oath in support of the emancipation proclamation. But even if that proclamation would stand up to a Supreme Court test, it exacted no guarantee of state laws, or constitutions, and "the right of a slave to freedom is an open question before the State courts on the relative authority of the State law and the proclamation". There was no doubt which authority the state courts would find the more binding. An oath to such a proclamation was meaningless. It might bind the one-tenth who took it, but not the nine-tenths who would succeed to the control of the State government. When that happened, the federal government would be left without any means to protect the freedman in the states, for, by defeating the bill, the President had defeated the freedman's legal remedy of a habeas corpus writ from a federal court.

And, that Lincoln should then offer to execute the bill, as "one very proper plan for the loyal people of any state choosing to adopt it"! How? The Manifesto thundered, "A more studied outrage on the legislative authority of the people has never been perpetrated".

The outrage was felt by many more who did not feel free to express it openly while their party's fortunes hung in the balance in the months preceding a crucial election. Thus Republican Albert G. Riddle later recalled that, although the masses were strongly in support of Lincoln's re-election,

at the Capital, thinking Union men were quite unanimous in sustaining Mr. Wade and Mr. Davis, as was the majority of both Houses of Congress.¹

Frederick Douglass lamented Lincoln's veto as yet another example of his policy, "Do evil by choice, right from necessity".² Secretary of the Treasury Salmon Chase recorded his disappointment in his diary, as well as his fears that the President and his chief advisers had not rejected the possibility of a reconstruction with slavery. He also recorded that Senator Pomeroy intended to go buffalo hunting and then to Europe!³

Such action would have been, in the long run, regretted. For in the cold light of day, Republicans had time to think more clearly about the failure of the Wade-Davis bill, and to stop regretting it in the light of later events. George Julian afterwards wrote that,

- the passage of the somewhat incongruous bill vetoed by the President, would probably have proved a stumbling-block in the way of the more radical measures which afterward prevailed.⁴

Perhaps the only people who might later have regretted it, were the more conservative Republicans. And indeed Senator John Sherman alleged many years after the events, that in conversation with Charles Sumner, President Lincoln had expressed his regret that he had not approved the bill.⁵

1. Albert G. Riddle, Recollections of War Times (New York: G. P. Putnam & Sons, 1895) p.305.
2. Quoted in The Liberator, September 16th, 1864.
3. David Donald, Inside Lincoln's Cabinet, The Civil War Diary of Salmon P. Chase, p.230-232.
4. George W. Julian, Political Recollections 1840-1872 (Chicago: Janson, McClung & Co., 1884), p.247.
5. John Sherman, Recollections of Forty Years in the House, Senate and Cabinet, (Chicago: The Werner Co., 1895, 2 vols.) I p.361.

The shortcomings of the bill were pointed out by Republicans in the second session of the Thirty-eighth Congress, which met in December. Many of them had voted for the original bill. But circumstances had changed. Lincoln had won in November, and some of the tensions had gone out of Congress's relationship with the Executive. In January when the House successfully passed the resolution calling for a thirteenth amendment to the constitution, abolishing slavery, some of the old urgency attaching to the Wade-Davis bill as an emancipation measure had gone. These were the circumstances in which James Ashley re-introduced the Wade-Davis bill in January, with two important amendments.¹ One required Louisiana and Arkansas to go through the enrolling phases of the bill, with its majority test of loyalty. It thus challenged the existence of loyal governments there. The second amendment cast some light on the weakness of the original bill. It required the states to accept not only the abolition of slavery, but also the corollary of freedom - a guarantee of civil rights. It provided that in the new state constitutions,

involuntary servitude is forever prohibited, and freedom and equality of civil rights before the law are guaranteed to all persons in said State.

For the objection to the original bill which Congressmen now raised most frequently was that it failed as a guarantee of freedom. It is difficult to determine how much of this criticism sprang from an honest attempt to make a better bill. For the criticisms came both from those for whom the bill as a whole was now too tame, and from those who wished to drop it in favour of a more conservative solution. Representative Kelley thought that the bill would not go far enough to guarantee freedom until it extended the suffrage to the freedman. He proposed an amendment to that

1. Cong. Globe, 38th Cong., 2 sess., p.280 January 16th, 1865.

effect on January 16th.¹ On the other side, there were Republicans like Dawes and Eliot who criticised the bill's failure to guarantee freedom and equality under the law.² Yet they did not propose firmer guarantees. Eliot proposed a substitute bill requiring states to establish republican governments, prohibiting slavery and guaranteeing freedom and equality of rights before the law. But it contained no machinery for doing so.³ Dawes wanted a plan which would leave more discretion to the loyal men in the states.⁴ Not radical enough for some, too radical for others, the bill had lost its attraction as a rallying point for Republican unity. On January 17th, the House decided to postpone further discussion on it by 103 votes to 34. Henry Winter Davis was right when he observed that "A vote to postpone is equivalent to a vote to kill the bill". Re-introduced on February 20th, it was tabled the following day.⁵ The Thirty-eighth Congress, like its predecessor, was to end without a reconstruction measure on the statute book.

One disappointed man was the bill's original House sponsor, Henry Winter Davis. He marvelled that representatives who voted for the bill in the previous session should suddenly discover that it sanctioned the enormities of the laws of slavery. Cynically he suggested that the discovery was prompted by the intervening election. Patronage considerations caused some of his colleagues to jump on to the successful President's bandwagon. He could not see how the bill failed as a guarantee of freedom, since,

1. Ibid., pp.281-291 January 16th, 1865.
2. See Eliot's speech, Ibid., p.298 January 17th, 1865, and Dawes, Ibid., p.935 February 20th, 1865.
3. Ibid., p.234 January 12th, 1865.
4. Ibid., pp.934-937 February 20th, 1865.
5. The bill was postponed on January 17th by a vote of 103 to 34, Ibid., p.301. The whole subject, including substitutes by Wilson and Eliot was tabled on February 22nd by 80 votes to 65., Ibid., pp.1102-1103.

I took some credit to myself for putting in a brief space the shortest possible declaration that all men should be equal before the law and that I had come, in these words, as near annihilating the black laws of the South as gentlemen could have done if they had spent tomes in writing out the provision for that purpose.¹.

But, whatever their motivation, the bill's critics were right. It was less than a positive guarantee of freedom and equal rights under law. Its importance in 1864 was that it contained more of a guarantee than Lincoln's plan - but it was less than Davis claimed. The section of the bill which made the link between freedom and the positive protection of rights in law, was that which set out conditions for the provisional governments. Section ten authorised the provisional governor not only to refrain from enforcing laws by which slaves were held to service, but also to see that "the laws for the trial and punishment of white persons shall extend to all persons". To that extent it implied a standard of conduct for the state which in future was to be governed by a free constitution. The sections which set out conditions for the restoration of loyal state governments did not respect even this positive provision, but a vague requirement that the freedom of all persons in the state was to be "guaranteed". Though Republicans did associate freedom with equal protection under the laws, without which freemen would once more be reduced to a condition of servitude under "black codes", they had a habit of assuming that when slavery was abolished, laws made in its interest would go too. This was a mistake. Henry Winter Davis perhaps took a false pride in "guaranteeing" freedom in the "shorest possible declaration". Perhaps it needed some "tomes" of definition - on such unspoken rights as that of giving testimony in court, without which freedom was a tenuous

1. Ibid., p.970 February 21st, 1865.

thing in any court. The provision of the bill which extended the jurisdiction of the federal courts to the issuing of a habeas corpus writ against enslavement suffered the same limitations. It was some protection, though remote, against bodily re-enslavement, but no guarantee against other forms of slavery at the hands of discriminatory and unequal laws.

The Wade-Davis bill, then, was a half-way stage between the Confiscation Act of 1862, and the Civil Rights Act of 1866. It adopted one guarantee of freedom which Congress had considered and rejected in 1862 -- the writ of habeas corpus from a federal court. It attempted to do more -- to make freedom a reality by political change, based on state constitutions adopted by ^{the} loyal... Because it attempted these things, it had more to offer than Lincoln's reconstruction plans. Hence it was a challenge in an election year. But it had limitations. It crossed state barriers only gingerly to protect the freedman by a writ of habeas corpus. It applied only to the Southern States. It exacted no guarantees from the states of equality under the law. The Thirteenth amendment was a surer guarantee of freedom, a certain right to a writ of habeas corpus -- anywhere in the Union. It was only then that Republicans would have to ask -- was it enough? What was "freedom" -- the absence of slavery only, or something more positive, which they had been hedging around in these reconstruction debates, a positive obligation on the part of the federal government to see that all men lived under the equal protection of the laws. Though they never got round to Henry Winter Davis' "tomes" of definition, in time they would have to clarify what they meant by freedom, and give more attention to the machinery which would have to be employed to guarantee it. The attempt, if not the solution came in 1866 with the Civil Rights Act.

C H A P T E R VTHE THIRTEENTH AMENDMENT

During the debate on the Wade-Davis Bill, it had become clear that the permanent dismantling of slavery was the aim of a majority of the Republican party. On June 15th 1864, failure of the Congressional resolution calling for a constitutional amendment abolishing slavery to pass by the necessary two-thirds vote of Congress, made the Wade-Davis Bill the only great antislavery measure of the session. It would have given the slave a right to a writ of habeas corpus in a federal court. In January 1865, Congress did pass the constitutional amendment resolution. Three-fourths of the states ratified the Thirteenth Amendment by December 1865. That amendment gave the slave, anywhere in the Union, a right to a writ of habeas corpus in a federal court. But, was that all there was to freedom? In the year following the adoption of the amendment, it became clear, from reports of the freedman's lot in the South, that the abolition of slavery did not automatically create conditions for the enjoyment of freedom. The Negro was subjected to unequal and discriminatory laws and customs, barred from giving testimony against white men, subjected to new forms of servitude under the notorious black codes - in short, he was denied the basic human rights which Republicans argued were the conditions of any man's freedom, black or white. Already, in the debate on the Wade-Davis bill, the Republicans had indicated the standards of justice which they believed to be the corollary of emancipation. In that bill, the Provisional Governor was charged with the duty of ensuring that "... the laws for the trial and punishment of white persons shall extend to all persons ...". Later, when the bill was revived in December 1865, Republicans were not satisfied that

it lived up to Henry Winter Davis' claim that it embodied freedom and equality under the laws. It did not require the states specifically to guarantee the civil rights of all persons once they were restored to the Union. It did not set up any national sanctions against the failure of the states to observe all but the emptiest forms of "freedom". In 1866, a majority of Republicans argued that the Thirteenth Amendment had supplied this want, that it had given the nation an interest in the meaning of freedom, and that its enacting clause gave Congress the power to pass "appropriate legislation" to guarantee it against the actions of states or individuals. Consequently, they rested the power to pass the Civil Rights and Freedman's Bureau Act on the Thirteenth Amendment. The acts did not represent an addition to its meaning of freedom, but rather, the specific means to make good its original declaration.

At least, this was the view of the majority of the Republicans, those who supported the civil rights legislation. Some of their more conservative colleagues, like Senator Edgar Cowan, put a more limited construction on the Thirteenth Amendment. In 1866, he argued that it meant

the breaking of the bond by which the Negro slave was held to his master; that is all. It was not intended to overturn this Government and to revolutionize all the laws of the various States everywhere. It was intended, in other words, and a lawyer would have so construed it, to give to the Negro the privilege of the habeas corpus; that is, if anybody persisted in the face of the constitutional amendment in holding him as a slave, that he should have an appropriate remedy to be delivered.¹

In contrast to this view, was that of the moderate Chairman of the Judiciary Committee, Lyman Trumbull, who played a prominent role in the drafting of the Civil Rights and Freeman's Bureau Acts, which he defended as a proper

1. Cong. Globe., 39th Cong., 1 sess., p.499, January 30th, 1866. Democratic Senator Saulsberry expressed similar views, Ibid., pp.476-480, January 29th, 1866.

sequel to the Thirteenth Amendment, arguing,

with the destruction of slavery necessarily follows the destruction of the incidents of slavery ... Those laws that prevented the coloured man going from home, that did not allow him to enforce rights; that did not allow him to be educated, were all badges of servitude made in the interest of slavery. They never would have been thought of or enacted anywhere but for slavery and when slavery falls, they fall also.¹

The courts divided along exactly the same lines when they came to adjudicate cases arising under the civil rights acts. Regarding the legislative intentions of Congress in framing the constitutional amendment, as relevant to their construction of the Civil Rights Act of 1866, they followed Edgar Cowan's or Lyman Trumbull's line of argument, posing the one or the other as the "true" interpretation, depending on the conservatism or liberalism of their own views. Thus, to Judge Robertson in the Kentucky case of *Bowlin v. Commonwealth* in 1867,² a white man's appeal for a repeal of judgment against him for grand larceny, on the testimony of a coloured witness, was quite proper. The Thirteenth Amendment meant only the absence of slavery. It could not support legislation like the 1866 Civil Rights Act which purported to interfere with the state's prohibition against the testimony of negroes. On the same question, the right of a coloured witness to give testimony against a white defendant, Justice Swayne took quite the opposite view in the case of *U.S. v. Rhodes*, in the federal circuit court in 1866.³ He took the most sympathetic view of the legislative intention behind the Thirteenth Amendment. It meant freedom, rather than the absence of slavery, and it gave Congress the power to protect the individual against violations of that freedom. The Civil Rights Act was "appropriate" legislation to that end.

1. *Ibid.*, p.322 January 19th, 1866.

2. *Bowlin v. Commonwealth* 65 Ky 5 (1867).

3. *U.S. v. Rhodes* Fed. Cas. 16, 151 (1866).

In determining the legislative intention, two questions must be asked of those who framed and sponsored the resolution. What did they mean by freedom? Did they intend to use the amendment, and legislation passed in its name, to initiate a federal revolution, to alter the balance between state and nation, limiting the powers of the former in their traditional sphere of defining and adjudicating the status and rights of persons under their jurisdiction?

The debates in Congress reveal most, if not all of the answers. The reader might well sympathise with Republican Representative Fernando Beaman, who remarked during the debate on the Wade-Davis Bill, that any man who could originate one new idea in relation to slavery should have it patented, and be ranked as one of the greatest discoverers of any age.¹ When the resolution finally passed in January 1865, the artist Clark Miller made plaster casts of the crania of those who supported the measure.² Many of those who spoke for it had the air of men whose crania were about to be immortalised, rather than persuaders, on whose skills crucial votes depended.

After considering a number of proposals, the Senate Judiciary Committee reported the following resolution for a Thirteenth Amendment, on February 10th, 1864.³

1. 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 its jurisdiction.
2. Congress shall have power to enforce this article by appropriate legislation.

1. Cong. Globe, 38th Cong., 1 sess., p.1246 March 22nd, 1864.
2. Cornelius Cole, Memoirs of Cornelius Cole (N.Y. 1908) p.221.
3. Several proposals were introduced in both the House and the Senate, calling for a constitutional amendment to abolish slavery. Senators Henderson and Sumner, Representatives Ashley, Norton and Windom all tendered such proposals. The Judiciary Committee's version, introduced on February 10th; Cong. Globe, 38th Cong., 1 sess. p.553 became the Thirteenth Amendment.

When the debate began in the Senate on March 28th, the ground was already well worn. Republican speeches on the whole were concerned with familiar themes; that the preservation and future peace of the Union depended on the removal of the source of the rebellion; that the institution itself was a great wrong, condemning the slave to every conceivable injustice, and now threatening to lose the liberty of both races in a rebellion against democracy. But most of all, they were now concerned with the means to end it forever. In the debate on the Wade-Davis Bill, many Republicans had made it clear that they doubted the legality of the President's Emancipation Proclamation. For the present, it depended on the army. After that, as Henry Winter Davis argued, freedom under it was a judicial question, to decide upon the individual freedom of each slave.¹ As the Wade-Davis bill's supporters said, there were few doubts as to its fate in the state courts. It might fare hardly better in the Supreme Court. It was too precarious a gauntlet to run. The courts could hold it for nothing. An incoming administration could reverse it. It applied only to a limited area in the South. Finally, slavery rested on state and local law. The proclamation did nothing to strike down these laws. That would take more than Executive action.²

It would also take more than Congressional action. Republicans had been aware of the problems of finding guarantees for permanent emancipation since 1862, when they experimented in the Confiscation Act of July 17th, with the idea of giving the freedman the right to a writ of habeas corpus from a federal court. The idea was dropped then, but revived in the Wade-Davis Bill, which of course never became law. But it would not have resolved all constitutional doubts. In the Veto Message which Lincoln

1. Cong. Globe, 38th Cong., 1 sess., App. p.84 March 22nd, 1864.

2. Senator Trumbull's speech introducing the amendment resolution sums up most of these doubts on the legality of the proclamation. Ibid., pp.1313-1314 March 28th, 1864.

prepared, but did not serve on the Confiscation Act, and then again in the veto message which he did issue on the Wade-Davis Bill, the President expressed doubts as to the constitutionality of Congress' attempts to abolish slavery.¹ The courts might well have shared his doubts. There was too, another loophole to the permanent extinction of the institution. The Congressional measures applied only to the slaves of rebels, or specifically to the South. Residents of Alabama might still purchase slaves in Kentucky or Delaware. There was only one way to put the matter beyond constitutional doubts, one way to extinguish its roots in state law, one way to ensure against the whims of a court, or the passing political complexion of a President or Congress - a constitutional amendment.

The Thirteenth Amendment and the Emancipation Proclamation, were complementary, rather than rivals. Lincoln himself had no doubts about that. "The original proclamation has no constitutional or legal justification, except as a military measure",² he wrote to Salmon Chase in September 1863, when Chase suggested extending it to parts of Virginia and Louisiana under Union control. The permanent removal of slavery had to be by constitutional amendment. Lincoln suggested such an amendment for gradual, compensated emancipation as early as 1862.³ In his veto message on the Wade-Davis bill, doubting the powers of Congress to emancipate, he expressed his support for the proposed Thirteenth Amendment.⁴ When the resolution finally passed Congress, the New York Tribune reported the following remarks of Lincoln's on the relationship between the Proclamation and the amendment,

1. Roy P. Basler (ed.), The Collected Works of Abraham Lincoln (New Brunswick; Rutgers University Press, 1953. 9 vols.) Vol.V pp.328-331 July 17th, 1862, Ibid., VII pp.433-434 July 8th, 1864. Hereafter cited as Lincoln, Collected Works.
2. Ibid., Vol. VI pp.438-9 September 2nd, 1863.
3. Ibid., Vol. V pp.529-532. December 1st 1862, Annual Message.
4. Ibid., Vol. VII pp.433-434 July 8th, 1864.

He thought all would bear him witness that he had never shrunk from doing all that he could to eradicate Slavery by issuing an emancipation proclamation. But that proclamation falls far short of what the amendment will be when fully consummated. A question might be raised whether the proclamation was valid. It might be added that it only aided those who came into our lines and that it was inoperative as to those who did not give themselves up, or that it would have no effect upon the children of the slaves born hereafter. In fact it would be urged that it did not meet the evil. But this amendment is a King's cure for all the evils. It winds the whole thing up.¹

Years later, in 1882, the debate on the need for a constitutional amendment was re-opened, when an article by James C. Welling in the North American Review, denying the legal validity of the Emancipation Proclamation, sparked off a reply from one, Aaron Ferris, who disagreed.² The Thirteenth Amendment, he said, was unnecessary. Though the Supreme Court had never actually tested the Proclamation, there was every reason to believe that they would have sustained it, as they sustained "Almost without exception", the other Presidential acts exercised under the war powers. He cites precedents for the abolition of slavery by proclamation. During the Revolution, the British commanders Sir Henry Clinton and Lord Dunsmore made use of proclamations to liberate slaves belonging to colonists. Mr. Ferris did not consider the freedom of the British commanders from the limitations of federalism, and the U.S. Constitution! He did, however, lose his own case for the superfluity of the Thirteenth Amendment, when he argued that the Proclamation was valid, "unless subsequently reversed, vacated, or modified by a superior tribunal "- which, he said, it hasn't been!

The Republicans wanted to remove the "ifs" and "maybes", and they were agreed that the only way to do it was by a constitutional amendment.

1. Ibid., Vol. VIII pp.254-255 February 1st 1865.

2, Aaron A. Ferris, The Validity of the Emancipation Edict, North American Review Vol. 131 p.551. See also the reply from Richard Dana, Nullity of the Emancipation Edict, North American Review Vol. 131 p.128.

As Trumbull argued, it would be difficult to show that this was unconstitutional, since the Constitution provided quite clearly for its own amendment. No such doubts were raised on the Republican side, except as to whether three-fourths of the states then represented in Congress should ratify it, as James Ashley argued, or three-fourths of all the states, which was Trumbull's argument, and the one which prevailed.^{1.} Incredibly, some of the Democrats trumped up an argument against the constitutionality of the proposed amendment. In the House, Hendricks of Indiana argued that slavery was especially immune from such interference, since it was a domestic institution existing prior to the adoption of the Constitution, and over which the states had delegated no power to the federal government. Only a unanimous vote of the states could abolish it.^{2.} On the whole, however, arguments on the amendment had to be about whether it was morally right, or politically expedient, rather than about the correctness of the method.

Republicans were agreed on all three counts -- its justice, expediency, and correctness. They were agreed that slavery must go. But what did they mean by "freedom"? When Senator Clark categorised the affront of slavery to liberty in familiar terms --

she has bound men, women and children, robbed them, beat them, bruised and mangled them, burned and otherwise murdered them. To their cries she has turned a deaf ear, to their complaints shut the courts, and taken from them the powers to testify against their oppressor. She has compelled them to submit in silence and labor in tears. She has forbidden their instruction, and mocked them with the pretence she was christianizing them through suffering.^{3.}

-- could it not be argued that when slavery was abolished, so too, in Clark's eyes, were these deprivations, giving way to the right to work for

1. Compare Trumbull's views on ratification, Cong. Globe, 38th Cong., 1 sess., pp.1313-14, March 28th, 1864, with those of James Ashley, Ibid., 2 sess., pp.138-141, January 6th, 1865.
2. Ibid., 1 sess., pp.1456-1458 April 7th, 1864.
3. Ibid., pp.1367-1370 March 31st, 1864.

a living, to marry, to read and write, to testify, and maintain rights in a court of law? Senator Johnson spoke of the inalienable rights of all men, regardless of colour,¹. Representative Ingersoll of the free man's right to the fruits of his own labour and the enjoyment of his family ties, rights of which he could be robbed by no white man.².

The most explicit statement of a positive connection between freedom and rights, came from Charles Sumner in the Senate. On April 8th, 1864, he proposed an alternative form of the amendment, to read,

All persons are equal before the law, so that no person can hold another as a slave; and the Congress shall have power to make all laws necessary and proper to carry this declaration into effect everywhere within the United States and the jurisdiction thereof.³.

In a speech explaining his preference for this form, Sumner outlined his plan for the permanent abolition of slavery.⁴. First, he said, it must be attacked through the courts. Though the prestige of the courts had sunk under the influence of slavery, now he thought, in this regenerated republic, they could be expected to interpret the Constitution on behalf of liberty. But action by the courts was not enough. Secondly, it was the duty of Congress to strike at slavery wherever they could, by abolishing the slave trade for example, or setting the federal house in order for equality before the law by passing the resolution he now proposed in the Senate, to establish the rights of coloured witnesses to testify in the federal courts.⁵. Yet all this was not enough. Finally, it must be done

1. Ibid., pp.1419-1424 April 5th, 1864.

2. Ibid., pp.2989-2991 June 15th, 1864.

3. Ibid., p.1482 April 8th, 1864. This represented a change from Sumner's first proposal which read, "Everywhere within the limits of the United States, and of each State or Territory thereof, all persons are equal before the law, so that no person can hold another as a slave". Ibid., pp.521-2 February 8th, 1864.

4. Ibid., pp.1479-1483 April 8th, 1864.

5. Sumner reported a bill to this effect on February 29th, 1864. See Charles Sumner, Works (Boston; Lee & Shephard, 1870-1873, 15 vols.) Vol. VIII pp.176-216. This did not represent an isolated attempt on Sumner's part to achieve equality before the law in federal courts. As more and more bills passed Congress relying on the federal courts for enforcement, it seemed to him a handicap to be bound by the rule that the laws of the states in which the court was held should be the rule for the competence of witnesses in the federal courts. He made earlier attempts to abolish the rule at the time of the bill to emancipate slaves in the District of Columbia, and also Act of July 1862. Ibid., Vol.VII pp.443-444 and 502-503.

by the people, in the form of an amendment to the Constitution. Anxious that this amendment should be expressed in its most effective and perfect form, he suggested the language of equality before the law, sketching its origins in the Greek language, and its present currency in European constitutions. It was, he said, not a phrase common in America, but,

it will be felt at once that this expression, "equality before the law", gives precision to that idea of human rights which is enunciated in our Declaration of Independence.¹

Sumner, then, quite explicitly brought to the meaning of freedom, the concept of equality before the law, and an obligation on the part of the national government to extend its protection to all men in the service of that concept. Faced, however, with the opposition of Senator Trumbull and his colleagues, Sumner withdrew his proposal the same day.²

Three years later, this episode in the debate was alluded to in a Kentucky court case. The question at issue in *Bowlin v. Commonwealth*³ was a negro's right, by the 1866 Civil Rights Act, to give testimony against a white defendant. The judge held that the Thirteenth Amendment was no basis for such legislation, since its framers intended by it only the absence of slavery, not the guarantee of positive rights. Freedom did not make a former slave a competent witness, in violation of state laws on the subject. As evidence of this, he cited the hostile reception which Sumner's "equality before the law" substitute received in the Senate.

Certainly, Trumbull did express some scepticism about borrowing the phrase from foreign constitutions, particularly the French, which he said was a notably precarious instrument of government. It was unnecessary, when they had a perfectly clear American precedent at hand in the Northwest

1. Cong. Globe, 38th Cong., 1 sess., pp.1479-1483 April 8th, 1864.

2. *Ibid.*, p.1488 April 8th, 1864.

3. *Bowlin v. Commonwealth* 65 Ky 5 (1867).

Ordinance of 1787, on which the Judiciary Committee had modelled the amendment.¹ Senator Howard's reaction is more instructive. His objections to Sumner's alternative wording was that it was meaningless in a legal and technical sense, a phrase unknown to a common law court. Why, he said, it might even be understood to mean that a woman would be the equal of her husband before the law! In conclusion, he remarked that the Northwest Ordinance was already well understood by the people, and

... no court of justice, no magistrate, no person old or young, can misapprehend the meaning and effect of that clear, brief, and comprehensive clause.²

It is true that the language of the Ordinance had not been construed to mean the positive association of freedom and civil rights. Many of the states to which it applied did not extend the equal protection of the laws to free negroes. But the same Senator, Howard, could not have meant to restrict the amendment based on its familiar language, to abolishing only the physical trappings of slavery. In retrospect, when speaking on the Civil Rights bill in 1866, which embodied Sumner's concept of equality before the law, he said that as a member of the Judiciary Committee which framed the Thirteenth Amendment, he knew that its "friends and advocates" had contemplated the possible use of the enacting clause which was now being made.³

Further evidence of the unfamiliarity of some contemporaries with the phrase "equality before the law", comes from Attorney-General Bates' diary. On February 10th, 1864, he wrote of a previous attempt by Sumner to introduce the phrase into the amendment,

1. What is equality before the law?
2. Does that equality necessarily prevent the one from becoming the slave of the other? The ordinance of '87, and all the constitutions made in pursuance thereof, provide that persons may be sold in slavery for crime - Is that repealed?⁴

1. Cong. Globe, 38th Cong., 1 sess., p.1488 April 8th, 1864.
2. Ibid., pp.1488-9 April 8th, 1864.
3. Ibid., 39th Cong., 1 sess., pp.503-504 January 30th, 1866.
4. Howard K. Beale (ed.), The Diary of Edward Bates (Washington; Govt. Printing Office, 1933) p.330 February 10th, 1864.

A few months later, he was still confused, writing,

yet some zealous persons (and good withal) in order to intensify (and Frenchify) the thought, will have it (adding unwarrantably, to the words of the declaration) that men are created equal "before the law". Now, it is precisely before the law, that men are not equal; because, independent of their intrinsic qualities, the law takes pains to make them unequal. The son of 24, though, possibly, a wiser and better man than his father of fifty, is not eligible, as his father is, to either house of Congress or to the Presidency. And why not? Simply because the law says no. Whatever he may be, by nature, nurture, and virtue, before the law, he is not his father's equal.¹.

But this was to confuse political with civil rights, and to confuse restrictions universally applied with those applied on grounds of race. Republicans did not support the Thirteenth Amendment with a view to interfering with the electoral laws of the states. But in the debate on this resolution, and on the related subject of reconstruction, they did connect freedom with the rights of man, the inalienable rights of life, liberty and the pursuit of happiness. All men must be equal before the law in their right to these. If the phrase was unfamiliar, the idea was not. And Sumner was quick to drop it, yielding to the opposition of his colleagues, saying that the most homely text containing the rule would be more beautiful than any words of eloquence. He apparently did not consider that the Judiciary Committee's version excluded the rule, or restricted Congressional action in making it good.

The extension of the idea that a free man had rights, and that he was equal in them with others before the law, was the Lockean principle that governments were instituted among men to maintain their natural and inalienable rights. By the Thirteenth Amendment, Congress had power to enforce its guarantee of freedom by "appropriate legislation". Democrats had no doubts as to what that meant. Representative Mallory charged the Republicans with the intention of using the enacting clause to invade

1. Ibid., p.407 September 11th, 1864.

the reserved rights of the states, and protect the negro against State laws and actions which infringed his "rights".¹ Beyond that, Democratic opponents of the measure were very much alive to the political consequences of the amendment. With the vestiges of slavery removed from the Constitution, the rule that a slave was three-fifths of a man for the purposes of representation would also be abolished, and southern representation subsequently increased. So, said Democrat Edgerton, no man who knew the motives of the party in power, would doubt that their policy in passing the resolution was first, to make the negro a citizen, second to protect him everywhere in defiance of existing state laws and constitutions, and finally, make him a voting citizen.² Complaints and prophecies of this kind were standard Democratic fare.

The lack of stout denials from the Republicans has been interpreted by Jacobus Ten Broek as signifying agreement. He writes that the debate reveals,

... that the proponents of the measure intended thereby a revolution in federalism; that the opponents of the amendment understood that intended purpose and made it virtually the sole basis of their opposition to the amendment; that the amendment was passed by Congress in the face of the well-articulated fear that it would revolutionize the federal system and the publicity expressed purpose of doing so, that is, with complete agreement between proponents and opponents as to its effect.³

Yet it is hard to find convincing evidence that the Republicans planned a revolution in federalism. They did talk about the duty of government to protect all men in their inalienable rights. They did not deny that such protection might involve a conflict between the nation, and

1. Cong. Globe, 38th Cong., 1 sess., pp.2981-2983 June 15th, 1864.

2. Ibid., pp.2986-2987 June 15th, 1864.

3. Jacobus Ten Broek, The Antislavery Origins of the Fourteenth Amendment (Berkeley & Los Angeles; University of California Press, 1951) pp.147-148.

the 'reserved rights' of the States, with the latter the loser. In the House, Republican Orth argued that the surest and safest way of guaranteeing the States a republican form of government was to provide proper guards and checks for the protection of individual and social rights in these communities; to keep a guardianship over them as long as necessary; and to see that both the name, and the spirit of slavery was erased from every state constitution. To both slaveholder and slave, the government's duty was "... giving to each equal protection under the law".^{1.}

They did associate rights with freedom. They did conceive of the use of the enacting clause to protect the free man in the enjoyment of his rights - if necessary. But that is rather a different thing from saying that they planned a revolution in federalism. There were certain good reasons for not announcing such a purpose. The amendment was to apply to the whole Union. Maryland and Ohio had their discriminating laws and customs, and would not welcome the prospect of federal revolution. A three-fourth vote of the states was necessary for ratification. For similar reasons, Republicans had to be careful of upsetting conservative colleagues, even some Democrats, by adopting too radical a stance. The resolution had to secure a two-thirds vote in both Houses. The Senate did not present a great problem, with its comfortable Republican majority. But 110 votes were needed to carry it in the House. Possible difficulties were indicated on May 31st, 1864, when the resolution was first introduced, and a move to table it was rejected by only 76 votes to 55.^{2.}

It is not even likely that only such political considerations led supporters of the amendment to mask their true intentions. Men like Lyman Trumbull, brought up to a lifetime's respect for the rights of states, did

1. Cong. Globe, 38th Cong., 2 sess., p.143 January 6th, 1865.

2. Ibid., 1 sess., p.2612 May 31st, 1864.

not cast off the tradition lightly. On the various debates over reconstruction, discussed in the previous chapter, it was obvious that they would only make such inroads into the domain of the states as was strictly necessary for the objects of peace, security and freedom on which the preservation of the Union in their eyes, depended. And so it was with the Thirteenth Amendment. They would take whatever further action was necessary. When it became clear in 1866, that it was necessary, that the freedman was doomed to new forms of servitude under black codes, the Republicans invoked the enacting clause of the Thirteenth Amendment to pass the Civil Rights and Freedmans Bureau Acts. But events, and not a preordained philosophy would determine how far they would go in altering the balance between state and nation to protect a man in the rights inherent in being free. First, they would give the states the opportunity to do justice to their own inhabitants. The amendment posed the threat of federal action if they did not. There is a good case, to be made in a subsequent chapter, that the same principle informed the Civil Rights and Freedman's Bureau Acts, and that they too, stopped short of federal revolution.

The charge, however, that the Republicans intended to make the freedman a "voting citizen" by the Thirteenth Amendment, can be refuted with more certainty. Surprisingly little was said on the Republican side of the House, about the effects of emancipation on Southern representation. The legal commentator, John N. Pomeroy in his Introduction to the Constitutional Law of the United States took this as evidence that the problem was probably overlooked at the time the amendment was adopted.¹ Yet, if the Democrats were so aware of the effects of the abolition of

1. John Norton Pomeroy, Introduction to the Constitutional History of the United States (N.Y., 1886, 9th ed.), pp.127-128.

the three-fifths rule on the distribution of power, it is unlikely that the Republicans were not equally so. Shortly after the passage of the resolution in the House on January 31st, 1865, Senator Sumner introduced a proposal for a reapportionment amendment.¹ The subject, however, was not taken up until the Thirty-Ninth Congress. The Republicans would not risk passage of the amendment by drawing attention to the touchy subject of black suffrage, an objective to which neither the party, nor the Northern people, were as yet committed. In a negative way, they were not prepared to say that freedom might bring the negro no political rights. Kentucky Senator Garret Davis' outrageous proposal to add a proviso to the amendment that no person whose mother or grandmother was a negro could be a citizen of the United States, or eligible for office was, not surprisingly, voted down by 28 votes to 6.² But as yet, they were not prepared to make a positive assertion that political rights were a condition of freedom. At the same session of Congress, they had deliberately omitted a proposal for open suffrage in the Wade-Davis bill, to avoid risking its passage, and refrained from pressing the issue in the bill to provide a temporary government for Montana, for the same reason. In 1865, it was not expected that the Thirteenth Amendment would do the work of the Fifteenth. Time and, once again, events separated the two.

On April 8th, 1864, the resolution passed in the Senate with a comfortable margin of 38 votes to 6.³ In the House vote on June 15th, the vote was 93 in favour, 65 against, - short of the necessary two-thirds. But when the resolution was called up again on January 31st, 1865, it passed by 119 votes to 56.⁴ A full Republican turnout, the vote of the

1. Sumner introduced the proposal on February 6th, 1865. See Charles Sumner, Works, Vol. IX p.236.
2. Cong. Globe, 38th Cong., 1 sess., p.1370 March 31st, 1864.
3. Ibid., p.1490 April 8th, 1864.
4. Compare the vote of June 15th, 1864, Ibid., p.2995, with the vote on January 31st, 1865, Ibid., 2 sess., p.531.

Speaker, and the 'Yeas' of seventeen Democrats and Unionists, with eight useful Democratic abstentions, gave it the necessary two-thirds majority. A number of events had occurred between the first vote and the second, to explain this change of heart.

As Sherman marched across the South, it was clear that victory was at hand. It could no longer be argued that passage of the amendment would prevent the South from laying down their arms and offering to return to the Union. It was too late to save their slaves. Already, in the abortive peace negotiations in the autumn of 1864, it was clear both that the Confederacy was unwilling to make terms of any kind, and that Lincoln did not propose to offer any that did not include emancipation.^{1.} Military success decided the issue. The Democrat, Samuel Sullivan Cox did claim, however, that he came to the House that morning prepared to vote for the resolution, and changed his mind when he heard that peace messengers from the South were on their way to see General Grant.^{2.} But, for the Republicans, it was much too late to be sensitive to Southern wishes.

Signs of change from the border states, too, in the autumn of 1864, made Republicans less uneasy about the effect of the amendment on opinion there. In October, Maryland opted for voluntary emancipation. If the example was followed by the rest of the border states, as it seemed likely that it would, the amendment would not damage their electoral prospects there.

James G. Blaine in Twenty Years of Congress, emphasises the importance

1. On the subject of the peace negotiations, see Lincoln, Works, Vol.7, p.1443 July 16th, 1864; p.451 July 18th; p.461, July 25th; pp.482-483, August 6th; pp.489-90 August 9th; pp.517-518 August 24th; pp.499-501 August 17th; Id. d., Vol.8, pp.1-2 September 12.
2. Samuel S. Cox, Three Decades of Federal Legislation (Providence, 1886) pp.327-329. Hereafter cited as Cox, Three Decades.

of President Lincoln's support for the measure in persuading Democrats to vote for it.¹ The President's Annual Message of December 6th, 1864 recommended its passage.² But he had already declared his support for it on June 9th, 1864, at the Baltimore Convention,³ a few days before Congress failed to approve it by the necessary two-thirds. The difference in December, and the most important factor was that he then spoke from a position of strength, after a successful election. The people had endorsed a President and a party who both supported the amendment. Lincoln was able to point out that it was only a matter of time before the increased majority of Republicans in the Thirty-Ninth Congress would pass it.

The vote itself was exciting. Samuel Cox recorded, "Every Republican is in his seat, and for the amendment".⁴ There was a feat for party organization! James G. Blaine attributed it to the behind-the-scenes efforts of the skilful parliamentarian James Ashley, who had charge of the resolution in the House.⁵

The behaviour of the Democratic party is the subject of some speculation. Six Democrats who voted "Nay" in June, absented themselves from the vote in January. Several observers agree that it was deliberate, and represented a tacit approval of the amendment.⁶ Three Democrats who abstained on the first vote, voted 'Yea' on the second. More strikingly, eleven Democrats and Unionists changed their votes from Nay to Yea. Eighty-two percent of those who changed their vote were "lameduck" Congressmen. One possible explanation is that, with no constituents to fear, these

1. James G. Blaine, Twenty Years of Congress (Norwich, 1884) pp.533-536. Hereafter cited as Blaine, Twenty Years.
2. Lincoln, Works, Vol.8, p.149. December 6th, 1864.
3. Ibid., Vol.7, p.380 June 9th, 1864.
4. Cox, Three Decades, p.326.
5. Blaine, Twenty Years, p.536.
6. Cole, Memoirs, p.221, Blaine, Twenty Years p.538.

men might be more likely to exercise independent judgment on the vote.

The significance of this statistic however, pales when a similar analysis is made of the ^{whole}/Democratic party. Over two-thirds of them were "lameducks" and did not change their votes.¹ The intervening election probably was significant, to the extent that it did demonstrate the will of the nation, to which Representatives must have been sensitive.

Several other contemporary sources suggest a different common factor among those who changed their votes, or abstained. Charles Dana recalls his part in persuading three Democrats, two from New York, and one from New Jersey, to vote for the amendment resolution.² He was told, he said, to give them what they wanted. Two wanted internal revenue collection appointments, the other an important appointment to the New York custom house, on behalf of a Republican. Samuel Cox also claims that Republican party funds were behind Democratic votes.³ Republican Representative Albert G. Riddle, from Ohio, recollected,

a New Yorker greatly desired a federal place in New York; he had a brother, a Democrat, in the House, who was assured that his vote for the abolishing amendment would largely augment his brother's chances. There was also a contest for a seat in the next House - a Democrat in the present House was a party to that contest; he came to see that the result would depend entirely upon his vote on the impending 13th Amendment. It was found necessary to secure the absence of one Democrat from the House on the day of the vote. A railroad in Pennsylvania was threatened with the passage of a bill by Congress greatly adverse to its interests - the bill was in Mr. Sumner's hands, ready to be reported; the road had struggled to have action on the bill deferred till the next Congress - thus far without avail. The lawyer for the railroad was a Democratic member of the present House.⁴

1. The Democrats and Unionists voted thus,

	NO CHANGE	'NAY' TO 'YEA'
Re-elected	16	2
Lameduck	34	9

The relation between these variables is - χ^2 (Chi Square) = 0.3 i.e. not a significant enough difference to rule out chance.

2. Charles A. Dana, Recollections of the Civil War (N.Y.; D. Appleton & Co. 1898) pp.174-177. Hereafter cited as Dana, Recollections.
 3. Cox, Three Decades, pp.327-329.
 4. Albert G. Riddle, Recollections of War Times. Reminiscences of Men and Events in Washington 1860-1865 (N.Y.; 1895) pp.324-325.

There is no conclusive proof of bribery, but strong suggestions of it. Certainly, Secretary of State William Seward had a lobby working for the amendment.¹ It included W. N. Bilbo of Nashville, George O. Jones, and Richard Schell, hard at work to get the support of New York Democrats. That there was a price, perhaps even of a political rather than material nature, is suggested by John and La Wanda Cox. Seward was never negligent of his own political interests, and they suggest that he used the shifting alliances at the time of the amendment, to build up a conservative coalition. They conclude,

in plain words, Seward in pursuing Democratic votes for the Amendment had let it be understood that there would follow a generous policy of peace and reconstruction, and that there would be a secure political berth for moderate Democrats in a new Conservative coalition.²

Seward's correspondence with Governor Perry of South Carolina, over the meaning of the enacting clause, may lend further substance to this view. The Governor wired the President that he feared the clause would give the federal government control over the race question. Seward replied on November 6th, 1865, assuring him that his fears were groundless, that "... the clause is really restraining in its effect, instead of enlarging the powers of Congress". The President, he said, considered South Carolina's ratification as indispensable to her restoration to the Union. Nevertheless, South Carolina, Florida, Alabama and Georgia tacked on provisos to their ratifications, to the effect that any attempt by Congress to legislate on the political status or civil relations of the former slaves would be contrary to the Constitution, even as amended.³ These conditions were rejected. Seward's statement that the powers of Congress were restrained, however, must be explained in the context of

1. La Wanda and John H. Cox, Politics, Principle and Prejudice 1865-1866 (N.Y.; 1963), Chapter 1.

2. Ibid., p.42.

3. The correspondence is quoted in Howard Devon Hamilton, The Legislative and Judicial History of the Thirteenth Amendment (Urbana, Illinois; 1950).

his political ambitions. It was not the meaning of the Thirteenth Amendment which most of his Republican colleagues in Congress would have given.

Georgia's ratification of the amendment on December 6th, 1865, gave it the necessary three-fourths vote of the states, and Seward proclaimed the amendment ratified on December 18th. Johnson's insistence that acceptance of the amendment was a condition of restoration, assured the votes of the Southern States. Even if their assent was half-hearted, it was better to accept Johnson's terms than be left to the mercies of the Congressional Republicans. Most of the Southern states ratified it by the time of Seward's proclamation. Florida's assenting vote came a few days later, on December 28th. Texas ratified it in February 1870. Mississippi rejected it on December 2nd, 1865. The admission of Nevada to the Union, according to Charles Dana, was a deliberate aid to ratification. He quotes Lincoln as saying, "It is easier to admit Nevada than to raise another million of soldiers".¹ In the end, Nevada's vote did not prove so crucial, though it might have done.

It was now up to the courts to interpret the meaning of the amendment. By that time, however, formal freedom was a fait accompli. Slaves did not seek a writ of habeas corpus. Masters did not sue to recover the body of the former slave. But they did sue to recover his price. The dockets of the state courts were full of cases where promissory notes for slaves had been given by purchasers while slavery was legal under state law. Now they pleaded emancipation as a defence against paying the original owner. The issue was complicated by the fact that almost all the new Southern state constitutions, approved by Congress, contained clauses prohibiting

1. Dana, Recollections pp.174-177.

state courts from taking jurisdiction of contracts involving notes on slaves, since abolition had rendered such contracts void. Yet, it was argued, such provisions were unconstitutional. No state could impair the obligation of contracts. It could be further argued, that if legitimate contractual relationships were to be undisturbed when these states were restored to the Union, slave contracts, like any other contracts, must be respected. And that was the argument of most of the highest courts of the states, confirmed by the United States Supreme Court. Though these cases have little relevance to the question of the connection between freedom and civil rights, they nevertheless give some insight into just how much or little of a "federal revolution", the courts were prepared to undertake.

Georgia's Supreme Court in *Hand v. Armstrong* in 1866, Florida's in *Walker v. Gatlin* in 1867, Arkansas' in *Jacoway v. Denton* in 1869,¹ among many cases, held that the purchasers must honour slave contracts made prior to emancipation. The details of individual cases are unimportant. The arguments tended to be duplicated, and so the findings of the judge in *Jacoway v. Denton* were fairly typical. He held that the section of Arkansas' 1868 constitution which nullified slave contracts was unconstitutional, in that it impaired the obligation of contracts. That obligation was binding by the laws in existence at the time it was made. There was no legal distinction between contracts for the sale of slaves, and any other contracts. Though the contracts stated that the slave was a slave for life, the purchaser, and not the seller, must bear the risk of any change in the status of the slave, due to accident, death, an act of God, or emancipation. The argument was even upheld in the Illinois Supreme Court in the case of *Roundtree v. Baker* in 1869.² Holding a promissory

1. *Hand v. Armstrong*, 34 Ga. 232; *Walker v. Gatlin* 12 Fla.1; *Jacoway v. Denton* 25 Ark. 665.

2. *Roundtree v. Baker* 52 Ill. 241.

note on a slave valid, despite the amendment, the judge argued that the court must respect the laws of the place where the contract was made (i.e. Kentucky) rather than where it was enforced.

Not all the state courts followed this logic. The argument of Louisiana's Supreme Court in *Wainwright v. Bridges*, and *Austin v. Sandel*, both in 1867, and both widely cited in the Louisiana courts was that, since property in slaves was prohibited by the sovereign power, all contracts based on such property were null and void.¹ Georgia's highest court, in *White v. Hart*, and *Shorter v. Cobb* in 1869, took a similar line.²

The United States Supreme Court had to deal with samples of both these arguments when cases came up on a writ of error. They were in an awkward situation. These cases depended not only on an interpretation of the Thirteenth Amendment, but also on the effect of the new state constitutions. The problem was an old one in the history of judicial federalism, the respect due to decisions of state courts in construing their constitutions. In *White v. Hart* and *Osborn v. Nicholson* in 1871,³ the court reversed state court decisions from Georgia and Arkansas respectively, which had denied the validity of promissory notes on slaves. The Supreme Court held that such contracts had become vested, and like any other contract made under statutes which were subsequently repealed, their validity was not impaired. The states could not pass laws impairing the obligations of the contract. When the plaintiff in error in *Boyce v. Tabb*⁴ in 1873, argued that ^{the} Louisiana court had refused to acknowledge the validity of such a contract and that the Supreme Court was, by the Thirty-fourth section of the 1789 Judiciary Act, obliged to respect the

1. *Wainwright v. Bridges*, 19 La. Ann. 234; *Austin v. Sandel*, 19 La. Ann. 309.

2. *White v. Hart*, 39 Ga. 306; *Shorter v. Cobb*, 39 Ga. 285.

3. *White v. Hart*, 13 Wall. 646; *Osborn v. Nicholson* 13 Wall. 654.

4. *Boyce v. Tabb*, 18 Wall. 546.

decision, Justice Davis said that the rule did not apply to questions "of a general nature not based on local statute or usage nor any rule of law affecting titles to land or settled rule of property". The decisions of the state courts, therefore, he said, were not conclusive, though they were entitled to attention and respect. The Supreme Court upheld the legal sanctity of contracts, slave or any other, respecting arrangements made under ante bellum state laws and constitutions, over the new constitutions. Neither they, nor the Thirteenth Amendment made such contracts invalid. Chief Justice Chase was a lone dissenter in these cases, arguing that contracts for the purchase and sale of slaves were against sound morals and natural justice, that the laws which once supported them were annulled by the Thirteenth Amendment and the contracts no longer valid. But where the price and not the body of the slave was invoked, the courts on the whole preferred to ignore moral questions of recognising past property in slaves, in favour of the legal sanctity of contracts, and the idea of continuity and social stability which lay behind it.

The principle in some cases also extended to contracts which involved the welfare of the freedman more directly. Judge Robertson, in *Parish v. Hill*¹, in the Supreme Court of Kentucky in 1866, held that although a man's will in 1860, freeing his slaves on his wife's death and giving them a legacy of two hundred dollars for the purpose of leaving America, granted the slave a premature title to freedom, nevertheless the Thirteenth Amendment gave them that status, which entitled them to their legacies - without the necessity of leaving the country! However, in the case of the *Farmers' Bank of Kentucky v. Johnson*², in 1868, the court held that

1. *Parish v. Hill* 63 Ky 396. Similar opinions were given in *Neely v. Merrill* 9 Bush 346, and *Todd v. Trott* 64 N.C. 280.

2. *Farmer's Bank of Kentucky v. Johnson* 4 Bush 411.

in destroying the obligation of the master towards the slave, as well as his right to his labour, the Thirteenth Amendment negated the provisions of a will for the care and burial of former slaves. Many more of these cases involving the effects of emancipation on inheritance rights, did not involve the amendment, but local and state laws, and had a mixed fate in the courts.

But the courts also had plenty of opportunity to pass upon the substantive meaning of the amendment when they came to adjudicate cases under the various civil rights laws which Congress passed in pursuance of its declaration of freedom. The questions were now turned over to them. What rights were inherent in freedom? What kind of legislation was "appropriate" to protect it? Could the federal government protect the individual, black or white, under it, only against discriminatory state action, or could they reach the individual violator?

John Jay wrote enthusiastically to Chief Justice Chase, of his high expectations of the Court in answering these questions,

the decision which I most wish to see pronounced by your Court is that the adoption of the Amendment abolishing slavery has destroyed the only exception recognized by the Constitution to the great principle of the Declaration of Independence and that from the date of the adoption of the amendment all persons black and white stand upon an equal footing, that all State legislation establishing or recognizing distinction of race or colour are void.¹

But the courts were not to live up to these expectations. At first it looked as if they might. Two decisions in the lower federal courts in 1866, took a broad view of freedom under the amendment, and Congress' power to guarantee it by the Civil Rights Act of 1866.² The issue in *U.S. v. Rhodes* was the right of a coloured witness to testify against a

1. John Jay to Salmon P. Chase, January 5th, 1867, Chase Papers, L.C. V. 98 f. 14727.

2. *U.S. v. Rhodes* Fed. Cas. 16, 151; *In re Turner* Fed. Cas 14, 247.

white defendant in a criminal case, under the provisions of the Civil Rights Act, but contrary to Kentucky state law. Justice Swayne was sympathetic to the accord between the amendment and the act pointing out that many of the Congressmen were present in both Congresses which passed the measures. Unlike other amendments to the Constitution, he said, this one trenched on the powers of the States and the people of the states. It made the former slave not only free, but a citizen. The Civil Rights Act merely made specific arrangements for the protection of his rights. The same year, on circuit in Maryland, Chief Justice Chase, in the case of Turner, held that the terms of certain indentures holding Elizabeth Turner in apprenticeship to her former master, violated the Thirteenth Amendment. It is unnecessary to list cases which followed this lead. Where judges upheld civil rights legislation, they affirmed Congress' right to enact it by the Thirteenth Amendment, and denied that the amendment meant only the abolition of slavery in a physical sense. As the defence argued in *Blyew v. U.S.*¹ in the Supreme Court in 1871, the amendment was not self-executing. It had been found necessary to legislate for the further definition and protection of freedom. "In this age", he concluded, "no man can be called free who is denied the right to make contracts, sue and be sued, and to give evidence in the courts". Significantly, in 1871, this was the argument of counsel, not the opinion of the judge. After a hopeful beginning in 1866, the federal judiciary put an increasingly conservative construction on the Thirteenth Amendment and civil rights legislation. With a few exceptions,² it is in the dissenting opinions - of Field in the Slaughterhouse Cases of 1873, of

1. *Blyew v. U.S.* 13 Wall. 581.

2. A happy exception was *Ex Parte Virginia* 100 U.S. 339 (1879). This case came up under the 1875 Civil Rights Act. A county judge was indicted for failing to select black jurors. His petition for a writ of habeas corpus was denied, on the grounds that the act enumerated jury service as a right, and imposed penalties for infringements. It was the dissenting judges, Field and Clifford, who took the narrower view of the intentions behind the Thirteenth and Fourteenth Amendments.

Harlan in the Civil Rights Cases of 1883, that the idea of the Thirteenth Amendment as more than "formal freedom" remained.

For, in a series of decisions unfavourable to civil rights legislation, both state and federal court judges attached to the Thirteenth Amendment the meaning which Senator Cowan and other conservatives had done at the time of the debate on the 1866 Civil Rights Act - that it gave the freed-man the right to a writ of habeas corpus in a federal court. And so the Supreme Court, in the Slaughterhouse Cases of 1873 would not entertain the claim of white men to the protection of their freedom to follow their own profession, against the restraints of the Crescent City Livestock Company in the form of a monopoly.¹ The amendment, they said, only had relevance to the conditions of negro slavery. Arguing against the constitutionality of parts of the 1875 Civil Rights Act in the 1883 Civil Rights Cases,² Judge Bradley took a narrow view that,

this amendment (the 13th), as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation ... By its own unaided force and effect it abolished slavery, and established universal freedom.

But the abolition of discriminatory laws regarding entry to hotels and public places was not a necessary part of that freedom. Very few rights were necessary to freedom, according to Judge Emmons' Charge to the Grand Jury in the United States Circuit Court of Tennessee, when he said,

the Thirteenth Amendment abolished slavery only; it did no more ... It accords no more authority to enact that he should have the right to vote, to testify, to make contracts, to hold real estate, exercise trade, attend public school, or any other matter or thing within the limits of a state, than it does to enact the same thing in reference to white men. The utmost effect of this great provision in our Constitution was to make the colored man a citizen, equal before the laws with the race which had enslaved him.³

1. The Slaughterhouse Cases, 83 U.S. 36.
2. The Civil Rights Cases 109 U.S. 3.
3. Charge to the Grand Jury 30 Fed. Cas. 18,260.

For Trumbull and his colleagues, at least the right to make contracts, testify, and hold real estate were part of being a "citizen" and "equal before the laws" - and were rights which their legislation demanded for the white man as well as the black.

Approval of the Fourteenth Amendment complicated the issue further. As judges argued that later civil rights legislation, the Ku Klux Klan Act, or the 1875 Civil Rights Act, which imposed penalties against individual violations and conspiracies to deprive persons of their civil rights, could not be justified by the Fourteenth Amendment, which applied only to states, they had to find arguments to deny Congress' power under the Thirteenth Amendment. Thus, Judge Brady argued in the 1870 California case of the People v. Brady,

the apparent purpose of the amendment was not to prevent the illegal duress of individuals. It was aimed exclusively at the institution of slavery as established by the laws of the States.¹

And so subsequent civil rights legislation directed against the acts of individuals, was, Justice Woods claimed in *Le Grand v. U.S.* in 1882,² an instance where the law was broader than the amendments on which it was based, i.e. both the Thirteenth and Fourteenth.

A broader interpretation of the Thirteenth Amendment, both in its meaning of freedom, and in the power of Congress to guarantee it against either state or individual infringements was temporarily revived at the beginning of the twentieth century. In the 1903 case of *U.S. v. Morris*³ in the district court of Arkansas, defendants who were charged with conspiring to injure and oppress black citizens in their right to lease

1. *The People v. Brady* 40 Cal. 198 (1870).

2. *Le Grand v. U.S.* 12 F 577. Similarly, Justice Strong's opinion in *Virginia v. Rives* 100 U.S. 313 (1879), linked the civil rights legislation to the Fourteenth, rather than the Thirteenth Amendment.

3. *U.S. v. Morris* 125 F 322.

and cultivate lands, challenged the constitutionality of the Civil Rights Act. The court sustained the Act. Giving the opinion of the court, the judge said that it was quite properly based on the Thirteenth Amendment rather than the Fourteenth, since it did extend protection against individual infringements. The right to lease and cultivate land was fundamental to freedom. "Shall the courts", he asked, "be less liberal in construing constitutional provisions in favour of freedom than those in favour of slavery?" The answer was Yes. Two years later, the Supreme Court in *Hodges v. U.S.*,¹ reverted to the conservative interpretation. The amendment applied only to "enforced compulsory service of one to another".

In the 1870's, rights and freedom became dissociated in the courts. In a sense, the legislative intention became divorced from the judicial application. The debate on the amendment resolution - indeed, the whole trend of debate on slavery and reconstruction in the Civil War Congresses - revealed that Republicans associated freedom with rights. A free man had certain - vague - "natural" and "inalienable" rights by definition of being free. The enacting clause of the amendment gave warning that the federal government was prepared to take action to make the declaration of freedom a reality, for all men, in these terms. But that does not mean that they contemplated "federal revolution". The states were invited to do justice first. When reports of their progress, particularly that of the Joint Committee on Reconstruction made it clear that they weren't, and that rights were far from "inalienable", then the Republicans took further action in the shape of the Civil Rights and Freedmans Bureau Acts, and the Fourteenth Amendment. The courts stood one step further away from

1. *Hodges v. U.S.* 203 U.S. 1.

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Congress' in contemplating federal revolution. The Supreme Court recognised the validity of slave contracts made under ante bellum laws - for the sake of stability and continuity. They shrank from using the amendment to strike down discriminatory and unequal laws, or to reach individual violations of civil rights. There was, of course, a time lag between the adoption of the legislation, and litigation on it in the courts. By the 1870's, most Northerners were as anxious to return to peace and quiet as the "old men" of the bench were. The possibilities of revolution had been within reach, but they were prepared to go only so far, as circumstances demanded, and no further.

C H A P T E R VIFREEDOM AND RIGHTS: THE NINETEENTH CENTURY UNDERSTANDING

All men were to be free. Free - Few words in any language could be so elusive of definition. If the philosopher could take a lifetime to speculate on its meaning, the Congresses which, by the Thirteenth Amendment had "power to enforce this article by appropriate legislation", the courts which put a judicial construction to it, the negro whose future depended on it, needed a meaning for it now. For some, the meaning was clear. For Edgar Cowan in the Senate, the Kentucky court in *Bowlin v. Commonwealth*, and many more conservatives, the Thirteenth Amendment meant the absence of physical bondage, the right of a man to a writ of habeas corpus if anyone tried to hold him in that condition. But for others, including the majority of Republicans in Congress, there was more to it than that. During the wartime debates on emancipation, their speeches revealed a connection in their thinking between freedom and rights. But the speeches also revealed a certain vagueness about the nature of these rights, beyond the briefest amplification of the Declaration of Independence to include the right of a man to travel freely, earn his own living, enjoy legal family relationships, a right to education, to own and dispose of property, and to seek the protection of the courts. All men, they said, were entitled to these rights, and in the enjoyment of them, government owed them equal protection. In 1866, events forced them into a clarification both of the meaning of freedom in law, and the respective roles of national and state governments in its protection and maintenance. The Report of the Joint Committee on Reconstruction described a situation in the South which was the negation of freedom. Black codes there denied

the negro even the most fundamental civil rights, and demonstrated that slavery had many forms, beyond remedy by a writ of habeas corpus. Freedom was not self-executing. Although the Civil Rights Act of 1866, and the Fourteenth Amendment were addressed to that problem, they were not just about the rights of newly freed slaves living under black codes. They were about the rights of all free Americans, anywhere in the Union, and the nation's particular responsibilities for their protection in a complex federal system. For that reason, it is useful to inquire into the background of these measures from a broader perspective, and to examine the slave's new status in the light of the experience of those who already enjoyed freedom. What were the rights of a free American before 1866, and to whom did he look for their protection?

It should not be such a difficult question to answer. After all, the Americans wrote constitutions and bills of rights, both federal and state. Bringing together the common features of these documents - and the extent of the common ground is impressive - a list of the rights of a free American would include the following:

- the right to assembly and petition, freedom of speech, of conscience, worship and expression,
- freedom from the quartering of soldiers on private houses,
- the right to bear arms,
- the all important safeguard against arbitrary arrest and imprisonment, the right of a man to a writ of habeas corpus,
- freedom from unreasonable search and seizures of person, house, papers, or effects,
- procedural rights in criminal prosecutions, including a speedy, public trial, indictment and presentation of charges, confrontation of accusers, an opportunity to answer, to introduce witnesses and compel them to give evidence under oath, the assistance of counsel, immunity from self-incrimination, trial by jury,
- no double jeopardy, excessive bail or fines, no cruel or unusual punishments,
- all governments were forbidden to pass bills of attainder or ex post facto laws,

- finally, and occupying a special place in Anglo-American constitutional law was the right of a man not to be deprived of life, liberty, or property without due process of law (or in the case of some state constitutions, without the law of the land).

But such a list, isolated in time and space, would go almost nowhere towards answering the question satisfactorily. The documents in question were never intended to be a definitive statement of the rights of man. According to the natural rights philosophy which informed much of American thinking on the nature of rights, rights existed prior to the creation of governments, and continued to exist in the external sphere of nature, even after the functions of government had been described.¹ The Declaration of Independence recognised a positive relationship between the functions of governments and natural, inalienable rights. Government were instituted to secure them. But in 1787, the American understanding of the relationship was a negative one, to secure rights and liberty against government. Their struggle for independence led them to the conclusion that it was dangerous to concentrate power at the centre, in monarchy, or in a parliament with plenary legislative powers. In 1787, the American answer was to distribute power in such a way that no one government, and no one branch of government could exercise an arbitrary and unlimited power over the body politic. Executive, legislative and judicial powers were separate and limited. Powers were divided between state and nation, and both were limited by written constitutions. All power was limited by the ultimate sovereignty of the people. Nowhere in the system, did the people lodge a power which could deprive them of their natural rights. This was largely a political solution. If the body politic was safe from despotism, by reference, in the best of all possible worlds, so too was the life, liberty and property of the individual.

1. Edward S. Corwin, The "Higher Law" Background of American Constitutional Law, 42 Harvard Law Review 1928.

Since governments did not possess the power to deprive a man of his fundamental rights, there was no reason to spell out these rights. That was the argument of the Federalists who opposed the addition of a bill of rights to the Constitution. But, what if it were not the best of all possible worlds, and the implied reservation of power over rights was exceeded or ignored? The Bill of Rights of the national Constitution was a concession to those who insisted on more explicit guarantees of individual rights. Though at the time, only about half the state constitutions contained similar bills, the fashion was quickly followed. It was no easy task, however, to crystallise a mixture of philosophical abstractions and common law traditions into a meaningful body of rights. The results are as unsatisfactory as the task is impossible. As Leonard Levy writes,

those documents, which we uncritically exalt, were imitative, deficient and irrationally selective. In the glorious act of framing a social compact expressive of the supreme law, Americans tended simply to draw up a random catalogue of rights that seemed to satisfy their urge for a statement of first principles - or for some of them. That task was executed in a disordered fashion that verged on ineptness.¹

Still, however, the bills of rights of national and state constitutions did not advertise themselves as a definitive statement of rights. The classic expression of the theory that rights continued to exist "out there", and that the people had not relinquished power over them to earthly governments, was the Ninth Amendment to the U.S. Constitution, which reads:

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

Bills of rights attached to state constitutions acknowledged their own incompleteness in similar "and so on" clauses. The result is that it is

1. Leonard Levy, Origins of the Fifth Amendment (N.Y.: Oxford U.P., 1968), p.415.

impossible to measure rights by the written constitutions, for as Thomas McIntyre Cooley writes, "These instruments measure the powers of the rulers, but they do not measure the rights of the governed".¹.

Yet this suggests an alternative approach. It is only when legislatures, courts, President and Governors took their share in making a living instrument out of a collection of words, that there was any meaningful test of the reality of rights. And as they tested their powers, marked out their respective territories, and interpreted restraints and limitations, they set in motion a process of change which made the Constitution of 1860 something different from the Constitution of 1787. Americans would argue, and continue to argue right up to the Holmes-Brandeis era, that whatever else changed, rights remained eternal and immutable.² But they argued in the face of much evidence to suggest that on this earth rights were far from inalienable and unchanging. The measurement of powers, then, is an integral part of the measurement of rights.

In this process of filling in the blanks of the constitutions, two developments are particularly important for this study. The first is the unique place which came to be occupied by the judiciary. In a society which claimed liberty under law, it was natural that the courts should be closely concerned with rights. Contests over private and public rights became court cases. But so often, adjudication of these cases depended on the construction of a constitution. A party might claim a constitutional right, challenge a statute, an order of the executive, or a rule of the judiciary as unconstitutional. Through the application and acceptance of the doctrine of judicial

1. Thomas M. Cooley, A Treatise on the Constitutional Limitations which rest upon The Legislative Powers of the States of the American Union (Boston: Little, Brown & Co., 1871 2nd ed.) p.36. Hereafter cited as Cooley, Limitation
2. There were some exceptions. During the Civil War, the conservative commentator C. C. S. Farrar wrote, "'The inalienable rights of man' are spoken of with as understanding faith as if they really existed; and 'right reason', the most undefined of all verbal imposture, is appealed to, as the conclusive foundation of this puerile card-house of rickety abstractions." C. C. S. Farrar, The War. Its Causes and Consequences. (Cairo: Blelock & Co., 1864) p.82.

review, the judges carved out for themselves the role of interpreters of constitutions. The United States Supreme Court claimed and exercised a power of review over the actions of the other branches of government, testing their validity by the Constitution. There the boundaries between the powers and restraints of legislatures were arbitrated - there too, the boundaries between nation and state were discovered and rediscovered.

In interpreting the Constitution, the judges were not applying clear and straightforward rules. By choosing meanings from a variety of alternatives, they themselves fashioned the law. A clear illustration of this is the way in which the courts brought within the pale of constitutional law the notion of natural rights, too imprecise to be captured on paper. Professor Edward Corwin describes the process as "the gradual absorption of higher law concepts into the written constitutions through the medium of judicial review."¹ The highest courts of nation and state made it a test of the validity of legislative acts that they should not violate a natural right. It was not stated so boldly, of course. The idea found a berth in the constitutional language of due process. Though the development came to fruition after the Civil War in the Supreme Court's substantive interpretations of the due process clause of the Fourteenth Amendment, it began much earlier. Professor Corwin documents a number of pre-Civil War cases where the highest courts of both nation and state employed a substantive, natural rights interpretation of existing due process clauses, to invalidate legislative acts.² This theme will be returned to later. But it is important to appreciate that the special role of the judiciary requires us to look beyond the words of Constitutions, to judicial constructions of them. Meanings change, and boundaries shift in the process.

1. Edward S. Corwin, Liberty Against Government - The Rise, Flowering and Decline of a Famous Juridical Concept (Baton Rouge: Louisiana State U.P., 1948) p.57. Hereafter cited as Corwin, Liberty Against Government.
2. Edward S. Corwin, The Doctrine of Due Process of Law Before the Civil War 24 Harvard Law Review 1911, hereafter cited as Corwin, Due Process.

The second, and the most crucial development from the Constitution of 1787 to that of 1860, was the ways in which nation and state mapped out their respective territories. Power was, of course, intentionally distributed to avoid the possibility of its monopoly by any one government. But, hedging government in with sufficient restraints to avoid its infringing political liberty and civil rights would, if carried to extremes, endanger them from inaction. Rights after all were limited, as power was limited. A man's rights must be limited by those of his neighbour, and the community he lives in. Thus it is also necessary to clothe governments with sufficient power to protect one man's rights by limiting his neighbour's. Edward Corwin writes succinctly of the two faces of both power and rights:

we enjoy civil liberty because of the restraints which government imposes upon our neighbours in our behalf and constitutional liberty because of the restraints which government itself operates when it comes to impose restraints upon us.¹

Yet, as powers and restraints came to be worked out between nation and state, the equation became lopsided. Because of the triumph of the politics of states rights in the decades after the framing of the federal Constitution, that instrument was interpreted almost solely by its restraints, rather than its powers. The nation was assigned a virtually non-existent role in the police functions of government, so that it had very little to do either with infringing the rights of individuals, or protecting them. The Bill of Rights lay idle. In the Supreme Court case of *Barron v. Baltimore* in 1833,² Chief Justice John Marshall gave the opinion of the court that the first eight amendments of the Constitution were a limitation, binding on the nation, but not on the states. Restrained from interfering with the rights of individuals, the federal government was robbed of the power to protect them against the

1. Corwin, Liberty Against Government, p.7.

2. *Barron v. Baltimore* 7 Peters 243 (1833).

infringements of others. As the constitutional commentator, John Norton Pomeroy expressed it, while the United States were forbidden to deprive a person of any of the privileges and immunities guarded by the Bill of Rights, the states may, in respect to their own inhabitants, and if consistent with their own organic laws, infringe upon them all!¹ So obsessed were the states-rights advocates with the one part of Corwin's equation - constitutional liberty, and that solely and narrowly defined as restraining the powers of the nation - that they forgot many of the problems of confining civil liberty stateside. As one modern writer puts it:

The body politic was to be guarded from despotism; the body of the individual was left to the discretion of his neighbour and his state government.²

The safety of doing this was assumed. The primary right, according particularly to states-rights commentators, was to be left alone, free from national centralisation. In the local community, men could assert and maintain their own rights. Thus the Southerner John Randolph Tucker expressed an exaggerated faith in laissez-faire when he wrote of a man's freedom:

to accomplish all which by nature he is fitted to accomplish, without hindrance from his fellows, and without help or interference from his government. The world the arena, man the athlete, government the mere police, God the arbiter, and the reward the laurel he can gather and the crown he can win.³

In this jungle, some men's rights were bound to be held for nothing, by the superior claim of the strong, as were the negro's. But, even with respect to the rights of the strong, Tucker's description fell short of accuracy. The government of the nation may well have been compelled to stand on the sidelines, just as he advocated, but that of the states was not.

1. John N. Pomeroy, An Introduction to the Constitutional Law of the United States (Boston and New York: 1886, 9th ed.) I, p.151. Hereafter cited as Pomeroy, Constitutional Law.
2. John P. Roche, Courts and Rights: The American Judiciary in Action. (N.Y.: Random House, 1961) p.59.
3. John Randolph Tucker, Address Delivered Before the Phoenix and Philomathean Societies of William and Mary College (Richmond: 1854) p.10.

They possessed the power to protect rights, but they possessed a considerable power potentially to make rights alienable. The state possessed the power of eminent domain, the power to use private property for public purposes, provided the owner was compensated. Roads, bridges and canals were built under license of the state legislatures, touching the rights of property. Corporations were chartered. The states possessed the power of taxation, again with implications for individual rights. They set conditions of citizenship, deciding who voted, who served on juries, and who served in the militia. Most of all, they possessed the most intangible of powers--the police power, touching every aspect of the life of the individual, in matters of health, welfare, education, and the nebulous field of public morality. There, at state level, the practical working out of the relationship between powers and limitations, had the greatest consequence for the reality of rights.

The state-centredness of rights prior to 1866, suggests further complications in answering the original question as to the rights of a free American. It will be part of the concern of this chapter to ask whether or not it is meaningful to talk of the rights of a free American, or whether one must ask instead, what were the rights of a free man in Ohio, Massachusetts, Arkansas, and so on. More than that, it is evident from even the most cursory examination of state legislation, that there are variations not simply from state to state, but within states. A negro in Ohio was "free", but he did not enjoy some of the most fundamental rights, freedom of ingress and egress, or of testifying against a white man in court. Such a situation suggests that 'freedom' was not the most accurate test of the rights of man, beyond philosophical abstractions, and that there is another, legally more complex field to explore -- that of citizenship.

But, with these general qualifications to the question in mind, it is necessary to look more closely at certain aspects of the problem, first to the relationship between the nation and rights, and then to the relationship between the states and rights (and by necessity between nation and state in these matters).

It was not the words of the Constitution which destined the federal government to have solittle to do with the lives of her citizens. Certainly, there were some explicit restraints, for example against passing ex post facto laws and bills of attainder, or suspending the writ of habeas corpus, "unless when in cases of rebellion or invasion the public safety may require it". The Bill of Rights, too, was a limitation on what the government could do to infringe rights. But there was no limitation on what the government could do to protect rights, or against actions consistent with the maintenance of rights. Everywhere there was room for argument and interpretation. And although the argument against the powers of the national government had been the dominant one since the founding of the republic, it did not go unchallenged. Recent research on the antislavery origins of the Fourteenth Amendment, demonstrates that important sections of public opinion on both sides of the slavery argument found in the Constitution, a statement of rights and the power to guarantee their equal protection.¹

Abolitionist rhetoric on the rights of man has a familiar ring to it. All men were equal in certain fundamental rights, by reason of their very humanity. In enumerating these, they went no further, and no less far, than

1. Howard J. Graham, Everyman's Constitution (Madison: State Historical Society of Wisconsin, 1968), hereafter cited as Graham, Everyman's Constitution. And Jacobus Ten Broek, The Antislavery Origins of the Fourteenth Amendment (Berkeley - Los Angeles: Univ. of California Press, 1951), hereafter cited as Ten Broek, Antislavery Origins.

the drafters of the Declaration of Independence, and the various bills of rights. But if their understanding of rights was familiar, their application of them to all men, black or white, slave or free was radical by the standards of American practice, if not theory. The second point of departure from the familiar, was in the interpretation of the respective roles of nation and states in the protection and maintenance of rights. Where the Supreme Court in *Barron v. Baltimore*, found that the first eight amendments to the Constitution were a limitation on the nation, but not on the states, the abolitionists found in the Bill of Rights a statement of the rights of all Americans, binding on all governments. Not only were the amendments binding in the negative sense, as restraints on the power of government, but their protection was the positive and active concern of government. The rights of man were not variables, to change from state to state. They were enshrined in the national Constitution. And it was in the national constitution that the abolitionists found the correlative power of equal protection.

In getting these ideas across, the abolitionists played the role of preachers and popularisers. Describing their views on constitutional law perhaps gives a misleading impression of their coherence. They were not all of one mind. Lysander Spooner understood some of these ideas better than William Garrison. But mostly they groped for solutions, confusing moral law with enforceable constitutional law. Nevertheless, a number of them did relate their ideas to the Constitution, in ways which would prove significant. They began by interpreting the objects of the Constitution in the light of its Preamble, and discovered a remarkable similarity between their own noble purpose, and that of its framers - to establish justice, promote the general welfare, and secure the blessings of liberty. The substance of the Constitution furnished the powers necessary to accomplish the object. Among

the specific provisions to which they attached their ideas, the most important were the two which would lend the same ideas to the Fourteenth Amendment. These were, the comity clause, "The Citizens of each State shall be entitled to all privileges and immunities of Citizens in the several states"; and secondly, the Fifth Amendment guarantee that a man shall not be deprived of life, liberty or property, without due process of law, (interpreted by the abolitionists to mean that the government must see that a man is not so deprived without just process of law). Their interpretations of these two constitutional provisions are worth further consideration in the light of prevailing constitutional practice.

The abolitionists read into the comity clause, a concept of national citizenship to which attached fundamental rights. This national citizenship, involved national guardianship of its privileges and immunities, and obliged the states to protect them. Defence counsel William Ellsworth argued in the famous Prudence Crandall case in 1834, that the intention of the comity clause was:

to declare a citizen of one state to be a citizen of every state, and as such, to clothe him with the same fundamental rights, to be where he might, which he acquired by birth in a particular state. (Its) clear intention (was) to do away with the character and consequence of alienage among the citizens of these United States, to the extent of the reciprocity of the privileges and immunities secured, be they what they may. To this extent a citizen of any state is a citizen of every state ... All are ... members of one government, one state.¹

Behind this was the implied notion of national citizenship. It was not yet explicit. The comity clause after all did not speak of the rights of citizens of the United States. It spoke of state citizenship. But the abolitionists acted on the assumption that rights held under state constitution were guaranteed and incorporated in the comity clause by reference - in

1. Quoted in Graham, Everyman's Constitution, p.179.

other words that the clause nationalised them. They continued to talk of federally secured privileges of state citizenship, rather than constitutional rights of national citizens. But the concept of national citizenship was there.

The term citizen of the United States was known, but only the abolitionists endowed it with such a broad meaning with respect to the protection of fundamental rights. In more conventional constitutional thinking, there was some confusion as to its meaning. Attorney-General Bates discovered how little understood the term was in 1862, when he was called upon to give an opinion as to whether or not free negroes were United States citizens. The case came up when a schooner was detained by a revenue cutter in New Jersey because its captain was a negro, a position, which by statute was confined to citizens of the United States. Bates wrote of a

fruitless search in our law books and the records of our courts, for a clear and satisfactory definition of the phrase citizen of the United States ... For ought that I see to the contrary, the subject is now as little understood in its details and elements, and the question as open to argument and speculative criticism as it was at the beginning of the Government. Eighty years of practical enjoyment of citizenship, under the Constitution, have not sufficed to teach us either the exact meaning of the word, or the constituent elements of the thing we prize so highly.¹

Apart from the difficulty of defining what it meant in terms of rights, there was not even a history of agreement on who was qualified to enjoy them. In 1821, Attorney-General William Writ, discussing the question of the eligibility of a coloured man to command a coasting vessel, gave the opinion that a free negro was not a citizen.² In 1843, however, Attorney-General Legare came to the opposite conclusion on the construction of a statute for

1. Opinions of the Attorneys General of the United States Vol.10 p.383. See also John Pomeroy's discussion of the problem, Constitutional Law Vol.1 pp.68-9, and Simeon E. Baldwin, The Citizen of the United States, Yale Law Journal 1893.
2. Opinions of the Attorneys General I p.506.

the pre-emption of public lands by citizens of the United States.¹ In 1857 the United States Supreme Court threw the balance in the other direction, in the Dred Scott case.² Chief Justice Taney distinguished between citizenship of a state, and citizenship of the nation, denying that the latter followed automatically from the former. A man, he said, may possess all the rights and privileges of state citizenship, and yet not be a citizen of the United States. It was true, he said, that at the time of the adoption of the Constitution, all the citizens of the several states became members of the nation. But this could not have included negroes, for at the time they were considered inferior beings with "... no rights or privileges but such as those who held power and the government might chose to grant them". Not only did Taney's opinion deny negroes original citizenship of the nation, but it shut the door against promotion to that status. For, even if a state conferred citizenship on a negro thereafter, it would not elevate him to national citizenship, since the states could not introduce new members to the nation. Congress possessed the sole power of naturalisation. This unhappy opinion was not, of course, the last word. In his 1862 opinion on citizenship, Bates came to the same conclusion as the abolitionists, that birth in the United States, irrespective of race, was the qualification of citizenship.³ All persons born within the limits of the United States were citizens, owing allegiance to the United States in return for protection. Furthermore, he rejected Taney's argument that a man could be a citizen of a state but not necessarily of the United States. Every United States citizen, he said was a citizen of a state, and vice versa.

Ascertaining qualifications for citizenship of the nation was just

1. Ibid., IV p.506.
2. Dred Scott v. Sanford 19 How. 393 (1857).
3. Opinions of the Attorneys General X p.382.

the beginning of the problem. Assigning rights to it was still more difficult. There were certain recognised constitutional and statutory rights which were the peculiar province of the nation's protection. They included the right to plead cases in United States courts, the pre-emption of public lands, the rights secured by treaty between the United States and foreign countries, the right to use the navigable waters of the United States and so on. But before 1866, it did not mean the embodiment of fundamental civil rights, paramount over state citizenship.

The comity clause did involve the nation in rights. But not in the comprehensive sense in which the abolitionists invoked it. The clause was about the privileges and immunities of state citizenship. It was about the rights which migrants might expect to enjoy when they moved to another state, and not about the rights which they carried with them anywhere in the Union. One of the best known and widely cited judicial definitions of the rights of migrants under the comity clause, was that of Justice Washington in the 1823 case of *Corfield v. Coryell*:¹.

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 than are paid by the other citizens of the state.

Certainly, behind this, and similar opinions, was the assumption of a body of basic civil rights which it would be expected that all citizens would enjoy under their own state government. The comity clause was simply a guarantee that the outsider would not be discriminated against in the

1. *Corfield v. Coryell* Fed. Cas. 3,230(1823).

enjoyment of them. But a man born in Alabama, who did not enjoy these rights in Alabama, could not appeal to the nation's protection via the comity clause. It did not purport to interfere with the business of the states in setting their own conditions of citizenship.

Furthermore, the clause was not held to restrict state governments from discriminating between residents and non-residents in every respect. Although the judge in *Corfield v. Coryell* listed fundamental rights, reciprocal between states, the case was about whether non-residents of New Jersey had a right to fish for oysters in New Jersey waters. The court decided that they did not. That right was a special one, not ceded to the United States by New Jersey. The postwar constitutional commentators John Norton Pomeroy and Thomas McIntyre Cooley also wrote of rights and privileges which a migrant could not claim under the comity clause, including political rights, the right to serve on juries or in the militia, the benefit of exemption laws, or of special privileges granted only to the citizen of that state.¹

Yet another drawback against invoking the comity clause to claim equal protection for the rights of national citizenship, as the abolitionists did, was that it did not even guarantee the equal treatment of all migrants. A black migrant, a woman, a white man - all would find themselves, in theory entitled to fundamental rights (according to *Corfield v. Coryell*), but subject to quite different laws. The states, it was recognised, could pass laws which vested privileges in some individuals, or which imposed special burdens on others. The good order of society demanded special regulations for lunatics, prostitutes, drunkards, and of course, negroes. Thus, as Attorney-General Bates argued in his 1862 opinion on citizenship, nobody

1. Pomeroy, Constitutional Law I p.174; Cooley, Constitutional Limitations p.438.

would deny the right of a state to make the negro 'immune' from jury service and so on. Migrants of different status would also be subject to the variations of laws affecting people of similar status in that state. This was the argument of the judge in the Minnesota Supreme Court case of Davis v. Pierse in 1862,¹ when he argued that the clause meant:

not absolute equality of rights and privileges with every citizen of each state of the Union, but all such privileges and immunities in any State as are, by the constitution and laws thereof, secured or extended, to her own people of the same class, and otherwise similarly situated.

This argument was one loophole in the idea of an equality of reciprocal rights, guaranteed by the comity clause. Some state courts went a stage further, and excluded negro migrants from the operation of the comity clause, on the grounds that they were not citizens. Thus in 1822 when Amy, a coloured woman contested the validity of a discriminatory Kentucky law, the court dismissed her counsel's argument that as a citizen of Pennsylvania and later Virginia, she was entitled to the protection of the comity clause.² She was not a citizen. The case was cited and followed in the Tennessee case of The State v. Claiborne in 1838,³ where after interpreting the comity clause in the broadest possible sense for the reciprocal rights of white citizens, the judge qualified its application, arguing that "... free negroes are not entitled to all the privileges of white persons in any of the States. They, therefor, are not citizens in the sense of the Constitution".

The comity clause, then, could not prevent the states from operating a 'sliding scale' with respect to the privileges and immunities, both of their own citizens, and those of migrants. The question was whether that

1. Davis v. Pierse 7 Minn. 13 (1862). Though the court decided that the right to institute and maintain actions in the courts of the state was one fundamental and common to all citizens.
2. Amy v. Smith 1 Litt. Ky. 326 (1822).
3. The State v. Claiborne 1 Meigs. 331 (1838). The court upheld a state statute prohibiting the entry of free negroes.

sliding scale operated only on special privileges, or on fundamental rights. The opinion of the judge in *Corfield v. Coryell*, suggested that there was an absolute standard of reciprocal fundamental rights, and that variations were only valid in the field of special privileges and exemptions. All too often, however, there was a sliding scale of basic rights, with negroes at the bottom of it, either as permanent inhabitants, or as migrants. The comity clause could certainly not be invoked by permanent residents of a state against their own state laws. It left the business of setting standards of citizenship with the states themselves. Its final disadvantage was that it was not framed as a clear grant of power to the nation. It did not imply a right of Congress to legislate for its execution. All in all then, the abolitionist interpretation of the comity clause was at odds with the practice of the times, and hampered by the terms of the clause itself. Nevertheless, they had established an important concept of national rights and its correlation of national protection. The transition had yet to be made from the concept to a more enforceable vehicle of constitutional power to make it good.

Another part of the abolitionist armoury was their contention that the Bill of Rights was a source of power to the national government for the protection of the rights it contained. Despite the Supreme Court's opinion in *Barron v. Baltimore*, they argued that the Bill of Rights had general application, and that the states too, were prohibited from infringing them. Certainly the first eight amendments refer specifically to the national government twice. The first amendment prohibited Congress from making laws respecting the establishment of religion, or abridging freedom of speech or of the press, assembly, or petition. But, as one writer argued recently, that does not prohibit Congress from prohibiting the states to abridge

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these rights.^{1.} Further, although the seventh amendment refers to trials by jury in federal courts, the rest of the procedural guarantees are phrased so generally to allow quite logically for the view that they were intended to have universal application.

Yet in practice, much of the Bill of Rights lay inactive. The Court's opinion in 1833 that it was a limitation on the powers of the nation had no dramatic practical effects, because in practice the legislative powers of the nation were already so limited. Much of the bill of rights was about procedural guarantees in criminal trials. They remained unused, because there was so little federal criminal law.^{2.} Even where Congress did make some crimes federal, such as the murder of a United States marshal, or counterfeiting, the states often had concurrent jurisdiction.^{3.} In other penal statutes, Congress enlisted the state courts for their enforcement,^{4.} so that, all in all, the criminal business of the federal government was so limited, as to make the Supreme Court's admonition in *Barron v. Baltimore* hardly necessary in that respect at least. As one student of the Fourth Amendment finds:

Like some other Bill of Rights provisions the Fourth Amendment remained for almost a century a largely unexplored territory. One does not have to seek far to find the reason. Until the latter part of the nineteenth century, the criminal jurisdiction of the federal government was seldom exercised by Congress.^{5.}

1. William W. Crosskey, Politics and the Constitution in the History of the United States (Chicago: The University of Chicago Press, 1953) II p.1057.
2. Apart from crimes which were made federal crimes by statute, it is a controversial point whether or not there was intended to be a federal common law of crimes, or whether there was to have been federal jurisdiction of common law crimes, but applying the common law of the state in which the crime was committed. Although early federal court opinions favoured the first idea, the Supreme Court twice rejected the idea of a federal common law of crimes (*U.S. v. Hudson-Goodwin* 7 Cranch 32 (1812) - *U.S. v. Coolidge* 1 Wheat. 415 (1816)). See Leonard W. Levy, Legacy of Suppression (Cambridge: Belknap, 1960) pp.238-245. But the criminal business of the federal courts was still very limited.
3. For example the murder of a U.S. marshal might also constitute a breach of the peace - a riot, assault or murder in the state. See Joel P. Bishop, Commentaries on the Criminal Law (Boston: Little, Brown & Co., 1872 5th ed.) pp.179-180.
4. An Argument which is illustrated and expanded by Charles Warren, Federal Criminal Laws and The State Courts, 38 *Harvard Law Review* 1925.
5. Jacob W. Landynski, Search And Seizure And The Supreme Court (Baltimore: Johns Hopkins Press, 1966) p.49.

But there was one Bill of Rights provision which was potentially a useful vehicle for the protection of the rights of man - the Fifth Amendment guarantee "nor shall any person ... be deprived of life, liberty, or property, without due process of law".

In the eyes of "respectable opinion" up to the Civil War, the due process clause of the Fifth Amendment, or its equivalent in state constitutions meant that a man must not be deprived of life, liberty or property, without the benefit of procedure. Usually this meant regular judicial procedure - a hearing, witnesses, the verdict of a judge and so on. It need not mean a jury trial in all civil cases. But it was not confined to judicial procedure. A statute, perhaps a remedial one, which deprived a man of a right of property might well conform to standards of due process, if it observed proper constitutional restraints and form.¹.

A great deal has been written about the transition from 'procedural' to 'substantive' due process. After the war, the supreme court made increasing use of the due process clause of the Fourteenth Amendment to strike now legislation which was a violation, not of correct procedure, but of 'just' process. In other words they made a qualitative judgment about the substance of the legislation. But the separation of procedure and substance is artificial. The concept of justice is inherent in both. Certainly, there is reason to believe from recent work on the subject, that, in many quarters due process had already acquired a substantive meaning well before the war.².

Howard Graham and Jacobus Ten Broek have investigated abolitionist speeches, and the party platforms of the Liberty and Free Soil parties, to demonstrate that the substantive meaning of the Fifth Amendment was widely

1. Walton Hamilton, The Path of Due Process of Law in Leonard Levy (ed.) American Constitutional Law: Historical Essays (N.Y.: Harper, 1966) pp.132-134; Pomeroy, Constitutional Law I pp.161-162; Cooley, Limitations p.388.
2. Corwin, Due Process: Graham, Everyman's Constitution.

understood in the 1830's and 1840's. The abolitionists understood it as a guarantee of the protection of all natural rights against unjust infringements. Thus slavery, and discriminatory laws made in its interest, were violations of the Fifth Amendment, in that they deprived a man of life, liberty or property without due process. Not only that, but the amendment vested a power in the national government, specifically Congress, to see that justice was done, and rights protected from such violations. Thus they brought natural rights within the framework of the Fifth Amendment, and demanded its protection against allcomers. Professor Graham argued that this popular development has gone unheeded by constitutional historians who are obsessed with judicial cases, and maintains that "Zealots, reformers, and politicians - not jurists - blazed the paths of substantive due process".^{1.}

But the zealots on this occasion found themselves in the strange company of some conservative jurists. Edward Corwin has documented a dozen or more major cases in pre-civil war constitutional law, which foreshadowed the growth of substantive due process. It will be remembered that, in the framing of the Constitution, the Americans had kept a card up their sleeves with respect to rights. They had not enumerated them all, and they had not given governments a carte blanche to infringe their natural rights. Yet rights were not very valuable if they remained 'out there', or could not be pleaded in a court of law. Very early in the history of the Republic, the Supreme Court began to bring the doctrine of natural rights into the constitutional fabric through the medium of judicial review. The earliest, and one of the most impressive examples was the case of *Calder v. Bull*, in the Supreme Court in 1798^{2.} The issue was the validity of a special act of the Connecticut legislature. The appeal against its validity was that

1. Graham, Everyman's Constitution p.250.

2. *Calder v. Bull* 3 Dallas 386.

it violated the constitutional prohibition on ex post facto laws. But Justice Chase strayed on to different and significant ground in his opinion, when he said:

I cannot subscribe to the omnipotence of the state legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the state. The people of the United States erected their constitutions ... to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide the proper objects of it. The nature and ends of legislative power will limit the exercise of it ... There are acts which the federal or state legislatures cannot do without exceeding their authority ... An Act of the legislature (for I cannot call it a law) contrary to the great principles of the social compact cannot be considered a rightful exercise of legislative authority ... A law that punishes an innocent action ...; a law that destroys, or impairs the lawful contracts of citizens; a law that makes a man a judge in his own case; or a law that takes property from A and gives it to B; it is against all reason and justice for a people to entrust a legislature with such powers; and therefore it cannot be presumed that they have done it. The genius, the nature, and the spirit of our state governments amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.

Here the Court was invoking an extraconstitutional principle of natural rights and right reason, to invalidate an act of the legislature. It was not to be the last time that the Supreme Court would set itself up as the repository of right reason. But it was a dangerous precedent. In a dissenting opinion, Justice Iredell argued that the court was not empowered to defeat the intention of the legislature, except on specific constitutional grounds. This was the view taken by later constitutional commentators, notably Thomas McIntyre Cooley, who strongly denied that a court could set aside legislation on the grounds that it violated natural rights, or some 'spirit' of the Constitution - or because in effect the judges didn't like it.¹

1. Cooley, Limitations Chapter VII. Though Cooley, too says that "It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed". For, he says, if the authority to do an act has not been granted, it cannot be necessary to prohibit it. Limitations p.183. See also John W. Cary, Limitations Of The Legislative Power In Respect To Personal Rights And Private Property, Reports of American Bar Assoc. 1892. Vol. XV pp.245-286.

Thus the doctrine articulated by Justice Chase, became woven into the safer ground of specific clauses of the Constitution. In the process, the arguments did not change very much, but they sounded more specific! The first route into the Constitution was found for the protection of vested property interests. The extraconstitutional notion this time was not "natural" but "vested" rights - that "the effect of legislation on existing property rights was a primary test of its validity".¹ This doctrine found its way into the Constitution through the 'obligation of contracts' clause. In *Fletcher v. Peck*, and the Dartmouth College case, the Marshall Court used it to strike down legislation impairing existing, or vested property rights.

Soon the doctrine spread to the states themselves, and state courts began to impose similar limitations on the powers of legislatures over vested rights. It is unnecessary to document individual cases. The most important tendency to note is the fusing of extraconstitutional principles, this time with the 'due process' or 'law of the land' clauses of the state constitutions. With the rise of mass democracy, and the vogue of popular sovereignty, vested property interests had to do battle with aspiring ones, and with state powers of police and eminent domain on the march in service of "the public good". One battleground was the courts, and the armoury due process of law. A high point was reached in the 1856 case of *Wynehamer v. The State of New York*.² A state anti-liquor law was invalidated on the grounds of its adverse effect on liquors in existence at the time. The government had no power to work such an act of destruction "even by the forms which belong to due process of law". Clearly they were using the due process argument as a thin disguise for the assertion of an extraconstitutional limitation.

It is fair to say that many more courts in anti-liquor cases did not

1. Corwin, Liberty Against Government p.72. For the development of the argument see also Corwin, Due Process.
2. *Wynehamer v. State of New York* 13 N.Y. 378 (1856).

follow this lead. It was not part of generally recognised constitutional law. But then, in 1857, it was taken up by Supreme Court in the Dred Scott case, where Taney argued against the validity of the Missouri Compromise on the grounds that it deprived Sanford of Dred Scott without due process! How strangely similar this looked to the abolitionist natural rights case -- except that they would have argued Dred Scott's case not to be deprived of his liberty without due process.

Vested property interests were aware of the similarities between the arguments they used to protect property rights, and the argument used by abolitionists to protect human rights. The courts were careful to restrict themselves to building up its protections only for property.

Nevertheless, in these two quite different strands of pre-Civil War constitutional thought, it is clear that important groups of public opinion attached a substantive meaning to due process. The abolitionists vested the power to secure its protection of natural rights primarily in Congress, where the property interests looked to the courts to apply a basically similar test of natural justice and right reason as a limitation on the legislature. The importance of these court cases should not be over-estimated. After Dred Scott, there was a lapse in the application of substantive due process until the Fourteenth Amendment. But these developments suggest that procedure and substance were not so neatly separated in the pre-Civil War context.

All in all, the experience of the abolitionists in seeking a power in the Constitution to protect human rights, was not an altogether satisfactory one. They sought to bring the intangibles of natural rights into the field of enforceable constitutional law. Clearly there was a case for arguing the relevance of the Constitution to the rights of all Americans, and

claiming its power to protect them. Only politics had destined the nation to play such a minor and limited role. But it was difficult to make out a case against the weight of orthodoxy. They reached for a concept of national citizenship unknown to the legal and constitutional 'Establishment'. They attached that concept to the comity clause. But that clause was about the rights of migrants, and implied neither a Congressional power of legislation, nor the power to prevent states setting their own conditions of citizenship. They attached it to the Bill of Rights, but in the face of the orthodoxy that the Bill of Rights was a limitation on the nation's power, and not a source. They invoked the due process clause of the Fifth Amendment as a source of Congressional power. But this was at a time when the few courts which shared some of the features of their substantive interpretation of the amendment used it for the protection of vested property rights against legislative acts. Nevertheless, by preaching, the abolitionists disseminated an alternative view to orthodoxy, and it was not long before the circumstances of war deemed that it would get a more hopeful hearing.

Meanwhile, the real testing ground of civil rights up to the Civil War was in the states. And here the real problems of definition and discovery begin. Like the national Constitution, state constitutions are far from being definitive statements of rights. But a study of the problem at state level involves additional hazards. The question of the powers and limitations of the nation was a live issue, perhaps because of the sensitivity of states in this matter. It was well publicised and debated, and the limitations were particularly well known. It was not so in the states. Indeed, there was no written authority on the subject of limitations on state powers until after the Civil War, when Thomas McIntyre Cooley published

his famous Treatise on the Constitutional Limitations which rest upon the Legislative Powers of the States.¹ By that time the omission had been painfully discovered.

All along, there had been limitations. There were the direct prohibitions of the federal Constitution in Article 1 Section 10, including those against entering into treaties, granting letters of marque and reprisal, coining money, passing bills of attainder or ex post facto laws or laws impairing the obligation of contracts, or granting any title or nobility. One of these prohibitions had been the vehicle of a limited application of restraints against state legislatures by the Supreme Court. As noted, in connection with the rise of substantive due process, the Court had used the contracts clause as a defence of vested property rights against state encroachment in *Fletcher v. Peck*, and the *Dartmouth College* case. But it was a small inroads into the legislative power of the states, and in service of a narrow concept of rights. Other potential limitations, notably the Bill of Rights, lay buried by politics. Much more remarkable, was the broad interpretation of state powers under the Constitution, in the states rights view of the Tenth Amendment:

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.

And these were indeed bountiful, since so few powers had been delegated to the United States, and so few prohibited to the states! With the rise of mass democracy, it became fashionable to believe that the state legislatures exercised near-plenary powers - that its powers could be assumed, unless positively restrained. They were, of course, positively restrained, not only by the federal constitution, but by the state constitution. Nevertheless, it was assumed that the two constitutions

1. First published in 1868.

represented quite different functions, a view even shared by Judge

Cooley, who wrote:

it is to be borne in mind, however, that there is a broad difference between the Constitution of the United States and the constitutions of the States as regards the power which may be exercised under them. The government of the United States is one of enumerated powers; the government of the States are possessed of all the general powers of legislation.

Therefore:

we look to the Constitution of the United States for grants of legislative power, but in the constitutions of the State to ascertain if any limitations have been imposed upon the complete power with which the legislative department of the State was vested in its creation.^{1.}

Judging from the limitations of state constitutions, and their guarantees of individual rights, it would seem a rational assumption to the casual observer, that state governments operated under the same restraints with respect to rights, as did the national government. Indeed state constitutions were very similar to the national constitution. Normally they began by setting out a framework of government, announcing suffrage qualifications, and working out checks and balances between the legislative, executive and judicial branches. They denied the existence of an arbitrary power over the lives and property of free men, and declared that all power was inherent in the people, who had the right to alter and amend their constitutions. They went on to list familiar rights - of petition and assembly, procedural rights, and so on, very much in the same style as the Bill of Rights of the federal Constitution.^{2.} They had ceased to give such matters much thought. Benjamin F. Wright's studies of early constitutional conventions suggests that for the most part, statements of natural rights went undebated. They were incorporated in the state constitution largely as a matter of form.^{3.}

1. Cooley, Limitations p.182.

2. The constitutions are collected in Francis N. Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws. (Washington: Govt. Printing Office, 1909 7 vols.).

3. Benjamin F. Wright, American Interpretations of Natural Law (Cambridge) Harvard U.P., 1931) p.185.

That was a pity. For the states came to exercise large, and dangerously vague powers over the lives of their inhabitants. There was the power of taxation - subject to the limitation that it was related to representation (in the case of whites at least). There was the power of eminent domain, the power to take private property for public purposes - subject to the constitutional limitation that the owner receive due compensation. But the most flexible, and potentially the greatest menace to individual rights was the police power.¹ It was undefinable, but all-embracing. In theory it was a power to be exercised positively for the protection of life, liberty and property, by restraining public nuisances, and restricting license on behalf of liberty. It included ordinary police functions, together with the promotion of public health and welfare: It embraced the state school system, quarantine laws, legislation on pauperism and on public morality, including a regulatory power over "houses and women of prostitution, gambling, drinking-shops and foundlings".²

It recognised a power of discriminatory legislation in the public interest, and was exercised in ways which infringed the rights of the dangerous classes, notably but not solely - the negroes. Thus statutes emanated under the police power, which restricted their right of free movement, education, assembly and so on. One North Carolina case, the State v. Manuel³ in 1838, gives some insight into the discriminatory nature of this power. The issue was the validity of an 1831 statute which provided that, when a negro was convicted of a crime, and was unable to pay the fine, he could be hired out. The judge said that a legislature:

1. For a discussion of the three great powers of state, see Cooley, Limitations.
2. T. D. Woolsey, Nature and Sphere of Police Powers, Journal of Social Science, Transactions of the American Assoc. Vol.3 1871, hereafter cited as Woolsey, Police Powers.
3. The State v. Manuel 20 N.C. 144 (1838).

may rightfully so apportion punishments according to the condition, temptation to crime, and ability to suffer, of those who are likely to offend as to produce in effect that reasonable and practical equality in the administration of justice which is the object of all free government to accomplish.

To be quite fair to North Carolina in this instance, the legislature remedied the situation in 1838 by passing a similar statute applicable to all persons. But the police power was obviously a difficult one to limit. Even after the war, writers recognised its breadth, and the necessity of making distinctions between the inhabitants of a state. But they insisted, unlike most prewar contemporaries, that there must be a test of the "reasonableness" of these distinctions (in effect a judicial test), and that colour, class or religion was no grounds for making them.^{1.}

But, to meet the challenge of the police power - where were the constitutional limitations, the bills of rights? Clearly, they were in hiding. For they speak of the rights of all the inhabitants of the state. The political sections of the state constitutions, dealing with representation, and suffrage qualifications, normally referred to 'citizens'. But the bills of rights spoke of persons, and free men. Yet once again, there is a confusion of concepts. The states had a widely recognised right to decide on standards of state citizenship, and on the nature of its 'privileges' and 'immunities'. Again, as with the police power, there was an opening for discrimination. Attorney-General Bates recognised the right of states to vest special privileges in individuals, or, say, to make negroes 'immune' from service on the jury. Although Judge Cooley insisted that "Equality of rights, privileges, and capacities unquestionably should

1. See Eugene McQuillon, Some Observations on State Laws and Municipal Ordinances, 64 Central Law Journal p.209; Woolsey, Police Powers; Cooley, Limitations, excluded colour, religion etc. as a legitimate grounds of discrimination. Making these limitations stick was of course another matter and an integral part of the whole Reconstruction effort to achieve equality under law. The problems involved in judicial tests of "reasonableness" are discussed by Joseph Trussman - Jacobus Ten Broek, The Equal Protection of the Laws, California Law Review XXXVII 1949.

be the aim of the law", he did allow that there were cases where a state legislature might grant special privileges to some citizens, for example, the franchise to be a corporation.¹ But in many, certainly most of the prewar states, there was a confusion between 'privileges' of citizenship, and 'rights' of men under the bill of rights. By what justification could these fundamental civil rights be denied, on grounds either that the negro was not a citizen, or that he was a peculiar kind of citizen with no rights?

In many cases, the logic was intriguing. In the State v. Claiborne² in the Tennessee Supreme Court in 1838, the judge argued that a citizen was a man with rights and privileges. Looking at the negroes, it was obvious that they did not possess these. Therefore, they were not citizens! Some court decisions did recognise the citizenship of free coloured persons, and their entitlement to the state bill of rights. The judge in the 1838 case of The State v. Manuel in North Carolina did. But it is questionable how much this meant. For that was the case already cited, in which the judge defended discriminations under the police power according to "condition, temptations to crime, and ability to suffer" of the convicted - black - citizen. Clearly "citizenship" and "police power" were a way out of acknowledging constitutional limitations on infringing the fundamental rights of a free man, or of failing to invoke the correlative constitutional power to protect them.

The black community was the most obvious victim of both the failure of state legislative power to observe limitations, and its failure to limit infringements by the black man's white neighbour. But there was another section of the community which also found itself searching for limitations against the onward march of the police power and the public good. These

1. Cooley, Limitations p.393.

2. The State v. Claiborne 1 Meigs 331 (1838).

were the men who had vested interests in property. Out of their predicament came the cases which I have already referred to - *Wynehamer v. The State of New York* in 1856, for example, where an anti-liquor law, passed in the name of the state police power, was contested by those whose existing interest in liquor was damaged by it. In this case, as in a dozen or so earlier ones, the courts applied an extraconstitutional limitation in the guise of a specific constitutional one - that it violated the due process clause of the state bill of rights. The pre-Civil War development along these lines, was of course very limited. The successful application of restraints, constitutional or otherwise, was not the norm.

It could be argued that this was so, because the legislatures observed self-restraint, used their powers sparingly and intelligently, and that people could afford to be lazy about analysing the relationship between powers - rights - restraints, because they did enjoy their rights. And many, like the Southern constitutional commentator John Randolph Tucker, would have made an argument of this. It was indeed true for most white Anglo-Saxon Protestants. They assumed their fundamental rights of locomotion, education, petition and assembly, habeas corpus, and so on. It is noteworthy that where they found themselves defending rights against the state powers, or urging limitations, the cases were about property. They were about vested property rights, versus aspiring property rights, or the 'public good'. In all the constitutional commentaries, a disproportionate amount of space is consumed by 'property' over 'personal' rights. The Century Edition of the American Digest of cases up to 1896 contains only nineteen pages of cases on "Personal, Civil and Political Rights", out of fifty volumes. How well a man was able to enjoy his rights depended on a good deal more than his freedom. Rights were for the white citizen of a

state, and especially for the white, property-owning citizen of a state. They were for the people who mattered - for those who enjoyed political, social and economic power, wealth and education. Some men's rights were superfluous, like that of Sanford not to be deprived of Dred Scott without due process. Other men's rights were insufficient for the pursuit of happiness, as Dred Scott's were.

To return to the original question of the rights of a free American in 1866. There was no national understanding of rights, save where the abolitionists were groping towards one. Indeed, it could well be argued that there was no understanding of rights at all. Imprecise, or sentimental thinking took the place of sound analysis. Hypersensitivity to the dangers of centralisation robbed the federal government of the power either to infringe or protect the rights of individuals. The government which had everything to do with personal and property rights was that of the states. Most men assumed a benevolent use of that power. But it was not enough to assume. Black rights were clearly far from inalienable. The states operated a sliding scale of rights, with the strong at the top and the weak at the bottom. And few of the strong realised that the powers to make some men's rights alienable, could make all men's rights alienable.

It remains to be seen what they decided to do about this in 1866, and finally to assess the impact of what they did on the balance of powers and restraints between nation and state.

CHAPTER VII

EQUALITY BEFORE THE LAW

In 1865, when Andrew Johnson took office, times had changed. The victorious North was committed to freedom under law. The Republican concept of freedom was more than the absence of slavery. It was the right of all to equality under law, to exercise the same rights and responsibilities in civil society which belonged to man by nature. Apparently it was not a commitment exclusive to Republicans and those who elected them. It also touched the new President, indeed even the Democratic party, according to the New York World, which, in October 1865 carried:

a conclusive refutation of the charge falsely made against the Democratic party that they are willing to exclude negro freedmen from that justice and equality before the law which is their right ... We believe that President Johnson, as we know that we do the views of the great mass of the Democratic party of the North, in saying that this equality before the law ought not to be, and cannot prudently be, denied to negro freedmen.¹

Several other newspapers agreed. At the time, the Republicans were still hopeful of the President's good intentions, and willingness to see them translated into reality. But a few months later, it would have read as a news item.

The tragedy of Johnson's Reconstruction programme is familiar - the black codes which brought new forms of slavery to the freedmen, the arrogance of Southern legislatures in voting pensions to ex-Confederates, harassing Unionists, and returning to power those who had so recently brought the Union to disaster. By the spring of 1866, that story was

1. Quoted in Lawanda and John Cox, Politics, Principle, and Prejudice 1865-1866. (N.Y.: Macmillan, 1963) p.166.

becoming increasingly familiar to the Republicans in Congress, through the eyes of observers like Carl Schurz, or the testimonials of hundreds of witnesses before the newly created Joint Committee of Fifteen on Reconstruction. Whatever the bias of these eyes and ears, there is too much consistency in the evidence to ignore. There was no equality under law. Without the frail protection of the army and the Freedmen's Bureau, the freedmen and loyal whites would be subjected to the daily tyrannies of the unrepentant, and the Union would stand once again in peril of dismemberment.¹

Behind Johnson's use of words like equality and rights, and that of the Republicans lay a world of different assumptions. Quite apart from whatever political follies Johnson was guilty of in the execution of his policy, or the moral blame of his less than half-hearted commitment to racial justice, it is clear that his background and political assumptions led him to share a vocabulary with men who were talking a different language. Abstract words are the most treacherous. For Johnson, the responsibility for equality under the law ended where it had always done - in the states - which meant that it never began. In the end, he saw no need for, no justification for, a national intrusion into the concerns of state legislatures and courts in looking after their private and exclusively domestic business of human rights. Anything Johnson had to say, then, about justice was in the realm of faith, rather than good works.

It was not enough. The need for action impressed Congress first, indeed before they became fully aware of the limitations of the new chief Executive. In forming a new committee, the Committee of Fifteen on Reconstruction, and in shaping new legislation to guarantee the equal

1. See the Report of the Joint Committee on Reconstruction at the First Session, Thirty-Ninth Congress (Washington: Government Printing Office, 1866).

protection of civil rights, the Republicans were not throwing down the gauntlet. They were simply taking what in their eyes were sensible and timely steps to deal with the situation, as they had done in the two previous Congresses. And the Thirty-ninth Congress which began its session in December 1865, was to prove as effective a schoolhouse as its wartime predecessors. Once again, their education was the result of a collision between events and ideas, which threw expediency and justice into perfect harmony. Emancipation had been undertaken because it was right in absolute terms, and because without it, the Union could not survive. So too with civil rights. Republican speeches on the Freedmen's Bureau and Civil Rights Bills, twin measures designed to honour the nation's responsibility for the protection of all men's rights in law, were less remarkable for their eloquence on the rights of man, than for the urgency of their appeals for action in the light of the facts. Their pleas were for the actual existence of the Union, and for its future - spiritual, economic and political in varied orders of priority. The comparative absence of eloquent pleas for justice does not reflect any cynicism of motivation. As the bills' author, Lyman Trumbull said, there is no point in talking about the abstract truths of the rights of man - like the Declaration of Independence - if men cannot avail themselves of them.¹ And so, perhaps the surest sign of the way in which the Republicans were 'growing', was the replacement of abstractions by concern for realities. The debates reveal a growing expertise on the specific questions at hand - the legal questions arising out of removals of suits to federal courts, questions of conflicts of laws, of citizenship and so on. In many ways, though by no means all, it was a coming of age.

1. Cong. Globe, 39th Cong., 1 sess., p.474 January 29th, 1866.

In January 1866, Trumbull introduced two bills from the Judiciary Committee. The first was a bill to enlarge the powers and extend the life of the Freedmen's Bureau. It was a temporary expedient, designed to cope with immediate necessities, of supervising relief for the freedmen, tenancy and occupation of vacant lands, education, and in the South, to extend judicial protection to freedmen and others who were denied, or could not enforce their civil rights. The second bill, the Civil Rights Bill had universal application. It was for the whole Union, and about the rights of all Americans. It defined the nature of United States citizenship. All native born Americans, with the exception of certain classes of Indians, were citizens, with rights. The bill attempted a definition of basic civil rights, and prescribed the means for their protection by the nation against allcomers.

The power to make this definition and assume these responsibilities rested squarely on the second clause of the Thirteenth Amendment, empowering Congress to enforce its guarantee of freedom by "appropriate legislation". For the bills' sponsors, Trumbull in the Senate and James Wilson in the House, there was no doubt that what they were doing now was entirely appropriate, the legislation in perfect accord with both the spirit and the letter of the Constitution as amended.¹ Several colleagues who had been active in support of the amendment agreed. Senator Howard, who had served on the Judiciary Committee of the Thirty-Eighth Congress which framed it said:

I take this occasion to say that it was in contemplation of its friends and advocates to give to Congress precisely the power over the subject of slavery and the freedom which is proposed to be exercised by the bill now under our consideration.² (The Civil Rights Bill).

1. Ibid., p.322 January 19, 1866; p.1118, March 1, 1866.

2. Ibid., p.503 January 30, 1866.

Representative Thayer in the House:

when I voted for the second section of the amendment, I felt in my own mind certain that I had placed in the Constitution and given to Congress ability to protect and guaranty the rights which the first section gave them.¹

That is not to say that the Republicans premeditated the actual form of the legislation they now sought to enact - whatever their Democratic opponents may have suspected at the time! But events had made it clear that freedom was not self-executing, and sharpened the need to define and realise it. They saw little that was revolutionary in that. They insisted all along that the rights they sought to protect were not new - as old, indeed older, than the Constitution. The means might have disturbed them more than the ends. Traditionally it was for the Supreme Court to interpret the meaning of the Constitution. Conservative opponents would frequently remind them of that during the debate. Congress could not legislate a meaning for the Constitution, overriding state laws. If state laws conflicted with the Constitution, if for example, argued Senator Cowan, Louisiana passed an unconstitutional law abridging the negro's 'freedom', the Supreme Court sat for the purpose of adjudicating such questions. The Negro, he said, was just as much entitled to avail himself of that protection as a man "of the fairest complexion and the brightest Saxon mold".²

There is no evidence, however, of an attempt by Congress to pre-empt the ultimate function of the Court as interpreter of the Constitution. It must have weighed with them that the remedy suggested by Cowan was, in the situation, like taking a broom to sweep up an earthquake. This was the nation's first entrance into the complex question of rights and remedies traditionally confined to state boundaries. There were bound to be

1. Ibid., p.1151 March 2nd, 1866.

2. Ibid., p.342 January 22nd, 1866.

difficulties in testing boundaries not only between state and nation, but between Congress and Court, Congress and Executive and so on. Such questions were important to men whose loyalty to the Union and the Constitution was inseparable. John A. Bingham, a long-term friend of the objects of the legislation had sufficient scruples about the constitutionality of the means to vote against the Civil Rights bill in the end, and pilot the Fourteenth Amendment to put the issue beyond constitutional doubt.¹ But the majority of his colleagues were convinced of the rightness of the remedy, and their clear mandate by the Thirteenth Amendment. They were also in a hurry.

On January 5th, 1866, Trumbull introduced a bill, S60, for the extension of the life and powers of the Freedmen's Bureau. He reported it with amendments, from the Judiciary Committee on January 11th.² The Bureau had been established by Congressional act in 1865. As its originally prescribed life-span of one year drew to a close, it was clear that it had by no means outlived its usefulness. Its commissioner, General O. O. Howard worked for a bill to extend the life of the Bureau. He had influential friends in Washington, and indeed co-operated closely with Senator Trumbull in its framing.³ The result was this bill. It was designed, as Trumbull said, to help the helpless until they were strong enough to help themselves.⁴

It provided for the organisation and distribution of relief supplies to refugees and freedmen in all parts. It dealt with the question of occupancy, and possible future purchase of 'unoccupied public lands' in Florida, Mississippi, Alabama, Louisiana and Arkansas. It instructed the

1. For a discussion of Bingham's position, and its implications for the meaning of the enacting clause of the Fourteenth Amendment, see Robert A. Burt, "Miranda and a Morganatic Marriage", ~~XXIX~~^{XXIX}; in Philip B. Kurland, 1969 The Supreme Court Review (Chicago-London: University of Chicago Press, 1969).
2. Cong. Globe., 39th Cong., 1 sess. p.129 January 5th; Ibid., p.184 January 11th, 1866.
3. William S. McFeely, Yankee Stepfather (New Haven: Yale University Press, 1968) pp.190-199, hereafter cited as McFeely, Yankee Stepfather.
4. Cong. Globe., 39th Cong., 1 sess., p.319 January 19th, 1866.

building of asylums and schools on such lands. But judging from the tenor of the debate, the parts of the bill which excited the greatest controversy were its judicial arrangements. In places where the ordinary course of judicial proceedings had been interrupted by the rebellion, in cases where any civil rights belonging to white persons were denied to freedmen, refugees or others by local law, police regulation, custom or prejudice, where these people were subjected to different punishments for the same offence as whites, the President, through the Bureau commissioners, was authorised to extend to them military protection and jurisdiction. Fines and prison sentences awaited those who infringed their rights. Jurisdiction of such questions, and all cases affecting freedmen, refugees and others so discriminated against, was placed with the officers and agents of the Bureau. By the act, these agents themselves were placed under 'military jurisdiction and protection'.

Hendricks of Indiana led off the Democratic attack.^{1.} It was a bill which would undermine the states. Under it, irresponsible courts were given the power to adjudicate disputes between citizens of the same state involving state law. It was monstrous. And to whom were these courts responsible? By placing Bureau men under military jurisdiction and protection, was this another plot to put Republican policies beyond the reach of (state) law? Perhaps with the procedure of the 1863 Habeas Corpus Act in mind, Hendricks wanted to know whether an agent offending state laws in the course of his duties could be held accountable from suits in the state courts. He did not voice these objections for the sake of Georgia or Alabama - but for Indiana, fearing the act's application there.

Trumbull reassured him on all counts. The judicial features he said, unlike the relief features, applied only to those states where ordinary

1. Ibid., pp.314-319 January 19th, 1866.

judicial proceedings had been interrupted by the rebellion, and not to states which enjoyed their full constitutional rights. The section of the bill putting Bureau officers and agents under military protection (although that did apply to all parts) was not intended to put them outside the law, but to make them responsible to any rules and regulations. A man as committed to the supremacy of civil over military law, was not about to make a virtue out of the strong presence of the army in the bill. But he was not about to shirk the situation either. The bill was a temporary expedient. It would cease to have effect when the states were fully restored. After that its functions would be taken over by a civil procedure. Indeed, he said, there was a bill coming up, designed to supply a more permanent protection for all men's rights in law. That could hardly have been a comfort to the Democrats. But Trumbull offered no easy way out. There was only one way to avoid the operation of these bills, but it required the states themselves to accomplish the objects. In words which became very familiar in the course of the debates, their currency suggesting their importance, Trumbull advised:

If the States will not do it, then it is incumbent on Congress to do it. But if the States will do it then the Freedmen's Bureau will be removed, and the authority proposed to be given by the other bill will have no operation.¹.

And of course the states historically preferred to do things for themselves! At every turn, the bill's opponents betrayed their unease at the taking over of state functions by a federal agency, and the implications that would have in their own states. Senator Edgar Cowan's thoughts on relief arrangements echo down through the New Deal:

I say that the freedmen of Pennsylvania ask no relief from the Freedmen's Bureau. Pennsylvania relieves her own destitute and her own poor. She is not a pensioner upon the United States Government for any favors of that kind. I say too, that if it is to extend beyond relief, and to administer municipal law there for the benefit of the freedmen, Pennsylvania administers her own municipal law ...².

1. Ibid., p.323 January 19th, 1866.

2. Ibid., p.345 January 22nd, 1866.

But Cowan's attempt to amend the bill by confining its operation to states "such as have lately been in rebellion" failed, defeated by 33 votes to 11.¹ Also rejected was Kentucky Senator Garret Davis' amendment to strike out that section which placed Bureau agents under military jurisdiction.² He spoke at length of the dangers of these courts adjudicating matters between citizens of the same state, and themselves being beyond the reach of state law. Perhaps his home state of Kentucky had special reason to feel sensitive about such measures, in view of the estimated 1,500 suits pending against federal officers in the courts of that state, and the threat of their removal to federal courts under the Habeas Corpus Act.³

But such arguments were lost on the Republicans. In the Senate, the bill passed on January 25th, by Thirty-seven votes to Ten, on a roll call only notable for its demonstration of Republican unity.⁴

In the House, Thomas D. Eliot of Massachusetts took charge of the bill arguing convincingly on the necessity and justice of such a measure, without which, "much injustice will be done to these freedmen, and there will be no one there to tell the story".⁵ Other Republicans spoke enthusiastically of the bill's provisions for education. Not all the talk was to such noble purpose. The Democrats urged the same objections as their Senate colleagues. And the bill's supporters were not free from considerations of their own states that they could afford consistent purity, as Representative Moulton, a Democratic maverick who voted with the Republicans, demonstrated when he urged those who wanted to keep blacks

1. Ibid., p.347 January 22nd, 1866.

2. Ibid., p.348 January 22nd, 1866.

3. See Chapter III, supra.

4. Cong. Globe, 39th Cong., 1 sess., p.421 January 25th, 1866.

5. Ibid., p.517 January 30th, 1866; Ignatius Donnelly was enthusiastic about the educational features of the bill, Ibid., pp.585-589.

out of the North, to vote for the bill:

Why? The very object of this bill is to protect the freedmen and refugees in their rights; and let me say, whenever the coloured man is completely and fully protected in the Southern States he will never visit Illinois and he will never visit Indiana, and every Northern State will be depopulated of colored people as will be Canada.¹.

Such a sentiment might have wrangled with the purist, and indeed suggest a few problems for the future, but shades of grey do not show on the roll call. On February 6th, the bill passed by a resounding 136 votes to 33.² There was a slight delay while adjustments were made between House and Senate on amendments, and agreement was reached on February 9th. Then came the bombshell. On February 19th, Johnson vetoed the bill.³.

According to the veto message, Johnson shared with Congress, the "strongest desire" to protect the freedmen in their freedom and property and their "independence and equality" in making contracts for their labour. In fact, Congress wanted more. They wanted equal protection of the laws. And Johnson was not saying so much. The rest of the message was a long and detailed explanation of his objections, many of them already voiced by the Democrats in Congress. They included the extension of military jurisdiction and protection to the Bureau in all parts of the United States, and specific complaints about the jurisdiction of the Bureau with respect to civil rights in the Southern states - that there were to be no appeals to existing courts, and that the absence of a jury trial violated the Constitution. And anyway, he said, it was all so unnecessary in time of peace, now that the freedman was guaranteed freedom by constitutional

1. Ibid., p.631 February 3rd, 1866.

2. Ibid., p.688 February 6th, 1866. The House had amended the bill to apply only to places where the writ of habeas corpus had been suspended on February 1st, 1866. But Trumbull clearly meant the bill's relief features, and its military protection of agents to have universal application. The Senate struck out the House amendment, Ibid., p.747 February 8th, 1866, and the House agreed, Ibid., p.775 February 9th, 1866.

3. Ibid., pp.915-917 February 19th, 1866.

amendment, and survival by the laws of supply and demand! Government money had never been spent on the care, the feeding, clothing and education of white people. To do so for black people was insulting, weakening to the moral fibre, and expensive. Perhaps the saddest omen, however, in the light of the purposes of the bill, was Johnson's contention that the protection of the freedman be left with existing civil authorities and courts. It was a denial of the necessary machinery to ensure protection. The message ended on a controversial political note, with an objection to the passage of divisive legislation at a time when unity should be the object, and eleven states affected by it were unrepresented -- though in his eyes they were restored. Johnson did make one sound observation. The bill resided too much power in the Executive. And indeed, that was a pity.^{1.}

If Lincoln was reputed to lag just a few weeks behind Congress on important issues, it is clear from the veto message that Johnson was not even travelling, let alone in the same direction. The negro's future, like his past, was state business, and the recent memory of that past did not inspire confidence.

The bill had not been thrown down as a direct political challenge to Johnson over Reconstruction. It was born of historical Congressional concerns and present exigencies. Trumbull had not anticipated the veto.^{2.} In the Senate, he went over the ground, answering the objections point for point. He emphasised the consistency of the legislation with the President's annual message in which he had said that "we shall but fulfil our duties as legislators by according equal and exact justice to all men,

1. As William R. Brock remarks, some of Johnson's objections were valid if one assumed that everybody, including Johnson was going to act badly. William R. Brock, An American Crisis: Congress and Reconstruction 1865-1867 (N.Y.: Harper, 1963) pp.105-106.
2. Ibid., p.105.

special privileges to none".¹ It was too late, however, to either reason or shame the President into accord. Johnson and Congress had taken an important step towards alienation and deadlock. But it was not the last. In the Senate, the bill failed to re-pass over the veto by one vote short of the necessary two-thirds. In the House, it re-passed with ease. For Johnson, the veto was political folly. The moderate men who had championed it, were Johnson's best hope. The vote showed that their patience was frayed. Less than two months later, it was quite ended.

But, if fears for the usurpation of state functions in their own constituencies had lain behind many of the comments on the Freedmen's Bureau, its sister bill seemed to give them substance. Senator Saulsbury had reminded his colleagues during the debate on the Bureau bill, that worse was to come and that:

for the first time in the history of the legislation of this country it is attempted by Congress to invade the States of the Union and undertake to regulate the law applicable to their own citizens.²

Introduced on the same day, S61, the Civil Rights Bill, was intended to be the structure which would stand once the military scaffolding of the Bureau bill was removed. It applied to all parts of the Union, and to all men. It began with a definition of national citizenship. All native-born persons, excluding untaxed Indians, were citizens. That status carried with it an equal right to make and enforce contracts, to sue, be parties, give evidence, inherit, purchase, and convey property, and to enjoy the equal benefit of laws, and equal punishment under the law with white citizens. The rest of the bill was concerned with the means to make good the nation's protection of these civil rights. The courts of the United States were to have exclusive jurisdiction of offences under the

1. Cong. Globe, 39th Cong., 1 sess., pp.936-943 February 20th, 1866.

2. Ibid., p.363 January 23rd., 1866.

provisions of the act, and of cases affecting persons denied, or unable to enforce their rights. In such a case, civil or criminal, the person would have the right to remove their case to the federal court, in the same way as the 1863 Habeas Corpus Act. Confirming the suspicion of the Democrats as to the meaning of the clause in the Freedmen's Bureau Bill which put the Bureau agents under military protection, this bill also included army and Bureau officers in the right of removal. Other pieces of enforcement machinery were borrowed from the 1850 Fugitive Slave Law. District attorneys, marshals, Bureau agents, and commissioners appointed by the courts, were authorised to institute proceedings against those who violated the law. Anyone hindering or obstructing any officer in the execution of the act, preventing arrests, or attempting rescue, would be liable to fine and imprisonment in the district court. The difficulties and dilemmas of enforcement, however, are illustrated by the contrast of the last two clauses of the act - the one authorising the President to employ land or naval forces if necessary, to execute the act, the other providing for final appeal to the Supreme Court on questions of law. In 1866, the sword and the judicial ermine were never quite untangled.

In an extensive debate over the nature of citizenship, Republicans made some of the same connections by now familiar to abolitionists - between birth in the country, allegiance to it, in return for protection; between the Preamble and the rest of the Constitution; and between privileges and immunities - due process - equal protection.¹ Judge Washington's opinion on the comity clause in *Corfield v. Coryell* was widely cited, and indeed formed the basis of the civil rights outlined

1. See the Senate debates of January 30th and 31st, which were almost exclusively about the nature of citizenship; Morrill's remarks, *Ibid.*, pp.570-571 February 1st; Thayer, pp.1151-4, March 2nd; Broomall's p.1263 March 8th; Shellabarger pp.1293-4 March 9th, 1866. Trumbull argued Congressional power over citizenship from Congress' constitutional power of naturalisation.

in the opening section of the bill. They were not, they insisted, claiming any new privileges and immunities.¹ Opponents pointed out, however, that when these rights were spoken of in connection with the comity clause, the context was quite different. That clause was about the rights of migrants, and it did not regulate state citizenship. It would entitle a migrant negro from Pennsylvania to Massachusetts only to the rights of Massachusetts negroes.² And so, Representative Kerr did think they were doing something revolutionary, in attempting to enlarge the privileges and immunities of blacks, not as subjects or citizens of the nation, but of the states. He warned against confusing these two things.³ It was not that Trumbull, for one, was so poor a lawyer that he did not know the meaning of the comity clause with respect to migrants. He said simply "... how much more are the native born citizens of the State itself entitled to these rights!"⁴

Whatever historical arguments could be made for the "true" interpretation of the Constitution, this venture into national protection of explicit rights of national citizenship was new. The definition of rights was no more satisfactory than the Bill of Rights. And so plenty of questions would still have to be answered. Would a state violate the act, for example, by denying negroes jury service, or the ballot, or ^{by} laws against inter-racial marriage? This last point was a sure way for opponents to drum up emotional reactions to "equality under the law". A dialogue on the subject between Hendricks and Trumbull reveals the conservatism of the bill's author, at least as to the difference between social equality and an equality of civil rights. Hendricks wanted to know what the effects

1. Trumbull made use of the Corfield decision to make this point, Ibid., pp.474-476 January 29th, 1866.
2. Davis in the Senate, Ibid., p.597 February 2nd, 1866.
3. Ibid., p.1258 March 8th, 1866.
4. Ibid., p.475 January 29th, 1866.

of the bill would be on Indiana's laws against mixed marriages. Trumbull replied:

I beg the Senator for Indiana to read the bill. One of its objects is to secure the same civil rights and subject to the same punishments persons of all races and colors. How does this interfere with the law of Indiana preventing marriages between whites and blacks? Are not both races treated alike by the law of Indiana? Does not the law make it just as much a crime for a white man to marry a black woman as for a black woman to marry a white man, and vice versa? ... Make the penalty the same on all classes of people for the same offence, and then no one can complain.¹.

As with the bill's intention with respect to social equality, so too with political equality. Traditionally, law writers and courts made a distinction between the civil and political rights belonging to 'citizens'. Women and children were citizens, entitled to the full and equal protection of the laws in the enjoyment of their rights of life, liberty, and property. But that did not mean that they could hold office, vote, or serve on juries. These distinctions were implicit in the debate. In the eyes of Republicans, the right to be a witness was clearly divorced from the right to jury service. Only the former was covered by the bill. The cynic might point out that one reason for this was that there were few occasions where a black jury was an essential ingredient to white justice, while there were many others where black testimony was. A successful suit against the white robbers of a white man's property might depend on the testimony of a sole black witness. But traditionally, testimony was a basic civil right. For the moment, the states were left with their discrimination intact regarding the selection of jurors.².

Opponents also voiced alarm as to the connection between civil rights and suffrage. Senator Saulsbury expressed his fear that the courts might

1. Ibid., p.322 January 19th, 1866.

2. For a discussion of Republican attitudes to jury service in the debates on the Fourteenth Amendment, see Alfred Aviss, The Fourteenth Amendment and Jury Discrimination: The Original Understanding. Federal Bar Journal Vol. XXVII 1967.

interpret "property" to include the elective franchise, which had, he said been defined in that way before, as a means of securing property.^{1.} Attempts were made to rule out such a possibility. On February 2nd, Saulsbury's amendment to insert "except the right to vote in the States", was defeated by 39 votes to 7. A similar attempt in the House also failed.^{2.}

Undoubtedly, in the eyes of many Republicans, there was a connection between suffrage and equality before the law. Speaking to constituents on November 7th, 1866, Representative George Boutwell of Massachusetts made the point that he did/^{not} think it possible to speak of equal protection of the laws as a thing separate from participation in government, without which there could be no protection. The negro must be the principal, as well as the agent, the maker as well as the subject of law.^{3.} And although political and civil rights were usually distinguished, there was also a tradition of overlap. After enumerating the privileges and immunities of citizenship in *Corfield v. Coryell*, Judge Washington had mentioned the elective franchise.^{4.} That sentence was often omitted in quotations. He did, however, qualify his inclusion of suffrage, with the proviso that it must be exercised under the laws or constitution of the state in which it was exercised. In this bill at least, the Republicans were not about to alter the rights of states in that respect. Though to many of them civil and political rights were inseparable - in this bill they were.

But, even with respect to what the bill did do, the Democrats and

1. Cong. Globe, 39th Cong., 1 sess. pp. 477-478 January 29th, 1866.
2. *Ibid.*, p.606 February 2nd, 1866; and House amendment, p.1162 March 2nd.
3. George S. Boutwell, Speeches and Papers Relating to the Rebellion and the Overthrow of Slavery (Boston: Little, Brown & Co., 1867, 2 vols), p.522. This was in contrast, however, to the clearer separation made by men like Trumbull.
4. *Corfield v. Coryell* Fed. Cas. 3,230 (1823). After enumerating fundamental privileges and immunities, the judge went on, "... 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."

some of the Republican conservatives like Cowan anticipated a federal revolution. The all-pervasive complaint of opponents throughout the debate was against this federal invasion into the traditional sphere of the states' business in regulating private and domestic concerns relating to their own citizens. It would mean the ruination of the state courts, and the aggrandisement of federal jurisdiction in these cases. By now, these were familiar fears. Over the 1863 Habeas Corpus Act, feelings had run high against a procedure which could take cases between citizens of the same state, and cases involving state law, out of the hands of the state courts. The same points were raised again now. When these cases were transferred to federal courts, it was feared that they would be tried de novo, without regard to the law of the state. Since the removal procedures applied to criminal as well as civil cases, the states were particularly sensitive to the possible loss of their all-important police power. On these questions, they argued, there could be no law but state law - where was the federal law on murder, arson and so on, committed in the states, and what would be the federal courts guidelines there?¹

After the war, in *The Justices v. Murray*, the Supreme Court dampened some of these fears,^{9f} de novo judgments, by holding that the section of the Habeas Corpus Act allowing for removals of cases which had been tried by a jury, for retrial as to both facts and law, was unconstitutional.² But that was in 1869. Now, this Civil Rights Bill proposed to give the federal courts 'exclusive' jurisdiction in an even wider range of civil and criminal matters than the Habeas Corpus Act. The word 'exclusive' worried its opponents a lot. This invasion of the whole field of the state police power, together with intolerable enforcement features, especially

1. Cong. Globe, 39th Cong., 1 sess., pp.476-480 January 29th, 1866; pp. 595-599 February 2nd.

2. *The Justices v. Murray* 9 Wallace 274.

the penalties against state judges and officers, in effect for the crime of obeying state law, was the beginning of the end. The bill, said Eldridge in the House:

seeks to lay prostrate at the feet of the Federal Government the judiciary of the States. It not only proposes to enter the States to regulate their police and municipal affairs, but it attempts to destroy the independence of the State judiciary.¹

But the bill did not amount to the federal revolution which opponents at the time, and admirers recently have claimed.² Senator Trumbull assured his Senate audience that the 'exclusive' federal court jurisdiction did not mean that in all cases involving a civil right, the state court would be denied jurisdiction. The states retained their right with respect to criminal law, their private and domestic concerns and so on. The federal courts would interfere only where there was a federal question, i.e. the denial of a civil right.³ Again, the states could avoid the situation altogether, for:

The bill draws to the Federal Government no power whatever if the States will perform their constitutional obligations.⁴

From a purely practical point of view, the federal courts could not have coped with the whole area of private rights normally contested in the state courts. The intention was not 'exclusiveness' in that sense, but rather the opposite - of making the state courts the auxiliaries of the federal, with a view to enforcing federal law there. But, where it was necessary to exercise federal jurisdiction, they were going to make sure that it was exclusive. If they were not above using a little co-ercion in the way of penalties against judges and other obstructive

1. Cong. Globe, 39th Cong., 1 sess., p.1154 March 2nd, 1866. The section of the bill allowing punishments against state officers was a particularly favourite objection of the opponents.
2. Jacobus Ten Broek, in The Antislavery Origins of the Fourteenth Amendment (Berkeley & Los Angeles: University of California Press, 1951) argued that the Civil Rights Act did indeed "revolutionize the laws of the states everywhere", and give Congress a large substantive power over these issues in the states.
3. Cong. Globe, 39th Cong., 1 sess., pp.1755-1761. April 4th, 1866.
4. Ibid., p.600 February 2nd, 1866.

officers, it was a symptom of their frayed temper with the problems of unco-operative state courts. The problem was even at that very moment being amply demonstrated in the border states, over enforcement of the Habeas Corpus Act. Writs for removal were not enough. When the 1863 Act was amended in the same session, it too, included a procedure for the punishment of judges. They had had enough.

As to the possibilities of de novo judgments in the federal courts, the bill is ambiguous. Jurisdiction was to be exercised in conformity with the laws of the United States. But in cases where the law was not adapted to the subject (perhaps with criminal cases in mind), then the common law, as modified by the constitution and laws of the State, would, if consistent with the laws of the United States, be the rule of trial and, in criminal cases, punishment. If re-assurances could not be drawn from this statement, it was all that could be expected in the circumstances. It had to leave room for manoeuvre. But it does not indicate a deliberate design to have all causes tried de novo in the federal courts, and disregard all state law.

Most Republicans were satisfied on these constitutional questions. Their prime concern was simply the pressing need to protect freedmen and loyalists in the South. As for the implications of the act in the North, they pointed out that they asked nothing for the black man that they did not ask for the white - simple justice and equal protection for all.

Still, there was a nagging doubt in the Republican corner. John A. Bingham's doubts arose from the method, rather than the object. He had long been committed to the idea, and the reality of equality before the law. But this bill worried him.¹ Bingham's interpretation of the enforcement

1. Ibid., pp.1291-1293 March 9th, 1866.

clause of the Thirteenth Amendment, did not take him as far as Wilson's. He argued that the bill's objects could only be achieved by a further amendment to the Constitution. Among his specific objections were to the lack of provision in the bill as it then stood, for a final appeal to the Supreme Court, and to those sections which might make it an offence for the Governor of Ohio to obey the laws of his own State. But he attempted to make his objections constructive, and worked towards removing some of the bill's flaws, as he saw them. He moved to strike out the original opening section of the bill ("there shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States in any State or Territory of the United States on account of race, color, or previous condition of slavery"), and those parts of the bill which were penal, or authorised criminal proceedings. But his motion to amend a proposal to re-commit the bill to the Judiciary Committee with these instructions, was defeated on March 9th, by 113 votes to 37.¹ All but two of those who voted with him, however, were Republicans. Further evidence of the doubts of a minority of Republicans comes from the vote to re-commit the bill to the Judiciary Committee. This time Bingham was on the right side of a vote to re-commit by 82 to 70.² The Republican majority voted against the motion, fearful perhaps that the bill would be weakened in committee. When the bill returned, there were a few changes, some of them along the lines suggested by Bingham. There was an additional section allowing a final appeal to the Supreme Court. The opening section which Bingham had attempted to strike

1. Proposed amendments - Ibid., pp.1271-1272 March 8th, Rejected Ibid., p.1276 March 9th, 1866. Using David Donald's categories from The Politics of Reconstruction 1863-1867 (Baton Rouge: Louisiana State University Press, 1965) Appendix, the breakdown of the 35 Republicans shows a preponderance of moderate, conservative, and non-factional Republicans - 3 'Ultra' Radicals, 5 'Stevens' Radicals, 3 'Independent' Radicals, (i.e. 11 Radicals), and 13 'Moderates', 6 'Conservatives', and 5 either not identified with a particular faction, or not voting often enough to be identified.
2. Cong. Globe, 39th Cong., 1 sess., p.1296 March 9th, 1866.

out had been replaced by the one which was to stand, declaring all persons born within the United States citizens, entitled to an equality of civil rights. With these and other minor changes, the bill came to a final vote on March 13th, and passed by 111 votes to 38.¹ Bingham took his constitutional scruples as far as 'Nay'. He was joined by Republican W. H. Randall of Kentucky, whose voting record in that Congress suggests that his dissent was to ends as well as means. The thirty-odd Republicans who had shown signs of sharing Bingham's doubts, returned to the fold on the final roll call.

For all its problems and imperfections, the bill showed some of what the Republicans had been learning over the years. It was part of a jig-saw. Some of the interlocking pieces have been noticed by historians - but not all of them. Its connection with the Freedmen's Bureau bill are well known. Trumbull made the connection clear. The Bureau bill was a temporary expedient, applying in some respects only to the South, relying for its execution on the sustaining hand of the army. The Civil Rights bill was permanent, for the whole Union, for everybody, relying for its execution on the civil courts. It was said, Trumbull, a court bill.²

This transition from military to civil jurisdiction was an important part of the motivation for the Civil Rights bill in the first place, and it provides clues to further connections in Republican policy. Emancipation and confiscation policies had been started, in practice, by army men on the spot. While Congress approved executive action on these things, they had worked hard to "get a law on the subject". Always, they were aware of the dangers of travelling across the boundaries of federal power without regularity, and law. Always, they were aware of the need to keep the civil

1. Ibid., p.1367 March 13th, 1866.

2. Ibid., p.605 February 2nd, 1866.

authority supreme over the military, and not to risk their policies on the whim of individual commanders. These thoughts were prevalent in earlier debates over the Confiscation Acts, and the various Reconstruction proposals. And it was important again here.

For, faced with the situation in the South where the troops themselves were not safe from harassment, and even murder, the army had taken steps to protect themselves, and their charges from "improper civil suits and penalties" in the former rebel States. On January 12th, the War Department issued General Orders No.3, which addressed itself to the problem. Commanders were to protect from suits in state courts - their own men, for offences allegedly committed under orders; loyal men for acts during the rebellion; persons charged with occupying abandoned lands; coloured persons charged with offences for which white persons were not prosecuted, or not punished in the same way. "Protection", under General Order No.9, consisted of discontinuing all such prosecutions pending in any other than a federal court, and forwarding all papers to military headquarters.¹

The Republicans cared that the same object should be accomplished by civil process, and that the necessarily close relationship between the law and the sword should be regulated to mutual advantage. So, said James Wilson;

We may provide by law for the same ample protection through the civil courts that now depend on the orders of our military commanders; and I will never consent to any other construction of our Constitution, for that would be the elevation of the military above the civil power.²

Yet, of course, the bill was not designed primarily to bring to heel a wayward or dangerous military power. The supremacy of the civil authority was simply a constant factor in their thinking, rather than an

1. Cited by James Wilson, Ibid., pp.1115-1119 March 1st, 1866.

2. Ibid., p.1119 March 1st, 1866.

alarm. The real present need was to assert the supremacy of one civil law over another, one civil power over another, nation over state. And both bills recognised that the army had an important role to play in effecting that.

The Freedmen's Bureau bill recognised the temporary impossibility of achieving equality before the law in Southern civil courts. Although the federal district and circuit courts were re-opening as soon as possible, they would not have been adequate to the task. Apart from the practical difficulty, that they would have been overrun, they would have been hard-pressed to argue constitutional justification for taking jurisdiction in most cases. Ownership of a knife, disputed between two blacks, matrimonial difficulties, all the way to contracts, murder, and lynching - the range and frequency of disputes called for greater discretion and speed. What was needed was more like an Ombudsman's court, to deal with the million and one everyday squabbles of a society in transition. It was by the handling of the everyday, and the ordinary, as well as by the 'great' question of freedom, that rights would be known. And so, Bureau courts for the moment, were to fill the void.

Yet the question, ^{to} which General Order No.3 had attempted a rough and ready answer was - who was going to protect the army and the agents of the Bureau while they were busy protecting others? The question was far from academic. During the preceding year, the army and Bureau had already suffered, sometimes in the form of harassing suits, sometimes mob violence, sometimes injury or death. A plea for their protection was ~~xxxx~~ made in the House debate.¹ Congressional awareness and concern for this aspect of the problem, was reflected in the machinery of the two bills. The

1. e.g. by Broomall, Ibid., p.1263 March 8th, 1866.

Freedmen's Bureau bill put Bureau agents, civil and military under 'military protection and jurisdiction'. As noted, this raised the alarm among the bill's opponents that they intended to provide an escape route from prosecutions in state courts. They did. The Civil Rights bill included these men in its removal procedures. The procedure was to be the same as that of the 1863 Habeas Corpus Act. For, the similarity of the situation led to similarity in the remedy. They learned. The freedmen and others were to be protected by the Bureau and the army, who in turn were to be protected by the federal courts.

Small wonder that to Senator Garret Davis of Kentucky, this was the last straw.¹ He had been the first to recognise the Republican plot to subvert state courts and put their policies and personnel beyond accountability in the state. He saw this in 1863, over the Habeas Corpus Act. But there was no plot. The Republicans often stumbled towards solutions, their progress too haphazard to be called a plot. But by 1866, the edges were less frayed, the shape clearer. They were consciously drawing on experience, like the machinery they borrowed from the 1850 Fugitive Slave Law, and the 1863 Habeas Corpus Act. And they were consciously seeking to improve it. One further piece of the jig-saw illustrates this - the amendment to the Habeas Corpus Act, debated at the same time as the Freedmen's Bureau bill, and Civil Rights bill, and particularly relevant to the latter.

By early 1866, the deficiencies in the original act were showing. Explaining the need to amend the act, Representative Cook said that it had come to the attention of the Judiciary Committee that there were literally thousands of suits pending against federal officers in state courts, especially Kentucky. But state courts were refusing to give up

1. Ibid., p.347 January 22nd, 1866, and attempt to strike that section conferring military protection on the Bureau from the Freedmen's Bureau Bill.

jurisdiction, often construing the terms of the act to give a remedy in the federal court, only to those who could produce an actual order of the President as the 'authority' under which they had acted when the alleged offence took place. The act needed teeth.¹ Thus the amendment clarified the nature of "authority", to explicitly include verbal orders, and orders by the military commanders on the spot, and the Secretary of War. But, in the light of the Civil Rights bill, the most interesting feature of the amendment was that section making state court judges liable to prosecution and damages for refusal to comply with the act. This element of co-ercion found its place in the Civil Rights Act, both in the section authorising prosecutions against officers of the state for obstructing the execution of the act, and directly in the stipulation that removal procedures should be carried out in the manner prescribed by the 1863 act, "and all acts amendatory thereof". This phrase had been inserted into the Civil Rights bill at a fairly late stage, on March 13th when the bill returned to the House after its recommital to the Judiciary Committee.² It was not an afterthought, however - but a forethought. For the amendment to the Habeas Corpus Act did not become law until May 4th, that is, after the Civil Rights bill. The Civil Rights bill passed the Senate on February 2nd, the House on March 13th. Perhaps thinking of the overlap of these pieces of machinery, Senator Cowan referred to "this brood of transferring cases from the state courts to the United States courts".³

Just as it was beginning to look like a deliberately constructed structure, the demolition man moved in again. Johnson announced another

1. Ibid., pp.1387-1388 March 14th, 1866.

2. Ibid., pp.1366-1367 March 13th, 1866 (i.e. the day before Cook addressed the House).

3. Ibid., p.2057 April 20th, 1866.

veto on March 27th.¹ The tone of the message was set by its opening complaints that this law, (which made citizens of Chinamen and gypsies as well as negroes!) discriminated against intelligent and patriotic foreigners, who still had to wait for citizenship. He went on to echo objections so lately uttered by the Democrats. The rights of citizenship enumerated in the bill had been considered as belonging exclusively to the states. True, he said, there are limitations on state powers. No State shall pass a law impairing the law of contracts, pass ex post facto laws, make anything but gold and silver legal tender. But there was no power against their discriminating between people with respect to the right to hold real estate. If Congress can say who can hold real estate, testify and so on, then they could say who should vote, and sit on juries. The rest of the message was concerned with the means employed to obtain these ends of which he had stated his disapproval. These included the section allowing penalties against judges, sheriffs and so on who might well be adhering to laws passed by their own legislature. The bill thus "invades the judicial power of the states", depriving the state judge of his independence of judgment in deciding in favour of the validity of a state law as opposed to a national one. Johnson went on to voice fears for de novo judgments in the federal court, referring to that section which made the laws of the United States the rule, except where modifications based on common law as modified by the state were necessary. In other words:

over this vast domain of criminal jurisprudence provided by each state for the protection of its own citizens, and for the punishment of all persons who violate its criminal laws, federal law, whenever it can be made to apply, displaces State law.

That was an exercise of judicial power quite beyond the Constitution.

1. Ibid., pp.1679-1681 March 27th, 1866.

For the President, "... the details of the bill seem fraught with evil". It was also unnecessary. Slavery was ended. Labour and capital could be left to find a new relationship. This bill was an unwarranted invasion of the states. And the message ended on the most improbable of all notes:

I will cheerfully co-operate with Congress in any measure that may be necessary for the protection of the civil rights of the freedmen, as well as those of all other classes of persons throughout the United States, by judicial process, under equal and impartial laws, in conformity with the provisions of the Federal Constitution.

But it was too late for any President to endorse the principle, and deny the means to make it a reality. The tenuous line between Johnson and the moderate Republicans snapped. In a display of integrity and unity, tinged with despair for those who had hoped for more from their President, Congress accomplished a constitutional "first" by re-passing the bill over the veto. On April 6th, it passed the Senate with the required two-thirds majority, aided by the unseating of New Jersey Democrat John P. Stockton.¹ The House needed no aid in its resounding vote of April 9th, 122 to 41.² Having stood firm once, it was easier to do so twice, and on July 16th "another" Freedmen's Bureau bill was also repassed.³ For Johnson - political suicide. For American citizens - the possibility of equality before the law.

But it was not to be. Far away from Washington, and from the speeches on rights, citizenship and federal powers, it was left to Bureau officers and the Army to relate these things to real everyday issues. General O. O. Howard, Chief of the Freedmen's Bureau, later estimated that their courts

1. Ibid., p.1809 April 6th, 1866. Stockton had been elected as senator for New Jersey, despite Republican attempts there to prevent it. Unpopular even with some of his own party, Stockton's election had depended on a change of rules to allow for election by a plurality rather than a majority. The election was now successfully contested in the Senate.
2. Ibid., p.1861 April 9th, 1866.
3. Essentially the same as the original bill, it did nevertheless have a more limited application in its civil rights jurisdiction - to places where conditions of 'rebellion' existed.

dealt with about 100,000 complaints a year.¹ Some of these cases were large issues, some petty, some contested between white and black, many between black and black. The Bureau officer's tasks were many and delicate. One Union officer, John De Forest, described his duties succinctly:

Indeed, a Bureau officer was an official jack-of-all trades. He must understand the Army Regulations; he must be able to lead troops on occasion; he must have an idea of civil law; he was a Poor Commissioner; he was a statistician. With all this multifarious knowledge, he must be a man of quick common sense, with a special faculty for deciding what not to do. His duties and powers were to a great extent vague, and in general he might be said to do best when he did least.²

One of the problems which consistently dogged them in the execution of these tasks, was the way in which the civil and military power overlapped, and often conflicted. The Army had to walk a tightrope between two civil powers, one in the locality of their operations, the other at Washington. On the field, the success of the Bureau's operations depended either on their ability to co-erce, or co-operate with the local white majority. In some instances, they resorted to co-ercion. In September 1865, during the first year of the Bureau, an agent in Shreveport, Louisiana, imprisoned the judge, sheriff, and all twelve jurors of a local civil court which had unjustly found against a negro for stealing a horse.³ Yet although this would not be the last show of force by the army against the civil authorities, it was not typical. Instead, the history of the Bureau is one of attempted, though often frustrated co-operation with and utilisation of existing courts and local civil authorities.

In part, this was dictated by circumstances. The local agent was the representative of federal authority in a hostile area, himself often

1. George R. Bentley, A History of the Freedmen's Bureau (Philadelphia, 1955), p.155. Hereafter cited as Bentley, A History of the Freedmen's Bureau.
2. John William De Forest, A Union Officer in the Reconstruction, ed. by James H. Croushore and David Morris (New Haven: Yale University Press 1948) pp.41-42. Hereafter cited as De Forest, A Union Officer.
3. Bentley, A History of the Freedmen's Bureau p.155

threatened with force if he construed that authority too broadly. In many districts, there was simply not sufficient military strength for the Bureau to call on to enforce their decisions, even had they wished to do so. But the utilisation of the local civil institutions was policy, as well as necessity. It was a policy outlined by Trumbull and his Congressional colleagues, when they said they would rather the states did justice, than have the army do it for them. General Howard attempted to translate the policy into practice.

Even before the 1866 Freedmen's Bureau Act, the Bureau had been handing over cases to the civil courts. For the ex-Confederate states themselves were beginning to put laws on the statute books which recognised some civil rights. And so, in 1865, Assistant Commissioner Thomas closed his Bureau courts after Mississippi agreed to admit negro testimony in cases involving negroes. The experiment was not successful. General Howard warned the commissioners to be wary of such laws until they had actually been tested. And in December 1865, he recommended the extension of the Bureau's functions on the grounds that the civil authorities could not be relied upon in places where co-operation had been tried.¹

But the policy continued in 1866. John De Forest chronicled the same practice in his area, even expressing confidence in the local magistrates to deal with the cases fairly.² A recent close-up study of a Louisiana agent also confirms the trend.³ The agent, Cornelius, interpreted his duties as affecting mostly the newly freed negroes. The already free, and the poor whites, he considered largely outside the scope of the Bureau's activities. And so, a high percentage of the cases he dealt with were

1. Ibid., pp.67-68.

2. De Forest, A Union Officer pp.30-32.

3. J. Thomas May, The Freedmen's Bureau at the Local Level: A Study of of a Louisiana Agent Louisiana History IX 1968.

between blacks. His practice was to refer more serious disputes to the local Justice of the Peace. At no time did he call on the assistance of troops to co-erce the white population. Instead, he continued to use the civil authorities, even when he was unimpressed with the quality of justice they meted out. He did not conceive of the Bureau's work as the promotion of social revolution. When he was concerned with cases involving the relationship between the two races, it was generally in the field of labor contracts between white employers and black labour. He took the sanctity of these contracts from both sides very seriously.¹ For, in Cornelius' eyes, the immediate priority was the regeneration of agriculture. Education for blacks would keep until later. This order of priorities suited the local population very well, accounting for the relative success of the Bureau's work in this field, as against education, welfare, or land ownership. In other words, this agent at least was no artery of Washington 'Radicals'. He preferred to use existing authorities, and attempted no revolution, but rather stability, and regeneration.²

Another recent investigation of the Bureau's policy suggests that the appointment of men who would not attempt a social revolution was deliberate. William McFeely cites the careers of a number of radical assistant commissioners who were out of sympathy with Johnson's Reconstruction policies, and who were transferred to safer jobs at headquarters.³ Other radical men, like Rufus Saxton and Thomas Conway could not always count on the undivided loyalty and support of their superiors.

The conservatism of the Bureau often annoyed local Republicans who were trying to press on with more radical policies in the state conventions.

1. For the conservative implications of this policy and the ways in which, in practice they worked against the freemen. See McFeely, Yankee Stepfather, Ch.8.
2. These points are also reinforced by Lawanda and John Cox, General O. O. Howard and The Misrepresented Bureau. Journal of Southern History, November, 1953.
3. McFeely, Yankee Stepfather, pp.67-68.

Thus one of Chase's correspondents wrote from South Carolina of their isolation, since:

The Military here, as a general rule do not co-operate with radical men; and the Bureau is a little inclined to conservatism.¹

And so the traditional picture of the close connections between 'Radicals' in Congress and the Freedmen's Bureau has had to be rethought - but not simply in the light of the 'conservatism' of the Bureau, or indeed even intrigues at Washington. There was an accord between some of the moderate men who framed the legislation of 1866, and the men who executed it. The policy of utilising state courts and encouraging them to do justice first was also Trumbull's. So too with the "life goes on" attitude of the Bureau in upholding labour contracts. It was not so different from the policy of the Supreme Court in the years after the war, already noted for example in its enforcement of the obligation of contracts on promissory notes made prior to the Thirteenth Amendment.

The wisdom and success of the Bureau's policy with respect to the civil authorities was another matter. One Florida agent reported that ninety-nine percent of cases adjudicated in the civil courts there went against the negro. Where juries were involved it seemed, justice was not. But the Bureau did not have an open choice on this question, and they were not simply trying to appease white majorities. President Johnson's Proclamation of April 1st, 1866, officially declared the end of the rebellion, and the return of civil order. Anticipating the Milligan decision, he ordered an end to military trials of civilians. In December, the Supreme Court's decision in the Milligan case was a further handicap to the Bureau courts, in outlawing the military trial of civilians in areas where the courts were open. Indeed, Johnson used the decision to

1. Gilbert Pillsbury to Salmon P. Chase, September 24th, 1867, Chase Papers, L.C., V. 99 f 14959.

justify taking an important case out of the Bureau's jurisdiction, that of Doctor James Watson of Virginia, who had been accused of killing a negro. He was subsequently discharged.¹.

A further complication occurred when, with the official return to civil order, the Civil Rights Act went into operation in the South, obliging the civil adjudication of civil rights cases where possible. It was a little premature under the circumstances. Responding to the situation, the War Department issued Order No.26 on May 1st, 1866, to the effect that, where possible, cases should be handed over to the civil authorities. That was the official word. On April 9th, however, a secret circular from Grant and Stanton had reminded commanders of the existence of both the Freedmen's Bureau and the Civil Rights Act, and to the means of their protection.².

And so, with one arm tied behind its back, the Bureau continued to do its best. And its record in adjudicating disputes, supervising the regeneration of agriculture, relief work, and education, is a creditable one for all that, however limited.

As to the question of the protection of Bureau officers themselves, "under military protection and jurisdiction", the picture is incomplete. Successful removals of suits to the federal courts under the Civil Rights Act are not conspicuous. This may be so because the cases very often did not emerge from the web of local circumstances, of intimidation and so on. In some instances, it may be because the agent was rescued by military, rather than judicial action. Such a case was the one which beset General Heintzelman in Texas. The case is interesting because it reveals so many

1. Bentley, A History of the Freedmen's Bureau.

2. Benjamin P. Thomas and Harold M. Hyman, Stanton: The Life and Times of Lincoln's Secretary of War (N.Y.: Knopf, 1962) p.478.

of the local and national problems of protecting the protectors. It was a case about who protects the army for protecting a Freedmen's Bureau agent, for protecting freedmen.

General Getty, the commanding officer, instructed Heintzelman to release Mr. Longworth from civil custody.^{1.} Longworth was a Bureau Agent who had been "illegally arrested" for acts done under his official capacity. In ordering the release, on 29th September, 1866, Getty referred to the Army's General Order No.3, ordering the protection of agents, freedmen and others from prosecutions in the state courts. (In later correspondence, the Freedmen's Bureau and Civil Rights Act were cited as additional authority, perhaps illustrating the confusion of men on the spot as to their authority). Heintzelman complied with the order, and removed Longworth, and all the papers in the case, from local custody. The clerk of the county proceeded to instruct the sheriff to arrest Heintzelman. Heintzelman refused to obey the capias. He appealed to the Adjutant General's office at Galveston saying, "I would not consider my life safe in the hands of the Texas civil authorities".^{2.} The appeal went right the way up the Army echelons. General Grant approved the action, and requested information from the War Department as to whether Heintzelman would be sustained by the Government. The ball passed from one corner to another without anyone picking it up. Stanton wrote to the President for instructions on January 29th.^{3.} On January 30th, the President instructed Stanton to refer it to the Attorney-General. Meanwhile, events intervened. Whether these events brought comfort to General Heintzelman or not, the Attorney-General's office was at least off the hook, when the case closed with this postscript of 15th July, 1868, over a year later:

Delay and subsequent events supervened and the case is superseded.^{4.}

1. Brevt. Maj. Gen. Getty to Brevt. Maj. Gen. Heintzelman, September 29th, 1866, Attorney-Generals Papers, National Archives, Record Group 60.
2. Heintzelman to the Acting Asst. Adjt. Gen., Galveston, December 22nd, 1866, Ibid.
3. Stanton to Johnson, January 29th, 1866. Ibid.
4. Stanton to Henry Stanbery, January 30th, 1866, Ibid., endorsed on July 15th, closing the case.

Thus, for all the Congressional logic of removal procedures, and the connections from one bill to another, in practice, the army and Bureau had to cope as best they could in the face of 'delay and subsequent events'. The confusion over the boundaries between civil and military 'protection' and 'jurisdiction', reached all the way back to Washington. Meanwhile, on the field, men sitting on a local powder keg could not wait for removal suits, and self-help might be the alternative to no help. Such problems, of course, were expected to be temporary, and the real test was to come when the supports were removed, and the Civil Rights Act brought equality under the law, to victors as well as vanquished.

As with the judicial application of the Habeas Corpus Act, there are some surprises, some state courts which act contrary to one's preconceptions, and give full credence to the legislative intentions. The highest courts of former Confederate states affirmed the negro's right under the Civil Rights Act to be a competent witness in cases involving whites as well as blacks - the Texas court in *Ex parte Warren* in 1868, the Arkansas court in the 1869 case of *Kelly v. The State*.¹ Indeed, in this latter case, where the court was adjudicating an appeal against a conviction for robbery on the grounds of the illegality of the evidence of coloured witnesses, and the unconstitutionality of the Civil Rights Act, the judge expressed a startlingly optimistic view that such a case was unlikely to occur in the state again, for the lapse of time, and the judgment of other tribunals were passing with "unerring certainty" towards the conclusive establishment of the right to testify against a white man. In California, the question of testimony received an unusual twist. In the *People v. Washington*,² the court upheld a lower court decision discharging a mulatto from custody on the grounds that the only witness to his alleged

1. *Ex parte Warren* 31 Tex. 143 (1868); *Kelly v. The State* 25 Ark. 392 (1869).
2. *The People v. Washington* 36 Cal. 658 (1869). But - overruled in *People v. Brady* 40 Cal. 198.

crime of robbery was the testimony of a Chinaman born in the Chinese Empire, debarred from testifying by state law. Thus, under the Civil Rights Act, the Native born mulatto citizen was to enjoy the same rights as the white, one of which was not being testified against by a Chinaman!

Many more cases concerned the rights to make and enforce contracts. The case of *Smith v. Moody* came to the Indiana Supreme Court on appeal in 1866.¹ Smith was black. He had sued Moody in a lower court for failure to honour a promissory note. The court sustained Moody in his refusal to pay up, on the grounds that Smith had moved to Indiana, and a state statute, forbidding the immigration of negroes into the state, made all contracts after that date, 1851, void. The supreme court now upheld the negro's citizenship, and overruled the lower court's decision.

An even thornier subject was the marriage contract. In most of these cases, the state courts did not think that laws forbidding interracial marriages contravened the Civil Rights Act. Though there were exceptions. In 1868, a lower court in Alabama held such a state law unconstitutional. But, on appeal, in *Ellis v. The State*,² the higher court disagreed, on the grounds that the Civil Rights Act prohibited discrimination in punishments, on account of race, rather than in the making of race a criteria for the original offence. Four years later, however, the same court changed its mind in *Burns v. The State*,³ when it reversed a judgment against a justice of the peace for solemnising an interracial marriage. Discriminatory laws, the court said, had arisen because of the black man's condition, rather than his colour, and now, under the Civil Rights Act, the object was to end such discrimination, and admit the negro to the same rights with respect to contracts as whites, including the marriage contract.

1. *Smith v. Moody* 26 Ind. 299 (1866).

2. *Ellis v. The State* 42 Ala. 525 (1868).

3. *Burns v. The State* 48 Ala. 195 (1872).

In 1874, the Louisiana Supreme Court alas sustained the right of children of an interracial marriage to their inheritance, on the grounds that the state laws forbidding such unions had been superceded by the Civil Rights Act.¹ But in many more cases, the courts took the line that the Civil Rights Act ~~only~~ outlawed discrimination only in punishment.² Beyond that, the whole question of marriage was still very much within the province of the states. But such judgments were not necessarily hostile to the legislative intention. It was, after all, only the same line of argument which Senator Trumbull had taken in the Senate debate when Hendricks of Indiana had raised such a hypothetical case. Trumbull had said then, observe equal punishments for the same offence, and you observe the act.

Over and above the model behaviour of some state courts in observing civil rights without prompting from the federal authority, others also exhibited a willingness to observe federal jurisdiction under the Act. The opinion of Judge Ogden of the Texas Supreme Court in the 1873 case of *Gaines v. The State*,³ would have been enough to warm the hearts of the Republicans who championed the bill. Allowing a motion for the removal of a case against a negro, on the grounds of local prejudice, he argued that, under the terms of the act, the remedy applied not only to those who were denied rights, but to those who were "unable to enforce them", due, for example, to prejudice. It was one thing, he said, to have equal laws on the statute books, as they now had in Texas, but there were still plenty of places in the state where a coloured man could not get justice. Of jurisdiction in these questions, he went on:

we think that State courts should be exceedingly cautious in attempting to settle questions of grave importance which belong peculiarly to a different and higher tribunal.

1. *Hart v. Hose* 26 La Ann. 90 (1874).
2. *Green v. The State* 58 Ala. 190 (1877); *The State v. Gibson* 36 Ind. 389 (1871).
3. *Gaines v. The State* 39 Tex. 606 (1873).

255.

The opinion was cited and followed by the North Carolina Supreme Court in *The State v. Dunlop*.^{1.}

Such behaviour, in the light of Congressional fears for the injustices of state courts, and later evidence to confirm the absence of equality before the law in the states, requires an explanation. One possibility, at least with respect to the South, is the influence of carpetbag justices. The career of one of these men, George Andrews has recently been illuminated by Professor Harold Hollingsworth.^{2.} In 1868, Andrews was appointed to the Supreme Court of Tennessee, by the Governor. He was no bandwagon dilettante, no Yankee failure gone South to seek compensatory success. Nor was he a Republican pawn. His decisions reflect a conscientious search for impartiality, and equality before the law. The same may be said of the career of Albion Tourgee, who occupied a seat in the bench of North Carolina's Supreme Court from 1868 to 1876.^{3.} But not all the judges by any means were carpetbaggers.

New state constitutions in the South had also changed conditions of judicial appointment and tenure. The Georgia constitution of 1865 provided for the election of supreme court judges for six years by the legislature. In 1868, this was changed again. This time, the Governor was to make the appointments, for a still longer period, twelve years instead of six. Thus, perhaps the judges who were appointed were a little more free from the excitement of public opinion or prejudice. Under the new constitution, the new chief justice was appointed - Joseph E. Brown! Brown was no carpetbagger, but a former state judge and governor. As an ardent champion of states rights he had been a wartime thorn in the flesh to Jefferson Davis. He was joined on the bench by H. K. McCoy, again a

1. *The State v. Dunlop* 65 N.C. 491 (1871).
2. Harold M. Hollingsworth, George Andrews, Carpetbagger Tennessee Historical Quarterly Vol.28, 1969.
3. See Otto H. Olsen, Carpetbagger's Crusade: The Life of Albion Winegar Tourgee (Baltimore: The Johns Hopkins Press, 1965) pp.143-155.

local lawyer, a Unionist, and Republican in the constitutional convention. The third judge was Hiram Warner, originally from Massachusetts. But he had moved to Georgia in 1821. Of the three, the former Yankee Warner was the most conservative, often finding himself in opposition to his colleagues in their pro-Union decisions - as for example, in *White v. Clements*, where the court upheld the rights of negroes to hold office.^{1.}

A similar story comes from South Carolina. By an act of 1868, a Supreme Court consisting of a chief justice and two others was to be elected by the legislature for a period of six years (though here, judges had previously enjoyed life tenure). The chief justice Franklin Moses, again was a local man. Indeed, he had to wait for the removal of his political disabilities by Congress before he took office in 1868. But apparently, he went on to serve with distinction until his death in 1877. The remaining composition of the court was diverse - A. J. Willard, a carpetbagger from New York (who remained till 1880); Solomon Hoge, a graduate of Cincinnati Law School, and a Union Officer. But he served for only eighteen months; finally Jonathan Wright, a black lawyer from Pennsylvania, former adviser to the Freedmen's Bureau, and now the first negro to serve as a judge in South Carolina, from 1870 to 1877. The verdict of one historian on this court:

In spite of the fact that the Supreme Court was composed of a Scalawag, a carpetbagger, and a Negro, its administration was fair and its decisions equitable.^{2.}

Certainly the carpetbag element should not be overemphasised, for there is reason to believe that the integrity of certain Southern state courts was a continuation of their ante bellum performance. A. E. Keir Nash's recent study of the record of the Texas Supreme Court from 1845 to

1. C. Mildred Thompson, Reconstruction in Georgia (N.Y.: Columbia U.P. 1915), pp.352-360.
2. Francis B. Simkins & Robert H. Woody, South Carolina During Reconstruction (Chapel Hill: The University of North Carolina Press, 1932) p.144.

1860, although it admits that Texas was never classed with the really 'bad' states of the Deep South, suggests that an honest attempt was being made there to extend the benefit to the negro of whatever laws there were for his protection, and to treat slaves as humans rather than simply property.¹ There were no common biographical factors among the judges. Nash suspects that one reason for their behaviour was their relative independence. Despite their theoretical control by popular election, the same judges were regularly re-elected. Once on the bench, the judge was comparatively free from the positive imperatives acting on his legislative colleagues to be seen to reflect public opinion. His professional interest was in individuals, rather than broad sweeps of policy.

But a great deal more work on state judges must be undertaken - and not only in Southern courts - before any more satisfactory picture can be drawn. More important still is the caution against equating even a significant number of favourable decisions with justice. This was the gilt on the ginger bread. The Supreme courts were the end of the road in the process of obtaining justice in the state. All too often, the process never began, or got lost in mid-passage. Thus, in a letter to Secretary of War Stanton on January 19th, 1867, General Howard of the Freedman's Bureau was cautious about the record of the supreme courts:

I am of the opinion that in the courts of superior jurisdiction, the judges are generally disposed to deal fairly with the Negro, but it is notorious that he stands little or no chance before a magistrate or inferior jurisdiction.²

Often there was a tale or two behind apparently well functioning judicial systems in the former Confederate states. A Texas judge, Winston Banks, wrote to Washington, testifying that he was holding court uninterruptedly in his district. Later, as he wrote to General Buell in

1. A. E. Keir Nash, The Texas Supreme Court and Trial Rights of Blacks, 1845-1860 The Journal of American History, December, 1971.
2. Quoted in Bentley, A History of The Freedmen's Bureau.

February, 1869, it dawned on him that the statement had been elicited from him by certain parties for their own interest in perverting justice.¹ They were attempting to procure the release from federal custody of men charged with the murder of New York carpetbagger, G. W. Smith, and have the case dealt with in the state courts. They wished, therefore, to convey an over-favourable impression of the peaceful functioning of the judicial system in the district. Judge Banks set the record straight. Although he was holding court, it was against a background of lawlessness and intimidation which had forced some of his colleagues to seek military protection. He related the problems, not unique to his area - the scourge of outlaws, whose victims included Union soldiers and the local Freedmen's Bureau agent; the murder of several freedmen; the intimidation of another Bureau agent, finally rescued from his office by troops disguised as citizens; an attack on the home of the Republican candidate to the state convention; the harrying of loyal men. Juries would not convict for these offences. As a result of this letter, the application to transfer the prisoners to the state court was refused.

Without denying the honest endeavours of some state courts to abide by the spirit of the Civil Rights Act, it is a very small part of the story. And, of course, there were decisions of state supreme courts which took a less liberal view of the act - though the classic came from Kentucky. In *Bowlin v. Commonwealth*,² the court found against the constitutionality of the Civil Rights Act. That act did not alter state laws preventing the testimony of black against white. The Thirteenth Amendment had ended slavery, as physical bondage, and warranted nothing more.

Bigger disappointments in the construction of the act were to come from

1. Winston Banks to General George P. Buell, February 1st, 1869, Attorney-Generals Papers, National Archives, Record Group 60.
2. *Bowlin v. Commonwealth* 65 Ky. 2 Bush 5 (1867).

the federal courts - bigger since these courts were the key to enforcement.

This was not true in the beginning, however. The first two outings of the act in the federal circuit courts brought sympathetic and hopeful constructions.¹ These cases have already been referred to in connection with the fate of the Thirteenth Amendment in the courts. On circuit in Maryland in 1866, in the case of Turner, Chief Justice Chase took the view that indentures of apprenticeship, unequal in their application to white and black children contravened the Civil Rights Act. The same year, his colleague, Justice Swayne upheld the constitutionality of the act in U.S. v. Rhodes, in the circuit court of Kentucky. Federal jurisdiction in this case was contested. It was a criminal case. The defendant Rhodes, had been found guilty of entering a black woman's house. The issue now, on this appeal for arrest of judgment, was the illegality of the woman's testimony under state law. It was argued that in a criminal case, the only parties affected were the sovereign state which prosecuted, and the defendant. Since the defendant was white, there was no federal question, and it was purely a matter for the state. But Swayne thought not. He upheld the right of the black woman to testify, under the Civil Rights Act. And he went on to urge a liberal construction of the act "to carry out the wise and beneficent purposes of Congress in enacting it". Judgment against Rhodes stood.

And then the tide turned. It began before the well-known Slaughterhouse opinion. In 1868, the federal circuit court in Kentucky took jurisdiction in a criminal case, a case of murder, where the defendants were white, and the victim black, on the grounds that a federal question

1. In re Turner Fed. Cas. 14,247 (1867); U.S. v. Rhodes, Fed. Cas., 16,151 (1866).

arose out of the denial of testimony of black witnesses to the crime. The defendants, Blyew and Kennard were convicted. The case was taken to the Supreme Court on a writ of error, contesting the jurisdiction of the federal circuit court. As in U.S. v. Rhodes, the question which states were anxious to settle, was the extent of federal jurisdiction in criminal cases where the defendant was white. This was a test case. The legislature of Kentucky passed a resolution directing the Governor to employ counsel in the case to take steps to test the constitutionality of the law. According to B. H. Bristow, the United States Attorney for the District, the counsel for Blyew and Kennard failed immediately to lodge the record of the case with the Supreme Court because the case was not a happy one on which to challenge the Act. The defendants were clearly guilty, a fact which might put their case in a bad light.¹ But the appeal eventually went ahead. The case of Blyew v. U.S. was decided in 1871.²

Blyew's counsel argued against federal court jurisdiction on the grounds that in a criminal case in which the defendants were white, the case was solely cognizable in the state court. Giving^{the} opinion of the Court, Justice Strong agreed. An indictment prosecuted by the government against an alleged criminal concerns only the parties, and not the witnesses. The purposes of the Civil Rights Act, he said, were only to protect coloured persons where a decision of the court might affect them injuriously in their personal or property rights. He rejected the secondary arguments of the U.S. Counsel that the case did 'affect' black rights directly, to the extent that the murdered woman was black. Strong thought that she was "beyond" being "affected". And the circuit court had no jurisdiction

1. B. H. Bristow to The Attorney-General, April 22nd, 1869, Attorney-Generals Papers, National Archives, Record Group 60.
2. Blyew V. U.S. 13 Wall. 581 (1871).

under the act because of the colour of the witnesses.

It was left to two dissenting justices, Swayne and Bradley to give an ampler meaning to the act in their dissenting opinions. Bradley defended the act as a proper sequel to the Thirteenth Amendment, which had abolished slavery, and placed negroes on "... an equality of rights and privileges with other citizens of the United States". Federal jurisdiction extended not only to circumstances under the first section of the act, i.e. a direct denial of a civil right, but also, by the terms of the third section of the act, where coloured or other persons were unable to enforce their rights in court. Thus, he said:

if the state should refuse to allow a freedman to sue in its courts, thereby denying him judicial relief, or should fail to provide laws for the punishment of white persons guilty of criminal acts against his person or property, thereby denying him judicial redress, there can be no doubt that the case would come within the scope of the clause under consideration. (Clause 3).

And this was such a case. It was not that all cases where negroes were witnesses came within federal jurisdiction. In some cases, the party against whom the crime was committed might not be affected. But here the right of testimony affected the murdered person. If she had lived, the case would have come under federal jurisdiction. All the more so, since the degree of violence was greater, leading to her death.

In the 1870's a string of cases were to follow the pattern in the Blyew case -- impressive dissenting opinions in which the spirit of the act was retained, but attached to limited constructions by the majority of the court. So it was in the Slaughterhouse Cases of 1873.¹ In 1867, the legislature of Louisiana confirmed a monopoly on a slaughterhouse business. The butchers who were consequently edged out of the business claimed that the monopoly was a violation of their rights, principally under the

1. The Slaughterhouse Cases 83 U.S. 36 (1872).

Fourteenth Amendment, but the Thirteenth, and the Civil Rights Act was also cited. The Supreme Court of Louisiana, however, held that the statute conferring the monopoly was a legitimate exercise of the state's police power. The case came to the Supreme Court on appeal.

Upholding the Louisiana court decision, Justice Miller for the court, dealt a blow to the trilogy of privileges and immunities - due process - equal protection. The most devastating blow of all fell on the concept of national citizenship which had informed Republican thinking on the Civil Rights Act. Miller's opinion separated national, and state citizenship. The privileges and immunities which were subject to national protection, and beyond infringement by the state were and then he tried to dodge the issue by saying:

we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.

Still, he could not resist citing a few, including free access to seaports and land offices, and federal protection on the high seas. This left the whole area of private, personal and property rights precisely where it had been before 1866, under the control of the states. Judge Miller disposed quickly of due process and equal protection. The monopoly was not a deprivation of property without due process. As for equal protection, the Court said that it only applied to discrimination against Negroes as a class. Miller then took a narrowly 'black' view of the amendment, ignoring its application to all men.

The dual citizenship doctrine expounded by the Court was clearly in conflict with the policy of the Congress which framed the Civil Rights Act, that being the same Congress which framed the Fourteenth Amendment.

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That was one of the points expressed by Justice Field in his dissent. He quoted Trumbull on the connections between freedom, and the right to equality before the law. The privilege and immunities of the Fourteenth Amendment, he said, were those of the Civil Rights Act. They were more extensive than the right to protection on the high seas and so on,—But:

The fundamental rights, privileges and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State.

Bradley and Swayne, although putting more emphasis on the 'due process' clause, joined him in the opinion that the Fourteenth Amendment was a limitation on the states in respect of these rights, and they dissented from the majority opinion of the Court.

Although the case had centred primarily on construction of the Fourteenth Amendment, it had important repercussions for the fate of the Civil Rights Act. The Court was beginning to separate the pieces of Republican policy, and isolate them from their historical connections. The next step was to isolate the Civil Rights Act in chronological terms too. Finding a conservative meaning for the Fourteenth Amendment, they proceeded to associate the Civil Rights Act with that amendment, although the act had passed first, and in pursuance of a power claimed under the Thirteenth Amendment.

This dislocation was most noticeable over the question of whether the federal authority could exercise jurisdiction in cases of individual infringements of private rights, irrespective of whether the state, or its officers were at fault. In 1876, the Supreme Court in *United States v. Cruickshank*,¹ gave the opinion that the Fourteenth Amendment was a

1. *U.S. v. Cruickshank* 92 U.S. 542.

federal guarantee against infringement of rights by the states, and did not reach violations by private individuals. As a result, later civil rights legislation which did attempt to govern private as well as public denials of rights, was held to go beyond the constitutional power on which it was based. Thus, in *Le Grand v. U.S.* in the Texas circuit court, Justice Woods reversed a judgment against private citizens for denying a black man the right to testify - by beating him up.¹ He held that the Enforcement Act of 1871, under which federal protection was claimed was an instance:

where an act of congress is directed exclusively against the action of individuals, and not of the states, the law is broader than the amendments by which it is attempted to be justified, and is without constitutional warrant.

In 1883, in the Civil Rights Cases, the same argument was used against the 1875 Civil Rights Act.² The Fourteenth Amendment applied only to state action. In these cases, the courts did not consider the Thirteenth Amendment as the proper basis of power for the legislation - although in his dissenting opinion Justice Harlan did make the point that the 1875 act did draw its powers from that amendment, which had application to all men. He also pointed out that it was quite proper to pass legislation reaching individuals. Had Congress not done that with the Fugitive Slave Law? Had not the Supreme Court upheld the constitutionality of doing so in 1842 in *Prigg v. Pennsylvania*? Harlan was right. As one historian says, if constitutional law had ended with the *Prigg* case, it could be asserted with confidence that there is "... nothing in the nature of American federalism that disables the Congress from controlling private

1. *Texas v. Gaines* Fed. Cas. 13,847 (1874).

2. *The Civil Rights Cases* 109 U.S. 3 (1883).

conduct affecting the civil rights of others".^{1.}

But the postwar Court changed that. And the 1866 Civil Rights Act, was an incidental casualty. And so, on circuit in Texas in 1874, Justice Bradley in *Texas v. Gaines*,^{2.} refused to take a case on removal under the 1866 Act on the grounds of local prejudice. The original opinion in the Supreme Court of Texas, had been remarkable for its liberal construction of the act. But here the federal court took a more limited view. It was not intended to protect civil rights against private infringements, where the laws themselves were impartial and sufficient. And yet Bradley was not consistent. In the 1883 Civil Rights Cases, he referred to the 1866 act with approval, and to the fact that under the Thirteenth Amendment, legislation could be direct and primary, operating on individuals, while under the Fourteenth, it could only be addressed to state action. Perhaps he could afford to be more generous in construction, since the issue was not the 1866, but the 1875 act, and the Court had decided that it rested on the Fourteenth Amendment.^{3.} But the Civil Rights Act of 1866 got caught in the backwash of these opinions on the Fourteenth Amendment, and the later Civil Rights legislation. There was so much legislation by the 1870's, that cases tended to be pleaded under a variety of headings, and it was easy for differences, of chronology and power base, to be ignored in the courts' tendency to treat the legislation as a package deal under the Fourteenth Amendment.

1. Mark De Wolfe Howe, Federalism and Civil Rights. Massachusetts Historical Society Proceedings CXVII 1965. *Prigg v. Pennsylvania*, 16 Peters 539 (1842), came to the court on appeal. Edward Prigg, a slaveowners agent was convicted in the Pennsylvania Supreme Court, of carrying off a slave to Maryland without legal proceedings, thus violating a Pennsylvania state 'liberty' law. But the Supreme Court reversed the judgment, holding that state law unconstitutional, interfering as it did with the fugitive slave clause of the Constitution. The execution of that law was exclusively federal business. Its intention was to reach, and cause the return of runaways i.e. exercise a power over individual rights directly.
2. *Texas v. Gaines* Fed. Cas. 13,847 (1874).
3. Bradley had taken a similar line in his opinion in *U.S. v. Cruickshank*, Fed. Cas. 14,897 (1874), when he gave a liberal interpretation of the 1866 Act, but held the Enforcement Act of May 31st, 1870 unconstitutional in its application to individual violations. The judgment was affirmed by the Supreme Court in *U.S. v. Cruickshank*.

The disappointing judicial history of the postwar amendments, and acts 'appropriate' to their enforcement, prompted a group of black lawyers in the 1880's, to write a volume lamenting the growing gap between the legislative intention, and the judicial application.¹ They urged a return to the original meaning, which had become obscured behind the doctrine of dual citizenship, and 'state' as opposed to universal application of the civil rights legislation, and the Fourteenth Amendment. They spoke of "the silent circumspection with which the courts have walked round the Fourteenth Amendment". But their disappointment was not just in the Court, but in the way that both political parties had betrayed the goal of equality before the law. They imagined a conversation between an observer, ignorant of the situation, and a "sarcastic reviewer" who might explain what had happened so:

You must pardon my mixed metaphors and apparent digression. I wanted to explain to you that, if there is a sick patient in this country, in our opinion, it is the civil rights man; but you see, he does not belong to any of the old nor is he a member of either of the modern great parties of the country, and therefore he cannot legitimately share in the treatment practised by their moderators. One party, for the time being, has placed him in quarantine, in one or another of its judicial harbors, to await the disinfecting process, or the expediences of the future. The other has banished him into an infirmary called the State courts. There he will either die an unnatural death, or if ever under their tyrannical treatment he recovers his health, he will be permitted without further molestation to take up his bed and walk, only because his recovery will be universally accepted as a miraculous interposition of Providence.²

Certainly, the responsibility for the failure to achieve equality before the law was far flung. It goes back through the long history of prejudices in men's minds, and the generations in which they had exercised them to assert their own rights in law, and deprive others of the same. Certain assumptions, both about negro inferiority and about the nature of federalism dogged the experiment. In the framing of the legislation itself,

1. Brotherhood of Liberty, Justice and Jurisprudence: an inquiry concerning the constitutional Limitations of the Thirteenth, Fourteenth and Fifteenth Amendments (N.Y.: Negro Universities Press, 1969. Reprint).
2. Ibid., pp.110-111. *Originally published in Philadelphia by J.P. Lippincott & Co. in 1889.*

Trumbull and his colleagues hesitated to go too far. They would rather that the states did the work of justice themselves. There are other criticisms which one would make of its Congressional backers, that they had a naive optimism in the power of law, or that their attempt to enshrine 'natural' law in positive law was unsatisfactory. And yet, that would be to ignore what was satisfactory about their attempt, both in motivation, and design.

For, in design, the Freedmen's Bureau and Civil Rights Acts contained more power than anyone was willing or able to use. This enforcement mechanism was, of course, deficient, both by Twentieth century standards, and by the needs of the situation which they had to cope with. But still, on paper, there was a touch of boldness - in the power, for example, of commissioners, marshals and so on to institute proceedings against those who infringed the act, in the threat of the authorisation to the President to use land and naval forces to carry out the act if necessary, and in the possibility of prosecuting state officers, including judges, for obstructing the execution of the act.

But, on the whole, the boldness remained on paper. There were many reasons. There was local prejudice, and determination that the law should not work. Against this, the minimal presence of the army and the Bureau was often powerless.

State court judges were seldom prosecuted. Immediately after the passage of the Civil Rights Act, the legislature of Maryland passed a law to reimburse magistrates and judges for any costs which they incurred for rendering decisions adverse to the act. One historian, however, cites a case of a state judge who was prosecuted.¹ Judge Abell of Louisiana was

1. Horace Edgar Flack, The Adoption of The Fourteenth Amendment (Baltimore 1908) pp.50-51.

arrested in July 1866, charged with "wickedly, wilfully and with malice aforethought" declaring the Civil Rights Act unconstitutional. But I have been unable to find the record of such prosecutions reaching the federal courts. It would have been more surprising if they had done. In the light of a history of sensitivity to respective jurisdictions between nation and state, it would not have been easy to throw off all restraint. The men of 1866, both as framers and executors did not want "federal centralisation" or "the invasion of the states" much more than their opponents did, and they were not eager to use the bill's machinery with too heavy a hand.

A more deliberate obstacle to the successful enforcement of the Congressional policy, was the non-co-operation of President Johnson. On January 8th, 1867, a Senate resolution called for information from the President on violations of the Civil Rights Act, and what steps, if any, had been taken by him to enforce the law and punish the offenders. At the War Department, Stanton showed some energy in collecting information. General Grant sent him a chilling list of offences from his knowledge in the Southern States including the rape of negro girls, the murder of freedmen and loyalists, and the murder of a former Bureau agent by a man on whom he had once imposed a fine.¹ And yet, when the Attorney-General, Henry Stanbery wrote to the President, in connection with the same resolution on January 21st, 1867, he had no report in his office of such violations. He cited one case, from Georgia, of a black man who was being held to involuntary servitude, without being charged with any crime. But he concluded:

I am not advised of any other case which requires Executive action under those sections which have been enumerated, or under any other section of the Civil Rights Bill.²

1. General U. S. Grant to Stanton, February 8th, 1867, Attorney-Generals Papers, National Archives, Record Group 60.
2. Attorney-General Henry Stanbery to President Johnson. January 21st, 1867. Ibid.

It was not that such cases were wanting. But, even with better information from the Attorney-General's office, Johnson was not disposed to aid the execution of the bills he vetoed.

But no single factor can be isolated, and there can be no one scapegoat. The fate of the 1866 civil rights legislation was the fate of Republican Reconstruction as a whole. Time passed, urgency faded, and some of the common factors on both sides of the Mason-Dixon line came to stand out more than old differences. And some of these common factors did not help to bring equality before the law. Racial prejudice was one. So too were old habits of decentralised government. The federal courts reflected, rather than created the conservatism of the 1870's, and 1880's. But that is not to say that the goal was unattainable in 1866. The men of the Thirty-ninth Congress worked with all the enthusiasm and skill at their disposal to make it happen. And their achievement is not small. There were men who were able to claim their rights, and who did claim them in law for the first time. And the legislation, like the Constitutional Amendments would remain on the statute books, not only for future use, but as a symbol of a real change. The clock would never be turned back. It was not enough. But it would also be hard to join with Albion Tourgee, one of the men committed to the idea at the time, in looking back at the work as "A Fool's Errand".

CONCLUSION

Something had been dreadfully amiss with the Union of 1861. Very soon after the war began, it became clear that there was to be no return to "The Union as it was, the Constitution as it is". Events put that beyond free choice. But the relationship between men and events was not so chaotic that one can study the Union and Constitution of 1866 as something which had been washed up on the beaches after a storm. Men made a study of what had gone wrong in 1861 with a view to putting it right. While they were involved in crisis, they studied, and made choices. If they were not master-planners of the Union's destiny, they were certainly conscious and intelligent participants.

Gone were the days when Americans were content with self-satisfied reverence for their Constitution as the last word on liberty. They had slept too long. It was war, wrote Orestes Brownson, which finally compelled the nation:

to pass from thoughtless, careless, heedless, reckless adolescence to grave and reflecting manhood. The nation has been suddenly compelled to study itself, and henceforth must act from reflection, understanding, science, statesmanship, not from instinct, impulse, passion or caprice, knowing well what it does and wherefore it does it.¹

But Brownson saved himself from the self-satisfaction of his predecessors by admitting how unfinished the task was, and that there was still much work to be done in enabling the nation to understand its own idea, and its Constitution. But basically, like the Republicans in Congress, he was pleased with the evidence of lessons already learned. Another learned

1. Orestes Brownson, The American Republic. Its Constitution, Tendencies, and Destiny (Louisville: Lost Cause Press, 1969. Reprint), pp.2-3.

constitutional commentator, Joel Parker, was less impressed early in the war when he observed:

The innumerable speeches in Congress and out of Congress, within the last few years, may serve to show with what diligence, if not with what success, constitutional law has recently been studied.¹.

Yet, for Congress, this very "diligence" had its rewards in understanding. As they studied particular problems at hand - making emancipation secure against state action, confiscating, regenerating Southern state governments, or indemnifying federal officers - they did not compartmentalise the issues. This is evident in the ways in which they transferred machinery from one act to another, for example the direct transplant of the removal procedures of the 1863 Habeas Corpus Act to the 1866 Civil Rights Act. But these things would only be a curiosity to the student of legislative history, if they did not also betoken a cumulative appreciation of the ways in which the problems themselves were interrelated. But they did grasp that it was the nation which was on trial. The power to compel obedience to its Constitution and laws was as necessary over habeas corpus jurisdiction in the border states as it was over emancipation in the South. For it was the lack of such a power which had threatened the nation's very existence. Moreover, as the slogan ran, Freedom was National, Slavery Sectional. In 1866, when the Republicans invoked the power to define that freedom and provide for its maintenance, it was important for New York as well as for Georgia. The rights of a free American were potentially as alienable there if the state chose to make them so. The liberty of the individual was not safe while he could not count on the protection of his nation's government. Nations which did not boast of their freedom and democracy could promise that much. The corollary was that the collective liberty of the nation was not safe while it could not offer that protection. And so, the Republicans

1. Joel Parker, "Constitutional Law", North American Review, April 1862.

aspired to believe that on the road from the Crittenden-Johnson resolutions to the Civil Rights Act, they had discovered a Constitution with the power to protect the nation and the individual against the excesses of 'state'.

If there is a sense of disappointment, it is that the power was in practice used so sparingly. It is that the opportunity to do more was lost. It is that the Civil War generation could not contemplate more radical structural changes in their federal system to make a real commitment to the equal rights of individuals. They did not bridge the gap from the formalities to the realities of equal protection - from using enough power to require states to observe equal laws, to using enough power to compel them, and everybody else to treat and respect these rights equally.

Racism persisted, and sapped the North's will to make such a commitment. But there is more to it than that. It would have involved a change in their concept of the functions and responsibilities of the national government in the federal system, which they perceived, but did not like. When the Republicans took the first steps across state boundaries in the earliest Reconstruction measures, it was clear that they wished to avoid basic structural change. They claimed the power to strike down the states' laws on one subject only - slavery. All other state law was to be respected. The incessant debate on reconstruction theory was another symptom of how uneasily they assumed new powers for nation over state. It had to be seen to be justified under the Constitution. And, for the mostpart they avoided theories which either ignored the existence of states, or which granted them more than the most temporary of powers to accomplish the necessary changes, and leave the states to work out the details of their own future.¹

1. See Chapter IV, *supra*.

With the Civil Rights and Freedmen's Bureau Acts, they claimed a potentially broad power for the nation to cross state boundaries and protect the rights of citizens in areas which were the traditional, and sensitive, province of the states. It was not that they thought they were bluffing. But it is clear from the debate that they hoped they would not be forced to use as much power as they had put on paper. They invited the states to make the appropriate changes in their laws first. Again, in 1866, they accepted the Fourteenth Amendment in the negative form which left the primary responsibility for equality before the law with the states, rather than the more positive form which read:

Congress shall have power to make all laws necessary and proper to secure to the citizens of each State all the privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

True, constitutional amendments were traditionally framed in the negative. Later historians have used that argument to suggest that the intention behind the form that Congress did adopt remained as positive, and the amendment as full a guarantee in the states.¹ But that interpretation is not consistent with their cautious and limited approach to state powers until then.

Frederick Douglass recognised the extent to which the reluctance to assume legislative powers over the states was a national phenomenon. Writing of recent changes in December 1866, he said:

The Civil Rights and the Freedmen's Bureau Bill and the proposed constitutional amendments, with the amendment already adopted and recognised as the law of the land, do not reach the difficulty, and cannot, unless the whole structure of the government is changed from a government by States to something like a despotic central government, with power to control even the municipal regulations of States, and to make them conform to its own despotic will. While there remains such an idea as the right of each State to control its local affairs - an idea, by the way, more deeply rooted in the minds of men of all sections of the country than perhaps any other political idea - no general assertion of human rights can be of any practical value.²

1. Jacobus Ten Broek, Antislavery Origins pp.200-203.
2. Frederick Douglass, "Reconstruction", Atlantic Monthly, December 1866. Emphasis mine.

Douglass was right. Nobody would contemplate such a degree of centralisation. And he offered an alternative - Give the black man the vote. He had advocated such a step when it was radical and unfashionable to do so. But now it was not. The Reconstruction Act of 1867 provided for universal suffrage as a condition of restoration. Until the states agreed to write that into their constitutions, they were to be subject to a period of military government. But it was a measure advocated by conservatives like Blaine as well as Radicals like Stevens. For conservatives, it was an alternative to proposals for a more far-reaching and prolonged assumption of federal power over the defeated states.¹ Carl Schurz used this argument to make a broad appeal for the proposals:

Far from desiring centralization repugnant to the genius of this country, it is in the distinct interest of local self-government and legitimate states rights that we urge these propositions, and nothing can be more certain than this is the only way in which a dangerous centralization of power in the hands of our general government can be prevented.²

It was not that they were solicitous for the South's sensitivities. It was their own sensitivities that caused them to draw back from radical alterations in the balance between nation and state, which must be permanent. Of course, there was a spectrum of opinion inside the Republican party. For many Republicans, the acceptance of universal male suffrage put an end to Reconstruction, again leaving the future to the states. Others, like Stevens and Sumner, could contemplate more in the way of federal change. But at the heart of the Republican party was a great unease about clothing the federal government with powers traditionally exercised by the states. They would go so far, but no further.

And so it is hardly surprising that the courts acted on many of the

1. Michael L. Benedict, "Preserving the Constitution: The Conservative Basis of Radical Reconstruction". Unpublished Paper, Rice University, 1970, used with the permission of the author.
2. Carl Schurz, "The True Problem", Atlantic Monthly, March, 1867, quoted, Ibid.

same conservative instincts. Generalisations about the record of the courts should of course be made cautiously, for their opinions reflect as varied understandings of the laws as the speeches of the men who debated them. Often the courts of both nation and state put broad and sympathetic constructions to recently made laws for the protection of individual rights in the states. State courts had been known to co-operate in making removal procedures work. But, particularly in the 1870's it did seem that there was a growing gap between the original legislative intentions, and later judicial constructions - notably in such questions as whether civil rights legislation reached individual violations where the laws themselves were "sufficient". Just as the pre-war Supreme Court had built up judicial conventions which affected the ways that Americans perceived their Constitution, and hence affected its real application (*Barron v. Baltimore* is a ready example), so too the post-war Court built conventions around the amended Constitution which in turn altered the way it worked. Judges might claim that they simply applied the laws, in a mechanical fashion. But they did more. The "dual citizenship" doctrine, or Conkling theory of the intention of the framers to protect corporations under the Fourteenth Amendment, were part of this process of change. Supporters of equal civil rights might resent such "extraconstitutional" deviations from the "true" Constitution, just as abolitionists resented *Barron v. Baltimore*, or *Dred Scott*. But there were no final truths to be achieved by changes in words. They had to be part of the living political fabric of the nation, of which the Constitution was the framework, and not the end. Courts and Congresses were part of that fabric, neither operating in a vacuum. And ten years after Appomattox, neither had the will to keep alive the original meaning of the words.

But the historian who confines his study of the failure of Reconstruction

to bring a real equality of civil rights, to what went wrong with the commitment in the 1870's, should study the nature of the original commitment. It was sincere - even idealistic. It was worth the cost of war - but not perpetual "centralization". At the height of their emotional commitment in the 1860's, they still tread carefully into the states. How much more so when they began to doubt the wisdom of the commitment.

But it would be too easy to end on a note of disappointment with the Civil War generation for allowing old notions of the limitations of government from preventing a real change in the service of equal rights. The incompleteness of our own education to the problems suggests the proverbial restraints on people who live in glass houses. It would also obscure the value of the lessons they did learn and apply, and undervalue what was now right with the Union and Constitution by comparison with what had been wrong with it.

Slavery, and its supports in state law had been rooted out. That itself was good news for four million men, women, and children. It was also good for the nation. It took away the most obvious and dangerous fuse for states rights, dissipating some of the energies which had served it in the past, and making it less lethal for the future.

The nation demonstrated the will to survive, and found the means under the Constitution. It was an important precedent. And the cost put a high price on its future.

Moreover, it was not just the fact of victory which strengthened the Union. There were changes going on under the surface. By increasing the jurisdiction of the federal courts, commensurate with the increase of subjects which were now federal questions - confiscation, indemnification, freedom, civil rights and so on - the nation was sending out roots to the

states, and establishing its presence there. By comparison with what was needed to secure racial justice, these roots were indeed frail. But they served the victors in other ways. It would be too strong a claim to say that here was the cement which held the Union together, forever to make a resort from law to arms impossible. Machinery itself can hold no such place in a democratic Union, held together by the extent to which ideas and interests are commonly shared. But it helped to have a foot in the door.

Making the national authority credible in the states was not a purely patriotic endeavour, or an exercise in the science of government. The national authority was no more an abstract good than "The Constitution". Both were given life by the ideas and interests they served. The Republicans were concerned to strengthen nation over state - to make policy decisions, on confiscation, reconstruction and so on work. Those who opposed the policies, also opposed the extent to which the states were being "invaded" on their behalf. In the reconstructed nation, the Republicans wished the machinery of Union and Constitution to go on serving the political will of the majority - in effect, the dominant section. It had not done so in 1861. In 1866, with the foundations laid, the prospects were brighter.

A P P E N D I X

- (a) An Act to confiscate Property used for Insurrectionary Purposes. August 6th, 1861.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if, during the present or any future insurrection against the Government of the United States, after the President of the United States shall have declared, by proclamation, that the laws of the United States are opposed, and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law, any person or persons, his, her or their agent, attorney, or employe, shall purchase or acquire, sell or give any property of whatsoever kind or description with intent to use or employ the same, or suffer the same to be used or employed in aiding, abetting, or promoting such insurrection or resistance to the laws, or any persons or persons engaged therein; or if any person or persons, being the owner or owners of any such property, shall knowingly use or employ, or consent to the use or employment of the same as aforesaid, all such property is hereby declared to be lawful subject of prize and capture wherever found; and it shall be the duty of the President of the United States to cause the same to be seized, confiscated and condemned.

2. And be it further enacted, That such prizes and capture shall be condemned in the district or circuit court of the United States having jurisdiction of the amount, or in admiralty in any district in which the same may be seized to which they may be taken and proceedings first instituted.
3. And be it further enacted, That the Attorney-General, or any district attorney of the United States in which said property may at the time be, may institute proceedings of condemnation, and in such case they shall be wholly for the benefit of the United States; or any person may file an information with such attorney, in which case the proceedings shall be for the use of the informer and the United States in equal parts.
4. And be it further enacted, That whenever hereafter, during the present insurrection against the Government of the United States, any person claimed to be held to labor or service under the law of any State, shall be required or permitted by the person to whom such labor or service is claimed to be due, or by the lawful agent of such person, to take up arms against the United States, or shall be required or permitted by the

person to whom such labor or service is claimed to be due, or his lawful agent, to work or be employed in or upon any fort, navy yard, dock, armory, ship, entrenchment or in any military or naval service whatsoever, against the Government and lawful authority of the United States, then, and in every such case, the person to whom such labor or service is claimed to be due shall forfeit his claim to such labor, and law of the State or of the United States to the contrary notwithstanding. Any whenever thereafter the person claiming such labor or service shall seek to enforce his claim, it shall be a full and sufficient answer to such claim that the person whose service or labor is claimed had been employed in hostile service against the Government of the United States, contrary to the provisions of this Act.

- (b) An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other purposes.
July 17th, 1862.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person who shall hereafter commit the crime of treason against the United States, and shall be adjudged guilty thereof, shall suffer death, and all his slaves, if any, shall be declared and made free; or, at the discretion of the court, he shall be imprisoned for not less than five years and fined not less than ten thousand dollars, and all his slaves, if any, shall be declared and made free; said fine shall be levied and collected on any or all the property, real and personal, excluding slaves, of which the said person so convicted was the owner at the time of committing the said crime, any sale or conveyance to the contrary notwithstanding.

2. Any be it further enacted, That if any person shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give aid or comfort thereto, or shall engage in, or give aid and comfort to, any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years; or by a fine not exceeding ten thousand dollars, and by the liberation of all his slaves, if any he have; or by both of said punishments, at the discretion of the court.
3. And be it further enacted, That every person guilty of either of the offences described in this act shall be forever incapable and disqualified to hold any office under the United States.
4. And be it further enacted, That this act shall not be construed in any way to affect or alter the prosecution, conviction, or punishment of any person or persons guilty of treason against the United States before the passage of this act, unless such person is convicted under this act.
5. And be it further enacted, That, to ensure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and

to apply and use the same and the proceeds thereof for the support of the Army of the United States, that is to say:

First. Of any person hereafter acting as an officer of the army or navy of the rebels in arms against the Government of the United States.

Secondly. Of any person hereafter acting as president, vice president, member of congress, judge of any court, cabinet officer, foreign minister, commissioners or consul of the so-called confederate States of America.

Thirdly. Of any person acting as governor of a State, member of a convention or legislature, or judge of any court of any of the so-called confederate States of America.

Fourthly. Of any person who, having held an office of honor, trust, or profit in the United States, shall hereafter hold an office in the so-called confederate States of America.

Fifthly. Of any person hereafter holding any office or agency under the government of the so-called confederate States of America, or under any of the several states of the said confederacy, or the laws thereof, whether such office or agency be national, State, or municipal in its name or character: Provided, That the persons thirdly, fourthly, and fifthly above described shall have accepted their appointment or election since the date of the pretended ordinance of secession of the State, or shall have taken an oath of allegiance to, or to support the constitution of the so-called confederate States.

Sixthly. Of any person who, owning property in any loyal State or Territory of the United States, or in the District of Columbia, shall hereafter assist and give aid and comfort to such rebellion; and all sales, transfers, or conveyances of any such property, shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section.

6. And be it further enacted, That if any person within any State or Territory of the United States, other than those named as aforesaid, after the passage of this act, being engaged in armed rebellion against the Government of the United States, or aiding or abetting such rebellion, shall not, within sixty days after public warning and proclamation duly given and

made by the President of the United States, cease to aid, countenance, and abet such rebellion, and return to his allegiance to the United States, all the estate and property, moneys, stocks, and credits of such person shall be liable to seizure as aforesaid, and it shall be the duty of the President to seize and use them as aforesaid or the proceeds thereof. And all sales, transfers, or conveyances of any such property after the expiration of the said sixty days from the date of such warning and proclamation shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section.

7. And be it further enacted, That to secure the condemnation and sale of any such property, after the same shall have been seized, so that it may be made available for the purpose aforesaid, proceedings in rem shall be instituted in the name of the United States in any district court thereof, or in any territorial court, or in the United States district court for the District of Columbia, within which the property above described, or any part thereof, may be found, or into which the same, if movable, may first be brought, which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases and if said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as enemies' property and become the property of the United States, and may be disposed of as the court shall decree and the proceeds thereof paid into the Treasury of the United States for the purposes aforesaid.
8. And be it further enacted, That the several courts aforesaid shall have power to make such orders, establish such forms of decree and sale, and direct such deeds and conveyances to be executed and delivered by the marshals thereof where real estate shall be the subject of sale, as shall fitly and efficiently effect the purposes of this act, and vest in the purchasers of such property good and valid titles thereto. And the said courts shall have powers to allow such fees and charges of their officers as shall be reasonable and proper in the premises.
9. And be it further enacted, That all slaves of persons who shall hereafter be engaged in rebellion against the Government of the United States, or who

shall in any way give aid or comfort thereto, escaping from such persons and taking refuge within the lines of the Army; and all slaves captured from such persons or deserted by them and coming into the control of the Government of the United States; and all slaves of such persons found on (or) being within any place occupied by rebel forces and afterwards occupied by the forces of the United States, shall be deemed captives of war, and shall be forever free of their servitude, and not again held as slaves.

10. And be it further enacted, That no slave escaping into any State, Territory, or the District of Columbia, from any other State, shall be delivered up, or in any way impeded or hindered of his liberty, except for crime, or some offense against the laws, unless the person claiming said fugitive shall first make oath that the person to whom the labor or service of such fugitive is alleged to be due is his lawful owner, and has not borne arms against the United States in the present rebellion, nor in any way given aid and comfort thereto; and no person engaged in the military or naval service of the United States shall, under any pretense whatever, assume to decide on the validity of the claim of any person to the service or labor of any other person, or surrender up any such person to the claimant, on pain of being dismissed from the service.
11. And be it further enacted, That the President of the United States is authorized to employ as many persons of African descent as he may deem necessary and proper for the suppression of this rebellion, and for this purpose he may organize and use them in such manner as he may judge best for the public welfare.
12. And be it further enacted, That the President of the United States is hereby authorized to make provision for the transportation, colonization, and settlement, in some tropical country beyond the limits of the United States, of such persons of the African race, made free by the provisions of this act, as may be willing to emigrate, having first obtained the consent of the Government of said country to their protection and settlement within the same, with all the rights and privileges of freemen.
13. And be it further enacted, That the President is hereby authorized, at any time hereafter, by proclamation, to extend to persons who may have participated in the existing rebellion in any State of part thereof, pardon

and amnesty, with such exceptions and at such time and on such conditions as he may deem expedient for the public welfare.

14. And be it further enacted, That the courts of the United States shall have full power to institute proceedings, make orders and decrees, issue process, and do all other things necessary to carry this act into effect.

- c) An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases.
March 3rd, 1863.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof. And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of habeas corpus, to return the body of any person or persons detained by him by authority of the President; but upon the certificate, under oath, of the officer having charge of any one so detained that such person is detained by him as a prisoner under authority of the President, further proceedings under the writ of habeas corpus shall be suspended by the judge or court having issued the said writ, so long as said suspension by the President shall remain in force, and said rebellion continue.

2. And be it further enacted, That the Secretary of State and the Secretary of War be, and they are hereby, directed, as soon as may be practicable, to furnish to the judges of the circuit and district courts of the United States and of the District of Columbia a list of the names of all persons, citizens of states in which the administration of the laws has continued unimpaired in the said Federal courts, who are now, or may hereafter be, held as prisoners of the United States, by order or authority of the President of the United States or either of said Secretaries, in any fort, arsenal, or other place, as state or political prisoners, or otherwise than as prisoners of war; the said list to contain the names of all those who reside in the respective jurisdictions of said judges, or who may be deemed by the said Secretaries, or either of them, to have violated any law of the United States in any of said jurisdictions, and also the date of each arrest; the Secretary of State to furnish a list of such persons as are imprisoned by the orders or authority of the President, acting through the State Department, and the Secretary of War a list of such as are imprisoned by the order or authority of the President, acting through the Department of War. And in all cases where a grand jury, having attended any of said courts having jurisdiction in the premises, after the passage

of this act, and after the furnishing of said list, as aforesaid, has terminated its session without finding an indictment or presentment, or other proceeding against any such person, it shall be the duty of the judge or said court forthwith to make an order that any such prisoner desiring a discharge from said imprisonment be brought before him to be discharged; and every officer of the United States having custody of such prisoner is hereby directed immediately to obey and execute said judge's order; and in case he shall delay or refuse so to do, he shall be subject to indictment for a misdemeanor, and be punished by a fine of not less than five hundred dollars and imprisonment in the common jail for a period not less than six months, in the discretion of the court: Provided, however, That no person shall be discharged by virtue of the provisions of this act until after he or she shall have taken an oath of allegiance to the Government of the United States and to support the Constitution thereof: and that he or she will not hereafter in any way encourage or give aid and comfort to the present rebellion, or the supporters thereof: And provided, also, That the judge or court before whom such persons may be brought, before discharging him or her from imprisonment, shall have power, on examination of the case, and, if the public safety shall require it, shall be required to cause him or her to enter into recognizance, with or without surety, in a sum to be fixed by said judge or court, to keep the peace and be of good behaviour towards the United States and its citizens, and from time to time, and at such times as such judge or court may direct, appear before said judge or court to be further dealt with, according to law, as the circumstances may require. And it shall be the duty of the district attorney of the United States to attend such examination before the judge.

3. And be it further enacted, That in case any of such prisoners shall be under indictment or presentment for any offence against the laws of the United States, and by existing laws bail or a recognizance may be taken for the appearance for trial of such person, it shall be the duty of said judge at once to discharge such person upon bail or recognizance for trial as aforesaid. And in case the said Secretaries of State and War shall for any reason refuse or omit to furnish the said list of persons held as prisoners as aforesaid at the time of the passage of this act within twenty days thereafter, and of such persons as hereafter may be arrested within twenty days from the time of the arrest, any citizen may, after a grand

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jury shall have terminated its session without finding an indictment or presentment, as provided in the second section of this act, by a petition alleging the facts aforesaid touching any of the persons so as aforesaid imprisoned, supported by the oath of such petitioner (or any other credible person) obtain and be entitled to have the said judge's order to discharge such prisoner on the same terms and conditions prescribed in the second section of this act: Provided, however, That the said judge shall be satisfied such allegations are true.

4. And be it further enacted, That any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending, or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress, and such defence may be made by special plea, or under the general issue.
5. And be it further enacted, That if any suit or prosecution, civil or criminal, has been or shall be commenced in any state court against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress, and the defendant shall, at the time of entering his appearance in such court, or if such appearance shall have been entered before the passage of this act, then at the next session of the court in which such suit or prosecution is pending, file a petition, stating the facts and verified by affidavit, for the removal of the cause for trial at the next circuit court of the United States, to be holden in the district where the suit is pending, and offer good and sufficient surety for his filing in such court, on the first day of its session, copies of such process and other proceedings against him, and also for his appearing in such court and entering special bail in the cause, if special bail was originally required therein. It shall then be the duty of the state court to accept the surety and proceed no further in the cause or prosecution, and the bail that shall have been originally taken shall be discharged. And such copies being filed as aforesaid in such court of the United States, the cause shall proceed therein in the same manner as if it had been brought in said court by original process,

whatever may be the amount in dispute or the damages claimed, or whatever the citizenship of the parties, any former law to the contrary notwithstanding. And any attachment of the goods or estate of the defendant by the original process shall hold the goods or estate so attached to answer the final judgment in the same manner as by the laws of such state they would have been holden to answer final judgment had it been rendered in the court in which the suit or prosecution was commenced. And it shall be lawful in any such action or prosecution which may be now pending, or hereafter commenced, before any state court whatever, for any cause aforesaid, after final judgment, for either party to remove and transfer, by appeal, such case during the session or term of said court at which the same shall have taken place, from such court to the next circuit court of the United States to be held in the district in which such appeal shall be taken, in manner aforesaid. And it shall be the duty of the person taking such appeal to produce and file in the said circuit court attested copies of the process, proceedings, and judgment in such cause; and it shall also be competent for either party, within six months after the rendition of a judgment in any such cause, by writ of error or other process, to remove the same to the circuit court of the United States of that district in which such judgment shall have been rendered; and 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. And any bail which may have been taken, or property attached, shall be holden on the final judgment of the said circuit court in such action, in the same manner as if no such removal and transfer had been made, as aforesaid. And the state court, from which any such action, civil or criminal, may be removed and transferred as aforesaid, upon the parties giving good and sufficient security for the prosecution thereof, shall allow the same to be removed and transferred, and proceed no further in the case: Provided, however, That if the party aforesaid shall fail duly to enter the removal and transfer, as aforesaid, in the circuit court of the United States, agreeably to this act, the state court, by which judgment shall have been rendered, and from which the transfer and removal shall have been made, as aforesaid, shall be authorized, on motion for that purpose, to issue execution, and to carry into effect any such judgment, the same as if no such removal and transfer had been made. And provided also, That no such appeal or writ of error shall be allowed in any

criminal action or prosecution where final judgment shall have been rendered in favor of the defendant or respondent by the state court. And if in any suit hereafter commenced the plaintiff is nonsuited or judgment pass against him, the defendant shall recover double costs.

6. And be it further enacted, That any suit or prosecution described in this act, in which final judgment may be rendered in the circuit court, may be carried by writ of error to the supreme court, whatever may be the amount of said judgment.
7. And be it further enacted, That no suit or prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or by or under any act of Congress, unless the same shall have been commenced within two years next after such arrest, imprisonment, trespass, or wrong may have been done or committed or act may have been omitted to be done: Provided, That in no case shall the limitation herein provided commence to run until the passage of this act, so that no party shall, by virtue of this act, be debarred of his remedy by suit or prosecution until two years from and after the passage of this act.

- d) An Act to guarantee to certain States whose governments have been usurped or overthrown a republican form of government.

July 2nd, 1864. Pocket-vetoed, July 8th, 1864.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in the States declared in rebellion against the United States the President shall, by and with the advice and consent of the Senate, appoint for each a provisional governor, whose pay and emoluments shall not exceed that of a brigadier-general of volunteers, who shall be charged with the civil administration of such State until a State government therein shall be recognized as hereinafter provided.

2. And be it further enacted, That so soon as the military resistance to the United States shall have been suppressed in any such State and the people thereof shall have sufficiently returned to their obedience to the Constitution and the laws of the United States the provisional governor shall direct the marshal of the United States, as speedily as may be, to name a sufficient number of deputies, and to enroll all white male citizens of the United States resident in the State in their respective counties, and to request each one to take the oath to support the Constitution of the United States, and in his enrollment to designate those who take and those who refuse to take that oath, which rolls shall be forthwith returned to the provisional governor; and if the persons taking that oath shall amount to a majority of the persons enrolled in the State, he shall, by proclamation, invite the loyal people of the State to elect delegates to a convention charged to declare the will of the people of the State relative to the re-establishment of a State government, subject to and in conformity with the Constitution of the United States.
3. And be it further enacted, That the convention shall consist of as many members as both houses of the last constitutional State legislature, apportioned by the provisional governor among the counties, parishes or district of the State, in proportion to the white population returned as electors by the marshal in compliance with the provisions of this act. The provisional governor shall, by proclamation, declare the number of delegates to be elected by each county, parish, or election district; name a day of election not less than thirty days thereafter; designate the places of voting in each county, parish or district, conforming as nearly as may be

convenient to the places used in the State elections next preceding the rebellion; appoint one or more commissioners to hold the election at each place of voting, and provide an adequate force to keep the peace during the election.

4. And be it further enacted, That the delegates shall be elected by the loyal white male citizens of the United States of the age of 21 years, and resident at the time in the county, parish, or district in which they shall offer to vote, and enrolled as aforesaid, or absent in the military service of the United States, and who shall take and subscribe the oath of allegiance to the United States in the form contained in the act of Congress of July 2nd, 1862; and all such citizens of the United States who are in the military service of the United States shall vote at the headquarters of their respective commands, under such regulations as may be prescribed by the provisional governor for the taking and return of their votes; but no person who has held or exercised any office, civil or military, State or Confederate, under the rebel usurpation, or who has voluntarily borne arms against the United States, shall vote or be eligible to be elected as delegate at such election.
5. And be it further enacted, That the said commissioners, or either of them, shall hold the election in conformity with this act, and, so far as may be consistent therewith, shall proceed in the manner used in the State prior to the rebellion. The oath of allegiance shall be taken and subscribed on the poll book by every voter in the form above prescribed, but every person known by or proved to the commissioners to have held or exercised any office, civil or military, State or Confederate, under the rebel usurpation, or to have voluntarily borne arms against the United States, shall be excluded though he offer to take the oath; and in case any person who shall have borne arms against the United States shall offer to vote, he shall be deemed to have borne arms voluntarily unless he shall prove the contrary by the testimony of a qualified voter. The poll book, showing the name and oath of each voter, shall be returned to the provisional governor by the commissioners of election, or the one acting, and the provisional governor shall canvass such returns and declare the person having the highest number of votes elected.
6. And be it further enacted, That the provisional governor shall, by proclamation, convene the delegates elected as aforesaid at the capital of the State

on a day not more than three months after the election, giving at least thirty days' notice of such day. In case the said capital shall in his judgment be unfit, he shall in his proclamation appoint another place, He shall preside over the deliberations of the convention and administer to each delegate, before taking his seat in the convention, the oath of allegiance to the United States in the form above prescribed.

7. And be it further enacted, That the convention shall declare on behalf of the people of the State their submission to the Constitution and laws of the United States, and shall adopt the following provisions, hereby prescribed by the United States in the execution of the constitutional duty to guarantee a republican form of government to every State, and incorporate them in the constitution of the State; that is to say:

First. No person who has held or exercised any office, civil or military (except offices merely ministerial and military offices below the grade of colonel), State or Confederate, under the usurping power, shall vote for or be a member of the legislature or governor.

Second. Involuntary servitude is forever prohibited, and the freedom of all persons is guaranteed in said State.

Third. No debt, State or Confederate, created by or under the sanction of the usurping power shall be recognized or paid by the State.

8. And be it further enacted, That when the convention shall have adopted those provisions it shall proceed to re-establish a republican form of government and ordain a constitution containing those provisions, which when adopted, the convention shall by ordinance provide for submitting to the people of the State entitled to vote under this law, at an election to be held in the manner prescribed by the act for the election of delegates, but at a time and place named by the convention, at which election the said electors, and none others, shall vote directly for or against such Constitution and form of State government. And the returns of said election shall be made to the provisional governor, who shall canvass the same in the presence of the electors, and if a majority of the votes cast shall be for the constitution and form of government, he shall certify the same, with a copy thereof, to the President of the United States, who, after obtaining the assent of Congress, shall, by proclamation, recognize the government so established, and none other, as the constitutional government

of the State; and from the date of such recognition, and not before, Senators and Representatives and electors for President and Vice-President may be elected in such State, according to the laws of the State and of the United States.

9. And be it further enacted, That if the convention shall refuse to re-establish the State government on the conditions aforesaid the provisional governor shall declare it dissolved; but it shall be for the duty of the President, whenever he shall have reason to believe that a sufficient number of the people of the State entitled to vote under this act, in number not less than a majority of those enrolled as aforesaid, are willing to re-establish a State government on the conditions aforesaid, to direct the provisional governor to order another election of delegates to a convention for the purpose and in the manner prescribed in this act, and to proceed in all respects as hereinbefore provided, either to dissolve the convention or to certify the State government re-established by it to the President.
10. And be it further enacted, That until the United States shall have recognized a republican form of State government the provisional governor in each of said States shall see that this act and the laws of the United States and the laws of the State in force when the State government was overthrown by the rebellion are faithfully executed within the State; but no law or usage whereby any person was heretofore held in involuntary servitude shall be recognized or enforced by any court or officer in such State; and the laws for the trial and punishment of white persons shall extend to all persons, and jurors shall have the qualifications of voters under this law for delegates to the convention. The President shall appoint such officers provided for by the laws of the State when its government was overthrown as he may find necessary to the civil administration of the State, all which officers shall be entitled to receive the fees and emoluments provided by the State laws for such officers.
11. And be it further enacted, That until the recognition of a State government as aforesaid the provisional governor shall, under such regulations as he may prescribe, cause to be assessed, levied, and collected, for the year 1864 and every year thereafter, the taxes provided by the laws of such State to be levied during the fiscal year preceding the overthrow of the State government thereof, in the manner prescribed by the laws of the State,

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as nearly as may be; and the officers appointed as aforesaid are vested with all powers of levying and collecting such taxes, by distress or sale, as were vested in any officers or tribunal of the State government aforesaid for those purposes. The proceeds of such taxes shall be accounted for to the provisional governor and be by him applied to the expenses of the administration of the laws in such State, subject to the direction of the President, and the surplus shall be deposited in the Treasury of the United States to the credit of such State, to be paid to the State upon an appropriation therefor to be made when a republican form of government shall be recognized therein by the United States.

12. And be it further enacted, That all persons held to involuntary servitude or labor in the State aforesaid are hereby emancipated and discharged therefrom, and they and their posterity shall be forever free. And if any such persons or their posterity shall be restrained of liberty under pretense of any claim to such service or labor, the courts of the United States shall, on habeas corpus, discharge them.
13. And be it further enacted, That if any person declared free by this act, or any law of the United States or any proclamation of the President, be restrained of liberty with intent to be held in or reduced to involuntary servitude or labor, the person convicted before a court of competent jurisdiction of such act shall be punished by fine of not less than \$1,500 and be imprisoned not less than five nor more than twenty years.
14. And be it further enacted, That every person who shall hereafter hold or exercise any office, civil or military (except offices merely ministerial and military offices below the grade of colonel), in the rebel service, State or Confederate, is hereby declared not to be a citizen of the United States.

- (e) An Act to amend an act entitled "An act to establish a Bureau for the relief of Freedmen and Refugees", and for other purposes.

February 9th, 1866. Vetoed, February 19th.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act to establish a bureau for the relief of freedmen and refugees, approved March three, eighteen hundred and sixty-five, shall continue in force until otherwise provided by law, and shall extend to refugees and freedmen in all parts of the United States; and the President may divide the section of country containing such refugees and freedmen into districts, each containing one or more States, not to exceed twelve in number, and, by and with the advice and consent of the Senate, appoint an assistant commissioner for each of said districts, who shall give like bond, receive the compensation, and perform the duties prescribed by this and the act to which this is an amendment or said bureau may, in the discretion of the President, be placed under a commissioner and assistant commissioners, to be detailed from the army; in which event each officer so assigned to duty shall serve without increase of pay or allowances.

2. And be it further enacted, That the commissioner, with the approval of the President, and when the same shall be necessary for the operations of the bureau, may divide each district into a number of sub-districts, not to exceed the number of counties or parishes in such district, and shall assign to each sub-district at least one agent, either a citizen, officer of the army, or enlisted man, who, if an officer, shall serve without additional compensation or allowance, and if a citizen or enlisted man, shall receive a salary of not less than five hundred dollars nor more than twelve hundred dollars annually, according to the services rendered, in full compensation for such services; and such agent shall, before entering on the duties of his office, take the oath prescribed in the first section of the act to which this is an amendment. And the commissioner may, when the same shall be necessary, assign to each assistant commissioner not exceeding three clerks, and to each of said agents one clerk, at an annual salary not exceeding one thousand dollars each, provided suitable clerks cannot be detailed from the army. And the President of the United States, through the War Department and the commissioner, shall extend military

jurisdiction and protection over all employes, agents, and officers of this bureau in the exercise of the duties imposed or authorized by this act or the act to which this is additional.

3. And be it further enacted, That the Secretary of War may direct such issues of provisions, clothing, fuel and other supplies, including medical stores and transportation, and afford such aid, medical or otherwise, as he may deem needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen, their wives and children, under such rules and regulations as he may direct: Provided, That no person shall be deemed "destitute", "suffering", or "dependent upon the Government for support", within the meaning of this act, who, being able to find employment, could by proper industry and exertion avoid such destitution, suffering, or dependence.
4. And be it further enacted, That the President is hereby authorized to reserve from sale, or from settlement, under the homestead or pre-emption laws, and to set apart for the use of freedmen and loyal refugees, unoccupied public lands in Florida, Mississippi, Alabama, Louisiana, and Arkansas, not exceeding in all three millions of acres of good land; and the commissioner, under the direction of the President, shall cause the same from time to time to be allotted and assigned, in parcels not exceeding forty acres each, to the loyal refugees and freedmen, who shall be protected in the use and enjoyment thereof for such term of time and at such annual rent as may be agreed on between the commissioner and such refugees or freedmen. The rental shall be based upon a valuation of the land, to be ascertained in such manner as the commissioner may, under the direction of the President, by regulation prescribe. At the end of such term, or sooner, if the commissioner shall assent thereto, the occupants of any parcels so assigned, their heirs and assigns, may purchase the land and receive a title thereto from the United States in fee, upon paying therefor the value of the land ascertained as aforesaid.
5. And be it further enacted, That the occupants of land under Major General Sherman's special field order, dated at Savannah, January sixteen, eighteen hundred and sixty-five, are hereby confirmed in their possession for the period of three years from the date of said order, and no person shall be disturbed in or ousted from said possession during said three years, unless

a settlement shall be made with said occupant, by the former owner, his heirs or assigns, satisfactory to the commissioner of the Freedmen's Bureau: Provided, That whenever the former owners of lands occupied under General Sherman's field order shall make application for restoration of said lands, the commissioner is hereby authorized, upon the agreement and with the written consent of said occupants, to procure other lands for them by rent or purchase, not exceeding forty acres for each occupant, upon the terms and conditions named in section four of this act, or to set apart for them, out of the public lands assigned for that purpose in section four of this act, forty acres each, upon the same terms and conditions.

6. And be it further enacted, That the commissioner shall, under the direction of the President, procure in the name of the United States by grant or purchase, such lands within the districts aforesaid as may be required for refugees and freedmen dependent on the Government for support; and he shall provide or cause to be erected suitable buildings for asylums and schools. But no such purchase shall be made, nor contract for the same entered into, nor other expense incurred, until after appropriations shall have been provided by Congress for such purposes. And no payment shall be made for lands purchased under this section, except for asylums and schools, from any moneys, not specifically appropriated therefor. And the commissioner shall cause such lands from time to time to be valued, allotted, assigned, and sold in manner and form provided in the fourth section of this act, at a price not less than the cost thereof to the United States.
7. And be it further enacted, That whenever in any State or district in which the ordinary course of judicial proceedings has been interrupted by the rebellion, and wherein, in consequence of any State or local law, ordinance, police or other regulation, custom, or prejudice, any of the civil rights or immunities belonging to white persons, including the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms, are refused or denied to negroes, mulattoes, freedmen, refugees, or any other persons, on account of race, color, or any previous condition of slavery or involuntary servitude, or wherein they or any of them are

subjected to any other or different punishment, pains, or penalties, for the commission of any act or offence than are prescribed for white persons committing like acts or offences, it shall be the duty of the President of the United States, through the commissioner, to extend military protection and jurisdiction over all cases affecting such persons so discriminated against.

8. And be it further enacted, That any person who, under color of any State or local law, ordinance, police, or other regulation or custom, shall, in any State or district in which the ordinary course of judicial proceedings has been interrupted by the rebellion, subject, or cause to be subjected, any negro, mulatto, freedman, refugee, or other person, on account of race or color, or any previous condition of slavery or involuntary servitude, or for any other cause, to the deprivation of any civil right secured to white persons, or to any other or different punishment than white persons are subject to for the commission of like acts or offences, shall be deemed guilty of a misdemeanour, and be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both; and it shall be the duty of the officers and agents of this bureau to take jurisdiction of, and hear and determine all offences committed against the provisions of this section, and also of all cases affecting negroes, mulattoes, freedmen, refugees, or other persons who are discriminated against in any of the particulars mentioned in the preceding section of this act, under such rules and regulations as the President of the United States, through the War Department, shall prescribe. The jurisdiction conferred by this and the preceding section on the officers and agents of this bureau shall cease and determine whenever the discrimination on account of which it is conferred ceases, and in no event to be exercised in any State in which the ordinary course of judicial proceedings has not been interrupted by the rebellion, nor in any such State after said State shall have been fully restored in all its constitutional relations to the United States, and the courts of the State and of the United States within the same are not disturbed or stopped in the peaceable course of justice.
9. And be it further enacted, That all acts, or parts of acts, inconsistent with the provisions of this act, are hereby repealed.

- (f) An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.

April 9th, 1866.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, (lease), sell, (hold), and convey real and personal property, and to 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.

2. And be it further enacted, That any person who, under color of any law, (statute, ordinance, regulation, or custom,) shall subject, (or cause to be subjected,) any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, (pains, or penalties) on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanour, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.
3. 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 of all crimes and offences committed against the provisions of this act, (and also, 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

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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, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, 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. The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

4. And be it further enacted, That the district attorneys, marshals, and deputy marshals of the United States, the commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting, imprisoning or bailing offenders against the laws of the United States, the officers and agents of the Freedmen's Bureau, and every other officer who may be specially empowered by the President of the United States, shall be, and they are hereby, specially authorized and required, at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed, as the case

may be, for trial before such court of the United States or territorial court as by this act has cognizance of the offence. And with a view to affording reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race or color, or previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, and to the prompt discharge of the duties of this act, it shall be the duty of the circuit courts of the United States, and the superior courts of the Territories of the United States, from time to time, to increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with a violation of this act; and such commissioners are hereby authorized and required to exercise and discharge all the powers and duties conferred on them by this act, and the same duties with regard to offences created by this act, as they are authorized by law to exercise with regard to other offences against the laws of the United States.

5. And be it further enacted, That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant or other process when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of the person upon whom the accused is alleged to have committed the offence. And the better to enable the said commissioners to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States and the requirements of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing, under their hands, any one or more suitable persons from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; and the persons so appointed to execute any warrant or process as aforesaid shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the clause of the Constitution which prohibits slavery, in conformity with the provisions of this act; and said warrants

shall run and be executed by said officers anywhere in the State or Territory within which they are issued.

6. And be it further enacted, That any person who shall knowingly and willfully obstruct, hinder, or prevent any officer, or other person charged with the execution of any warrant or process issued under the provisions of this act, or any person or persons lawfully assisting him or them, from arresting any person for whose apprehension such warrant or process may have been issued, or shall rescue or attempt to rescue such person from the custody of the officer, other person or persons, or those lawfully assisting as aforesaid, when so arrested pursuant to the authority herein given and declared, or shall aid, abet, or assist any person so arrested as aforesaid, directly or indirectly, to escape from the custody of the officer or other person legally authorized as aforesaid, or shall harbor or conceal any person for whose arrest a warrant or process shall have been issued as aforesaid, so as to prevent his discovery and arrest after notice or knowledge of the fact that a warrant has been issued for the apprehension of such person, shall, for either of said offenses, be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, by indictment and conviction before the district court of the United States for the district in which said offence may have been committed, or before the proper court of criminal jurisdiction, if committed within any one of the organized Territories of the United States.
7. And be it further enacted, That the district attorneys, the marshals, their deputies, and the clerks of the said district and territorial courts shall be paid for their services the like fees as may be allowed to them for similar services in other cases; and in all cases where the proceedings are before a commissioner, he shall be entitled to a fee of ten dollars in full for his services in each case, inclusive of all services incident to such arrest and examination. The person or persons authorized to execute the process to be issued by such commissioners for the arrest of offenders against the provisions of this act shall be entitled to a fee of five dollars for each person he or they may arrest and take before any such commissioner as aforesaid, with such other fees as may be deemed reasonable by such commissioner for such other additional services as may be necessarily performed by him or them, such as attending at the examination, keeping the prisoner in custody, and providing him with food and

lodging during his detention, and until the final determination of such commissioner, and in general for performing such other duties as may be required in the premises; such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper district or county, as nearly as may be practicable, and paid out of the Treasury of the United States on the certificate of the judge of the district within which the arrest is made, and to be recoverable from the defendant as part of the judgment in case of conviction.

8. And be it further enacted, That whenever the President of the United States shall have reason to believe that offences have been or are likely to be committed against the provisions of this act within any judicial district, it shall be lawful for him, in his discretion, to direct the judge, marshal, and district attorney of such district to attend at such place within the district, and for such time as he may designate, for the purpose of the more speedy arrest and trial of persons charged with a violation of this act; and it shall be the duty of every judge or other officer, when any such requisition shall be received by him, to attend at the place and for the time therein designated.
9. And be it further enacted, That it shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and enforce the due execution of this act.
10. And be it further enacted, That upon all questions of law arising in any case under the provisions of this act a final appeal may be taken to the Supreme Court of the United States.

B I B L I O G R A P H Y

Manuscripts.

Salmon P. Chase Papers. Library of Congress.
The Papers of the Attorneys General. Record Group 60, National Archives.

Cases.

United States Reports.
Federal Cases.
Federal Reports.
The Reports of individual State Supreme Courts, or Courts of Appeal.

Finding Aids.

The Century Digest.
Corpus Juris Secundum.
United States Code Annotated.

Public Documents.

Congressional Globe, 37th, 38th, and 39th Congresses.
Official Opinions of the Attorneys Generals of the United States.
40 vols. Washington: Government Printing Office 1791-1948.
Report of the Joint Committee on Reconstruction at the First Session,
Thirty-Ninth Congress. Washington: Government Printing Office,
1866.
Richardson, James D., comp. A Compilation of the Messages and Papers
of the Presidents. 10 vols. Washington: Government Printing Office,
1897.
Thorpe, Francis N., ed. The Federal and State Constitutions, Colonial
Charters, and Other Organic Laws. 7 vols. Washington: Government
Printing Office, 1909.
United States Statutes at Large.
United States, War Department. The War of the Rebellion: A
Compilation of the Official Records of the Union and Confederate
Armies. 128 vols. Washington: Government Printing Office, 1880-
1901.

Newspaper.

The Liberator.

Printed Sources - Books.

Basler, Roy P., ed. Collected Works of Abraham Lincoln. 9 vols.
New Brunswick: Rutgers University Press, 1953.
Bates, Edward. The Diary of Edward Bates, ed. Howard K. Beale.
Washington: Government Printing Office, 1933.
Bishop, Joel P. Commentaries on the Criminal Law. Boston:
Little, Brown, 1872.
Black, Henry C. A Treatise on the laws and Practice Governing the
Removal of Causes. St. Paul: West Publishing Co. 1898.
Blaine, James G. Twenty Years of Congress: from Lincoln to Garfield.
2 vols. Norwich: The Henry Bill Co., 1884-1886.

- 307.
- Boutwell, George S. Reminiscences of Sixty Years in Public Affairs. 2 vols. N.Y.: McClure, Phillips & Co., 1902.
- , Speeches and Papers Relating to the Rebellion and the Overthrow of Slavery. 2 vols. Boston: Little Brown & Co., 1867.
- Brotherhood of Liberty. Justice and Jurisprudence; an Inquiry Concerning the Constitutional Limitations of the Thirteenth, Fourteenth, and Fifteenth Amendments. N.Y. Negro Universities Press, 1969.
- Browning, Orville H. The Diary of Orville Hickman Browning, ed. Theodore C. Pease and James G. Randall. 2 vols. Springfield: Illinois State Hist. Soc. Library, 1925.
- Brownson, Orestes A. The American Republic. Its Constitution, Tendencies and Destiny. Louisville: Lost Cause Press, 1969.
- Catterall, Helen T. Judicial Cases Concerning American Slavery and the Negro. 5 vols. Washington: Carnegie Institution, 1926-1937.
- Chase, Salmon P. Inside Lincoln's Cabinet; The Civil War Diaries of Salmon P. Chase, ed. David Donald. N.Y.: Longman, Green & Co., 1954.
- Cole, Cornelius. Memoirs of Cornelius Cole. N.Y.: McLoughlin Bros., 1908.
- Cooley, Thomas M. A Treatise on the Constitutional Limitations Which Rest Upon The Legislative Powers of the States of the American Union. Boston: Little, Brown & Co., 1871.
- Cox, Samuel S. Eight Years in Congress from 1857 to 1865. N.Y.: D. Appleton & Co., 1865.
- , Union - Disunion - Reunion. Three Decades of Federal Legislation 1855-1885. Providence: Reid, 1886.
- Dana, Charles A. Recollections of the Civil War. N.Y.: D. Appleton & Co., 1898.
- De Forest, John W. A Union Officer in the Reconstruction, ed. James H. Croushore and David M. Potter. New Haven: Yale University Press, 1948.
- Douglass, Frederick. Life and Times of Frederick Douglass. Hartford: Park Co., 1881.
- Farrar, C. C. S. The War. Its Causes and Consequences. Cairo, Memphis & Paducak; Blelock & Co., 1864.
- Farrar, Timothy. Manual of the Constitution of the United States of America. Boston: Little, Brown & Co., 1867.
- Fisher, Sidney G. A Philadelphia Perspective. The Diary of Sidney George Fisher, ed. Nicholas B. Wainwright. Philadelphia: Historical Society of Pennsylvania, 1967.
- Foner, Philip S. ed. The Life and Writings of Frederick Douglas 4 vols. N.Y.: International Publishers, 1950-1955.
- Hurd, Rollin C. A Treatise on the Right of Personal Liberty and the Writ of Habeas Corpus. Albany: W. C. Little & Co., 1858.
- Julian, George W. Political Recollections 1840-to 1872. Chicago: Jansen, McClurg & Co., 1884.
- , Speeches on Political Questions. N.Y.: Hurd & Houghton, 1872.
- Hendrick, Benjamin B., ed. The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867. N.Y.: Columbia University Press, 1914.

- Lieber, Francis. Essays on Property and Labor as Connected with Natural Law and the Constitution of Society. N.Y.: Harper & Bros., 1841.
- , On Civil Liberty and Self-Government, ed. Theodore D. Woolsey. Philadelphia: J. B. Lippincott Co., 1911.
- McClure, Alexander K. Recollections of Half a Century. Salem: Salem Press Co., 1902.
- McCulloch, Hugh. Men and Measures of Half a Century. N.Y.: Scribner's, 1888.
- McPherson, Edward. The Political History of the United States of America During the Great Rebellion. Washington: Solomons & Chapman, 1865.
- , The Political History of the United States of America During the Period of Reconstruction. Washington: Solomons & Chapman, 1875.
- Mulford, Elias. The Nation: The Foundations of Civil Order and Political Life in the United States. N.Y.: Hurd & Houghton, 1870.
- Nicolay, John G. and Hay, John. Abraham Lincoln, a History. 10 vols. N.Y.: The Century Co., 1917.
- Parsons, Theophilus. The Political, Personal, and Property Rights of a Citizen of the United States. 2 vols. Chicago: Beach & Co., 1875.
- Pierce, Edward L. Memoirs and Letters of Charles Sumner. 4 vols. London, 1878-1893.
- Pomeroy, John N. An Introduction to the Constitutional Law of the United States. Boston & N.Y.: Houghton, Mifflin & Co., 1886.
- Riddle, Albert G. Recollections of War Times; Reminiscences of Men and Events in Washington 1860-1865. N.Y.: Putnam's, 1895.
- Schouler, James. Constitutional Studies, State and Federal. N.Y.: Dodd, Mead & Co., 1897.
- Sherman, John. Recollections of Forty Years in the House, Senate, and Cabinet. 2 vols. Chicago: The Werner Co., 1895.
- Strong, George T. The Diary of George Templeton Strong, ed. Alan Nevins and Milton H. Thomas. 4 vols. N.Y.: Macmillan, 1952.
- Sumner, Charles A. Works. 15 vols. Boston: Lee & Shepherd, 1870-1873.
- Tourgee, Albion W. A Fool's Errand, ed. John Hope Franklin. Cambridge: Belknap, 1961.
- Welles, Gideon. The Diary of Gideon Welles, ed. Howard K. Beale. N.Y.: Norton, 1960.
- Whiting, William. War Powers Under the Constitution of the United States. Boston & N.Y.: Lee & Shepherd, 1871.

Printed Sources - Articles, Speeches, Pamphlets.

- (Anonymous). "The Right to Confiscate and Emancipate", Monthly Law Reporter, 24 (September 1862), 645-656.
- , "The Power of Congress to Confiscate and Emancipate", Monthly Law Reporter, 24 (June 1862), 469-495.
- , "American Judges", Albany Law Review (March 1870).
- , "United States Provisional Court for the State of Louisiana", American Law Register, 13 (December 1864; March 1865).

- 307.
- Appleton, John. "Equality Before the Law in the Courts of the United States", The Law Magazine and Review, 17 (1864), 137-153.
- Baldwin, Simeon E. "The Citizen of the United States", Yale Law Journal, 2 (February 1893).
- , "Recent Changes in Our State Constitutions", Journal of Social Science, Transactions of the American Association, 10 (1879).
- Banks, Nathaniel P. An Address at the Customhouse, New Orleans, July 4, 1865. N.Y.: Harper & Bros., 1865.
- Barrett, George C. "The Administration of Criminal Justice", Journal of Social Science, Transactions of the American Association, 2 (1870).
- Cary, John W. "Limitations of the Legislative Power in Respect to Personal Rights and Private Property", Reports of the American Bar Association, XV (1892), 245-286.
- Chamberlain, D. W. "The State Judiciary. Its Place in the American Constitutional System", in Constitutional History of the United States as Seen in the Development of American Law. N.Y.: 1889.
- Curtis, B. R. Executive Power. Boston: Little, Brown & Co., 1862.
- Curtis, George T. On Constitutional Liberty. N.Y.: McClellan Campaign Document No.7, 1864.
- Dana, Richard. "Nullity of the Emancipation Edict", North American Review, 131.
- Dillon, John F. "A Century of American Law", New York Bar Association Reports, 13 (1890).
- Douglass, Frederick. "Reconstruction", Atlantic Monthly, XVIII (December 1866).
- Ferris, Aaron A. "The Validity of the Emancipation Edict", North American Review, 131.
- Field, David Dudley. "Centralization in the Federal Government", North American Review, CLXCIV (May 1881).
- Fisher, Sidney George. "The Suspension of Habeas Corpus During the War of the Rebellion", Political Science Quarterly, 3 (September 1888).
- Godkin, E. L. "The Constitution and Its Defects", North American Review (July 1864).
- , "The Lesson of the Crisis", The Nation, 4 (January 17th, 1867) 50-51.
- Heiskell, J. B. "Conflict Between Federal and State Court Decisions", American Law Review, XVI (October 1882). 743-760.
- Hurd, John C. "Theories on Reconstruction", American Law Review, 1 (January 1867).
- Lowell, James R. "Reconstruction", North American Review (April 1865).
- McQuillon, Eugene. "Some Observations on State Laws and Municipal Ordinances", Central Law Journal 64, 209.
- Nott, C. C. "The Burden of the Supreme Court", The Nation, 10 (January 13th, 1870), 22-24.
- Parker, Joel. "Constitutional Law", North American Review, XLIV (April, 1862).
- , "Habeas Corpus and Martial Law", North American Review 93.

- Pierce, Edward L. "The Contrabands at Fortress Monroe", Atlantic Monthly, VIII (November 1861).
- Sedgwick, A. G. "The Bar and the Judges", The Nation 9 (December 16th, 1869), 529-530.
- Smith, Eugene, "Conflict of State Laws", Journal of Social Science, Transactions of the American Association, 19 (1884).
- Stearns, George L. The Equality of All Men before the Law Claimed and Defended: In Speeches by William D. Kelley, Wendell Phillips, and Frederick Douglass. Boston: Rand & Avery, 1865.
- Tucker, John Randolph. Address Delivered Before the Phoenix and Philomathean Societies of William and Mary College, 3rd July, 1854. Richmond: 1854.
- Washburn, Emory. "Reconstruction. The Duty of the Profession to the Times", Monthly Law Reporter, 26 (July 1864).
- , Lecture Before the Members of the Harvard Law School, January 11th, 1861. Boston: 1861.
- , "Limitations of Judicial Power", Journal of Social Science, Transactions of the American Association, 8 (1876).
- Woolsey, T. D. "Nature and Sphere of Police Powers", Journal of Social Science, Transactions of the American Association, 3 (1871).

Secondary Materials - Books.

- Abraham, Henry J. The Judicial Process; An Introductory Analysis of the Courts of the United States, England and France. N.Y.: Oxford University Press, 1962.
- Bartlett, Irving H. The American Mind in the Mid-Nineteenth Century. N.Y.: Cromwell, 1967.
- Bauer, Elizabeth K. Commentaries on the Constitution, 1790-1860. N.Y.: Columbia University, 1952.
- Beale, Howard K. The Critical Year: A Study of Andrew Johnson and Reconstruction. N.Y.: Ungar, 1958.
- Belden, Thomas Graham, and Belden, Marva R. So Fell The Angels. Boston, Toronto: Little, Brown & Co., 1956.
- Belz, Herman. Reconstructing the Union: Theory and Practice During the Civil War. N.Y.: Cornell University Press, 1969.
- Bentley, George R. A History of the Freedmen's Bureau. Philadelphia: University of Pennsylvania Press, 1955.
- Bowers, Claude G. The Tragic Era: The Revolution After Lincoln. Cambridge: Houghton, Mifflin & Co., 1929.
- Brock, William R. An American Crisis: Congress and Reconstruction, 1865-1867. N.Y.: St. Martin's Press, 1963.
- Brodie, Fawn M. Thaddeus Stevens: Scourge of the South. N.Y.: Norton, 1959.
- Burgess, John W. The Civil War and the Constitution, 1859-1865. N.Y.: Charles Scribner's Sons, 1901.
- Commager, Henry S. The American Mind. An Interpretation of American Thought and Character Since the 1880's. New Haven: Yale University Press, 1950.
- Corwin, Edward S. Liberty Against Government - The Rise, Flowering and Decline of a Famous Juridical Concept. Baton Rouge: Louisiana State University Press, 1948.

- Cox, Lawanda and John H. Politics, Principle and Prejudice 1865-1866. Dilema of Reconstruction America. N.Y.: Free Press of Glencoe, 1963.
- Craven, Avery. Reconstruction: The Ending of the Civil War. N.Y.: Holt, Rinehart & Winston Inc., 1969.
- Crosskey, William W. Politics and the Constitution in the History of the United States. Chicago: The University of Chicago Press, 1953.
- Current, Richard. The Lincoln Nobody Knows. N.Y.: McGraw-Hill, 1958.
- Donald, David. The Politics of Reconstruction 1863-1867. Baton Rouge: Louisiana State University Press, 1965.
- , Lincoln Reconsidered. N.Y.: Random House, 1961.
- , Charles Sumner and The Rights of Man. N.Y.: Knopf, 1970.
- Du Bois, W. E. B. Black Reconstruction. N.Y.: Harcourt, Brace & Co., 1935.
- Dunning, William A. Reconstruction, Political and Economic 1865-1877. N.Y.: Harper Bros., 1907.
- Dusinberre, William. Civil War Issues in Philadelphia 1856-1865. Philadelphia: University of Pennsylvania Press, 1965.
- Elezar, Daniel J. The American Partnership: Intergovernmental Co-operation in the Nineteenth-Century United States. Chicago: The University of Chicago Press, 1962.
- Emerson, Thomas I, Haber, David, and Dorsen, Norman. Political and Civil Rights in the United States; a collection of legal and related materials. Boston: Little, Brown & Co., 1967.
- Fairman, Charles. Mr. Justice Miller and the Supreme Court 1862-1890. Cambridge: Harvard University Press, 1939.
- Flack, Horace Edgar. The Adoption of the Fourteenth Amendment. Baltimore: The Johns Hopkins Press, 1908.
- Frankfurter, Felix, and Landis, James M. The Business of the Supreme Court. A Study in the Federal Judicial System. N.Y.: Macmillan, 1927.
- Frederickson, George M. The Inner Civil War: Northern Intellectuals and the Crisis of the Union. N.Y.: Harper & Row, 1965.
- Graham, Howard J. Everyman's Constitution. Madison: State Historical Society of Wisconsin, 1968.
- Harris, Robert J. The Quest For Equality. The Constitution, Congress and the Supreme Court. Baton Rouge: Louisiana State University Press, 1960.
- Hesseltine, W. B. Lincoln's Plan of Reconstruction. Tuscaloosa: Confederate Publishing Co., 1960.
- Hurst, James W. Law and Conditions of Freedom in the Nineteenth Century United States. Madison, Milwaukee & London: University of Wisconsin Press, 1967.
- Hyman, Harold M., ed. The Radical Republicans and Reconstruction 1861-1870. Indianapolis and N.Y.: Bobbs-Merrill Co., 1967.
- , ed. New Frontiers of the American Reconstruction. Urbana: University of Illinois Press, 1966.
- Jacobs, Clyde E. Law Writer and the Courts. Berkeley and Los Angeles. University of California Press, 1954.
- James, Joseph B. The Framing of the Fourteenth Amendment. Urbana: University of Illinois Press, 1965.

- Jellison, Charles A. Fessenden of Maine, Civil War Senator. N.Y.: Syracuse University Press, 1962.
- Kelly, Alfred H. and Harbison, Winfred A. The American Constitution. Its Origins and Development. N.Y.: Norton, 1963.
- Konvitz, Milton R. A Century of Civil Rights. N.Y.: Columbia University Press, 1961.
- Korngold, R. Thaddeus Stevens. Boston: Little, Brown & Co., 1950.
- Kutler, Stanley I. Judicial Power and Reconstruction Politics. Chicago: University of Chicago Press, 1968.
- Landynski, Jacob W. Search and Seizure and the Supreme Court. A Study in Constitutional Interpretation. Baltimore: Johns Hopkins Press, 1966.
- Levy, Leonard W, ed. American Constitutional Law: Historical Essays. N.Y.: Harper, 1966.
- , The Law of the Commonwealth and Chief Justice Shaw. Cambridge: Harvard University Press, 1957.
- , Legacy of Suppression. Freedom of Speech and Press in Early American History. Cambridge: Belknap, 1960.
- , Origins of the Fifth Amendment. The Right Against Self-Incrimination. N.Y. Oxford University Press, 1968.
- Litwack, Leon F. North of Slavery. The Negro in the Free States 1790-1860. Chicago: University of Chicago Press, 1961.
- McCarthy, Charles H. Lincoln's Plan of Reconstruction. N.Y.: McClure, Phillips & Co., 1901.
- McCloskey, Robert G. The American Supreme Court. Chicago: University of Chicago Press, 1960.
- McFeeley, William. Yankee Stepfather: General O. O. Howard and the Freedmen. New Haven: Yale University Press, 1968.
- McKittrick, Eric. Andrew Johnson and Reconstruction. Chicago: The University of Chicago Press, 1960.
- McPherson, James M. The Struggle for Equality: Abolitionists and the Negro in the Civil War and Reconstruction. Princeton: Princeton University Press, 1964.
- McWhinney, Grady. Grant, Lee, Lincoln and the Radicals; Essays in Civil War Leadership. Illinois: Northwestern University Press, 1964.
- Miller, Perry. The Life of the Mind in America. N.Y.: Harcourt, Brace & World Inc., 1965.
- Morgan, Donald G. Congress and the Constitution: A Study of Responsibility. Cambridge: Belknap, 1966.
- Nevis, Alan. The War For the Union. 2 vols. N.Y.: Scribner's, 1959-1960.
- Nichols, Roy F. American Leviathan. N.Y.: Harper & Row, 1966.
- Olsen, Otto H. Carpetbagger's Crusade: The Life of Albion Winegar Tourgee. Baltimore: The Johns Hopkins Press, 1965.
- Paul, Arnold M. Conservative Crisis and the Rule of Law; Attitudes of Bar and Bench, 1887-1895. Ithaca: Cornell University Press, 1960.
- Pritchett, C. Herman. The American Constitution. N.Y.: McGraw-Hill, 1959.
- Quarles, Benjamin. The Negro in the Civil War. Boston: Little, Brown & Co., 1953.
- , Lincoln and the Negro. N.Y.: Oxford University Press, 1962.

- Randall, James G. Lincoln the Liberal Statesman. N.Y.: Dodd, Mead & Co., 1947.
- , Lincoln the President. 4 vols. N.Y.: Dodd, Mead & Co., 1945-1955.
- , Constitutional Problems Under Lincoln. N.Y. and London. D. Appleton & Co., 1926.
- Randall, James G., and Donald, David. The Civil War and Reconstruction. Boston: D. C. Heath & Co., 1961.
- Riddle, Albert G. The Life of Benjamin F. Wade. Cleveland: William W. Williams, 1886.
- Roche, John D. Courts and Rights. The American Judiciary in Action. N.Y.: Random House, 1961.
- , The Quest for the Dream; The Development of Civil Rights and Human Relations in Modern America. N.Y.: Macmillan, 1963.
- Scott, Eben G. Reconstruction During the Civil War in the United States. Boston and N.Y.: Houghton, Mifflin & Co., 1895.
- Sewell, Richard H. John P. Hale and the Politics of Abolition. Cambridge: Harvard University Press, 1965.
- Shapiro, Henry D. Confiscation of Confederate Property in the North. N.Y.: Cornell University Press, 1962.
- Sharkey, Robert P. Money, Class, and Party; an economic study of Civil War and Reconstruction. Baltimore: Johns Hopkins Press, 1959.
- Silver, David M. Lincoln's Supreme Court. Urbana: University of Illinois Press, 1956.
- Simkins, Francis B. and Woody, Robert H. South Carolina During Reconstruction. Chapel Hill: University of North Carolina Press, 1932.
- Stamp, Kenneth M. The Era of Reconstruction 1865-1879. N.Y.: Knopf, 1965.
- Stamp, Kenneth M. and Litwack, Leon F. eds. Reconstruction. An Anthology of Revisionist Writings. Baton Rouge: Louisiana State University Press, 1969.
- Ten Broek, Jacobus. The Antislavery Origins of the Fourteenth Amendment. Berkeley: University of California Press, 1951.
- Thomas, Benjamin P. and Hyman, Harold M. Stanton. The Life and Times of Lincoln's Secretary of War. N.Y.: Knopf, 1962.
- Thompson, C. Mildred. Reconstruction in Georgia 1865-1872. N.Y.: Columbia University Press, 1915.
- Trefousse, Hans L. Benjamin Franklin Wade; Radical Republican from Ohio. N.Y.: Twayne Publishers, 1963.
- , The Radical Republicans. Lincoln's Vanguard for Racial Justice. N.Y.: Knopf, 1969.
- Van Deusen, G. William Henry Seward. N.Y.: Oxford University Press, 1967.
- Wagandt, Charles L. The Mighty Revolution. Negro Emancipation in Maryland 1862-1864. Baltimore: Johns Hopkins Press, 1964.
- Warren, Charles. The Supreme Court in United States History. 2 vols. Boston: Little, Brown & Co., 1960.
- White, Horace. The Life of Lyman Trumbull. Boston and N.Y.: Houghton, Mifflin Co., 1913.
- Williams, T. Harry. Lincoln and the Radicals. Madison: University of Wisconsin Press, 1941.

- Willoughby, Westel W. The Constitutional Law of the United States.
N.Y.: The Century Co., 1904.
- Wood, Forrest G. Black Scare; The Racist Response to Emancipation
and Reconstruction. Berkeley: University of California Press, 1968.
- White, Benjamin F. Jr. American Interpretations of Natural Law.
Cambridge: Harvard University Press, 1931.

Secondary Materials - Articles.

- Avins, Alfred. "The Fourteenth Amendment and Jury Discrimination:
The Original Understanding", Federal Bar Journal, XXVII (1967).
- Beale, Howard K. "On Re-writing Reconstruction History", American
Historical Review, XLV (1939-40).
- Belz, Herman. "The Constitution in the Gilded Age: The Beginnings
of Constitutional Realism in American Scholarship", American
Journal of Legal History, 13 (April 1969).
- Bestor, Arthur. "The American Civil War as a Constitutional Crisis",
American Historical Review, LXIX (January 1964), 327-352.
- Blackard, W. Raymond. "The Demoralization of the Legal Profession
in Nineteenth Century America", Tennessee Law Review, 16 (1940)
314-323.
- Bloomfield, Maxwell. "Law vs. Politics; The Self-Image of the
American Bar", American Journal of Legal History, October, 1968.
- Burt, Robert A. "Miranda and Title II: A Morganatic Marriage",
The Supreme Court Review ed. Philip B. Kurland. Chicago and London:
University of Chicago Press, 1969.
- Corwin, Edward S. "The Higher Law Background of American Constitutional
Law", Harvard Law Review 42.
- , "The Doctrine of Due Process of Law Before the Civil War".
Harvard Law Review 24 (1911).
- Cox, John H. and Lawanda. "Andrew Johnson and His Ghost Writers:
An Analysis of the Freedmen's Bureau and Civil Rights Veto
Messages", Mississippi Valley Historical Review, 48 (December
1961), 460-480.
- , "General O. O. Howard and the Misrepresented Bureau", Journal
of Southern History, November, 1953.
- Doyle, Elisabeth Joan. "New Orleans Courts Under Military Occupation
1861-1865", Mid America, July 1960.
- Du Bois, W. E. B. "Reconstruction and Its Benefits", American
Historical Review, XV (1910).
- Farnham, Wallace D. "The Weakened Spring of Government: A Study in
Nineteenth-Century American History", American Historical Review,
April 1963, 662-680.
- Frank, John P. and Munro, Robert F. "The Original Understanding of
"Equal Protection of the Laws"", Columbia Law Review, February
1950.
- Graham, Howard J. "The "Conspiracy Theory" of the Fourteenth Amend-
ment", Yale Law Review, 1938.
- Hollingsworth, Harold M. "George Andrews, Carpetbagger", Tennessee
Historical Quarterly, 28 (1969), 310-323.
- Howe, Mark De Wolfe. "Federalism and Civil Rights", Massachusetts
Historical Society Proceedings, LXXVII (1965).

- Hyman, Harold M. "Law and the Civil War", Civil War History V (March 1968).
- . "Deceit in Dixie", Civil War History, III (March 1957), 65-82.
- Jones, Alan. "Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration", The Journal of American History, 53 (1966-7), 751-771.
- Larsen, Charles E. "Nationalism and States Rights in Commentaries on the Constitution After the Civil War", The American Journal of Legal History 3 (1959).
- Lerche, Charles O. "Congressional Interpretations of the Guarantee of a Republican Form of Government", Journal of Southern History, XV (May 1949).
- Lofton, William H. "Northern Labor and the Negro During the Civil War", Journal of Negro History, XXXIV (July 1949).
- May, J. Thomas. "The Freedmen's Bureau at the Local Level: A Study of a Louisiana Agent", Louisiana History IX (1968).
- Morton, Louis. "The Historian and the Study of War", Mississippi Valley Historical Review, XLVIII (March 1962), 599-612.
- Nash, A. E. Keir. "The Texas Supreme Court and Trial Rights of Blacks, 1845-1860", The Journal of American History, December, 1971.
- Nichols, Roy F. "Federalism v. Democracy. The Significance of the Civil War in the History of United States Federalism", in Roscoe Pound, Charles H. McIlwain and Roy F. Nichols. Federalism as a Democratic Process. New Brunswick: Rutgers University Press, 1942.
- Pressly, Thomas J. "Bullets and Ballots; Lincoln and the Right of Revolution", American Historical Review, LXVIII (April 1962), 647-662.
- Randall, James G. "Some Legal Aspects of the Confiscation Bills", American Historical Review, 18 (October 1912).
- . "The Indemnity Act of 1863 - A Study in Wartime Immunity of Government Officers", Michigan Law Review, 20 (1922).
- Roche, John D. "American Liberty", in Milton Konvitz and Clinton Rossiter, eds. Aspects of Liberty. N.Y.: 1958.
- Simkins, Francis B. "New Viewpoints of Southern Reconstruction", Journal of Southern History, V (1939).
- Spector, Robert M. "Judicial Biography and the United States Supreme Court," American Journal of Legal History, XI (January 1967).
- Trefousse, Hans L. "The Joint Committee on the Conduct of the War - a Reassessment", Civil War History X (March 1964).
- Trussman, Joseph and Ten Broek. "The Equal Protection of the Laws", California Law Review, XXXVII (September 1949).
- Warren, Charles. "New Light on the History of the Federal Judiciary Act of 1789", Harvard Law Review, 37 (1923-1924).
- . "Federal and State Court Interference", Harvard Law Review, XLVIII (January 1930).
- . "Federal Criminal Laws And The State Courts", Harvard Law Review, 38 (March 1925), 545-598.
- Weisberger, B. A. "The Dark and Bloody Ground of Reconstruction Historiography", Journal of Southern History, XXV (1959).

Williams, T. Harry. "An Analysis of Some Reconstruction Attitudes",
XII (1946).

Dissertations.

- Cooke, John W. Some Aspects of the Free Individual in the United States 1800-1860. Unpublished Ph.D. Dissertation, Vanderbilt, Nashville, 1967.
- Di Nunzio, Mario. Lyman Trumbull, United States Senator. Unpublished Ph.D. Dissertation, Clark University, 1964.
- Hamilton, Howard D. The Legislative and Judicial History of the Thirteenth Amendment. Ph.D. Dissertation, University of Illinois, Urbana, 1950.
- Henry, George S, Jr. Radical Republican Policy Toward the Negro During Reconstruction 1862-1872. Unpublished Ph.D. Dissertation, Yale University, 1963.
- Hughes, David F. Salmon P. Chase: Chief Justice. Unpublished Ph.D. Dissertation, Princeton University, 1963.
- Mitchell, Wendell, Relations Between the Federal and State Courts. Ph.D. Dissertation, Columbia University, 1949.
- Paludan, Philip S. Law and Equal Rights: The Civil War Encounter. A Study of Legal Minds in the Civil War Era. Unpublished Ph.D. Dissertation, University of Illinois, 1968.