A New Birth of Freedom:
The Effect of the Civil War and
Reconstruction on Ohio Law

A dissertation submitted in partial fulfillment of the
requirements for the degree of Doctor of Philosophy in
Judicial Studies

by

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August, 2015
THE GRADUATE SCHOOL

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Entitled

A New Birth Of Freedom: The Effect Of The Civil War And Reconstruction On Ohio Law

be accepted in partial fulfillment of the requirements for the degree of

DOCTOR OF PHILOSOPHY

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ABSTRACT

In the seventy years from its first settlement to the start of the Civil War, Ohio developed from a trackless wilderness populated only by a few Native Americans into an agricultural garden and home to over two million residents. By this time Ohio had become the third most populous and the fourth most industrialized state in the nation.

Ohio had a leading role in the American Civil War (1861-1865). Over 300,000 Ohioans served in the War and about one in ten died. Several of the Union’s leading Generals, including Ulysses S. Grant, William Tecumseh Sherman and Phillip Sheridan hailed from Ohio. Future Presidents Grant, Rutherford B. Hayes, James A. Garfield, Benjamin Harrison and William McKinley served in the Union Army and hailed from the Buckeye State. Political leaders such as Secretary of War Edwin Stanton, Treasury Secretary, and later Chief Justice Salmon P. Chase, Senators Benjamin Wade and John Sherman, Congressmen Clement Vallandingham, George Pendleton, and John Bingham called Ohio home. In addition, Ohio’s farms fed the Union war machine and its transportation infrastructure transported these commodities to the Armies in the field.

Ohioans made many sacrifices during the War. Although only one military campaign touched Ohio’s borders during the conflict, that being Morgan’s raid in July, 1863, this was a small affair. However, over 35,000 Ohioans lost their lives and a similar number deserted. Ohio was required to cede an enormous amount
of power to the federal government in order to win the War. Ohioans were also forced to endure the curtailment of many of their political and civil rights, as guaranteed by the United States and the Ohio Constitutions. These infringements included the suspension of habeas corpus, arrests without trials, trials of civilians by military commissions, and infringements on free speech and freedom of the press.

At the war’s conclusion, Congress had three major challenges: 1) dealing with the loss of life and property during the war; 2) the uncertainty about whether the war was really over; and 3) the enormity of the task of economic and political reconstruction. By denying seats to the Congressman and Senators elected to represent the former Confederate states at the end of the war, the 39th Congress, which held session from March 4, 1865 to March 3, 1867, held a Republican super majority that allowed them to propose constitutional amendments as well as override presidential vetoes.

The 39th Congress passed 714 pieces of legislation during its term, including: 1) the Civil Rights Act of 1866; 2) the extension of the Freedman’s Bureau for another two years; and 3) the 14th Amendment. Ohio Congressman John Bingham was the principal author of Section 1 of the 14th Amendment, and he and his colleagues crafted this amendment with moderate verbiage. When the Southern states rejected the 14th Amendment, the country entered into the period of Congressional (Radical) Reconstruction and Southern States were forced to ratify both the Fourteenth and Fifteenth Amendments in order to regain full voting status in Congress.
It is quite clear that the Civil War and Reconstruction era had a profound
effect upon Ohio and its laws. In addition to the great loss of life and property,
Ohioans only reluctantly accepted the Fourteenth and the Fifteenth Amendments
after denying full civil and political rights to African-American several times in the
past. The enabling legislation that was included as part of these amendments
allowed Congress to expand the jurisdiction of the federal courts and remove
some cases from local juries and transfer them to the federal court system.

However, it is equally evident that Ohio had a more profound effect on
Reconstruction than Reconstruction had on Ohio. Ohio’s military leaders won the
war and administered Congressional Reconstruction of the Southern States. Its
political leaders took advantage of a temporary Republican super majority to
enact two Amendments whose effect was small at the time, but became much
more profound in the next century. Finally, Ohio’s Presidents and future
Presidents helped lead the Nation from a time of schism and War into the 20th
Century.
ACKNOWLEDGMENTS

I took my first course at the National Judicial College in the summer of 2003, and, like the song, “what a long strange trip it’s been.” The next summer, much to my surprise, I was accepted as a student in the Judicial Studies Program. I graduated with a Master of Judicial Studies Degree in 2007, and my thesis was later published as a law review article. Once again, to my further surprise, I was accepted as a student in the Judicial Studies doctoral program. This dissertation is the final obstacle in that program.

I would first like to thank all of the friends and colleagues I have met in the program. To Tim, Greg, Phil, Matt, Rusty, Bill, Chuck, Walt, Brendan, Kris, and everyone else, I give my thanks for your encouragement and friendship throughout the last 12 years. Also my thanks to the faculty and staff of the National Judicial College and the Judicial Studies Program, with a special thanks to Professor James Richardson for mentoring me throughout this project, and Denise Schaar-Buis, who kept track of my grades and progress and answered all of my silly questions. UNR faculty members Dick Bjur, Matt Leone, Elizabeth Francis and especially the late Robert Harvey made learning an enjoyable experience.

Special thanks goes to my committee, Mr. Milt Nuzum, Professor David Tanenhaus, Magistrate Bill Rickrich, Veronica Dahir and especially my committee chair, Professor James Richardson. Their assistance made this a better product, not perfect but better. Another thanks goes to that unknown person who
developed the *Undo* command for Microsoft Word, who saved me countless hours correcting my mistakes.

Finally, to my late parents, William and Phyllis Minahan, who instilled a lifelong love of reading and learning in all of their children.
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CHAPTER 1
WHY STUDY OHIO?

Mrs. Powel: “Well, Doctor, what have we got – a republic or a monarchy?”
(confronting Benjamin Franklin after he signed the Constitution)
Benjamin Franklin: “A republic, Madam, if you can keep it.”

“The Republic, sir, is in the hands of its friends, and its only safety is in the hands of its friends.”

John A. Bingham, 1866

I. Introduction

The American Civil War was by far the most traumatic event in this nation’s history. As a result of a great number of factors, the country became divided against itself. Tension between the sections had been brewing for many years, but, a number of events occurred in the 1850s that created the explosive atmosphere that led to the Civil War. Among these events were: a more stringent Fugitive Slave Act, enacted by Congress as part of the Compromise of 1850; whether or not the vast territories acquired as a result of the war against Mexico should be open to slavery; the regional bloodshed that occurred as a result of the Kansas-Nebraska Act; the decision of the United States Supreme Court in the case of Dred Scott vs. Sandford; and last, but certainly not least, the publication of the antislavery novel Uncle Tom’s Cabin.¹

While Uncle Tom’s Cabin may be the literary piece that foreshadowed the Civil War, President Lincoln was the political force that pushed the country to the

breaking point. Lincoln, an anti-slavery Republican, was elected as President in 1860. Within two months of Lincoln’s victory, seven states seceded from the Union and established the Confederate States of America. The fighting began when the Confederate Army opened fire on Fort Sumter, a federal installation located in Charleston Harbor, South Carolina, on April 12, 1861. A four-year struggle ensued that cost more than 600,000 lives.

President Lincoln resorted to extraordinary measures to win the war and preserve the Union, including calling forth the state militias, suspending *habeas corpus*, and declaring a naval blockade of all southern ports. Lincoln assumed near dictatorial powers that strained the Constitution in ways never seen before or since.\(^2\) Did Lincoln usurp the powers of Congress and the courts when performing these actions? Probably,\(^3\) Did he trample on the Bill of Rights and the rule of law to preserve the Union? Unquestionably.\(^4\)

Although Lincoln had no personal ties to Ohio, the State still played a key role in the American Civil War, both politically and logistically. In the 1840s and 50s, Ohio emerged as an intellectual leader providing both political leadership and Western idealism. By 1860, Ohio was the third most populous state in the Union with 2,339,000 residents. Ohio was the fourth most industrialized state in the nation and a leader in agriculture. Ohio provided over 300,000 troops to the Union Army during the Civil War; the third largest number of troops to come from


\(^3\) Id.

\(^4\) Id.
any Union state. More than 35,000 Ohioans, or one out of every 10 who served, died as a result of the war. Several of the Union’s leading generals, including Ulysses S. Grant, William Tecumseh Sherman, and Phillip H. Sheridan, hailed from the Ohio. Many leading politicians, such as Secretary of War Edwin Stanton, Treasury Secretary, and later Chief Justice Salmon P. Chase, Senators Benjamin Wade and John Sherman, Congressmen Clement Vallandigham, George Pendleton, John Bingham and James A. Garfield called Ohio home. Finally, five Ohio born Union army officers later served as President of the United States; Ulysses S. Grant, Rutherford B. Hayes, James A. Garfield, Benjamin Harrison and William McKinley.

Even though Ohio played such an influential role in the war, its citizens paid a high price. Ohio and the other Union states were required to cede an enormous amount of power to the federal government in order to win the war. Ohioans were also forced to endure the curtailment of many of their individual rights, as guaranteed by the United States and Ohio Constitutions. Professor Daniel Farber discussed in detail infringements on individual rights that occurred during this era, most notably are the suspension of habeas corpus, arrests without trials, trials of civilians by military commissions, and infringements on free speech.

Farber writes that at least 13,000 civilians were held under military arrest during the Civil War. Some of the arrestees, particularly draft dodgers, deserters, and blockade runners, were arguably under military jurisdiction. Others, most notably citizens of the Confederacy, those northern citizens caught trading with
the Confederacy, and individuals accused of disloyal speech were often denied their constitutional right to jury trial and other protections.\(^5\)

Thus, because of the infringements on individual rights, the original goal of this study was to examine and discuss the changes in Ohio law that occurred as a result of the Civil War. The individual human rights (generally referred to as civil rights or political rights at that time) abuses listed previously are certainly issues ripe for further examination. However, it soon became clear that the abuses that occurred as a result of the Civil War were merely temporary measures enacted in order to win the war. Yet, the power shift that occurred between the states and the federal government became a lasting paradigm via the Reconstruction Era (1863-1877). This "shift" was necessary to abolish slavery, but there were many collateral effects as well.

II. The 39\(^{th}\) Congress

Those responsible for leading the country out of the war had to deal with managing the shift in power to a more centralized federal government, required to guarantee individual rights. Among them was Ohio Congressman John Bingham, a member of the 39\(^{th}\) Congress, which was in session from March 4, 1865 to March 4, 1867. Bingham and his colleagues faced three major challenges: 1) the loss of life and property in the war; 2) the uncertainty about whether the war was really over; and 3) the enormity of the task of economic and political reconstruction. By denying seats to the Congressmen and Senators

\(^5\) Daniel Farber. LINCOLN'S CONSTITUTION, 144-146. (Chicago: The University of Chicago Press, 2003).
elected to represent the former Confederate states at the end of the war, the 39th Congress, which was in session from March 4, 1865 to March 3, 1867, held a Republican majority of 77% in the House and 79% in the Senate. This majority gained for the Republicans not only a veto-proof Congress, but the supermajority necessary to enact constitutional amendments (¾ of the states still had to ratify amendments). Their majority allowed the Congress to ignore veto threats from President Andrew Johnson, who succeeded to the Presidency after Lincoln’s assassination, and also provided very little incentive for them to negotiate with the Democrats.

The 39th Congress passed 714 pieces of legislation during its term, more than any Congress had passed up to that time. Included in the legislation enacted by this Congress was: 1) the Civil Rights Act of 1866; 2) the extension of the Freedmen’s Bureau for another two years; and 3) the 14th Amendment (which was ratified in 1868). Congressman Bingham, a freshman legislator from Cadiz, Ohio, was the principal author of section 1 of the Amendment. Bingham and his colleagues knew that such an amendment, even though proposed to address abuses within the former Confederate states, could seriously affect the northern states as well. For this reason, the terms of the amendment were far more lenient than those proposed by the states in the North and East, who desired a far more stringent reconstruction policy.

III. Historical Theories of Reconstruction

Professor Laura Edwards explains several of the historical theories that have attempted to explain the Civil War era and Reconstruction. The Dunning
School, named for its most vocal advocate, had its roots in the direct aftermath of the War. Professor Dunning and his disciples believed that Reconstruction was a failure, and the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments was merely a power grab by the federal government at the expense of the states. The Civil War was started by abolitionist elements in the North and was avoidable. Openly racist in their beliefs; these historians blame a radical minority for granting rights to African-American males who were incapable of exercising them. Although in vogue for many years, most modern scholars have rejected the Dunning theory.

Former Confederate President Jefferson Davis published a two-volume memoir entitled *The Rise and Fall of the Confederate Government* in 1881. Davis denied that the peculiar institution was the primary cause of the War, and considered the reforms caused by Reconstruction as the “imposing [of] an oppressive peace on honorable men who had laid down their arms.”

W.E.B. DuBois published his work *In Black Reconstruction in America* in 1935. DuBois conducted an extensive analysis of the economies of the former Confederate states, the composition of their legislatures, and their state budgets. Highlighting the accomplishments, rather than the failures, of the era, DuBois wrote that the Reconstruction governments established public education in the

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South, invested in public infrastructure, and establish public health agencies to combat the spread of disease. Any economic or political unrest during this era was primarily the result of the white planter class and paramilitary groups attempting to suppress the votes of the Freedmen.\(^8\)

Later theories, Edwards writes, arose in the wake of *Brown v. Board of Education* and the Civil Rights Era. These theorists believe that the conflicts between the various sections of the country made the Civil War inevitable. The weaknesses of the original Constitution, particularly the lack of authority at the federal level, prevented the development of a central government strong enough to prevent the war. Reconstruction, rather than war, was to them the primary vehicle of change.\(^9\)

Foremost among those vehicles of change were the Fourteenth and Fifteenth Amendments. These two Amendments and their enabling legislation not only changed the legal status of every American, they transferred the issue of civil and political rights from the states to the federal government. These Amendments granted civil and political rights to African-Americans not only in Arkansas, but in Ohio as well. During this era Congress also shifted the authority to enforce civil and political rights from the states to the federal courts. Congress passed a series of enactments beginning with the Habeas Corpus Act of 1863 and culminating with the Removal Act of 1875 to accomplish this purpose.

\(^9\) II The Cambridge History of Law, *supra* note 6 at 315.
One modern school of thought focuses on the failure of Reconstruction. White former Confederates quickly regained control of the Southern governments through a process known as Redemption, ignored federal law, and created a segregated culture that did not differ markedly from slavery. Corporations and railroads used their power and influence to hijack the provisions of the Fourteenth Amendment to serve their own purposes. Even the Courts did not enforce the mandates of Reconstruction in the manner intended.\(^\text{10}\)

Another modern school of thought has a more positive view of Reconstruction. Reconstruction, particularly the Fourteenth Amendment, ushered in a “Second American Revolution” with the hope of fulfilling the promises of the first one. Although progress was glacial, by the mid-20\(^{th}\) Century, its effects culminated with the decisions of the Warren Court and the Civil Rights Act of 1964.\(^\text{11}\)

Edwards also writes that most of the legal research in this era concentrated on the events that occurred at the national level, particularly the changes that occurred in the Executive, Legislative and Judicial branches of the federal government. These effects of these changes were then followed to the states and then to the local level.\(^\text{12}\)

More recently, Edwards writes, works that examine the changes to the law that occurred at the state and local level during this era have been written. This recent trend concerns itself not just with legal history, but also examines

\(^{10}\) The Cambridge History of Law, supra note 704 at 314.
\(^{11}\) Id.
\(^{12}\) Id. at 315.
women’s issues, African-American issues as well as social, cultural and economic changes that occurred. Examining those changes from the perspective of Ohio and its citizens should contribute significantly to the existing literature in this area.

IV. Amar

In his book entitled *The Bill of Rights: Creation and Reconstruction*, Professor Akhil Reed Amar challenges the conventional thinking regarding the origins and the original intent of the Bill. It is Amar's hypothesis that, contrary to popular belief, the Bill of Rights was not originally constructed to protect minorities against oppression by the majority, but rather to protect the rights of the majority from a distant and tyrannical (aka Federal) government. The notion that incorporation of the Bill of Rights against the individual states through the due process clause of the 14th Amendment did not take hold until the Reconstruction Era following the Civil War.

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13 Id.
15 During the time the Bill was being debated and ratified, 1789-1791, the French Revolution (1789-1799) was in its early stages. During the Reign of Terror (1793-94), it is estimated that as many as 40,000 prisoners were executed without trial or died awaiting trial. Donald Greer. *The Incidence of the Terror During the French Revolution: A Statistical Interpretation*. (1935).
17 For a history of the U.S. Supreme Court's decisions regarding incorporation, see Justice Black's dissent in *Adamson v. California*, 332 U.S. 46 (1947).
Amar’s divided his book into two parts. In Part one, Amar analyzes the Bill as it was originally conceived. Amar carefully examines the original Bill of Rights, clause by clause, to show its inherent Anti-Federalist character. For example, Amar characterizes the role of free speech and assembly, and a well-regulated militia, as populist checks on the (federal) government. Amar further divided the Bill into its two component parts, *structure* (of the government) and (individual) *rights*, and explains the origins and evolution of each category. Amar also discusses why the various clauses are lumped together and how they interrelate. He explains the themes that connect the amendments and how the original Constitution and the Bill are linked together.

Amar then discusses the history of the Fourteenth Amendment, and notes that the speeches Bingham had given before Congress in 1866, while arguing for the Amendment, closely mirror the speeches he gave in 1859 in response to the holding in *Dred Scott*. Bingham blasted the *Scott* court, which he claimed went too far in limiting certain rights, such as due process, that are guaranteed to all persons, not just citizens. Seven years later Bingham acknowledged that the Bill did not extend to the states and that his amendment would specifically overrule *Barron*.

Amar then points out the similarities between the Constitution and the Fourteenth Amendment. Both the Convention and the Joint Committee debates were shrouded in secrecy, and Americans anxiously awaited both final products.

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18 Twelve amendments were originally proposed.  
Partisan feelings were at a high level during both ratification periods, and the ratification process for both documents ran much longer than the authors had hoped.\(^\text{20}\)

Democrats and other critics of the Amendment argued that most of the states, including Ohio, had written specific provisions protecting individual rights and freedoms into their state constitutions. While that is true, many of the Southern states ignored these provisions when dealing with “the peculiar institution.” In spite of this, Democrats argued that the responsibility for guarding and preserving civil and political rights should remain with the states.\(^\text{21}\)

Finally, the proponents wondered how the courts would interpret the Amendment. Although the Supreme Court had used the doctrine of judicial review to strike several state statutes in the era before the Civil War, they had only invoked the Bill of Rights once against Congress; invalidating that provision of the Missouri Compromise that prohibited slavery above the line of 36° 30'. Bingham argued that the Supreme Court could neither interfere with the ratification of the Amendment nor strike it down. In the event the Court did interfere, the House could “sweep away their appellate jurisdiction in all cases,” and annihilate “the usurpers in the abolition of the tribunal.”\(^\text{22}\)

In Part two, Amar shows how Reconstruction and the ratification of the Fourteenth Amendment transformed the nature of the Bill into what we recognize

\(^{20}\) Amar, \textit{supra} note 14 at 204.

\(^{21}\) \textit{Id.} at 205.

today.\textsuperscript{23} Amar carefully discusses whether the Fourteenth Amendment incorporates the Bill of Rights against the states, and how it does so. He analyzes the three conventional approaches to incorporation, Justice Black’s “total incorporation” theory, Justice Brennan’s “selective incorporation” model, and Justice Frankfurter’s “fundamental fairness” doctrine. Amar finds the fatal flaw in each of these arguments, and instead proposes a “refined incorporation” model, using a combination of the three theories.\textsuperscript{24} Amar finds that refined incorporation helped adapt Amendments that were originally designed to empower majorities into rules that protect individual and minority rights.

V. Goals.

This work will focus on the Reconstruction Era and the influence Ohio politicians had in the shaping of the 14\textsuperscript{th} Amendment by carefully examining the theories put forth by Professor Akhil Reed Amar in his book entitled: \textit{The Bill of Rights: Creation and Reconstruction}. Amar discusses the paradigm shift that occurred in the relationship between the federal and state governments, to the point where today the federal, rather than state government, is the primary guarantor of the individual rights of its citizens and residents. Because Congress expanded the jurisdiction of the federal courts and allowed the removal of state cases to federal courts, the courts have assumed the role as the primary protector of individual rights.

\textsuperscript{23} Professor Amar also stresses that when analyzing cases involving the 14\textsuperscript{th} Amendment, the Courts must determine the intent of Congress in 1868, when the Amendment was ratified, and not 1791, when the Bill of Rights was adopted.\textsuperscript{24} Amar, \textit{supra} note 14 at 140.
In the former Confederacy, that power shift was quick to occur and easily recognizable. Four of the five paragraphs of the 14th Amendment were directed primarily towards abuses that had occurred in the southern states. While such abuses occurred to a much more limited extent in the northern states, they still occurred. This work will examine that power shift as it occurred in Ohio during this era.

Early chapters will follow the development of the legal system in Ohio, including the legal system in the Northwest Territory, Ohio's Constitution of 1802, Ohio Law in the Age of Jackson, Ohio's Constitution of 1851 and the Discordant Decade that followed, and the state of relations between Ohio and the federal government during each era. The human rights abuses (an anachronistic term) that occurred during the Civil War, as described by Farber, will be discussed in some detail. However, the primary emphasis will be on Ohio's role in the drafting and ratification of the 14th Amendment, and the changes brought on by that text, which has been called the most important amendment to the U.S. Constitution.

Summary

The Civil War began on April 12, 1861, and by the time it ended four years later over 600,000 American lives were lost. President Lincoln resorted to extraordinary measures to win the War and preserve the Union. Many of Lincoln's actions infringed on the rights granted to all citizens by the first ten Amendments to the U.S Constitution and by most state constitutions.
Most of the changes that occurred as a result of the War were temporary, and almost all of them ended at the War's conclusion. The real change to federal-state relations, particularly the dramatic increase in federal power occurred during the Reconstruction Era (1863-1877), and as a result of the enactment and ratification of the Thirteenth, Fourteenth and Fifteenth Amendments.

The State of Ohio played a critical role in this era. Its military leaders won the War and its political leaders set the course for Reconstruction. Most of the Reconstruction policies were designed for moderate states, like Ohio, striking a balance between the support of President Johnson and his followers, who felt that no Reconstruction policy was necessary, and the Radical Republicans, who desired a stricter and more punitive Reconstruction policy.

The goal of this work is to examine the changes that occurred in Ohio and its laws as a result of the Civil War and Reconstruction, using the criteria described by Professor Akhil Reed Amar in his book *The Bill of Rights: Creation and Reconstruction*. 
CHAPTER 2:
ANTECEDENTS: OHIO LAW IN THE PRESTATEHOOD ERA

I am George Rogers Clark. You have just become a prisoner of the Commonwealth of Virginia.

--George Rogers Clark, 1779

I. Introduction

In 1984, the Ohio Division of Travel and Tourism adopted the slogan “Ohio, the heart of it all.” The new slogan appeared on all official publications of the Division, as well as on highway signs welcoming people to the State. Ohio’s boundaries form the rough shape of a heart, but many other thoughts were behind the slogan.

Ohio has long been at the center of the nation’s population, geography, and economic activity. The same can be said of Ohio’s past. Ohio was the first state admitted from the Northwest Territory, and its admission set the precedent for the admission of other states. Ohio’s western frontier was the center of warfare between white settlers and the Native American (Indian) tribes in the 1780s and 1790s, and was a main theatre of conflict during the War of 1812. Ohio’s northern border faced the British and the Canadians. Its southern border faced the slaveholding states. Ohio also served as the gateway from the industrial states in the mid-Atlantic region to the agricultural states to the West.

25 OHIO HISTORY CENTRAL, available at: http://ohiohistorycentral.org/w/Ohio’s_State_Tourism_Slogans
Known as a “swing state” since the 1980s, one in which no single candidate has overwhelming support, the last time Ohio voters declared for the losing presidential candidate was in the 1960 election. Also known as a home rule state, the Ohio Constitution grants certain powers, such as police powers, ownership of public utilities, and local self-government to municipal corporations that the General Assembly cannot amend by simple majority vote.\textsuperscript{26}

A. Early Ohio

In colonial times, the Ohio country was at the center of a 'world war' among the empires of France, Great Britain, and Spain. The French were the first to lay claim to Ohio, after an exploration conducted by Robert de LaSalle in 1669. The French later established trading posts throughout the area to control the fur trade with the Native Americans.\textsuperscript{27}

By the mid-1750s, several Native American tribes had relocated to the Ohio country. Delaware and Shawnee arrived from east, the Wyandot and the Ottawa came from the north, and the Miami migrated into western Ohio and Eastern Indiana. The Mingos were made up of Iroquois tribes that had relocated to Ohio from New York State, combined with the remnants of several other tribes

\textsuperscript{27} The French solidified their claim to the area in the summer of 1749, when a French expedition led by Celeron de Blainville travelled downstream from the Upper Allegheny River to the Ohio. Celeron buried lead plates at each important river confluence, claiming the region for France. Once he reached the confluence with the Great Miami River, he travelled upstream to the Miami Indian village of Pickawillany, and finally to Detroit. GEORGE W. KNEPPER, OHIO AND ITS PEOPLE (Kent State University Press, 1989).
pushed west by colonists along the eastern seaboard. The struggle between the British and French for control of the fur trade in the Ohio country reached its zenith during the Seven Years’ War, 1756-63, better known in the colonies as the French and Indian War. While Great Britain fought with Spain and France over control of their respective American colonies, several other nations including Prussia, Austria, Portugal, Sweden, Saxony, and the Russian Empire, fought one another as part of a continuing series of wars that had been raging since the 1680s.

Great Britain eventually prevailed, and as a result of the 1763 Treaty of Paris, gained control of the bulk of Eastern Canada, Spanish Florida, several islands in the Caribbean and the West Indies, the colony of Senegal on the West Coast of Africa, and the French trading posts located on the Indian subcontinent. The British also gained control of the Ohio Country, but the Native American tribes residing there were excluded from the peace negotiations. Their dissatisfaction with British policies resulted in Pontiac’s rebellion, 1763-66, named after the most prominent of the Native American leaders involved.

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29 KNEPPER, supra note 27 at 26.
30 Pontiac (c. 1720-1769) was an Ottawa leader who sided with the French during the French and Indian War. Dissatisfied with the trading practices of the victorious British, Pontiac and his followers attempted to capture Ft. Detroit in 1763. While failing to take Detroit, the war soon spread throughout the Great Lakes region. Enjoying some local successes, Pontiac’s followers, suffering from smallpox and short on powder and lead, withdrew to the Illinois country. Pontiac continued to encourage resistance to British rule, but he eventually agreed to stop fighting in 1766. He was killed by a Peoria Indian near Cahokia in 1769. DAVID DIXON, NEVER COME TO PEACE AGAIN: PONTIAC’S UPRISING AND THE FATE OF THE BRITISH EMPIRE IN NORTH AMERICA (University of Oklahoma Press, 2005).
During the American Revolution, in an effort to defend white Kentucky settlements against Native American raids, troops led by Virginia Major George Rogers Clark crossed the Ohio River and captured the British outposts of Kaskaskia, Cahokia, and Vincennes. Although Clark’s conquest of the Illinois Country was considered by some to be only a temporary occupation, his campaign significantly reduced the British influence in the area. The resulting power vacuum led Great Britain to cede the entire territory to the United States as part of the 1783 Treaty of Paris.

At the War’s conclusion, the new country faced many problems, including an enormous national debt. The United States owed over $12 million to foreigners, mostly the French. The National government owed $40 million and the state governments owed $25 million to Americans who sold food, horses and other supplies to the American Army during the course of the War.

Towards the end of the War, in an effort to combat the continued issue of paper currency that had become largely worthless, Congress and the States began issuing land grants to officers and soldiers who had served during the War but had not yet been paid. Many of the States, including Virginia and Connecticut, set aside lands in the new territory to use as payment to their citizens who served during the Revolution.

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31 Virginia created Fincastle County, Virginia from the Kentucky settlements in 1772.
32 The lands located west of Pennsylvania, north of the Ohio River, south of the Great Lakes and east of the Mississippi River are referred to as the Ohio Country, the Northwest Territory, and the Illinois Country at various times.
B. Ordinances of 1784, 1785 and 1787

In order to establish procedures for the settlement and the political incorporation of these new lands, prevent illegal settlement by squatters, and provide a defense against Indian raids, the Confederation Congress enacted the Ordinances of 1784, 1785 and 1787. The first of these, drafted by Thomas Jefferson and passed by Congress, divided the Trans-Appalachian region into 17 roughly rectangular, self-governing districts, with 10 of these districts located in the Northwest Territory. When the population of a district reached 20,000, a representative from the district could be sent to Congress. A district would become eligible for statehood when its population equaled that of the least populous state then in existence. One article, prohibiting slavery and involuntary servitude, was rejected by delegates from the southern states. Critics of this plan stressed that the many, smaller states proposed by Jefferson in this Ordinance would dilute the power of the original 13 states in Congress. Because of those and other concerns, most of the provisions of this Ordinance were eventually superseded by other laws.

The Ordinance of 1785 provided for a scientific survey and the systematic subdivision of the new lands. Since the Confederation Congress lacked the power to tax, legislators saw the sale of land as a way to raise money to operate the country and repay war debts. The basic unit of land was to be the township, a tract of land measuring six miles on each side. The townships were divided into

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35 Specifically, the Northwest Territory consisted of that part of the American frontier lying west of Pennsylvania, north of the Ohio River, east of the Mississippi River, and South of the Great Lakes.
sections, and in order to fund education, one section in each township was reserved for schools. The procedures established in this ordinance, called the Public Lands Survey System,\textsuperscript{36} were to guide American land use policies until Congress enacted the Homestead Act in 1862.\textsuperscript{37}

The final and most important of these three acts was the Ordinance of 1787. Passed by the Confederation Congress in July, 1787, the Ordinance established government in the Northwest Territory, provided a means for the admission of its constituent parts as states, equal in stature to the original thirteen, and superseded parts of the 1784 Ordinance. The Ordinance also provided that no fewer than three or more than five states could be carved from the territory.

C. Establishing a Government

Ohioans have always guarded their rights dearly. When the first settlers arrived at Marietta in 1788, well ahead of any organized government, they created a temporary legal code and posted it to a tree trunk.\textsuperscript{38} The Confederation Congress enacted the Northwest Ordinance in 1787,\textsuperscript{39} but before the governmental functions were established in the new territory, settlers in the

\textsuperscript{37} C. Albert White, \textit{A History of the Rectangular Survey System} (Bureau of Land Management, 1983).
\textsuperscript{39} The newly created United States Congress reaffirmed the Ordinance in 1789.
Miami area framed a temporary legal code, established a court and appointed a judge and a sheriff.\textsuperscript{40}

Under the Northwest Ordinance,\textsuperscript{41} Congress appointed a governor, a secretary to act in the absence of the governor, and three territorial judges, whose terms ran during “good behavior.” The path to statehood consisted of three stages. During Stage 1, the governor and the judges shared the legislative and judicial functions. The governor occupied the most powerful post in the territorial government. In addition to his legislative and judicial authority, he commanded the militia and appointed all militia officers below the rank of general officer. He was also tasked with creating new counties, organizing their governments, dealing with the Native American tribes, and appointing magistrates and other local officials.\textsuperscript{42} Congress authorized the governor and judges to adopt any law then in force in any of the original states.\textsuperscript{43}

Stage 2 began when the population was large enough (5000 free males). At that time a territorial legislature,\textsuperscript{44} consisting of a lower house elected by the

\begin{footnotes}
\item[41] The Northwest Ordinance (officially known as And Ordinance for the Government of the Territory of the United States, North–West of the River Ohio) was enacted by the Congress of the Confederation of the United States on July 13, 1787. Congress reaffirmed the Ordinance, with several modifications, in 1789 after the adoption of the United States Constitution.
\item[43] The judges also wanted the ability to adapt laws from the original states and the common law, arguing that the territory needed laws not found in the codes of the original states. THE HISTORY OF OHIO LAW, supra note 16 at 30 (quoting Andrew R. L. Cayton, Law and Authority in the Northwest Territory).
\item[44] Northwest Ordinance, art.6.
\end{footnotes}
citizens and an upper house chosen by the lower house, would be empaneled. The legislature was empowered to alter any of the original territorial laws as they saw fit. One (nonvoting) delegate to Congress would be selected. When a portion of the territory reached a population of 60,000, it could apply for statehood (Stage 3).

The Ordinance of 1787 reflected the then prevailing notion of republican government. Section 13 declared that “fundamental principles of civil government and religious liberty…form the basis whereupon these republics, their laws and [their] constitutions are either directed.”

Section 14 of the Ordinance described key principles including religious freedom, writs of habeas corpus, trial by jury, and bail. Fines were to be moderate, cruel and unusual punishment was prohibited, and one could be deprived of liberty or property only by judgment of one’s peers or by the law of the land. A taking of private property required full compensation and no law could interfere with bona fide private contracts previously made. Other articles mandated the encouragement of education, promoted religion, morality, and knowledge, promoted good faith toward Native Americans, and banned slavery.

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45 In 1796 the governor and judges published Laws of the Territory of the United States North-West of the Ohio, more commonly known as Maxwell’s Code, named after its publisher. Maxwell’s Code was the first civil and criminal code for the new American frontier, as well as the first book published in the Northwest Territory. Maxwell’s Code, available at www.ohiohistorycentral.org/w/Maxwell’s_Code?rec=1470

The Confederation Congress appointed Arthur St. Clair of Pennsylvania as Governor of the new territory. Seconding St. Clair as Secretary was Winthrop Sargent of Massachusetts. Both appointments were confirmed by the Congress that had been established following the adoption of the new Constitution.47

D. Ohio’s Early Leaders

Arthur St. Clair (1736-1818), was an American soldier and politician. Born in Scotland, St. Clair attended the University of Edinburgh and served as a junior officer in the British Army during the French and Indian War under Generals Jeffrey Amherst and James Wolfe. After the War, he settled in western Pennsylvania and served as a judge. In 1775 Congress appointed him as a colonel in the Continental Army. St. Clair participated in the Quebec Invasion and fought at the Battles of Trenton and Princeton. His retreat from Fort Ticonderoga in 1777 led to his court-martial. Although exonerated, St. Clair never held another field command in the War.48

By the War’s end, St. Clair was Washington’s aide-de-camp, with the rank of Major General. In 1785 he was elected to the Continental Congress from Pennsylvania and Congress appointed him as the first Governor of the Northwest Territory in 1787. A Federalist, St. Clair frequently clashed with the territorial

47 The Northwest Ordinance contained many of the provisions of the Bill of Rights that were eventually adopted as amendments to our U.S. Constitution. Arguably these applied to the states before the adoption of the 14th amendment. Concurring Opinions. THE NORTHWEST ORDINANCE OF 1787 AND THE BILL OF RIGHTS. Available at: http://concurringopinions.com/archives/2011/11/the-northwest-ordinance-of-1787-and-the-bill-of-rights.html
judges and actively opposed Ohio’s admission as a state. After denouncing the Enabling Act, which established the mechanism for Ohio’s admission as a state, President Jefferson removed St. Clair from office in 1802.

The new Territorial Secretary, Winthrop Sargent, was born in Massachusetts and graduated from Harvard College. He served during the American Revolution with Henry Knox’s Regiment of Artillery, ending the war as a brevet major. He served with his regiment at the Battles of Long Island, White Plains, Trenton, Monmouth, and Brandywine Creek. He also served during the winter encampment at Valley Forge. After the War, Sargent became a land speculator, surveyed the Seven Ranges tract in southern Ohio, and was one of the founders of the Ohio Company.

Sargent participated in the Northwest Indian Wars of the 1790s and eventually became Colonel and adjutant general. Sargent’s position was critical to the new territory, since he acted in the place of the governor during his absences, and St. Clair was frequently absent. Sargent, like St. Clair, clashed with the judges and local officials over their respective spheres of influence. President Adams appointed Sargent as Governor of the Mississippi Territory in 1798. Adams appointed William Henry Harrison to replace Sargent as Secretary

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49 Ohio History Central. ARTHUR ST. CLAIR. Located at: http://www.ohiohistorycentral.org/w/Arthur_St._Clair
50 HURT, SUPRA NOTE 28 AT 272-283.
in 1798. Sargent was dismissed as Governor of the Mississippi Territory when Thomas Jefferson assumed the office of President in 1801.\textsuperscript{51}

Harrison was born into the Virginia aristocracy. Harrison’s father Benjamin signed the Declaration of Independence and served as Governor of Virginia. William was studying medicine in Philadelphia when his father died, leaving him without the funds to continue his studies. Harrison joined the Army, was commissioned as an officer, and joined his regiment at Fort Washington, just outside Cincinnati.

Harrison served throughout the Northwest Indian Wars of the 1790s and eventually became aide-de-camp to commanding General Anthony Wayne. Harrison was at Wayne’s side during the Battle of Fallen Timbers and he later signed the Treaty of Greenville. President Adams appointed Harrison as Secretary of the Northwest Territory and he was later elected as that territory’s nonvoting delegate to Congress.

President Adams appointed Harrison as Governor of the new Indiana Territory in 1800, and he served in that capacity until 1812. He led the American forces against the Seven (Indian) Nations at the Battle of Tippecanoe and led the Army of the Northwest during the War of 1812. Harrison ran unsuccessfully for the Presidency in 1836, and later was elected in 1840. He died after 31 days in office.\textsuperscript{52}

\textsuperscript{51} \textit{Encyclopedia of Alabama}. WINTHROP SARGENT. Located at: \url{http://www.encyclopediaofalabama.org/face/Article.jsp?id=h-2371}

Charles Willing Byrd served both as the final governor and the final secretary of the Northwest Territory. Born into a wealthy family in Virginia, Byrd studied law in Philadelphia and gained admission to the bar in 1794. Appointed as territorial Secretary by President Adams in 1800, he served in that capacity until Ohio became a State on March 1, 1803. Appointed as Governor after St. Clair’s firing in 1802, he served until he was replaced by the newly-elected Ohio governor, Edward Tiffin, on March 3, 1803. Byrd was a member of Ohio’s first constitutional convention and is considered by many to be the principal author of that document. President Jefferson named Byrd as the first judge of the U.S. District Court for the District of Ohio on March 3, 1803 and he served in that post until his death in 1828.

Congress selected John Armstrong, Samuel Holden Parsons, and James Mitchell Varnum as the first Judges of the Territorial Court. Congress also established the original courts for the Territory on August 23, 1788. A general or Circuit Court was established for the entire territory, which could be presided over by all three judges, any two, or by one alone. The Court met annually at Marietta in October, at Cincinnati in March, and at Detroit, Vincennes, and Kaskaskia, whenever one of the judges was able to reach those places.53

John Armstrong was born in Carlisle, Pennsylvania and studied at the College of New Jersey (now Princeton University). Armstrong joined a Pennsylvania militia regiment in 1775, and he served as aide-de-camp to

General Hugh Mercer at the Battle of Princeton. Armstrong served throughout the war, ending as a major. Armstrong was also at the center of a group of officers that met to discuss back pay and other grievances. Washington managed to defuse this “protest” and he took no official action against Armstrong for his role.

In 1787 and 1788 Armstrong served as a Pennsylvania delegate to the Continental Congress. Congress appointed him as Chief Justice of the new Northwest Territory, but he declined this appointment as well as several other public offices over the next few years. Armstrong was later elected Senator from New York and was selected as Minister to France and Spain. At the outbreak of the War of 1812, President Madison appointed him first as Brigadier General in the Regular Army, and later as Secretary of War. Madison dismissed him from the latter office after the British captured, and then burned, Washington in 1814.54

Parsons was born in Lyme, Connecticut and graduated from Harvard College in 1756. Parsons read law with his uncle and was admitted to the bar in 1759. He was elected to the Connecticut General Assembly, and he supported resistance to British rule in the days before the American Revolution.

Congress commissioned him as a Colonel in the Continental Army in 1775; he served continuously until the end of that conflict, ending the war as a Major General. Parsons participated in the Battle of Bunker Hill, the battles

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54 CARL E. SKEEN, JOHN ARMSTRONG, JR., 1758-1843: A BIOGRAPHY (Syracuse University Press, 1982).
around New York City, and was a member of the board of officers that tried and convicted Major John Andre of espionage.\(^55\)

After the war, Parsons became a director of the Ohio Company, and was a member of the Connecticut Convention for adopting the U.S. Constitution. Congress appointed him as Chief Justice of the Northwest Territory in 1788. Assuming his judicial duties in the new territory, Parsons also surveyed the Ohio Company’s lands and the Connecticut Western Reserve. Parsons drowned while surveying government lands in Pennsylvania in November, 1789.

Perhaps the most renowned of the original judges of the Territory was James Mitchell Varnum. Born in Massachusetts, Varnum attended Harvard College and graduated from the English Colony of Rhode Island and the Providence Plantations (later renamed Brown College) at age 20.

Varnum served in the Continental Army as a Brigadier General until 1779. After his resignation, he was appointed Major General in the Rhode Island volunteer militia. Varnum fought at the siege of Boston, the battles on Long Island, at White Plains and Red Bank, and the winter encampment at Valley Forge. After the war, Varnum was a founding member of the Society of Cincinnati, and later served as its president.\(^56\)

After the war, Varnum worked as an attorney in Rhode Island and successfully represented the defendant in the case of *Trevett v. Weeden*, one of

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the first cases in which a court declared an act of the legislature void as unconstitutional.\textsuperscript{57} Varnum served as a delegate to the Continental Congress, and was appointed to the Court of the Northwest Territory. He died at Marietta in 1789 at the age of 40.\textsuperscript{58}

Congress selected John Cleaves Symmes of New Jersey to take Armstrong’s place in February 1788. Symmes was born on Long Island, educated as an attorney and relocated to Morristown, New Jersey. During the American Revolution, he served as a Colonel in the New Jersey militia and on the New Jersey Legislative Council. Symmes served on the New Jersey Supreme Court in 1777 and 1778, and represented New Jersey in the Continental Congress from 1785 to 1786. In 1788, Symmes purchased 311,682 acres in the Northwest Territory from Congress. Known as the Symmes Purchase, the tract was later reduced to 248,250 acres. Symmes settled in North Bend, Ohio and served as a judge of the Territorial Court from 1788 until Ohio became a state in 1803.\textsuperscript{59} He was the father-in-law of President William Henry Harrison and the great-grandfather of President Benjamin Harrison.

Although most of the territorial judges were well educated and legally trained, historian Andrew Cayton wrote that none would be likely to survive the

\textsuperscript{57} WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 37 (University Press of Kansas, 2000).
\textsuperscript{58} JAMES MITCHELL VARNUM, A SKETCH OF THE LIFE AND PUBLIC SERVICES OF JAMES MITCHELL VARNUM OF RHODE ISLAND, BRIGADIER – GENERAL OF THE CONTINENTAL ARMY; MEMBER OF THE CONTINENTAL CONGRESS; JUDGE U.S. SUPREME COURT, N. W. TERRITORY; MAJOR – GENERAL RHODE ISLAND VOLUNTEER MILITIA (Boston: David Clapp & Son, Printers, 1906). Available at: https://archive.org/stream/sketchoflifepubl00varn#page/n9/mode/2up
\textsuperscript{59} OHIO HISTORY CENTRAL. JOHN C. SYMMES. Available at: http://www.ohiohistorycentral.org/w/John_C._Symmes
close scrutiny or Congressional hearings that today’s federal judges must endure. Most of them were major land speculators who would earn huge amounts of money once a stable government was established. Moreover, most of these judges would not be sympathetic to the interests of small landowners or squatters.\textsuperscript{60}

Setting aside ethical considerations and possible conflicts of interest, the most important trait Congress sought in the new judges was reliability. Were they loyal to the federal government? Did they pledge their private fortunes to ensure the success of the new country? Could they adequately represent the interests of the federal government on the far-flung frontier? Congress ensured that its early appointees met these criteria. The governor and judges largely followed these standards when appointing local officials as well.\textsuperscript{61}

Once the portion of the territory that would become Ohio reached the threshold of 5,000 free male settlers, a territorial legislature was created. This bicameral legislature consisted of a House of Representatives, elected by the citizens, and a Council, nominated by the House and appointed by Congress. Locked in a power struggle with the governor, the legislature selected William Henry Harrison as the delegate to Congress, narrowly defeating the governor’s son, Arthur St. Clair Jr.

\textsuperscript{60} \textsc{The History of Ohio Law}, supra note 42 at 20-21 (quoting Andrew R. L. Cayton, \textit{Law and Authority in the Northwest Territory}).

\textsuperscript{61} \textsc{The History of Ohio Law}, supra note 42 at 21-22 (quoting Andrew R. L. Cayton, \textit{Law and Authority in the Northwest Territory}).
William McMillan was elected as delegate to replace Harrison in 1800. McMillan was born in Virginia and graduated from the College of William and Mary. He moved to Cincinnati and was admitted to the bar in 1788. McMillan served as a local judge and Hamilton County commissioner before being elected as delegate. He declined renomination in 1800.

Paul Fearing was the last delegate to serve prior to statehood. Born in Massachusetts, he graduated from Harvard College and was admitted to the bar in 1787. He relocated to Marietta shortly thereafter and became the first practicing attorney in the Northwest Territory. Fearing served as probate judge and member of the territorial legislature prior to his election as delegate. After his term as delegate ended, Fearing practiced law and was appointed as common pleas judge in 1810. He served one seven-year term and died in 1822.

In addition to gaining the population necessary to apply for statehood, several other conflicts had to be resolved. Among these were: the conflict between settlers and the Native Americans; the conflict between legitimate settlers and squatters; the conflict between the federal government and the British; the conflict between territorial and local control; and, finally, the conflict between Governor St. Clair and the territorial judges, and later with the territorial legislature.

II. Trouble with the Tribes (1775-1795)

A. The Militia
Conflicts between the Americans and the Native American tribes began soon after Daniel Boone led the first settlers into Kentucky via the Wilderness Road in 1775. At first the tribes raided isolated outposts and settlements, but in 1777, the Native Americans, aided by British regulars and Canadian militia, conducted a largely unsuccessful campaign to drive the remaining settlers from Kentucky. When the American Revolution ended in 1783, the Allied tribes were again not consulted or represented. As a result, the fighting on the frontier continued, with the primary targets being flatboats of settlers floating down the Ohio River.

George Rogers Clark led punitive expeditions against the tribes in 1780, 1782, and 1786, but these were largely ineffective. Instead of cowing the Native Americans as intended, these attacks served only to further incite the tribes and increase the depredations along the Ohio River.\(^{62}\)

B. The U.S. Army Takes Charge

The new federal government, installed in 1789, had no better luck quelling the tribes. US forces launched three major expeditions against the principal Miami villages located at Kekionga, today’s Fort Wayne, Indiana in 1790, 1791 and 1794.\(^{63}\) The first two of these, led by Generals Harmar and St. Clair, were wildly unsuccessful.


\(^{63}\) The conflict between the Americans and the Indian Confederation for control of the Northwest Territory was known by several names, including the Northwest Indian War, Little Turtle’s War, the Ohio War, the Ohio Indian War, the War for the Ohio River Boundary, the Miami Confederacy
C. Harmar’s Defeat

The first expedition was led by General Josiah Harmar and consisted of almost 1500 men, mostly untrained militia and levies. Harmar’s force left Fort Washington (Cincinnati) in early October, 1790 and by October 19th the force was within striking distance of Kekionga. Over the next three days Harmar sent out a number of small detachments, which burned several abandoned villages. Each detachment was defeated by the Native Americans and driven back to Harmar’s main force.64

Harmar then determined that because of his high number of casualties (over 200 killed and wounded by some accounts), the approaching winter, the lack of supplies and forage, and the desertion of some of the militia, he was unable to attack with his full army. Harmar then marched his force back to Cincinnati, declared victory, and promptly resigned his army commission.65

D. Massacre Along the Wabash

President Washington, incensed at Harmar’s defeat and the escalating violence against the settlements, ordered St. Clair to mount another expedition the next year. Because of shortages of men, horses and supplies, St. Clair, like Harmar, was unable to start the expedition until early October. St. Clair’s Army

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65 HURT, supra note 28 at 105-111.
consisted of about 2,300 men including most of the strength of the Regular US Army, augmented by six-month levees from Virginia and Pennsylvania, and militia from Kentucky. St. Clair built two stockades, Forts Hamilton and Jefferson, as supply depots along his line of march. From the start his expedition was desperately short on supplies, forage, and pack animals.\textsuperscript{66} Morale among the troops was low to nonexistent.

Plagued by desertions among the levees and the militia, the Army reached the headwaters of the Wabash, near today’s Fort Recovery, Ohio, on November 3rd with less than 1,200 men and camp followers. Early on November 4\textsuperscript{th}, 1,000 warriors led by Little Turtle and Blue Jacket attacked St. Clair’s encampment. The allied tribes quickly surrounded St. Clair’s army, inflicting devastating casualties. After several hours of fighting, the survivors, led by St. Clair, broke out of the encirclement and retreated towards Fort Jefferson, 29 miles to the south. The retreat quickly turned into a rout, which then turned into headlong flight. The Americans lost over 800 soldiers and camp followers killed.\textsuperscript{67}

Exasperated by this second defeat, Washington set aside any concerns about a large standing\textsuperscript{68} army and appointed his former lieutenant, Anthony Wayne, as Major General and commander of the Legion of the United States.

\textsuperscript{66} For an excellent discussion of the Campaign of 1791, see, SWORD, supra note 64 at 160-195.  
\textsuperscript{67} HURT, supra note 28 at 111-119.  
\textsuperscript{68} The Continental Army was disbanded by Congress at the conclusion of the American Revolution in 1783. On June 3, 1784, Congress reestablished the Regular Army as the First American Regiment. Congress added the Second Regiment in 1791, after Harmar’s Defeat, and both regiments were reconstituted as sub-legions in 1792. Department of the Army: Lineage and Honors. Available at: http://www.history.army.mil/html/forcestruc/lineages/branches/inf/0003in.htm
The Legion was to be a professional force, recruited and trained in the Pittsburgh area. It consisted of four sub-legions, each with two battalions of infantry, a battalion of riflemen, a battery of artillery, and a troop of dragoons. Given sufficient time to assemble and train his force, Wayne moved the Legion to Fort Washington in April, 1793.

E. Anthony Wayne and Victory

In 1794, General “Mad” Anthony Wayne constructed a series of forts in the heart of hostile country, repelled a siege against Fort Recovery,\(^69\) and defeated the Seven Nations at the Battle of Fallen Timbers.\(^70\) After the battle, Wayne ordered that all of the Native American villages and their crops within a 50 mile radius be destroyed. Wayne’s forces also threatened the British post of Fort Miami,\(^71\) located just down the Maumee River from the battle site. The warring parties met the next year at Fort Greenville, and signed the Treaty of Greenville on August 20, 1795. By its terms, the tribes ceded almost all of Ohio to the United States, allowing settlement to resume at an accelerated pace. This treaty

\(^{69}\) Wayne built Fort Recovery at the site of St. Clair’s defeat in 1793.

\(^{70}\) Just before the battle, the Miami chief Little Turtle addressed his colleagues and said: “We have beaten the enemy twice under separate commanders. We can not expect the same good fortune always to attend us. The Americans are now led by a chief who never sleeps; the night and the day are alike to him and during all the time that he has been marching upon our village notwithstanding the watchfulness of our young men we have never been able to surprise him. Think well of it. There is something whispers to me, it would be prudent to listen to his offers of peace.” HISTORY CENTER NOTES & QUERIES. OUR STORIES FROM FT. WAYNE & ALLEN COUNTY, INDIANA. Located at: [http://historycenterfw.blogspot.com/2012/07/remembering-little-turtle.html](http://historycenterfw.blogspot.com/2012/07/remembering-little-turtle.html)

\(^{71}\) See, also, CALVIN M YOUNG, LITTLE TURTLE (ME-SHE-KIN-NO-QUAH): THE GREAT CHIEF OF THE MIAMI INDIAN NATION; BEING A SKETCH OF HIS LIFE, TOGETHER WITH THAT OF WILLIAM WELLS AND SOME NOTED DESCENDANTS (Sentinel Ptg. Company, 1917).

\(^{71}\) Although they ceded the entirety of the Northwest Territory to the United States in the Treaty of Paris (1783), the British continued to garrison several posts in the area, including Fort Miamis and Detroit.
also ushered in an era of friendly relations between the white settlers and the tribes that lasted almost 15 years.\textsuperscript{72}

III. The Jay Treaty

Once the Seven Nations were defeated, Great Britain saw the need to make peace with the Americans, particularly in light of the fact that it had been at war with France since 1792. President Washington sent Chief Justice John Jay to London to negotiate a treaty. Among the issues were: normalizing relations and trade between the two countries; the return of or compensation for, several hundred American merchant vessels seized by the British Navy; evacuation of military posts the British had built on American soil;\textsuperscript{73} and, finally, determining the border between the United States and Canada.

Although bitterly opposed by the Jeffersonians, the U.S. Senate ratified the Jay Treaty in August, 1795. The treaty terms were to be effective on February 29, 1796. By its terms, the British agreed to evacuate all posts on American soil by June, 1796. The British also agreed to compensate American ship owners for their losses, and in return, the Americans agreed to most of the British anti-French maritime policies.\textsuperscript{74}


\textsuperscript{73} These posts included Forts Detroit and Mackinac in modern-day Michigan, Fort Miami in modern-day Ohio, and Forts Niagara and Oswego in modern-day New York State.

\textsuperscript{74} SWORD, supra note 64 at 314-315. The British granted the United States “most favored nation” trading status. The issues of seizures of American ships and impressments of American sailors on the high seas were to be resolved by arbitration. U.S. DEPARTMENT OF STATE, OFFICE OF THE HISTORIAN. MILESTONES 1784-1800. Available at: http://history.state.gov/milestones/1784-1800/jay-treaty
IV. Squatters

As noted previously, the Land Ordinance of 1785 established procedures for the survey and sale of the lands ceded by the British. Some prospective settlers decided not to wait for the survey to be completed. Following the theory that vacant land should be free for the taking, these settlers crossed the Ohio River, settled on public lands and dared the rightful owners to evict them. Legitimate land purchasers were incensed by the effrontery of these settlers and demanded that the government take action against them.

The first squatters arrived in the Ohio country soon after the start of the American Revolution. Their illegal settlements posed a danger to legitimate settlers by encroaching on Indian lands and inciting them to violence. Even General Washington was affected by these illegal settlers. When he traveled to Pennsylvania in 1784 to survey the lands awarded to him by the British for his service in the French and Indian War, he discovered that several Scotch-Irish families had already cleared the land, erected cabins and fences, and began growing crops and raising cattle.75 These squatters claimed that by clearing and planting the land, they had a moral and legal claim of ownership greater than that of an absentee landlord, who simply had a paper title to the property. The circuit court held in favor of the General, and rather than pay him rent or purchase the land outright, the settlers simply abandoned their homesteads and settled elsewhere.

The British and later the American governments took steps to address the problem of squatters. Following their victory in the French and Indian War, the British issued the Proclamation of 1763. This Act prohibited the English colonists from settling on lands west of the Appalachian Mountains. The Americans largely ignored this act, and the migration west continued.

At the end of the American Revolution, the Confederation Congress prohibited settlement of the lands in the Ohio country, but the squatters ignored this law as well. Beginning in 1785, the Army attempted to remove illegal settlers from their holdings, but aside from burning their cabins and destroying their crops, the Army’s efforts were mostly ineffective. The language of the Fort McIntosh Treaty, signed in 1785, provided that squatters residing on land reserved to the Indians would not be protected by the Army and that the Indians “may punish [them] as they pleased.” It eventually became clear that the Army was too small, the country too big, and the squatters too plentiful for the government to curtail the practice of squatting.

V. Turf Wars

Congress appointed Arthur St. Clair as Governor of the new territory and tasked him with forming local governments and establishing peace, security and prosperity there. While Congress was authorized to veto any of St. Clair’s actions, it very rarely did so. St. Clair arrived in Marietta on July 15, 1788, appointed as a proconsul from afar. One of his first acts was to establish

76 OHIO HISTORY CENTRAL: SQUATTERS. Located at: http://www.ohiohistorycentral.org/w/Squatters
77 HURT, supra note 28 at 146.
Washington County, with Marietta as the county seat, on July 27th. Almost from the moment he arrived a struggle ensued between St. Clair and the territorial judges over their respective authority.

A. Creating Laws

The Ordinance required the Governor and Judges “to adopt and publish…such laws of the original states, criminal and civil, as may be necessary, and best suited to the needs of the district.” St. Clair interpreted this provision to mean that they must adopt laws ONLY from the original thirteen states. He also believed that any law must be approved by him, even if all three judges favored it.

Conversely, the judges argued for a liberal reading of this provision, believing that the conditions in the Northwest Territory were unlike that of any existing state, and therefore required a set of laws specifically designed for the territory. In addition, the judges attacked the common law as the last vestige of a monarchical (British) government. They acknowledged that the common law should be used when there was no alternative, but they also believed that the law should be flexible, particularly in cases where the common law did not apply.

In the end the governor and the judges compromised. Taking a pragmatic approach to the problem, they agreed that the laws of the several states could be

78 Northwest Ordinance, July 13, 1787, section 5.
79 HURT, supra note 28 at 273-274.
81 THE HISTORY OF OHIO LAW, supra note 42 at 24-25.
combined, and that the supposedly static common law could be adjusted to meet
the unique conditions of the frontier. ⁸²

In the summer and fall of 1788, the Governor and judges created a code
of laws for the territory. ⁸³ These laws provided for a militia, setting minimum ages
from marriage, statutes of limitations on civil and criminal actions, and the
administration of county governments. They adapted laws from Pennsylvania
and the common law and established a list of crimes and punishments. Noting
that the Governor and the judges were former Army officers, historian Theodore
Pease noted that the laws read “more like general orders… than laws.”⁸⁴

As might have been expected judges did strange things. Especially
was this true in Illinois. John Reynolds has left on record the story of the
court at Prairie du Rocher that tried a man for the murder of a hog. Another
court in the Illinois paraded a man through the street with his face
to his horse’s tail, his wife leading the horse. August 16, 1794, a man was
adjudged 16 stripes for nonpayment of a debt. In 1799 an Illinois court
entertained the indictment of a man as a common nuisance for living with
another man’s wife. The legislation of the Northwest Territory can be
picked full of defects, but it is a question whether the scattered
communities for which it was made would not generally have governed
themselves in about the way they actually did whatever the legislation
provided for them. ⁸⁵

Prior to the signing of the Treaty of Greenville, most of the white
settlements in the Northwest Territory were located close to the Ohio River. Once

⁸² THE HISTORY OF OHIO LAW, supra note 42 at 22-23.
⁸³ The full text of this code is available at: FULL TEXT OF THE LAWS OF THE NORTHWEST
TERRITORY. Available at: http://archive.org/stream/lawsofnorthwestt17nort/lawsofnorthwestt17nort_djvu.txt
⁸⁴ THEODORE CALVIN PEASE, THE LAWS OF THE NORTHWEST TERRITORY, 1788 – 1800 (Springfield,
⁸⁵ 2 BATEMAN AND SELBY, HISTORICAL ENCYCLOPEDIA OF ILLINOIS AND HISTORY OF ST. CLAIR COUNTY
698-701, found in: http://archive.org/stream/lawsofnorthwestt17nort/lawsofnorthwestt17nort_djvu.txt
a treaty was signed with the Native American tribes and peace was established, settlements were founded farther up the Ohio River tributaries and the population grew exponentially. Because cash was in short supply, speculators began selling their lands on time installments or by granting credit. The Harrison Frontier Land Act, passed by Congress on May 10, 1800, allowed prospective sellers to purchase public lands on credit, spurring additional settlement.86

Once peace was established throughout the territory, government officials began the process of civil administration of the territory and the growing population. Before 1795, the Governor and the judges were able to enact laws that were contrary to the procedures (to only adopt laws from the original thirteen states) previously established by the Northwest Ordinance. Governor St. Clair knew the judges were exceeding their statutory authority but he largely overlooked this issue.

B. Slavery

Article VI of the Northwest Ordinance decreed that: “There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted: Provided, Always, any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be

lawfully reclaimed and conveyed to the person claiming his or her labor or
service as aforesaid."87

French settlers in the region had owned slaves long before the American
government was established. Governor St. Clair, under pressure from French-
speaking individuals in the area, chose to interpret the provision to prohibit the
future introduction of slavery, but not to disturb the peculiar institution in areas
where it already existed.88 Settlers moving into the Virginia Military District twice
petitioned the territorial legislature for permission to bring their slaves with them.
Both requests were rejected.89

C. Maxwell’s Code

By 1795, however, the federal government began closer scrutiny of the
situation in the territory and congressional debates began. The federal House of
Representatives debated and eventually rejected several of the laws passed by
St. Clair and the judges. The United States Senate failed to concur, and the
“arbitrary” laws remained in place.

Perhaps in response this Congressional scrutiny, in the summer of 1795
the Governor and judges met at Cincinnati to prepare a more comprehensive civil
and criminal code. This work became known as Maxwell’s Code, named after its
publisher. Twenty-five of the thirty-seven laws that were proposed were taken
from the Pennsylvania Code, while the remaining laws were taken from the laws

87 An Ordinance for the government of the Territory of the United States Northwest of the River
Ohio. Article VI.
88 THE HISTORY OF OHIO LAW, supra note 42 at 27.
89 KNEPPER, supra note 27 at 85.
of other states. Maxwell’s Code established the English common law, restructured certain court practices, prohibited excessive taxation, and imposed a variety of regulations.

Three years later the acting governor and the judges adopted eleven more laws, including four taken from Kentucky. The latter laws were created in spite of the requirement of the Northwest Ordinance that any laws be adopted from the original thirteen states. The acting governor and the judges justified their actions by declaring that the conditions in Kentucky, which was admitted as a state in 1792, were similar to the conditions in the Northwest Territory.  

VI. Stage 2

By the summer of 1798, Governor St. Clair, having realized that there were now “5000 free male inhabitants of full age” in the territory, called for a census in order to establish the second stage of territorial government. The Governor didn’t wait for the results of the census, and on October 29, 1798 declared that the requisite number of eligible males had been reached. He set the third Monday in December as the date for choosing delegates to the territorial legislature.

A. The Territorial Assembly

In February, 1799 the 22 members of the new lower house met and nominated 10 persons for the five seats in the upper house, or Legislative Council. Members of the lower house were required to own at least 200 acres,

90 KNEPPER, supra note 27 at 82-83.
and members of the upper house were required to own at least 500 acres. The members chose Edward Tiffin as President of the House of Representatives.

The new territorial assembly dealt with the issue of slavery in the new territory, streamlined election laws, enacted laws dealing with personal conduct and criminal actions, and levied taxes.

B. Congress Forms the Indiana Territory

While the settlers living east of the Great Miami River looked anxiously toward statehood, the settlers west of that river (today’s states of Indiana and Illinois) wanted to return to the first stage of territorial government, which they believed served their interests better. Governor St. Clair, on the other hand, wanted to postpone statehood and divide his enemies, located in the valley of the Scioto River, from his supporters, centered east of the Scioto River near Marietta.

Congress sided with the settlers located west of the Great Miami River and created the Indiana Territory on May 7, 1800. Northwest Territory was divided along a line running north from the mouth of the Kentucky River, through Fort Recovery, and north to Canada. Cincinnati was named as the capital of the territory east of the border, and Vincennes was designated as the capital of the territory west of the border. President Adams appointed William Henry Harrison as Governor, and the new territory reverted to Stage 1 of territorial government until 1809.91

C. Jefferson Elected as President

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91 KNEPPER, supra note 27 at 87.
Meanwhile, on the national level, Democratic-Republican Thomas Jefferson was elected President in 1800, sweeping the Federalist majority from power. Prior to leaving office, however, the lame duck President John Adams appointed St. Clair to another term as Governor.

The Ohio Republicans, led by Nathaniel Massie and Thomas Worthington, preferred local control of the government. The Republicans wanted statehood and opposed the Bank of the United States and the fiscal policies of Alexander Hamilton. They believed that the 60,000 inhabitants necessary for statehood would be reached in the 1800 census. Their center of power was Chillicothe.

The Federalists, led by Governor St. Clair, believed in a strong national government. They believed that men of property should control the government. The Federalists opposed statehood, and wanted to further divide the territory along the Scioto River. They supported a large standing army and navy, and backed the Bank of the United States. The Cincinnati and Marietta areas were their centers of power.

In an effort to retain power, St. Clair persuaded the territorial assembly to pass the Division Act of 1801. His purpose was to establish the western border of Ohio at the Scioto River. By dividing Ohio as St. Clair suggested, neither area would possess the 60,000 inhabitants necessary for statehood, thus allowing St. Clair and the Federalists to remain in office. In January 1802, Congress overwhelmingly rejected the Division Act, greatly increasing Ohio’s chances for statehood in the near term.
Summary

The new United States of America gained control of the Ohio Country at the close of the American Revolution. The Confederation Congress hoped to raise money to repay war debts through the sale of these lands to the public. Congress also granted lands to war veterans as a reward for their service.

Congress enacted the Ordinances of 1784, 1785 and 1787, which established procedures for the settlement of the new lands. Initially, the governmental powers were divided between the governor, a Secretary to act in the governor's absence, and three territorial judges. Once the population of a specific area reached 5000 free males, a territorial legislature would be elected. Once an area gained a population of 60,000, it could apply for statehood.

The Native American population residing in the area bitterly contested white settlement. The Confederation, known as the Seven Nations, humiliated federal forces on two occasions until they were defeated by General Anthony Wayne at the Battle of Fallen Timbers in August, 1794. The Treaty of Greenville, signed in 1795, opened the Ohio Country to settlement.

Ohio's population increased exponentially, and by 1800 and were enough settlers to elect a legislature. The legislature clashed frequently with the Governor and the judges over their respective spheres of influence. The territorial Governor, Arthur St. Clair, actively opposed statehood for Ohio, but by 1802 the area reached a population of 60,000 and clamored for statehood.
CHAPTER 3:

OHIO’S 1802 CONSTITUTION AND STATEHOOD

A Bill of Rights is what the people are entitled to against every government on earth, general or particular; and what no just government should refuse, or rest on inferences.

--Thomas Jefferson, 1787

I. Introduction.

Once Congress rejected the Division Act, Ohio Republicans\textsuperscript{92} set their eyes on statehood. They felt certain that the new President and the newly elected Republican Congress supported their agenda. The U.S. House of Representatives appointed a committee to report on Ohio’s prospects for statehood. Although the 1800 census revealed that Ohio only had 45,365 residents, the committee determined that the region would soon have the 60,000 residents required for statehood. They issued a report proposing that the steps be established for Ohio’s statehood.\textsuperscript{93} Although Paul Fearing,\textsuperscript{94} the nonvoting delegate, opposed the committee’s findings, Congress accepted the committee’s report.

A. Enabling Act of 1802

\textsuperscript{92} The political party referred to here is at various times known as the Democratic–Republican Party, the Republican Party, or the Jeffersonian Republicans. This party was organized in 1791, primarily to oppose the programs of Secretary of the Treasury Alexander Hamilton. As a result of the presidential election of 1824, this party eventually split into four factions.

\textsuperscript{93} KNEPPER. supra note 27 at 90.

\textsuperscript{94} Fearing was an ally of Governor St. Clair and opposed statehood for Ohio.
On April 30, 1802, Congress passed the Enabling Act of 1802. Section 1 of the Act read:

That the inhabitants of the Eastern division of the territory northwest of the river Ohio, be and they are hereby, authorized to form for themselves a constitution and State government, and to assume such name as they shall deem proper, and the said State, when formed, shall be admitted to the Union upon the same footing with the original States in all respects whatever.

The Enabling Act described Ohio’s new boundaries, and set November 1, 1802 as the date for a constitutional convention. The new Constitution was to be “Republican, and not repugnant to the Ordinance of 13 July, 1787, between the original States and the people and States of the territory northwest of the River Ohio.”

The voters would elect 35 delegates, or one delegate for each 1,200 people. While the Northwest Ordinance limited the vote to men who owned a “freehold in 50 acres,” the Enabling Act included “all male citizens of the United States, who have arrived at full age, and resided within the said territory at least one year previous to the day of election, and shall have paid a territorial or County tax…” However, noncitizens who owned at least 50 acres could also vote.

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95 The full text of the Enabling Act of 1802 is available at: OHIO HISTORY CENTRAL: ENABLING ACT OF 1802. Available at: http://www.ohiohistorycentral.org/w/Enabling_Act_of_1802_(Transcript)
96 The state boundaries were established at the Pennsylvania line, the Ohio River to the mouth of the Great Miami, the meridian northward to its intersection with a line projected due east from the southern tip of Lake Michigan, then along that line to the international boundary.
97 Enabling Act of 1802, § 5.
98 Enabling Act of 1802, § 4.
since the Enabling Act allowed the electors who had qualified under the Northwest Ordinance to vote for convention delegates.\footnote{\textsc{Steven H. Steinglass \\ \\ \\ & \textsc{Gino J. Scarselli, The Ohio State Constitution 212 (Oxford University press, 2011).}}

Like the Northwest Ordinance, the Enabling Act permitted most male residents to vote. The prior laws allowed voting only at the county courthouses, but since the original counties were so large, voting was encouraged by establishing polling places at the township level.\footnote{\textsc{The History of Ohio Law, supra note 42 at 42.}} The result was a large voter turnout, with most precincts reporting a doubling or tripling of voters compared to earlier territorial elections.\footnote{\textsc{Barbara A. Terzian, Symposium: The Ohio Constitution—Then and Now: An Examination of the Law and History of the Ohio Constitution on the Occasion of Its Bicentennial: Ohio’s Constitutions: An Historical Perspective,}, 51 Clev. St. L. Rev. 357,360 (2004).}

The Enabling Act also provided that the new state would be allowed one member of the House of Representatives until the time of the next census.\footnote{Enabling Act of 1802, § 6.} Finally, the Act provided that the federal government would control public lands within the new state, and the State agreed to allocate one-twentieth of the net proceeds of land sales in Ohio for building roads. Specifically, the one-twentieth portion should “be applied to the laying out and making public roads, leading from the navigable waters emptying into the Atlantic, to the Ohio, to the said State, and through the same, such roads to be laid out under the authority of Congress, with the consent of the several States through which the road shall pass.”\footnote{Enabling Act of 1802, § 7.}

\section*{B. Ohio’s First Constitutional Convention}
On November 1, 1802, the thirty-five delegates assembled at Chillicothe. Twenty-six of the delegates supported the platform of the Democratic-Republican Party. Seven of the delegates identified themselves as Federalists, and two were independents. The Democratic–Republicans favored a small government of limited powers, and they believed that the legislative branch should control most of the powers that the government possessed. Conversely, the Federalists believed in a stronger, more centralized government structure. The delegates only voted on a straight party-line basis once, when the Democratic–Republicans defeated a Federalist-backed proposal to submit the proposed constitution to the voters for approval.

During the delegate campaign, the Federalists accused the Democratic–Republican candidates of proslavery leanings, while the latter candidates claimed that they were falsely accused in an effort to defeat their candidacies. While there may have been some support in committee for a limited form of slavery in the new state, most likely from the delegates originally from Kentucky or Virginia, none of these views were presented to the entire convention.

The delegates quickly elected officers, including Edward Tiffin as President, validated the delegates’ credentials, established rules and formed

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106 History of Ohio Law, supra note 42 at 363.
107 Id. at 360.
108 Id. at 47.
109 Edward Tiffin was born in Carlisle, England and studied medicine before emigrating to Virginia in 1784. He moved to Chillicothe in 1796 to practice medicine. Tiffin served as Speaker of the
committees. Governor St. Clair addressed the delegates on the third day and urged them to ignore the Enabling Act and retain the current government structure. On November 22, 1802, President Jefferson learned the details of St. Clair’s speech and promptly dismissed him as Governor. The delegates ignored St. Clair’s advice and recommended that the convention draft a constitution and form a state government.\textsuperscript{110} The delegates agreed to form a state, and drafted the Constitution of 1802.

In crafting Ohio’s new Constitution, the delegates relied on several recently written or rewritten constitutions from other states. During the American Revolution, patriots from the original 13 colonies had overthrown their colonial governments. In order to provide governance, the colonies needed to prepare new constitutions to supersede the royal charters then in existence. While New Hampshire, Virginia, South Carolina, in New Jersey created new constitutions before July 4, 1776, Rhode Island and Connecticut simply deleted all references to the Crown in their existing royal charters. Drafting Issues

Two different types of constitutions were drafted during this era, depending on whether the wealthy or the less affluent had control of the

\textsuperscript{110}Enabling Act of 1802, § 5.
process. In the more affluent states, such as Maryland, Virginia, Delaware, New York and Massachusetts, the new constitutions included the following:

- Substantial property qualifications for voting and elected office;
- Bicameral legislatures, with an upper house as a check on the lower (democratically-elected) house;
- Strong governors, with veto power and substantial appointment authority;
- Few or no restraints on individuals holding multiple government offices;
- State established religion.

In the states where the less affluent individuals held power, particularly Pennsylvania, New Jersey, and New Hampshire, the new constitutions embodied the following factors:

- Universal white male suffrage, with no or minimum property requirements for voting or holding office;
- Strong, unicameral legislatures;
- Weak governors, lacking veto powers and little appointment authority.

Ohio’s first Constitution was perhaps the most democratic state Constitution yet adopted. Cognizant of the authoritarian rule of King George III

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and later Governor St. Clair, the first Ohio Constitution vested nearly all of the State’s power in a bicameral legislature, with elections every two years for state senators and annually for state representatives. Representation for both houses was based on the number of white male inhabitants over the age of twenty-one. Bills could originate in either house, subject to alteration, amendment or rejection by the other house. The Governor was to be “elected” by the voters, but all other state officials as well as the judiciary were elected by the legislature.

II. The General Assembly

The delegates to Ohio’s first constitutional convention met with goals to 1) curb the power of the Governor, and 2) create a General Assembly that was the dominant branch of state government. As a result, the authority of the Governor was severely limited, while the General Assembly was granted wide-ranging powers. Although the framers of Ohio’s first Constitution separated the governmental powers into three distinct branches, the legislature was by far the recipient of most of those government powers. Checks on the General Assembly

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112 SHRIVER & WUNDERLIN, supra note 104 at 99.
113 Arthur St. Clair (1736-1818), was an American soldier and politician. Born in Scotland, St. Clair served as a junior officer in the British Army during the French and Indian War. After the War, he settled in western Pennsylvania and served as a judge. In 1775 Congress appointed him as a colonel in the Continental Army. He served throughout the War and attained the rank of Major General. In 1785 he was elected to the Continental Congress from Pennsylvania and was appointed as the first governor of the Northwest Territory in 1787. A Federalist, St. Clair frequently clashed with the territorial judges and actively opposed Ohio’s admission as a state. After denouncing the Enabling Act, setting up the mechanism for Ohio’s admission as a state, President Jefferson removed St. Clair from office in 1802. HURT, supra note 28 at 272-283.
114 OHIO CONST. of 1802, art. I, § 2.5.
115 Justices of the Peace were also elected locally. Les Benedict and Wheeler, supra note 42 at 364.
came not from the other two branches, but from the voters, acting through frequent elections.

The delegates determined that governmental power sprang from the will of the people. Many of the state constitutions written during this era were very democratic, allowing white male suffrage, frequent elections, dominant legislatures, and weak executives.\textsuperscript{116} Ohio was no exception.

The preamble of the 1802 Constitution began with “We, the people.” The first section of the Bill of Rights recognized that “every free Republican government” was founded on the “sole authority” of the people, who had a right “at times…” To alter, reform, or abolish their government.”\textsuperscript{117} The Constitution attempted to restrict legislative power by explicitly retaining in the people “all powers, not hereby delegated.”\textsuperscript{118}

The General Assembly would appoint the secretary of state,\textsuperscript{119} state treasurer and auditor,\textsuperscript{120} the judges of the supreme and common pleas courts,\textsuperscript{121} and major generals and quartermasters of the militia.\textsuperscript{122} The General Assembly was also authorized to impeach the Governor and all other civil officers.\textsuperscript{123} The Constitution gave the General Assembly appointment power over the judiciary,

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\textsuperscript{117} OHIO CONST. of 1802, art. VIII, § 1.
\textsuperscript{118} OHIO CONST. of 1802, art. VIII, § 28.
\textsuperscript{119} OHIO CONST. of 1802, art. II, § 6.
\textsuperscript{120} OHIO CONST. of 1802, art. VI, § 2.
\textsuperscript{121} OHIO CONST. of 1802, art. III, § 8.
\textsuperscript{122} OHIO CONST. of 1802, art. V, § 5.
\textsuperscript{123} OHIO CONST. of 1802, art. I, § 24.
\end{flushleft}
but remained silent on the issue of judicial checks on legislative power. The U.S. Supreme Court issued its ruling on *Marbury v. Madison*[^124] in the same year that Ohio was admitted as a state, but the doctrine of judicial review was not mentioned.[^125]

### III. The Governor

Territorial Governor Arthur St. Clair ruled the Northwest Territory with an iron fist during his 14 years in authority. He could convene or dissolve the territorial legislature at will, appoint nearly all local public officials, establish new counties and draw county lines, and administer territorial law. No act of the territorial legislature could become law without his approval, even if approved by the Territorial Judges. He held the power of veto, and did not hesitate to use it.

Frustrated by St. Clair’s use (or abuse) of his veto powers, the delegates intended to strip the chief executive of nearly all the power that the territorial governor had exercised. Charles Willing Byrd, Hamilton County’s delegate, wanted the delegates to adopt provisions from the Tennessee Constitution of 1796,[^126] which sharply limited the power exercised by the executive.

The delegates wrote Article II, which vested the “supreme executive power of the state” in the office of the Governor, who would have responsibility to “take

[^124]: 5 U.S. 37 (1803).
[^125]: The subject of judicial review in Ohio is discussed in Chapter 4.
care that the laws shall be faithfully executed.” However, in constitutional terms, the term “power” is an exaggeration.

While the governor had the authority to make recess appointments when the General Assembly was not in session, he had little real power. The Governor had no veto, a provision that the delegates included clearly in reaction to the veto power St. Clair had frequently exercised as territorial governor. The Governor under the new constitution could only recommend measures to the legislature. He was commander of the state’s army, navy and militia forces, but was subject to term limits of “no more than six years and any term of eight years.” Historian Barbara Terzian suggested that the delegates wanted the governor to represent the state, but not control it.

The governor’s term of office was set at “two years, and until another governor shall be elected and qualified.” The governor was chosen by popular vote, but the General Assembly had the authority to intervene in the event of “[c]ontested elections.” There was no Lieutenant-Governor; in the event of the death, impeachment, resignation or removal of the Governor, the Speaker of the Senate was first in line to exercise the office. If the Senate leader was unavailable to serve, then the Speaker of the House would fill the vacancy.

Finally, the delegates established strict eligibility requirements for the office of governor. The governor’s term was two years, with a limit of six years in

127 Ohio Const. of 1802, art.II, §§ 1,7.
128 THE HISTORY OF OHIO LAW, supra note 42 at 46.
129 Ohio Const. of 1802, art. II, § 3.
130 Ohio Const. of 1802, art. II, § 2.
131 Ohio Const. of 1802, art. II, § 12.
an eight year period, a minimum age requirement of 30 years, and a citizenship requirement of 12 years in the United States and four years in the state preceding his election. Members of Congress and any person holding any office under the United States, or the state were ineligible, and compensation was capped at $1000.00 annually.

Although important as a ceremonial position, with its lack of real power, the office of the Governor was not a great job. Of the sixteen persons who held the position under the 1802 Constitution, four (Edward Tiffin, Return J. Meigs Jr., Ethan Allen Brown, and Wilson Shannon) resigned in the middle of their terms to accept another appointed or elected position. Only one, Alan Trimble, served long enough to be disqualified from the office by term limits. Governor Thomas Worthington wrote of the office that “[t]he extraordinary increase of population in the state has increased in the same proportion as the duties of the office of Governor and makes it necessary he should spend much of his time at the seat of Government.” Clearly, the Governor’s office was a full-time job with part-time pay.

IV. The Judiciary

The Northwest Ordinance, passed by Congress in 1787, provided for, among other things, a judicial system for the Northwest Territory. Congress

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  \item \textsuperscript{132} \textit{Ohio Const.} of 1802, art. II, § 3.
  \item \textsuperscript{133} \textit{Ohio Const.} of 1802, art. II, § 3.
  \item \textsuperscript{134} \textit{Ohio Const.} of 1802, art. I, § 19.
  \item \textsuperscript{135} \textit{The History of Ohio Law}, \textit{supra} note 42 at 145.
  \item \textsuperscript{136} Frank Theodore Cole. \textit{Thomas Worthington}. Ohio Archaeological and Historical Quarterly 12, 365 (October 1903).
\end{itemize}
appointed the judges initially, then after the adoption of the United States Constitution, the President appointed and the Senate confirmed the territorial judges pursuant to Article III. The highest court in the territory was the three-judge general court. Below the general court were county courts of common pleas, a general court of quarter sessions of the peace, and various specialized courts.

Under the new Ohio Constitution, Article III provided for common pleas courts in each county. The state was divided into three circuits, and each circuit would have a court “president.” Each county in the circuit would have no fewer than two or more than three associate judges. Three judges constituted a quorum. Initially, only the court “president” was legally trained, while the two associate judges were laymen. A vote of the two associate justices could “overrule” the court’s president. Each judge would be elected to a seven-year term.

The Supreme Court consisted of a Chief Justice and two Associate Justices, “elected” by the General Assembly to a term of seven years “so long as they behave well.”137 Two justices would constitute a quorum. The General Assembly was authorized to add another Justice to the Court after five years, at which time the court could divide the state into two circuits, with two justices sitting each circuit.138 After much debate, and in an effort to keep the

137 Ohio Const. of 1802, art. III, § 8.
138 Ohio Const. of 1802, art. III, §§ 2,10.
administration of justice at the local level, the Supreme Court was required to meet in each county every year.\textsuperscript{139}

In some states in the colonial and postcolonial eras, there appears to have been support for an elected judiciary, but this support did not occur in Ohio.\textsuperscript{140} In its constitutional convention, Ohio delegates wanted the judiciary to be controlled by the legislature. And, since the Constitution was not presented to the electorate for approval, there were no ratification debates to worry about.

The other court established by the Constitution was the justice of the peace court, established at the township level, and again reflecting the delegates’ desire to keep the administration of justice local. The Justices of the Peace would be elected by township and would serve three-year terms.\textsuperscript{141} The problems associated with a judiciary “selected” by the legislature would soon be demonstrated.

V. Other Provisions

A. Ohio’s Bill of Rights

Ohio’s first constitution also included a Bill of Rights,\textsuperscript{142} adopted just 11 years after the federal Bill of Rights. Ohio’s Bill of Rights consisted of 28 sections and was substantially similar to its federal counterpart. However, the Ohio Constitution’s Bill of Rights included the right to alter reform or abolish

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\item \textsuperscript{139} Ohio Const. of 1802, art. III, § 10.
\item \textsuperscript{140} Steven P. Crowley. \textit{The Majoritarian Difficulty: Elected Judiciaries and the Rule of Law}, 62 U. Chi. L. Rev. 689, 714 716 (Spring 1995).
\item \textsuperscript{141} Ohio Const. of 1802, art. III, § 8.
\item \textsuperscript{142} Ohio Const. of 1802, art. VIII.
\end{itemize}
government, a prohibition against slavery and involuntary servitude, rights of conscience and education, rights for victims of crime, a prohibition on imprisonment for debt, and a declaration that all powers not otherwise delegated are to remain with the people. Section 12 provided that the writ of habeas corpus shall not be suspended, “unless when the case of rebellion or invasion, the public safety may require it.”

B. Slavery/Suffrage

Although the delegates intended that Ohio be a free state, and had originally approved a proposal granting suffrage to African-American men, they reconsidered this proposition and voted against African-American suffrage. Suffrage for women was also voted down. The Constitution required voters to reside in the state for at least one year and pay a state or county tax. The tax requirement had the effect of limiting the vote to property owners, since the only state and county taxes at that time were real property taxes. However, a temperance provision barring the state from licensing the sale of alcohol was presented to the voters as a separate amendment and passed by a vote of

143 Ohio Const. of 1802, art. VIII, § 1.
144 Ohio Const. of 1802, art. VIII, § 2.
145 Ohio Const. of 1802, art. VIII, § 3
146 Ohio Const. of 1802, art. VIII, § 25.
147 Ohio Const. of 1802, art. VIII, § 7.
148 Ohio Const. of 1802, art. VIII, § 15.
149 Ohio Const. of 1802, art. VIII, § 28.
150 Ohio Const. of 1802, art. VIII, § 12.
Finally, there was a provision that if two-thirds of the General Assembly found it necessary to amend or change the constitution, they would so recommend to the electorate. If a majority of the electors agreed, a convention would be called to revise, amend or change the constitution.\footnote{153}{Ohio Const. of 1802, art. VII, § 5.}

C. Only White Men May Participate

Historian Barbara Terzian wrote that Ohio’s new Constitution was designed primarily to benefit white men. After one year’s residency, his right to vote was guaranteed by either paying a state or county tax or by working on local roads. He could elect his state representatives, and could easily replace them because elections were held annually. He could vote for a governor, who could be easily replaced by election or impeachment if he ignored local issues or became corrupt. The legislature chose his judges, but he could still elect justices of the peace, who handled local civil and criminal matters. He could elect all county and township officials, and if he was a member of the militia, he could elect his own officers.

If accused of a crime, his right to jury trial was “inviolate.” If prosecuted, he had a right to be informed of any charges against him, he could testify in his own defense, and could face witnesses testifying against him, he could compel witnesses to testify, and he was entitled to a speedy trial. He had a right to speak, to assemble, and to petition the government. He had a right to bear arms, to rely on contracts, and he had full access to the courts. The state provided

\footnote{152}{The History of Ohio Law, supra note 42 at 60.}

\footnote{153}{Ohio Const. of 1802, art. VII, § 5.}
schools to educate his children, and he could not be imprisoned for debts.\textsuperscript{154} Conversely, African-Americans and women were regarded as second-class citizens.\textsuperscript{155}

The convention completed its work on November 29, 1802, and then adjourned. Unlike most of the state constitutions rewritten after 1776, Ohio's proposed Constitution was not submitted to the voters for ratification.\textsuperscript{156} The Ross County delegate, Thomas Worthington, presented the proposed Constitution to President Jefferson on December 20\textsuperscript{th} and to Congress on December 22\textsuperscript{nd}.\textsuperscript{157}

D. Congress Approves

Congress approved several alterations that the delegates suggested to the requirements contained in the Enabling Act. The delegates proposed reserving public lands for educational purposes in the Virginia Military District, the United States Military District, the Connecticut Reserve, and Indian lands not ceded. A college township was to be located within the Symmes purchase, and 3\% (instead of the 5\% specified in the Enabling Act) of the receipts from the sale of public lands were to be used for public roads in the state. The State also

\textsuperscript{154} Terzian, supra note 73 at 368-369.
\textsuperscript{155} At the time Ohio's Constitution was drafted, there were about 337 African-Americans living in the Northwest Territory, with most of these in Detroit. Knepper, supra note 3 at 93. Under the State's new constitution, voting was limited to "white male inhabitants above the age of twenty-one years. Some of the rights detailed in Ohio's Bill of Rights, such as enjoying liberty, acquiring, possessing and protecting property, and the right to worship are specifically reserved to "all men." Other, such as the right to be free from warrantless searches and seizures, the right to answer to criminal charges, the right to bail, the right to peaceably assemble, and several other are reserved to "all persons." Ohio Const. of 1802, art. VIII.
\textsuperscript{156} Robert D. Geise, American History to 1877 (Barron's EZ 101 Study Keys) 37 (Barron's Educational Series, February 19, 1992).
\textsuperscript{157} Shriver & Wunderlin Jr, supra note 76 at 99
agreed to refrain from taxing federal lands for five years. A provision slightly altering Ohio’s northern border was not addressed.\(^{158}\)

Statewide elections were held in January, 1803, even though statehood had not yet been formally approved. The voters elected Edward Tiffin as Governor and Jeremiah Morrow as Representative. The legislature elected Thomas Worthington and James Smith to the United States Senate.\(^{159}\) A bill passed Congress on February 19, 1803, officially recognizing Ohio as a state. The General Assembly first met on March 1, 1803, and that date is recognized as Ohio’s official date of admission to the Union.\(^{160}\)

Summary

Congress passed the Enabling Act in April, 1802. This legislation empowered the citizens of the Eastern division of the lands northwest of the Ohio River to draft a Constitution, form a state government and apply for statehood. All male citizens (including free African – Americans) who had reached full age, lived in the area for one year and paid a County tax were eligible to vote for one of the 35 convention delegates. Noncitizens who owned at least 50 acres were also eligible to vote.

On November 1, 1802, the delegates met in Chillicothe. Twenty-six of the delegates were Democratic – Republicans, seven were Federalists and two were

\(^{158}\) The failure of Congress to act on this provision was one of the primary causes for the Toledo War, discussed in Chapter 3. A map of the reserved and purchased land in Ohio is available at: [http://upload.wikimedia.org/wikipedia/commons/thumb/1/1e/Ohio_Lands.svg/240px-Ohio_Lands.svg.png](http://upload.wikimedia.org/wikipedia/commons/thumb/1/1e/Ohio_Lands.svg/240px-Ohio_Lands.svg.png)

\(^{159}\) HURT, \textit{supra} note 28 at 282-283.

\(^{160}\) KNEPPER, \textit{supra} note 27 at 93.
independents. The Democratic – Republicans favored a small government with limited powers, whereas the Federalists favored a stronger, more centralized government. The delegates elected Edward Tiffin to preside.

The new Constitution vested nearly all of the governmental powers in a bicameral legislature, while the Governor had limited powers and no veto. The General Assembly appointed most of the state officials, including those of the Executive Branch and the Judiciary. Elections were held every two years for the Senate and the Governor, and annually for the House. Checks and balances on the General Assembly came not from the other two branches, but from the citizens through the use of frequent elections. Suffrage was limited to white males over the age of 21 years, striking mail African – Americans from the voting rolls.

The Convention adjourned on November 30, 1802, and the final product was presented to Congress the next month. Congress approved several modifications from the requirements listed in the Enabling Act, and a problem with Ohio's northern border was not addressed. Congress passed a bill officially recognizing the new state of Ohio on February 19, 1803. Ohio's official date of admission was March 1, 1803.
CHAPTER 4:

BETWEEN THE CONSTITUTIONS: OHIO LAW IN THE AGE OF JACKSON

*If the Union is once severed, the line of separation will grow wider and wider, and the controversies which are now debated and settled in the halls of legislation will then be tried in fields of battle and determined by the sword.*

--Andrew Jackson, 1837

I. Introduction

Once the Constitution was drafted and statehood achieved, Ohioans set to the task of governing themselves. With almost all of the power of government vested in the General Assembly, problems were bound to occur. From its first constitution in 1803 upon admittance to the Union, to 1851 when a new constitution was drafted and approved, Ohio struggled to enforce its state power in governing its territory and protecting the rights of its citizens.

On the national scene, the country endured the War of 1812, enjoyed the Era of Good Feelings, and entered the Age of Jackson. Ohio was a main theatre of conflict during the War, and its citizen/soldiers defended the state from invasion by the British and their Native American allies at Forts Meigs and Stephenson.

In most other respects the War gave a major boost to the state’s economy. Ohio’s produce helped feed the country’s war machine and outfit its soldiers. The removal of the Native Americans after the War helped spur further settlement. In addition, the Army built roads throughout the state in order to
transport supplies to its troops. Hard money was scarce in the state, and the resulting barter-economy stalled the growth of farms and businesses.\(^{161}\)

The Era of Good Feelings was a period after the War where the sense of nationalism grew and political and sectional strife declined. The Federalist Party disappeared in the wake of the Hartford Convention and nearly everyone considered themselves a Republican. The Era is roughly defined as synonymous with the administration of James Monroe (1817-1825). The Missouri Compromise and the Monroe Doctrine represented the major political accomplishments during this era.\(^{162}\)

The Age of Jackson (1828-1850) was an era of tremendous growth of the nation’s population, wealth and economy. Between 1830 and 1850 the population, as well as the number of persons held as slaves nearly doubled. Seven new states joined the Union during that time frame and the country acquired a vast tract in the arid southwest as a result of the War with Mexico.\(^{163}\)

Ohio also enjoyed a period of increased growth. The completion of the Erie Canal and the National Road led to increased immigration to the northern and central parts of the state. This tremendous growth over a short time period led to growing pains in the state. The increasing reliance on paper money and barter set the stage for the Panic of 1819. Finally, a defect in the original state


constitution caused Ohio to flex its political muscle to wrest a disputed area away from its northern neighbor.\footnote{164}

During this time, three major constitutional crises occurred within the state: the Sweeping Resolution,\footnote{165} the Rebellion of 1820,\footnote{166} and the Ohio-Michigan War.\footnote{167} The Sweeping Resolution and the Ohio-Michigan War were a result of defects in the original state constitution, while the Rebellion of 1820 was a major conflict over the issue of state versus federal authority that predated both the Nullification Crisis of 1832 and the Civil War. In addition, the activities of the U.S. District Court in Ohio played a role in ushering in changes to Ohio’s Constitution. This Chapter will explore the three constitutional crises that occurred in this era. These issues helped shape Ohio’s relations with its own government, as well as its relationships with its neighbors and the federal union.

II. The Sweeping Resolutions

A. The Revolution of 1800

In the election of 1800, Republican\footnote{168} presidential candidate Thomas Jefferson won an overwhelming victory over incumbent President John Adams, and the Federalist majority in Congress was swept from power. The Federalists, who had controlled the Presidency and Congress until that time, had appointed

\footnote{164} Kern and Wilson, \textit{supra} note 16 at 163-165.\footnote{165} For an in-depth discussion of the Sweeping Resolution, See DONALD F. MELHORN JR., LEST WE BE MARSHALL'D: JUDICIAL POWERS AND POLITICS IN OHIO, 1806-1812 (The University of Akron Press, 2003).\footnote{166} Called “Ohio’s War against the Bank of the United States”.\footnote{167} Sometimes called the Toledo War.\footnote{168} The Jeffersonian Republicans of the early 1800’s should not be confused with the modern-day Republican Party, which was founded in the 1850’s.
only Federalists to the judiciary. At the end of 1801, Jefferson wrote the following to John Dickinson:

“They [the Federalists] have retired into the judiciary as a stronghold. There the remains of Federalism are to be preserved and fed from the treasury, and from that battery all the works of Republicanism are to be beaten down.”  

B. *Marbury v. Madison*

Every first-year law student is acquainted with the case of *Marbury v. Madison*.170 In that case, the lame duck Sixth Congress enacted the Judiciary Act of 1801.171 President Adams signed the bill on February 3, 1801, three weeks before the end of his Presidency. The Act established 10 new federal district courts and increased the number of federal circuit courts from three to six. The Act also added additional judges to each circuit, and gave the President authority to appoint federal judges and justices of peace to fill the new vacancies. The Act gave President John Adams the opportunity to pack the judiciary with federalist appointees before that party lost power. Adams, in pursuit of that goal, appointed William Marbury as a federal justice of the peace just before he left the presidency in 1801. Marbury’s commission was signed and sealed, but was not

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171 2 Stat. 89. An Act to provide for the more convenient organization of the Courts of the United States. This act was also known as the Midnight Judges Act.
delivered to him prior to the expiration of Adams’ term. Marbury filed for a writ of mandamus with the United States Supreme Court, seeking an order to the new Secretary of State James Madison to deliver his commission.

Madison did not respond to the Court and refused to deliver Marbury’s commission. Congress, now under the control of the Jeffersonians, passed the Judiciary Act of 1802 which repealed the Act passed by the Federalists the previous year, and then suspended the Court’s 1802 term. The Court’s prestige, and its very existence as a coequal branch of government, was in serious jeopardy.

Chief Justice John Marshall, facing a major issue involving separation of powers, found that Madison had improperly withheld Marbury’s commission. However, Marshall also held that the Court lacked the jurisdiction to grant the relief Marbury requested. By doing so, Marshall declared that Section 13 of the Federal Judiciary Act of 1789, which gave the Court original jurisdiction to issue writs of mandamus, was contrary to the Constitution, and thus null and void. This decision infuriated the Jeffersonians, but their only remedy was to give Marbury his commission, which they had no intention of doing. Eventually, the

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172 The Act also granted to the federal courts jurisdiction over all cases involving federal law, lowered from $500.00 to $100.00 the minimum amount required to assert federal jurisdiction, reduced the number of Supreme Court Justices from six to five, and eliminated their circuit riding duties. William E. Nelson. MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 37(University Press of Kansas, 2000).
173 Id. at 57-58.
174 Ironically, Marshall was serving as Secretary of State under Adams and was responsible for Marbury failing to receive his commission before Adams’ term expired.
175 NELSON, supra note 172 at 60-61.
176 The U.S. Constitution limited the original jurisdiction of the Supreme Court to certain kinds of cases, and mandamus was not one. U.S. Cons. Art. III. Expanding the Court’s jurisdiction to mandamus actions would require a constitutional amendment.
Court and the Jeffersonians implicitly agreed to the idea of judicial review.\textsuperscript{177} The Court did not overturn another congressional statute until 1857, and the President did not challenge the Court’s authority to do so.

C. Ohio’s Courts Adopt Judicial Review

This led state courts to follow suit and courts in Ohio soon adopted the principle of judicial review,\textsuperscript{178} Courts gave themselves the authority to review laws passed by the legislature to determine if they conflicted with the federal or the state constitutions. The involved statute was known as the 50 Dollar Act, which granted justices of the peace jurisdiction over civil claims not exceeding $50.00.\textsuperscript{179} In the case of \textit{Rutherford v. McFadden}, (1807, unreported) Justices Tod and Huntington held that the act infringed upon a constitutional right to trial by jury. Relying on \textit{Marbury v. Madison}, the justices struck down the Act. The Court held that:

\begin{quote}
[a]ny act in violation of the Constitution, or infringing its provisions must be void, because the legislature, when they step beyond the bounds assigned them, act without authority, and their doings are no more than the doings of any other private man.” The role of the judiciary was “to expound what the law is.”
\end{quote}

\textsuperscript{177} According to the 1817 Pennsylvania case of \textit{Moore v. Houston}, 1817 WL 1787 (Pa. 1817), the concept of judicial review was “well-established by the great mass of opinion, at the bar, on the bench and in legislative assemblies of the United States.” NELSON, supra note 172 at 75.

\textsuperscript{178} The term “judicial review” was first used by Professor Edwin S. Corwin. Edwin S. Corwin, \textit{The Rise and Establishment of Judicial Review},” parts 1 and 2, Mich. L. Rev. 9 (December 1910): 102 – 25; (February 1911): 283 – 316.

\textsuperscript{179} Act of February 12, 1805, 3 Laws of Ohio 21 (1805).
The Court compare[d] the legislative act with the Constitution. Since the Constitution clearly “[could not] be adjudged void, the judges had no choice but to declare that “any act inconsistent with it [to] be no law.”\(^\text{180}\)

Circuit Judge Calvin Pease reached a similar conclusion in the case of \textit{E. Wadsworth v. Solomon Braynard, Trumbull County Court of Common Pleas} (1808). These decisions were extremely unpopular at the time, and there was a serious question of whether the doctrine of judicial review could even be asserted under Ohio’s 1802 Constitution.

D. Impeachment and the Sweeping Resolutions

The members of the Ohio House were so infuriated when their laws were overturned that they brought impeachment charges against Tod and Pease. Huntington, who had recently been elected Governor, escaped their wrath. Both Tod and Pease were tried (separately) before the Ohio Senate, and both narrowly avoided conviction.\(^\text{181}\)

After failing to remove the justices by impeachment, the General Assembly enacted the Sweeping Resolutions.\(^\text{182}\) Under the Ohio Constitution, judges in Ohio were elected to a seven-year term by the General Assembly. The judges who replaced the originally-elected judges were under the impression that their seven-year terms began upon their selection, and many of their

\(^{180}\text{NELSON, supra note 172 at 76. Although there were no official case reporters in Ohio at this time, the state’s sixty newspapers occasionally printed important judicial opinions. Columns debating the decisions often followed. THE HISTORY OF OHIO LAW, supra note 42 at 505.}\n
\(^{181}\text{For a more in-depth review of this trial, See, MELHORN JR., supra note 134, Chapter Eight.}\n
\(^{182}\text{Also known as An act defining the duties of justices of the peace and constables in criminal and civil cases.}\)
commissions reflected this fact. The new law provided that current officeholders could not serve beyond the original seven-year term held by their predecessors. This statute would effectively "sweep" all of the currently serving judges and justices from office on March 1, 1810. The General Assembly could then elect new Supreme Court Justices and common pleas judges who did not condone the concept of judicial review. Several judges who were removed under the resolution continued hearing cases, causing an entirely new set of problems.\(^{183}\)

A group of Federalists and independent Republicans opposed the resolution from the start, but they lacked the votes to repeal the resolutions. The Resolutions were eventually repealed in the 1811-1812 legislative session; the House easily repealed the measure, and in spite of intense opposition, the Senate repealed the measure by a single vote.\(^{184}\) Perhaps Thomas Jefferson addressed situation best when he wrote:

> An effective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among the several bodies of magistracy, has that no one could transcend their legal limits, without being effectively checked and restrained by the others.\(^{185}\)

The delegates to Ohio’s 1851 constitutional convention, no doubt aware of the problems associated with an “all powerful” legislature, addressed the checks and balances of power in the new document by restructuring Ohio’s

\(^{183}\) The judgments in these cases were later set aside by the Ohio Supreme Court. MELHORN JR., supra note 134 at 153-155.

\(^{184}\) THE HISTORY OF OHIO LAW, supra note 42 at 16.

\(^{185}\) Thomas Jefferson. Notes on the State of Virginia, 122.
judiciary. In addition to dropping the requirement that the Supreme Court meet in each county annually, and creating a new system for the district courts of appeal, all judges would thereafter be elected by popular vote.\textsuperscript{186}

While the Sweeping Resolutions were a result of a defect in the original state constitution, the Rebellion of 1820 was a major conflict between federal and state powers in the governance of state territory and protecting individual rights.

III. The Rebellion of 1820

A. The Great Bank Robbery

In the early afternoon of September 17\textsuperscript{th}, three men burst into the Chillicothe Branch Office of the Bank of the United States.\textsuperscript{187} Two of these “ruffians” jumped the counter and entered the bank’s vault. The third man, John Harper, prevented the bank’s cashier from interfering with the heist. The trio made off with over $120,000 in bank funds, and bank officials were unable to block their escape.

No, the year was not 1933, and the suspects were not John Dillinger and his gang. The year was 1819, and the culprits were Sheriff John Harper and two assistants, acting under a commission from Auditor of State Ralph Osborn, to collect past-due taxes from the Bank pursuant to Ohio law. The Bank of the United States sued Osborne and his accomplices for contempt, trespass, and

\textsuperscript{186} KNEPPER, supra note 27 at 205.
\textsuperscript{187} This branch was known as the Chillicothe Office of Discount and Deposit, one of the two Ohio branches of the Second Bank of the United States. The other branch was located in Cincinnati.
caring away $100,000\textsuperscript{188} “under color and pretense of the laws of Ohio.” Just two
days before the “robbery,” the federal court served State Auditor Osborne with a
copy of a petition requesting the injunction and a subpoena to appear before the
court in January. However, since no injunction was actually served upon him,
Osborne collected the tax.

Harper deposited the funds in a state-chartered Bank in Chillicothe
overnight, and the next day, both he and Osborn were served with an injunction
which prohibited them from collecting the taxes. Since they had already collected
the taxes, both Harper and Osborn claimed that the injunction was moot and
ignored it. Osborn deposited the funds in the state treasury, minus a 2% fee paid
to Harper and his assistants. United States marshals arrested Harper, and
Osborn was cited for contempt for disregarding the injunction.\textsuperscript{189}

B. The Bank of the United States

In the Republic’s early years, there was not enough gold or silver available
to conduct the nation’s business. As a means of expanding available currency,
the new nation issued paper money, bank money and credit. Secretary of the
Treasury Alexander Hamilton convinced Congress to charter the First Bank of
the United States on February 25, 1791. Hamilton’s goal was to furnish a

\textsuperscript{188} KNEPPER, supra note 27 at 137. Some reports claim that Harper seized a total of $120,000
from the bank. The next day he turned the funds over to the state treasurer. Upon discovering the
error, the treasurer promptly returned the extra $20,000 to the Bank. Ohio History Central:
Osborn v. Bank of the United States. Available at:
http://www.ohiohistorycentral.org/w/Osborn_v._Bank_of_the_United_States.

\textsuperscript{189} R. CARLISLE BULEY, THE OLD NORTHWEST: PIONEER PERIOD 1815–1840, 590 – 592 (Indiana
circulating medium and credit system in order to improve the handling of the financial business of the federal government.

The Bank was funded through the sale of $10 million in stock. The United States government purchased the first $2 million of stock while the remaining $8 million in shares was sold to the public. One quarter of the stock had to be paid in gold or silver, while the remaining balance could be paid with bonds, notes, or government stock. Congress chartered the Bank for a period of 20 years, and at the end of that time Congress could either extend or terminate the Bank’s charter. Many of the southern states opposed Hamilton’s plan. Those states believed that a national bank would primarily serve the interests of the industrial states in the North and East, while they preferred locally chartered banks, which they felt would better serve their largely agricultural interests.\[190\]

C. Banks on the Frontier

The primary purposes of a bank are: 1) to accept deposits; 2) to make loans; and, 3) to issue notes. On the frontier, there is less hard money (specie) available, so the note issuing function becomes more important.\[191\] The first Bank in Ohio was the Bank of Marietta, chartered by the Ohio legislature in 1808. The Bank of Chillicothe was chartered the same year, and the Bank of Steubenville was chartered in 1809.\[192\]

\[190\] MARK R. WILSON, LAW AND THE AMERICAN STATE, FROM THE REVOLUTION TO THE CIVIL WAR: INSTITUTIONAL GROWTH AND STRUCTURAL CHANGE. IN: THE CAMBRIDGE HISTORY OF LAW IN AMERICA. SUPRA NOTE 6
\[191\] BULEY, supra note 189 at 567.
\[192\] Id. at 568.
Three types of banks were operating in Ohio during this period, the Bank of the United States, state-chartered banks, and unchartered, or wildcat banks. The First Bank of the United States, described above, was in operation from 1791 to 1811, when its charter expired. Five years later, Congress chartered the Second Bank of the United States, under the same terms, with the government owning 20% of the outstanding shares and the public owning the remaining 80%. The Second Bank was the largest bank, the largest lender and the largest business corporation in the United States.\textsuperscript{193}

Caught in a wave of prosperity following the War of 1812, Ohio’s economy was ready for the expansion of banking services. Ohioans felt that the Second Bank of the United States would help the local economy by providing access to cash and other mediums of exchange essential to conducting the state’s business. Further, the Bank could issue notes that were secured by United States Treasury deposits in Philadelphia.\textsuperscript{194} These notes really were “good as gold” and were the preferred medium of exchange in commercial transactions and the payment of debts.

Two different political factions competed for the establishment of a branch office of the Bank in their respective communities. William Henry Harrison represented the interests of Ohio’s major commercial center, Cincinnati, while Chillicothe, the state’s original capital and political center, was represented by Governor Thomas Worthington and Ohio House Speaker Duncan McArthur. In

\textsuperscript{193} Kern and Wilson, supra note 161 at 17-18.
\textsuperscript{194} Knepper, supra note 27 at 135.
an effort to placate the two factions, the Bank established a branch in Cincinnati in January, 1817, followed by a Branch in Chillicothe in October of that year.\textsuperscript{195}

The second category consisted of the state-chartered banks. These banks flourished after the First Bank of the United States closed. There were 88 state-chartered banks in Ohio in 1811; there were 208 by the end of 1814.\textsuperscript{196} Although these banks issued a huge number of notes, their notes were backed by hard currency, and therefore maintained excellent credit.

The third type was the unchartered, or wildcat banks. These banks were most often seriously undercapitalized, some with “the usual assets of a table, chair, or keg of nails with a few coins on top.”\textsuperscript{197} These banks were accused of distributing nearly worthless currency backed by problematic security. Ohio’s wealthiest citizens operated the state-chartered banks, while most wildcat banks were under local control. In an attempt to stabilize the state’s currency, the Ohio legislature outlawed the notes of the unchartered banks after January 1, 1817. Some of these notes were held by state-chartered banks, while others continued to circulate. By the spring of 1817, some of the wildcat bank notes were offered at 80% of their face value, and by the next summer most were practically worthless.\textsuperscript{198}

\textsuperscript{197} W.H. Hunter, Pathfinders of Jefferson County, Ohio, Ohio Archaeological and Historical Society Publications, VIII (1900) at 195-96.
\textsuperscript{198} BULEY, supra note 189 at 580.
D. The Panic of 1819

Rather than providing economic security to the region the founders intended, the Second Bank of the United States, like the state-chartered banks of the day, liberally extended credit. The loan policies of the Bank's branch offices actually increased the amount of paper money in the state. Thousands of Ohioans overextended themselves and purchased more land than they could finance. If they couldn't make the payments, they borrowed even more. This excessive borrowing, speculation, and the huge supply of paper money in Ohio was a ticking time bomb ready to explode.\(^{199}\)

The explosion occurred in the late summer of 1818, when the United States suffered its first economic depression, later known as the Panic of 1819. Because Ohio's economy was built on such a shaky foundation, it and other Western states were hit first and hardest. General causes for the Panic included a decrease in the demand for American agricultural products from Europe, the decision of most European countries to return to the gold standard after the Napoleonic Wars, and the British decision to buy cotton from its Indian colonies instead of from the American South.\(^{200}\)

The Second Bank (Bank) was forced to undertake drastic measures to avoid closing. In July, 1818, the Bank ordered its Cincinnati branch to begin collecting outstanding balances at 20% per month. This sudden reversal of their


previous policy probably saved the Bank from collapse, but it also caused most of the state banks to stop redeeming notes with specie. The Bank’s actions caused prices to fall rapidly and left worthless bank paper as the primary medium of exchange.\textsuperscript{201} The Panic became even worse in August when the Bank ordered its branches to stop accepting each other’s notes.\textsuperscript{202}

This economic downturn caused farm prices to crater and real estate became impossible to sell. The state banks began calling in the loans for the heavily-mortgaged properties they had financed in better economic times. Borrowers were unable to repay their loans and soon the primary real estate transactions in the state became foreclosure actions filed by the Bank’s Cincinnati Office. Several factors were responsible for this economic collapse.\textsuperscript{203} However, to most Ohio citizens, the Bank was responsible. Most Ohioans felt that the Bank’s change in policy led directly to the Panic.\textsuperscript{204}

The Bank and the Panic became leading issues in the election of 1818. Several members of the Bank’s Board of Directors also served in the state government. A great wave of resentment against the state’s “elites” soon occurred. Ordinary Ohioans wondered why the Bank’s policies had changed so

\begin{footnotes}
\textsuperscript{201} BULEY, supra note 189 at 583.
\textsuperscript{202} Id. at 583.
\textsuperscript{203} GEORGE DANGEROUSFIELD, THE AWAKENING OF AMERICAN NATIONALISM: 1815-1828, 179 (Harper & Rowe, New York, 1965). Among the factors outside of the Bank’s control were obstruction from private banks, federal regulations, and the European market fluctuations. “If the [Second Bank of the United States] had been wisely managed from the beginning” wrote historian George Dangerfield, “it could not have prevented the panic; it could only have modified its effects.”
\textsuperscript{204} CHARLES CLIFFORD HUNTINGTON, A HISTORY OF BANKING AND CURRENCY IN OHIO BEFORE THE CIVIL WAR 297-300 (BiblioBazaar, 2009).
\end{footnotes}
quickly, and why the western states were affected by the Panic much more than the states of the North and East.\textsuperscript{205}

E. The Voters Retaliate

The election of 1818 was a disaster for incumbent officeholders. Governor Worthington was defeated, and Speaker McArthur lost his bid for reelection. Almost every politician affiliated with the Bank was turned out; most were replaced by anti-bank candidates. The new legislature soon set out to regulate, and possibly tax, the Bank's Ohio branches.\textsuperscript{206}

The idea of taxing the Bank and its branches was not new. In 1817, the General Assembly, concerned about the possibility of unfair competition between the Bank of the United States and the state-chartered banks, formed a committee to examine the issue. After all, a tax on the state-chartered banks helped pay Ohio's debt from the War of 1812.

The General Assembly also attempted to regulate wildcat and out-of-state banks after their notes threatened to drive the notes of state-chartered banks out of existence. Why should the National Bank be exempt from regulation and/or taxation, officials asked? After all, the Bank was not an entity of the federal government, 80% of its shares were privately held. The General Assembly introduced a bill to levy a tax on the Bank, but intense lobbying by the Bank's directors and Bank-friendly politicians led to the Bill's eventual defeat.\textsuperscript{207}

F. Ohio Taxes the Bank

\textsuperscript{205} \textsc{Ohio History}, \textit{supra} note 199 (quoting Gannon at 88).
\textsuperscript{206} \textsc{William T. Utter}, \textit{The Frontier State: 1803-1825} (Ohio Historical Society, 1968).
\textsuperscript{207} \textsc{Knepper}, \textit{supra} note 27 at 136.
In the new legislative session, another committee was empaneled, this time stacked with anti-Bank men.\textsuperscript{208} This committee blamed the Bank alone for the recent economic collapse. Ohio was not the only state interested in taxing the Bank. Other states including Maryland, Tennessee, Georgia, North Carolina, and Kentucky had enacted laws taxing the branch offices of the Bank located in their respective states. In addition, the states of Indiana and Illinois enacted legislation banning the Bank within their respective states. Relying on these actions by other states, the committee decided that Ohio could only protect itself by driving the Bank out of the state. The committee’s final report recommended a tax of $50,000 on any non-state-chartered financial institution doing business in the state.\textsuperscript{209}

The new law, entitled: “An act to levy and collect a tax from all banks and individuals, and companies, and associations of individuals, that may transact banking business in this state, without being authorized to do so by the laws thereof,” also known as the “outlaw” act, became effective on February 8, 1819. The new law would impose a tax on any unauthorized financial institution doing business in the state after September 1, 1819. The tax was due each year on September 15\textsuperscript{th} at a rate of $50,000.00 per office. The state auditor was empowered to commission agents to collect the tax, and pay the agents a 2\% commission.\textsuperscript{210}

\textit{G. McCulloch v. Maryland}

\textsuperscript{208} \textsc{Ohio History}, supra note 199 (quoting Gannon at 87).
\textsuperscript{209} \textsc{Knepper}, supra note 27 at 136.
\textsuperscript{210} \textsc{Knepper}, supra note 27 at 136-137.
About one month after the passage of the Act, the United States Supreme Court issued its decision in the case of *McCulloch v. Maryland*.\(^{211}\) The issues were similar to those in Ohio,\(^{212}\) where the State of Maryland levied a tax on the Baltimore branch of the Bank of the United States. Their ultimate purpose was to drive the Bank and its operations from the state. It was soon clear that *McCulloch* involved not only banking issues, but also the larger matter of allocation of state and federal authority. Chief Justice Marshall, writing for a unanimous majority, ruled in favor of the Bank. The Court held that Maryland’s taxation of the Bank was unconstitutional, further finding that the federal government possessed implied powers, including the power to charter a bank.

Marshall’s assertion of federal sovereignty did not sit well with state’s rights advocates. Many Ohioans felt that if they continued their efforts to tax the Bank, they would eventually get their day in court, and they could urge the justices to overturn *McCulloch*.\(^{213}\)

A standoff was inevitable. The Bank, relying on the *McCulloch* decision, continued to operate, while the state legislature had no intention of repealing the tax. The Auditor felt duty-bound to collect the tax. On September 11\(^{th}\), lawyers representing the bank told Auditor Osborne that they intended to file for an injunction in the federal court that would prohibit him from collecting the tax. On September 15\(^{th}\), the Court served Osborne with a copy of the petition and a

\(^{211}\) *McCulloch v. Maryland*, 17 U.S. 316 (1819).

\(^{212}\) Many Ohioans rationalized their opposition to *McCulloch* by insisting that the issues in that case were different than the situation in Ohio. KNEPPER, supra note 27 at 136-137.

\(^{213}\) OHIO HISTORY, supra note 199 (quoting Gannon at 93).
subpoena to appear before the Court. An injunction was not served. Auditor Osborne ignored the documents and commissioned Sheriff Harper to collect the tax, setting the stage for the “robbery” at the Bank’s Chillicothe office on September 17th. The Auditor’s actions drew some criticism, but the overwhelming majority of Ohioans approved of his actions.214

Eastern newspapers accused the Ohio officials of treason, nullification, and other crimes, and great debates began. Political candidates issued their “Declarations of Independence” against the Bank as part of their political platforms. Public opinion mostly supported Ohio’s stance. James Wilson,215 editor of the Western Herald and Steubenville Gazette, wrote that for Ohio to submit to the Federal judiciary as “dispenser of justice between her and the U.S. bank” would pave the way for some new attack upon state sovereignty.216

H. Osborn v. Bank of the United States

The Bank quickly filed suit against Osborne, Harper and Harper’s assistants to recover the “stolen” funds. The Court jailed Harper and one of his assistants on trespass charges and Osborne and Harper were summoned into the Circuit Court to explain why they ignored the Court’s injunctions. Chief Justice Marshall then issued a permanent injunction, prohibiting the state from using the ill-gotten funds.

214 KNEPPER, supra note 27 at 136-137.
215 Newspaper editor James Wilson was the grandfather of future President Woodrow Wilson. OHIO HISTORY, supra note 199 (quoting Gannon at 92).
216 BULEY, supra note 189 at 591-592.
Ohioans celebrated when the Bank closed its Cincinnati Office in October 1820. The Bank rationalized its decision by stating that Ohio had too many branch offices, but anti-bank feeling in the state certainly had to be a factor.\textsuperscript{217}

The General Assembly convened in December, 1820 with even greater anti-Bank sentiments. The members felt that the Bank’s actions brought harm to the State. They also felt that the only reason that the federal lawsuit was brought against the State Auditor, rather than the State itself, was to avoid the 11\textsuperscript{th} Amendment prohibition against suits involving a State as a party. Finally, the legislature was aware of the doctrine of judicial review, discussed above, where the federal courts interpret the U.S. Constitution, but they felt that the State, rather than the courts, had the ultimate responsibility to determine the constitutionality of federal actions.\textsuperscript{218}

Essentially, the legislature declared that: 1) The 11\textsuperscript{th} Amendment prohibited the Bank from bringing the action because the State was a party, and 2) Even if the Bank could bring the action, the States, rather than the federal courts, were the final arbiters of the constitutionality of federal measures. By their actions, the legislature attempted to “nullify” the McCulloch decision.\textsuperscript{219}

On January 29, 1821, the General Assembly passed “an act to withdraw from the Bank of the United States the protection and aid of the laws of this state,

\textsuperscript{217} OHIO HISTORY, supra note 199 (quoting Gannon at 95-96).
\textsuperscript{218} OHIO HISTORY, supra note 199 (quoting Gannon at 97-980).
\textsuperscript{219} In the 1830s, John C Calhoun tried to explain South Carolina’s nullification of federal tariff statutes. The Constitution, he wrote, was a compact among the several states. If one party to the arrangement, namely, the federal government, violated the terms of this compact, the states were free to exercise their rights as parties to that compact and nullify the actions that violated the arrangement. JOHN C. CALHOUN, EXPOSITION AND PROTEST, IN UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 311-365 (Ross M. Lence ed., Indianapolis Liberty Fund, 1992).
in certain cases.” This law, if rigidly enforced, would have prohibited local courts and law enforcement from assisting the Bank in conducting its business activities, and would eventually force the Bank to close its doors. In February, the General Assembly offered to suspend the January Act if the Bank agreed to be taxed at the same rate as state-chartered banks. The Bank, citing the *McCulloch* decision, refused to budge. The Act became effective in September 1821.220

I. Trial in the Circuit Court

In September, 1821, the federal lawsuit was tried in the Circuit Court before Justice Thomas Todd.221 Kentucky Senator Henry Clay represented the Bank. State Senator Charles Hammond,222 a leading anti-bank advocate who later served as reporter for the Ohio Supreme Court, represented the State of Ohio. By this time, two injunctions had been issued against the State, one preventing any future collection of taxes from the Bank, and the other ordering the return of the funds already seized by the State.

Clay attempted to argue Harper’s trespass and centered his case-in-chief on that issue. Hammond, by contrast, argued the larger issue of state sovereignty, or specifically the power of the State to levy a tax against business entities. Hammond then agreed “to an amendment which would raise the actual question-let a verdict pass by consent and take the case on Bill of exceptions to

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220 BULEY, *supra* note 189 at 593.
221 Justice Todd served on the U.S. Supreme Court from 1807-1826. Here, Justice Todd was presiding in his capacity of Judge of the Circuit Court.
the Supreme Court of the United States. The Circuit Court ruled in favor of the Bank. Federal marshals then arrested the State Treasurer, confiscated his keys, and seized a total of $98,000 from state treasury.

J. The U.S. Supreme Court

The case was argued before the United States Supreme Court on March 10-11, 1824. Chief Justice Marshall, writing for a 6-1 majority, held for the Bank and against Osborne. The Court also reviewed and confirmed its prior decision in *McCulloch v. Maryland*, affirmed the jurisdiction of the Court to hear the action, upheld the constitutionality of the Bank, and prohibited the states from taxing instrumentalities of the federal government. The Court also found that, although Osborne was an agent of the state and acting in its' behalf, he could not use the state’s immunity from suit as a defense.

Once the Court announced its decision in *Osborn*, the entire issue died rather quietly. There was neither a public outcry nor fiery editorials in the state’s newspapers. Many historians theorized that the state’s politicians used the doctrines of state’s rights and nullification merely for convenience. When the state’s economy improved, the doctrines were easily discarded. In the meantime, the Bank closed its Cincinnati office in October 1820 and the activities of the Chillicothe branch were significantly reduced. The Bank closed the Chillicothe office at the end 1825 and the General Assembly repealed the “outlaw” act early

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224 **KERN & WILSON**, supra note 161 AT 201
226 Id.
in 1826. Andrew Jackson, who assumed the Presidency in 1829, vetoed the bill providing for the Bank’s recharter and later removed federal deposits from the Bank’s coffers.²²⁷

This line of reasoning regarding Ohio’s assertion of state’s rights can best be summarized by William Utter, who wrote:

> It seems clear that the argument [of state sovereignty] was developed almost wholly to justify the State’s course against the Bank. The very men who drafted the resolutions [asserting state sovereignty] were advocates of national aid in building the Cumberland Road, and in financing the Erie and Ohio canals…. Ohio’s economic interests were best served by a nationalistic government; in the Bank matter only were economic interests aligned with an opposite theory of government.²²⁸

Recent historians have put a new spin on this incident. Ohioans felt that the Bank was primarily responsible for the Panic of 1819. Ohioans primary goal was to drive the bank from the state, and they accomplished that goal several years before Jackson vetoed the Bank’s recharter in 1832. By the time the “outlaw” act was repealed it was moot.²²⁹

The Court left the larger issues hanging. The issue of the relationship between the states and the federal government was not addressed at all and would continue to percolate over the next 40 years. The Court left Ohio’s state’s rights position mostly undisturbed. Further, Marshall resolved the 11th Amendment argument very narrowly; since Osborne, not the State of Ohio was the party of record in the suit, the protections of the 11th Amendment did not apply.

²²⁷ KNEPPER, supra note 27 at 137-138.
²²⁸ KNEPPER, supra note 27 at 137-138.
²²⁹ OHIO HISTORY, supra note 199 (quoting Gannon at 103-104).
Finally, the *Osborne* case was simply one in a series of cases that extended federal sovereignty to the detriment of the states. This line of cases started with *Martin v. Hunter’s Lessee* (1816),\textsuperscript{230} to *McCulloch*, through *Cohens v. Virginia* (1821),\textsuperscript{231} *Osborn* and finally, to *Planter’s Bank v. Georgia* (1824).\textsuperscript{232} The “war” between the Bank and Ohio was not an isolated event; instead it was part of a larger struggle involving federalism and states’ rights as well as the economic conflict between the “haves” and “have-nots” in the frontier state. The issues that arose from this “Rebellion” remained hotly contested and would appear again regularly during the prewar period. At the same time, Ohio was fighting to protect its boundary lines in the Ohio-Michigan War.

**IV. The Ohio-Michigan War (Toledo War)**

Each November, football teams representing the Ohio State University and the University of Michigan gather either at Columbus or Ann Arbor for the annual gridiron classic. This rivalry is one of the most famous in all of college football, but the discord between these two adjoining states does not begin or end with football. The origins of this rivalry are much deeper and more complex.

This “War Between States” occurred 30 years before the American Civil War. Unlike that war, there were no deaths, no grand strategies, and no generals

\textsuperscript{230} *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816). The Supreme Court has jurisdiction over questions of federal law.

\textsuperscript{231} *Cohens v. Virginia*, 19 U.S. 264 (1821). The U.S. Supreme Court has the power to review state supreme court decisions in civil law matters when the defendant claims that their constitutional rights have been violated.

\textsuperscript{232} *Planter’s Bank v. Georgia*, 22 U.S. 904. The circumstance that a state is a member of a private corporation will not give the Supreme Court original jurisdiction of suits where the Corporation is a party.
seeking political office. Before it was over, the Toledo War would involve six U.S. presidents, and a future Confederate general.\footnote{Andrew Jackson was president and fired Michigan’s territorial Governor in an effort to resolve the dispute. Martin Van Buren served as vice president and would run for president in 1836. James Monroe favored the remarking of the boundary carried out by Captain Andrew Talcott in 1834. Second Lieutenant Robert E. Lee was a member of the survey party. James K. Polk was Speaker of the House, and Senator James Buchanan argued against Michigan’s claim to the Strip. John Quincy Adams defended Michigan’s position in the House of Representatives.} When Ohio’s congressional delegation blocked Michigan’s application for statehood, the latter state drafted a Constitution and elected state officers in defiance of federal authority. Disputes over the Ohio–Michigan boundary continued into the 1970s.

A. Origins of the Conflict

When Congress enacted the Northwest Ordinance in 1787, one of provisions included as part of the document: was a division of the Northwest Territory into not less than three nor more than five states.\footnote{An Ordinance for the government of the Territory of the United States Northwest of the River Ohio. § 14, Art. V.} Section 14, Article 5 of the Northwest Ordinance established boundaries for the “3 to 5 states.” This northern boundary of this State (Ohio) would be \textit{an East and West line drawn through the southerly bend or extreme of Lake Michigan}. (Emphasis added). This northern boundary of the proposed new state would cause trouble in the future.

At the time Congress drafted the Ordinance, the most complete map of the Northwest Territory was known as the Mitchell Map, compiled in 1755.\footnote{Don Faber, \textit{The Toledo War: The First Michigan–Ohio Rivalry} 13 (The University of Michigan Press, 2008).} According to the Mitchell map, the East-West line referred to in the Ordinance intersected Lake Erie near the mouth of the Detroit River. Basing its northern border based on that line would give the entire shoreline of Lake Erie west of the 

\footnote{233 Andrew Jackson was president and fired Michigan's territorial Governor in an effort to resolve the dispute. Martin Van Buren served as vice president and would run for president in 1836. James Monroe favored the remarking of the boundary carried out by Captain Andrew Talcott in 1834. Second Lieutenant Robert E. Lee was a member of the survey party. James K. Polk was Speaker of the House, and Senator James Buchanan argued against Michigan's claim to the Strip. John Quincy Adams defended Michigan's position in the House of Representatives.}
Pennsylvania border to Ohio. However, as historian Carl Wittke once observed, “Bad maps produce a lot of history.”

B. Ohio’s Constitutional Convention

During Ohio’s first constitutional convention in November 1802, several members allegedly received reports from a beaver trapper, who disclosed that the southernmost extent of Lake Michigan was actually much farther south than previously thought or mapped. The delegates believed that Congress’ intent in drawing that particular border was to place Ohio’s northern border north of the mouth of the Maumee River. This would give Ohio access to most or all of the Lake Erie shoreline west of Pennsylvania.

To resolve this dilemma, the delegates included a provision in the Constitution that if the trapper’s report was correct, the boundary line would be angled slightly to the northeast to intersect Lake Erie at the “most northerly cape of the Miami (Maumee) Bay”. The delegates realized that if Lake Michigan extended farther south than believed, Ohio would lose a significant amount of territory, and perhaps the entire southern shore of Lake Erie.

When Ohio presented its draft Constitution to Congress for approval, the state boundary issue was referred to a committee. The committee reported that the proposed northern boundary was dependent upon “a fact not yet ascertained” (the southernmost extent of Lake Michigan), and the proposed boundary was

236 Carl Wittke, The Ohio-Michigan Boundary Dispute Re-examined, Ohio State Archeological and Historical Quarterly (October, 1936).
237 KNEPPER, supra note 27 at 157.
238 KERN & WILSON, supra note 161 at 204-205.
239 OHIO CONST. Art. VII., § 6.
accepted without further debate.\textsuperscript{240} However, when Congress created the Michigan Territory in 1805, they used the northern border described in the Northwest Ordinance instead of the northern border described in Ohio’s Constitution of 1802. No one noticed the inconsistency at the time, but it would have serious consequences in a few years.\textsuperscript{241}

C. Early Surveys

Residents of the disputed area asked the Ohio government to resolve the border question. Congress approved a request for a survey of the border, but the survey was delayed by the War of 1812. The survey finally began in 1816. The United States Surveyor General, Edward Tiffin, was in charge of the survey. Tiffin,\textsuperscript{242} a former Ohio Governor, commissioned a survey based on the line described in the Ohio Constitution of 1802, not on the Ordinance line. Not surprisingly, the Harris line, named after surveyor William Harris, placed the Bay of the Maumee River completely within the State of Ohio.\textsuperscript{243}

Michigan Governor Lewis Cass was not pleased with the results of Tiffin’s survey. Cass believed that the line should be surveyed based on the original Northwest Ordinance line, and he commissioned surveyor John Fulton to survey that line. The Fulton Line showed Ohio’s northern boundary south of the mouth of the Maumee River. The disputed region between the Harris Line and the Fulton

\begin{itemize}
  \item \textsuperscript{240} \textit{Faber}, supra note 235 at 26-28.
  \item \textsuperscript{241} \textit{See}, ALEC R. GILPIN, THE TERRITORY OF MICHIGAN (1805 – 1837) (Michigan State University Press, 2002).
  \item \textsuperscript{242} Tiffin was also the president of the Ohio constitutional convention that redrew Ohio’s northern boundary.
  \item \textsuperscript{243} \textit{Kern & Wilson}, supra note 161 at 204-206.
\end{itemize}
line became known as the Toledo Strip. The strip was 8 miles wide at its intersection with Lake Erie and 5 miles wide at its intersection with Indiana border. The Strip contained approximately 468 square miles, including the land that would eventually become the City of Toledo. Both Ohio and Michigan claimed ownership of the Strip, and neither would compromise.\footnote{244}{FABER, supra note 235 at 30-31.}

D. Indiana and Illinois Join In

The dispute became more complicated when Indiana sought admission to the Union in 1816. Indiana wanted frontage on Lake Michigan, and so its Constitutional convention placed its northern border 10 miles north of the Northwest Ordinance line. Because southwestern Michigan was mostly unpopulated at the time, and because Governor Cass was busy with other duties, Indiana’s northern border went unchallenged.\footnote{245}{FABER, supra note 235 at 32-34.}

Perhaps emboldened by Indiana’s actions, Illinois asked Congress to establish its northern boundary at a line almost 60 miles north of the most southerly end of Lake Michigan, to include Fort Dearborn, now Chicago, and the lead mines surrounding Galena. Congress agreed and a bill adding 8,500 square miles to Illinois,\footnote{246}{The Toledo Strip, by contrast, contained approximately 468 square miles.} at the expense of the Michigan Territory, was soon passed. Governor Cass argued for strict enforcement of the Ordinance Line, and asked Congress to examine and modify the borders.

In 1824, the Michigan Territory’s population met the 5,000 residents needed to enter the second stage of territorial government. A Legislative Council
was selected\(^\text{247}\) consisting of 18 members and later increased to 26. The completion of the Erie Canal in 1825 caused the population to increase exponentially. By the early 1830s, Michigan had achieved the 60,000 population necessary to achieve statehood.

E. Ohio Blocks Michigan Statehood

In 1833 Michigan voters sought Congress’ approval to hold a constitutional convention, with its southern boundary based on the original Northwest Ordinance (Fulton) Line. Ohio insisted that its northern border was firmly established in its constitution and refused to negotiate. Ohio’s congressional delegation\(^\text{248}\) convinced several other states to block Michigan’s request for statehood.\(^\text{249}\)

In January, 1835, Michigan’s acting Governor Stevens T. Mason\(^\text{250}\) called for a state constitutional convention for May of that year. Congress, at the urging of the Ohio delegation, refused to pass an enabling act that would authorize a constitution. Regardless, the convention met from May 11 to June 24, 1835 and drafted a proposed constitution. In the meantime, the Ohio General Assembly

247 Half of the council was elected by the people and the remainder approved by the President.
248 Ohio’s delegation in the 23rd Congress consisted of 19 representatives and two Senators in a Congress of 240 representatives and 48 Senators.
249 Indiana and Illinois supported Ohio’s position because both of their northern boundaries were moved well to the north of the Ordinance Line upon their gaining statehood. If Ohio’s border was questioned, their own claims might have been challenged. Southern states opposed the admission of another free state unless a slave state was admitted at the same time.
250 Stevens T. Mason (1811-1843) was the last territorial governor and the first state governor of Michigan. Known as the Boy Governor, Mason was appointed as Territorial Secretary at age 19 and Acting Governor at age 23. Replaced as Acting Governor by President Jackson in 1835, Mason was elected Michigan’s first state Governor. He served from 1835 to 1840. For more information on Mason, See, DON FABER, THE BOY GOVERNOR: STEVENS T. MASON AND THE BIRTH OF MICHIGAN POLITICS (University of Michigan Press/Regional, 2012).
passed legislation establishing county governments within the Strip, including Lucas County, named for Ohio Governor Robert Lucas.  

Both sides presented legitimate claims to the Strip. Ohio argued, among other things that:

- Congress neither confirmed nor rejected Ohio’s revision of its northern boundary. This can be interpreted as implied consent;
- the maps that Congress relied upon in setting the original boundaries were faulty;
- the Northwest Ordinance, unlike the Constitution, can be amended by simple congressional action. Congress has a perfect right to adjust the borders as it sees fit;
- Indiana and Illinois were admitted to the Union after Ohio and Congress accepted their adjusted northern boundaries;
- Ohio was a critical swing state in the upcoming 1836 presidential election, while Michigan was considered safely in the Democratic fold.  

Michigan argued the following:

- Congress never consented to a change in the boundary described in the Northwest Ordinance;

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251 Robert Lucas (1781-1853) served as Ohio’s 12th governor from 1832–1836, and later served as Iowa’s first Territorial Governor from 1838–1841. Lucas participated in two border disputes during his terms as governor. The first was the Toledo War between Ohio and Michigan in 1835 and the second was the Honey War, between the State of Missouri and the Iowa Territory in 1837.

252 FABER, supra note 235 at 106-110.
● The Northwest Ordinance was not merely an act of Congress, it was a compact between the federal government and the territory; both parties must agree to change the terms of the compact;

● Michigan’s boundary claim was based on the Northwest Ordinance and therefore predated the Ohio Constitution;

● Michigan had exercised jurisdiction over the disputed area for the last 30 years. Conversely, the Great Black Swamp served as a natural boundary between the Toledo Strip and the remainder of Ohio;

● Residents of the Toledo Strip voted in territorial elections and the territorial government was functioning throughout the Strip;

● The United States Attorney General supported Michigan’s claim. 253

F. The Conflict Escalates

The Michigan Legislature enacted the Pains and Penalties Act in February, 1835. This act made it a criminal offense for Ohio officials to conduct business within the Strip and provided for fines up to $1000.00 and five years’ imprisonment for violations. Governor Mason appointed Joseph W. Brown to command the state militia, and ordered him to move against the Ohio trespassers. Lucas then dispatched a detachment of the Ohio militia to the Strip, arriving at Perrysburg, just southwest of Toledo, on March 31, 1835. 254 Mason

253 Faber, supra note 235 at 116-119.
254 While the Michigan troops had an easy march from Detroit, the Ohio troops were forced to traverse the Great Black Swamp, a vast area of forests, wetlands, and grasslands, approximately 100 miles long and 25 miles wide, located in northwestern Ohio.
and Brown arrived shortly thereafter and occupied Toledo with approximately 1000 troops. Lucas, asserting that the dispute was between the State of Ohio and the federal government, refused to deal with Governor Mason or any other territorial officers.

President Andrew Jackson referred the dispute to Attorney General Benjamin Butler for an opinion. Contrary to Jackson’s wishes, Butler opined not only that Michigan was entitled to the Strip, but also that the Pains and Penalties Act, unless it was overturned by Congress, was valid and enforceable. Because Ohio’s had a sizeable congressional delegation and was a crucial swing state in the upcoming presidential election of 1836, Jackson decided that Ohio’s claims should win out. He ordered two representatives to the area to negotiate a compromise. While Lucas reluctantly agreed to disband his militia, Mason prepared his troops for a possible armed conflict.

G. Battle

Ohio next conducted elections in the disputed area. On April 8, 1835, the sheriff of Monroe County Michigan arrested two Ohio residents and charged them with a violation of the Pains and Penalties Act because they voted in the Ohio election. Lucas sent surveyors to remark the Harris Line and on April 26, 1835, the surveyors were confronted by a detachment of Michigan militia in what became known as the Battle of Phillips Corners. The surveyors claimed that the

255 FABER, supra note 235 at 5.
attackers fired 30 to 50 shots in their direction and captured nine prisoners.\textsuperscript{256} The Michigan troops claimed that they only fired a few shots in the air, with none aimed at the surveyors. This “battle” served to further heighten tensions between the two sides.

Following the “battle,” a special session of the Ohio General Assembly established Toledo as the county seat of Lucas County, formed the Common Pleas Court for the county, and appropriated $300,000 to enforce their legislation. Lucas also sent a delegation to Washington to present Ohio’s case to President Jackson. Michigan responded by appropriating a similar amount to fund its militia.\textsuperscript{257}

In May and June 1835, Michigan officials conducted their own constitutional convention and drafted a state Constitution, which provided for a bicameral legislature, a Supreme Court, and other components of state government. Ohio’s congressional delegation continued to oppose Michigan’s efforts, and Congress again blocked Michigan’s bid for statehood. The actions of the Ohio delegation also prevented Michigan from receiving its share of the

\textsuperscript{256} Mason claimed that, by conducting the survey, the surveyors not only violated the Pains and Penalties Act, but also committed a trespass within Michigan Territory.

\textsuperscript{257} Both Governor Lucas and Governor Mason claimed to have 10,000 troops ready for action. Most of these “troops” were unarmed and untrained, and most carried clubs or broomsticks instead of muskets. The Toledo Gazette, supporting Ohio’s claim, described the Michigan militia as an invading army “composed of the lowest and most miserable dregs of the community – foreigners and aliens, low drunken frequenters of grog shops, who had been hired at a dollar a day.” Faber, supra note 235 at 96-97.
federal budget surplus that occurred in 1835, which was distributed to the states, but not to the territories.\textsuperscript{258}

Tensions in the Strip remained high throughout the summer of 1835. Arrests of Ohioans by Michigan officials were followed by Ohio officials arresting Michiganders. Civil suits and criminal prosecutions became commonplace occurrences. Spying parties, organized by both sides, reported on the activities of their counterparts.

The first “casualty” of the war occurred on July 15, 1835. On that date, Monroe County, Michigan Deputy Sheriff Joseph Wood arrested Major Benjamin Stickney and his three sons in Toledo. During the arrest, Two Stickney,\textsuperscript{259} one of Benjamin’s sons, stabbed Wood in the leg with a pen knife and fled south to Ohio. Lucas then refused Mason’s request to extradite the fugitive.

Mason asked President Jackson to refer the matter to the United States Supreme Court.\textsuperscript{260} Jackson demurred. Instead, on August 15, 1835, Jackson replaced Mason as Secretary and Acting Governor with John S. (Little Jack) Horner. Before Horner could arrive to assume his duties, Mason ordered his troops to enter Toledo proper and prevent the symbolically important opening

\textsuperscript{258} When President Jackson closed the Second Bank of the United States in 1835, the government realized a huge profit on its original investment. The resulting budget surplus of $17.9 million was greater than the government’s total expenses for that year. Jackson paid off the remainder of the national debt and returned the surplus to the state governments, many of which were heavily in debt. Bureau of the Public Debt. Our Country: The 19th Century. Located at: \url{http://www.publicdebt.treas.gov/history/1800.htm}

\textsuperscript{259} Not to be confused with his older brother, One Stickney. KERN & WILSON, \textit{supra} note 161 at 205.

\textsuperscript{260} Ohio wanted Congress to resolve the dispute because its large congressional delegation and support from other states gave it a decided advantage. In the event Michigan was admitted as a State before the boundary dispute was resolved, the matter would be referred to the U.S. Supreme Court, where the legal arguments would likely favor Michigan’s claim.
session of the Court of Common Pleas. Ohio officials frustrated Mason’s efforts by holding a midnight session of the Court before returning to Perrysburg the next morning.

In October 1835, Michigan held its own elections. The voters approved the proposed Constitution elected Mason as their first Governor. However, Congress refused to seat Michigan’s duly elected Representative and Senators. For a time, both federal and state governments competed to govern the territory.

H. President Jackson Takes Charge

In June, 1836, President Jackson proposed another compromise. At Jackson’s urging, Congress passed the Northern Ohio Boundary Bill. This bill proposed that if Michigan would cede the Toledo Strip, it would receive the Western three-quarters of the Upper Peninsula in exchange. If Michigan agreed with the proposal, it could become a state. At the same time, Congress passed another bill admitting Arkansas to the Union without restrictions. Michiganders were not pleased and they initially rejected Congress’ offer.

Governor Horner favored compromise and wanted to resolve the dispute, but he was very unpopular among Michiganders. On July 3, 1836, Jackson appointed Horner as the Territorial Secretary for the new Territory of Wisconsin. He soon left to assume his new duties, leaving no federal officials in charge.

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261 Michigan.gov. Important Dates in Michigan’s Quest for Statehood. Available at: https://www.michigan.gov/formergovernors/0,4584,7-212--79532--,00.html
262 The eastern half of the Upper Peninsula, that part east of the line drawn north from the mouth of the Great Miami River, had been part of Michigan since its early days.
263 FABER, supra note 235 at 142-144.
264 Id. at 167-169.
Michiganders held a convention in September, 1836 to consider Jackson’s proposal. Because the delegates thought the Upper Peninsula was worthless, they rejected Jackson’s proposal.

I. Michigan’s Frostbitten Convention and Statehood

By December, 1836, the dispute was ready to resolve itself. Because of the funds the territory spent in garrisoning the disputed region, Michigan found itself in a deep financial bind and was nearly bankrupt. On December 14, 1836, another convention, known as the Frostbitten Convention, was held in Ann Arbor. The legislature did not authorize this convention, and Whig delegates boycotted and refused to attend. The delegates voted to approve the compromise proposed by President Jackson, but Michigan voters rejected the compromise. Congress questioned the legality of the convention, but accepted its results and admitted Michigan as the 26th state effective January 26, 1837.²⁶⁵

The Upper Peninsula, awarded to Michigan in the compromise, was considered to be a worthless wilderness at the time. However, discoveries of copper and iron led to a mining boom that helped replenish the state’s coffers. The harvesting of timber also became a major industry later in the century. Toledo became a great port on Lake Erie and the opening of the St. Lawrence Seaway in the 1950’s increased its value to the state even more. In the end, both states benefited greatly from the Compromise, and the only real loser in the deal was the Territory of Wisconsin, which gave up the western three-quarters of the Upper Peninsula and received nothing in return.

²⁶⁵ KNEPPER, supra note 27 at 157-158.
Summary

Between the time of Ohio's admission to the Union in 1803 and the ratification of a new Constitution in 1851, three major constitutional crises occurred within the state: the Sweeping Resolution, the Rebellion of 1820, and the Ohio – Michigan War. The Sweeping Resolution and the Ohio – Michigan War resulted from defects in Ohio's original Constitution, whereas the Rebellion of 1820 was a major conflict over the issue of state versus federal authority that predated both the Nullification Crisis of 1832 and the Civil War.

The Sweeping Resolution occurred because several Ohio judges, following the precedent of the United States Supreme Court in the case of Marbury versus Madison, invalidated an act of the General Assembly because its terms conflicted with the state Constitution. The General Assembly, after failing to remove the judges through impeachment proceedings, passed a resolution that terminated every judicial term in the state effective March 1, 1810. The General Assembly was then able to appoint new judges who did not believe in the concept of judicial review.

Congress chartered the Second Bank of the United States in 1816, and two branch banks were soon established in Ohio. The Bank served a vital function on the frontier by providing cash and by issuing notes that were secured by the main branch in Philadelphia. The country suffered its first major economic depression in 1818, and Ohioans largely blamed the Bank and its policies. The General Assembly levied a tax against the Bank and also the state-chartered and wildcat banks. The Bank refused to pay the tax and filed suit against Ralph
Osborn, the state auditor. The Circuit Court found in favor of the Bank, and the United States Supreme Court affirmed their holding. The Court also confirmed its holdings in McCulloch versus Maryland, which prohibited the states from taxing instrumentalities of the federal government. In spite of the favorable ruling, the Bank closed both of its Ohio branches, and after President Andrew Jackson vetoed the Bank's recharter, the issue died quietly.

The Northwest Ordinance established Ohio's northern boundary as a line parallel to the southernmost extent of Lake Michigan. During Ohio's original constitutional convention, the delegates received a report that Lake Michigan extended much farther south than was believed, so the delegates wrote a provision into the state constitution altering Ohio's northern boundary. When Congress established the Territory of Michigan in 1805, they used the boundary described in the Northwest Ordinance. When the Michigan Territory sought statehood in the 1830s, the boundary became a major issue. Ohio used its considerable political influence to block Michigan's admission to the Union until the boundary issue was resolved. Both Michigan and Ohio sent troops to the disputed area. President Andrew Jackson needed Ohio's support in the upcoming presidential election, so he attempted to resolve the issue by granting the disputed area to Ohio, and, in exchange, Michigan would be awarded the Upper Peninsula. Michiganders originally rejected the compromise, but they later accepted the compromise and were admitted to the Union in 1837.
These three episodes demonstrated the growing pains that Ohio exhibited during this period, the growing influence of Ohio in the federal Union, and the need for change as Ohio has outgrown its original governing structure.
CHAPTER 5:
A TIME FOR CHANGE: OHIO’S CONSTITUTION OF 1851

Every constitution, then, and every law, naturally expires at the end of nineteen
years. If it be enforced longer, it is an act of force, and not of right.

--Thomas Jefferson, 1789

I. Introduction

By 1851, Ohio was ready to make some much needed changes to its
constitution. The influence for change was not solely driven by Ohio citizens.
The federal courts were rapidly changing and the Ohio state courts had too much
to handle. Some of the changes in the 1851 Constitution were reflective of the
activities of the newly added federal district courts. Additionally, the 1851
Constitution would address: 1) solidifying Ohio’s need to protect individual rights
via the Bill of Rights; 2) balancing the power between the three branches of
government: the General Assembly, the Governor, and the Judiciary; and, 3) social reform issues of the times.

II. The U.S. District Court

Article III of the U.S. Constitution provides: “The judicial Power of the
United States shall be vested in one supreme Court, and in such inferior Courts
as the Congress may from time to time ordain and establish.” Under that
power, Congress established two local federal trial courts by the Judiciary Act of
1789. The District Court had jurisdiction over maritime cases, suits brought by the United States, and minor civil and criminal cases. The Circuit Court served as

266 U.S. Const. Art. III.
an appellate court for District Court cases, and as a trial court for major civil and
criminal matters.\footnote{267}

Congress created the U.S. District Court for the District of Ohio upon
Ohio’s admission to the Union in 1803.\footnote{268} President Jefferson appointed Charles
Willing Byrd as the first judge of the new court, and Byrd served as judge until his
death in 1828. At first, the Court served as both a District and a Circuit Court, but
in 1807 Congress established the Seventh Circuit, encompassing the states of
Ohio, Kentucky and Tennessee. One Supreme Court Justice and one District
Court judge presided over the Circuit Court. Congress created a new seat on the
U.S. Supreme Court to administer the Circuit Court, and President Jefferson
appointed Thomas Todd to of Kentucky fill the vacancy.\footnote{269}

In its early days, there was little business before the court. At its first
meeting, the officers took their oaths, five attorneys were admitted to practice,
and the court issued rules. The next day the court admitted two more attorneys
and the grand jury convened. There were no criminal indictments from 1803 to
1807, and the United States did not file its first civil suit until 1805. The majority of
the actions before the court were for the collection of money, based on diversity
jurisdiction.\footnote{270}

\footnote{267} Judiciary Act of 1789, 1 Stat. 73 (1789). Under this system, the Supreme Court justices were
required to ride circuit for several months each year.

\footnote{268} See, 2 Stat. 201.

\footnote{269} An Act establishing Circuit Courts, and abridging the jurisdiction of the district courts in the
districts of Kentucky, Tennessee, and Ohio. 2 Stat. 420 (1807).

\footnote{270} The History of Ohio Law, supra note 16 at 271 (quoting Roberta Sue Alexander, The
Changing Role of the Federal District Court).
Two major cases were before the court during the Byrd’s tenure. The first involved former Vice President Aaron Burr, and the second was *Osborn v. Bank of the United States*, described previously.

A. Early Cases

In 1807, Burr and Harman Blennerhassett, purchased an island in the Ohio River near Marietta. The duo intended to use the island as a staging point for their plan to carve an empire out of the Spanish territories along the Mississippi River. Blennerhassett ordered the construction of several riverboats near Marietta, and he published several articles in an attempt to gain support for their plan. After Burr’s acquittal of treason charges in Virginia, the grand jury indicted both Burr and Blennerhassett, but neither of them ever appeared before the court. The case was eventually dismissed after several continuances spanning several years.

In his book *The History of the United States District Court for the Southern District of Ohio*, Irwin Rhodes calculated that between 1807 and 1820, the District Court handled a total of 267 cases, averaging about 20 per year. The majority of the cases were default judgments. Judge Byrd heard major civil and criminal cases as a circuit judge, and minor criminal and civil cases, and also maritime cases, as a district judge.

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271 KNEPPER, supra note 3 at 100-101.
272 THE HISTORY OF OHIO LAW, supra note 16 at 272-273 (quoting Roberta Sue Alexander).
274 Id.
B. The Docket Increases

Next, President Andrew Jackson appointed Humphrey H. Leavitt as judge of the District Court in 1834; Leavitt served in this capacity until his retirement in 1871. As Ohio’s economy grew and its population increased, so did the District Court’s docket. Congress enlarged the court’s docket again in 1842, when it conferred concurrent jurisdiction with the Circuit Court for all criminal cases except for capital crimes.\(^{275}\) The Bankruptcy Act of 1841\(^{276}\) and the Fugitive Slave Act of 1850\(^{277}\) added even more cases to the Court’s docket. By the 1850s, the Court’s docket had increased to the point where Congress divided Ohio into a northern and a southern district.\(^{278}\)

The Fugitive Slave Act of 1850, while acting as a compromise between northern and southern states, strengthened abolitionist movements in the north, including the Underground Railroad. These issues influenced Ohio’s Constitution, even though an act to enfranchise African-American men was defeated.\(^{279}\)

III. Ohio’s 1851 Constitution

As early as the 1810s, there were calls for reforming the judiciary, created by Article III of the 1802 Constitution. The Supreme Court, which at that time had both original and appellate jurisdiction, had fallen behind on its docket. The


\(^{276}\) Bankruptcy Act, 5 Stat. 440 (1841).

\(^{277}\) Fugitive Slave Act, 9 Stat. 462 (1850).

\(^{278}\) An Act to Divide the State Ohio into two Judicial Districts. 10 Stat. 605, 1855.

\(^{279}\) All of the supporters of the amendment represented the counties of the Western Reserve.
requirement that the court sit in each county at least once per year made the problem even worse.

By the late 1840’s, Ohio’s population had increased from fewer than 60,000 to more than two million. Eight counties became eighty-four, and, as a result, the judges spent the majority of their time travelling from county to county.\textsuperscript{280} In addition, the judges were chosen by the legislature rather than the voters, which, in reality, made the court a subservient branch of government.

Another major problem involved the disproportionate power of the legislature, compared to the executive and judicial branches. In 1810, the legislature, incensed that the judiciary declared one of its acts unconstitutional, passed a bill that declared that all judicial offices in the state would become vacant effective March 1, 1810. This was the so-called “Sweeping Resolution” because it swept all judges in the state from office.\textsuperscript{281}

The legislature later came to be seen as corrupt, conducting business through private bills, subsidizing private companies to construct canals, railroads and other capital improvements, and granting special privileges in corporate charters. Democrats argued for some limitation in the General Assembly’s ability to incur debt, since the state debt had increased to $20 million by 1849.\textsuperscript{282} A new constitution, adjusting the checks and balances of power between the three branches of government, was seen as crucial.

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\textsuperscript{280} THE HISTORY OF OHIO LAW, supra note 16 at 51 (quoting Barbara A. Terzian. Ohio’s Constitutional Conventions and Constitutions).
\textsuperscript{281} FRED MILLIGAN, OHIO’S FOUNDING FATHERS, 148 (iUniverse.com, 2003).
\textsuperscript{282} THE HISTORY OF OHIO LAW, supra note 16 at 51.
\end{flushright}
A. Convention

Whether to hold a convention had been an issue for several years. By law, Ohio voters are asked whether a new constitutional convention should be called every twenty years. The voters overwhelmingly rejected a proposal to hold a convention in 1819, and Whig legislators blocked later efforts. However, by 1849 a Democratic-Free Soil coalition managed to pass an act providing for a referendum to be placed before Ohio voters at the next general election. In the October, 1849 general election, voters approved the proposal by a 3 to 1 margin.283

The convention began in Columbus in May, 1850. The voters chose 108 delegates; 68 were Democrats, 41 were Whigs and 3 were members of the Free-Soil Party. The Democrats were split into two factions: the liberal wing favored working-class issues, while the conservative wing supported issues favoring the wealthy. Forty-three of the delegates were lawyers and thirty were farmers. William Medill from Fairfield County, soon to be elected as Governor, was chosen as president of the convention by the delegates. An outbreak of cholera that occurred in Columbus just after the convention started forced an adjournment until December, when the delegates reassembled in Cincinnati.284

283 Thomas Jefferson, for one, was very suspicious of unchanging constitutions. He proposed that each constitution expire after 20 years. This would ensure that every generation had a say in the document. See, JOHN R. VILE. REWRITING THE UNITED STATES CONSTITUTION-AN EXAMINATION OF PROPOSALS FROM RECONSTRUCTION TO THE PRESENT. (Prager Publishers, New York, NY, 1991). The 1802 Constitution provided that “all white male inhabitants above the age of twenty-one years, having resided in the State one year next preceding the election, and who have paid or are charged with a State or county tax,” are entitled to vote. OHIO CONST. of 1802, Art. IV., § 1.
284 KNEPPER, supra note 3.
The delegates completed their work and adjourned the convention on March 10, 1851. A special ratification election was held on June 17, 1851, and by a margin of 113,237 to 104,255. Ohio’s white male electorate approved the new Constitution.  

In addition to judicial reform and adjusting the checks and balances of power between the branches, several of the delegates wanted to address social reform, including African-American rights, women’s rights, and temperance. The creation of new counties was also of great interest to the delegates. Although in the minority, Whigs and Free-Soilers teamed up with the two Democratic factions to mandate state-supported schools and other reforms.

As was the case with Ohio’s 1802 Constitution, the delegates could rely on several recently written or rewritten constitutions from other states. The remaining states comprising the Northwest Territory, which had based their state constitutions in large part on Ohio’s, were either writing or rewriting their state constitutions at around this time. Indiana, admitted in 1816, adopted a new constitution in 1851. Illinois, admitted in 1818, adopted a new constitution in 1848. Michigan, admitted in 1837, adopted a new state Constitution in 1850. Wisconsin, who’s 1846 Constitution was rejected by the electorate, adopted their first Constitution in 1848. Iowa, admitted in 1846, but not part of the Northwest Territory, adopted a new state constitution in 1857. Most of these states based all

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285 THE HISTORY OF OHIO LAW, supra note 16 at 59-60.
286 KNEPPER, supra note 3 at 204-205.
287 KERN & WILSON. supra note 193 at 211.
or part of their original constitutions on Ohio’s 1802 Constitution and experienced similar problems.

B. Changes to the Constitution

Compared to the 1802 Constitution, the Preamble is an exercise in brevity and reads as follows:

We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution.

C. Bill of Rights

Ohio’s 1851 Constitution contained a Bill of Rights, and like its predecessor, the new document contained provisions similar to the federal Bill of Rights. The new Ohio Bill of Rights contained 20 sections, but unlike its predecessor, these rights are spelled out at the beginning of the document, in Article 1.288 “Indeed, unlike the federal Bill of Rights, the Ohio Constitution begins with its own Bill of Rights, thereby emphasizing the prominence our Constitution affords to the protection of individual rights.”289

Like its 1802 counterpart, Ohio’s 1851 Constitution recognized that:

“All political power is inherent in the people. Government is instituted for their equal protection and benefit, and may have the right to alter, reform, or abolish the same…”290

288 The Bill of Rights in Ohio’s 1802 Constitution is set forth in Article VIII and consists of 28 sections.
290 Ohio Const. 1851, Art. I, §. 2.
Ohio’s 1851 Bill of Rights similarly granted to “all men” the right to peaceably assemble,\(^{291}\) to bear arms,\(^{292}\) to trial by jury,\(^{293}\) to worship according to the dictates of their own conscience,\(^{294}\) to speak, write, and publish his sentiments on all subjects,\(^{295}\) to be free from unreasonable searches and seizures,\(^{296}\) and have his property rights held inviolate.\(^{297}\)

The delegates added a prohibition of slavery and involuntary servitude,\(^{298}\) that the privilege of the writ of habeas corpus would not be suspended “unless, in cases of rebellion or invasion, the public safety require it,”\(^{299}\) a prohibition on imprisonment for debt,\(^{300}\) as well as other unremunerated rights.\(^{301}\)

D. Balancing the Power

Next the delegates were tasked with the need to balance the three branches of government. While many changes were necessary to bring equality among the branches, the delegates wanted the General Assembly to maintain its preeminent standing within the government structure.

E. The General Assembly

\(^{291}\) OHIO CONST. 1851, Art. I, § 3.  
^{293} OHIO CONST. 1851, Art. I, § 5.  
^{295} OHIO CONST. 1851, Art. I, § 11.  
^{297} OHIO CONST. 1851, Art. I, § 19.  
^{300} OHIO CONST. 1851, Art. I, § 15.  
^{301} OHIO CONST. 1851, Art. I, § 20.
Under Article II of Ohio’s new Constitution, the General Assembly was still the preeminent branch of government. The General Assembly would still consist of a Senate and a House of Representatives, with each chamber to be the judges of the election, returns, qualifications\(^{302}\) and discipline\(^{303}\) of its own members.

In an effort to address the state’s debt crisis, the general Assembly was prohibited from drawing funds from the treasury except for specific appropriations, and no appropriation would be made for a period of more than two years.\(^{304}\) A debt ceiling of $750,000.00 was also established.\(^{305}\)

The House of Representatives would have the sole power of impeachment, with the trials of any impeached officials to be conducted in Senate.\(^{306}\) The General Assembly was prohibited from enacting retroactive laws, or laws impairing the obligation of contracts.\(^{307}\) Finally, the General Assembly was prohibited from establishing any new county containing fewer than 400 square miles,\(^{308}\) and from changing county lines or removing county seats without the express approval of the voters of the involved counties.\(^{309}\)

Intending that the legislature convene just once every two years, the delegates passed a proposal for biennial elections and sessions of the General

\(^{302}\) OHIO CONSTITUTION 1851, Art. II, § 6.
\(^{303}\) OHIO CONSTITUTION 1851, Art. II, § 8.
\(^{304}\) OHIO CONSTITUTION 1851, Art. II, § 22.
\(^{305}\) OHIO CONSTITUTION 1851, Art. VIII, § 1.
\(^{306}\) OHIO CONSTITUTION 1851, Art. II, § 24.
\(^{307}\) OHIO CONSTITUTION 1851, Art. II, § 28.
\(^{308}\) OHIO CONSTITUTION 1851, Art. II, § 30.
\(^{309}\) Since the ratification of Ohio’s 1851 Constitution, no additional counties have been established.
Assembly. This proposal was opposed by delegates who felt that biennial sessions would disrupt the balance of power between the government’s branches, because the executive and judicial branches were in session all year. Some delegates also believed that annual sessions would keep the business of the lawmakers closer to the people.\textsuperscript{310}

While the new Constitution took some powers away from the General Assembly, the voters, rather than the other branches of the government, were the primary beneficiaries of this power shift. Now, the electorate had the power to choose officers of the executive and judicial branches. Further, the ability of the General Assembly to create and divide counties was curbed, and stricter guidelines for apportionment, special acts of incorporation, retroactive laws, and legislatively granted divorces were enacted.\textsuperscript{311}

The delegates did manage to curb the authority of the General Assembly to some extent, but the executive and judicial branches were still subordinate branches.

F. The Governor

Ohio’s 1802 Constitution eliminated nearly all of the power that the territorial governor possessed. The Governor could only appoint one state official, the Adjutant General, and he could only fill vacancies in the other civil offices by recess appointment, subject to the approval of the General Assembly. The Governor’s term was set at two years; term limits were imposed, and he was

\textsuperscript{310} \textit{The History of Ohio Law}, supra note 16 at 102-103 (quoting David M. Gold. \textit{The General Assembly and Ohio’s Constitutional Culture}).

\textsuperscript{311} \textit{The History of Ohio Law}, supra note 16 at 102.
chosen by popular vote, except for "[c]ontested elections," wherein the General Assembly had the power to select.  

One goal of the delegates was to restore some power to the Governor. The primary debates concerning the powers and duties of Governor revolved around the veto power. One proposal suggested that the Governor could hold an offending bill for a time certain, which would then be returned to the General Assembly for reconsideration. A simple majority could override this "pocket veto." Debates then began regarding the override margin, with some delegates favoring a simple majority while others demanded a two-thirds majority. Both proposals were eventually shelved.

Ohio’s 1851 Constitution established the new offices of Lieutenant Governor and Attorney General, and set a two-year term for these offices. In addition, the offices of Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, and Attorney General would now be elected by popular vote. The Auditor was given a term of four years, while the remaining officers held two-year terms.

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313 The History of Ohio Law, supra note 16 at 147-148.
314 The History of Ohio Law, supra note 16 at 147.
315 Ohio Const. 1851, Article III, §§ 1, 2.
316 Ohio Const. 1851, Art. III, § 1. Several states have adopted this concept, called a plural executive, where the executive powers are distributed among several elected officials. The United States, by contrast, has a unitary executive, as established in Article II, Section 1 of the U.S. Constitution.
317 Ohio Const. 1851, Art. III, § 2.
While denied the veto power until 1903, the Governor held the power to convene the General Assembly on “extraordinary occasions,” and, in the event of a disagreement between the two Houses, he could adjourn the General Assembly as well.\footnote{Ohio Const. 1851, Art. III, § 8.}  

Other changes included eliminating term limits, changing the eligibility requirements to “the qualifications of the elector,” expanding his appointment power of military officers to include the “Adjutant General, Quartermaster General, and other staff officers, as may be provided for by law,” and to commission “all officers of the line and staff, ranking as such.”\footnote{Ohio Const. 1851, Art. III, § 9.} The Governor was also included in the legislative reapportionment process, along with the Auditor and Secretary of State.\footnote{Ohio Const. 1851, Art. IX, § 3.}  

Finally, the delegates would tackle the Judiciary’s much needed independence from the General Assembly in an effort to complete the balance of power between the three branches of government.

G. The Judiciary

The proposed constitution also called for major changes to Ohio’s judiciary. One of the biggest problems of the 1802 Constitution was the requirement that the court hold session in each county every year. This requirement was merely an inconvenience in 1802 when Ohio had nine counties, but by 1850 the state had grown to 84 counties. Complying with this provision

\footnote{Ohio Const. 1851, Art. XI, § 11.}
proved an impossible burden for the justices, and the court’s docket dragged. Further, allowing popular election of judges would help curb some of the power of the General Assembly and grant some independence to the judicial branch.

The final document completely restructured Ohio’s judicial system. Article IV of the new Constitution called for a Supreme Court, District Courts with appellate jurisdiction, Courts of Common Pleas, Probate Courts, Justice of the Peace Courts and other inferior courts “and the General Assembly, may, from time to time, establish.”

The Supreme Court was increased to five members and the requirement that the Court meet in each county every year was dropped. Justices were elected to five-year terms in statewide elections. The Court had original jurisdiction in *quo warranto*, mandamus, habeas corpus and *procedendo* “and such appellate jurisdiction as may be provided by law.” However, the General Assembly could increase or decrease the number of justices, and the number of Common Pleas districts; they could change the districts, and establish other courts upon vote of two-thirds of the members.

District Courts, consisting of Common Pleas judges and one Supreme Court justice, were established at a level between the Supreme Court and the Common Pleas Courts. The District Courts had the same original jurisdiction as the Supreme Court and “such appellate jurisdiction as may be provided by

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322 Ohio Const. 1851, Art. IV, § 1.
323 Ohio Const. 1851, Art. IV, § 1.
324 Ohio Const. 1851, Art. IV, § 2.
325 Ohio Const. 1851, Art. IV, § 15.
law.” At the trial court level, nine Common Pleas districts were created, bounded by county lines, and as nearly equal in population as practicable.

The new Constitution also created a Probate Court with one judge per county, elected to a three-year term by the voters of the county. The Probate Court had existed previously under the territorial government, but was eliminated by the Constitution of 1802. Justice of the Peace Courts were continued in each township in the several counties, elected by the voters to three-year terms. Their powers and duties “shall be regulated by law.”

Although Ohio’s new Constitution relaxed somewhat the chokehold that the General Assembly held on the judiciary, it was clear that the legislature remained as the dominant branch of government. Although members of the executive branch and the judiciary were now directly elected by the voters and term limits were eliminated, the governor still had no veto power. The General Assembly also retained the authority to increase or decrease the number of Justices of the Supreme Court, the number of Common Pleas districts, and the jurisdiction of the remaining courts, giving them some coercive power over the judiciary.

Having completed the necessary changes to the branches of government, the delegates moved to the topic of social reform. They would attempt to include

326 OHIO CONST. 1851, Art. IV, § 6.
327 OHIO CONST. 1851, Art. IV, § 8.
328 From 1803 to 1851, the probate courts of Ohio were incorporated into the courts of common pleas, which were granted special “probate jurisdiction.” John F. Winkler. The Probate Courts of Ohio. 28 U. Tol. L. Rev. 563, 569-570.
329 OHIO CONST. 1851, Art IV, § 9.
acts that would speak to the social issues of the times, including African-American rights, women’s rights, and temperance.

H. African-American/Suffrage Issues

The abolitionist movement had strong support in Ohio during the prewar years. Prominent abolitionists, many of whom were affiliated with Oberlin College, founded the Ohio Anti-Slavery Society in Zanesville in April, 1835. Other organizers of the Society included Quakers from Mt. Pleasant. The Society’s media outlet, the Anti-Slavery Bugle began publication in Lisbon in 1845 and continued until 1861.

The Society established chapters in every area of the state and employed speakers to convince others to join. James Birney’s newspaper, The Philanthropist published articles supporting the movement. One historian referred to Oberlin as the “town that started the Civil War” because of its reputation as a center of the abolitionist movement. Over 40,000 runaway slaves utilized the over 700 Underground Railroad safe houses and “depots” in Ohio on their journey to freedom in Canada. Cincinnati was the home of the Lane Theological Seminary as well as the home of abolitionist author Harriet Beecher Stowe. Stowe’s father, Lyman Beecher, became the first president of the seminary in 1832. Charles Grandison Finney, who became known as “The Father of

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330 Oberlin College, founded in 1833, was the first college in the United States to admit African-American students (1835) and women (1837).
333 KERN & WILSON, supra note 193 at 142-143.
Modern Revivalism, moved to Ohio from Connecticut to teach at Oberlin College. From that platform, Finney became a vocal advocate of abolitionism.\(^{334}\) By the late 1830s Ohio was home to over 200 antislavery organizations.\(^{335}\)

In spite of this, abolitionist sentiment in Ohio in the prewar period was hardly overwhelming. In the early part of the 19\(^{\text{th}}\) century, Ohio, reflecting its southern roots,\(^{336}\) was more hostile to blacks than other free states. While the delegates to the 1802 constitutional convention overwhelmingly opposed slavery, they did not necessarily support African-American rights. The convention proposed limiting suffrage to white men only. Black laws, passed in 1804 and 1807, required African Americans entering Ohio to prove their freedom, register with local authorities, and find an Ohio resident to attest to their good behavior.\(^{337}\)

In the 1830s, race riots in Cincinnati forced the students and faculty of the Lane Theological Seminary to relocate to Ohio’s Western Reserve. The delegates to Ohio’s Constitutional convention of 1851 overwhelmingly defeated a proposal for black suffrage and a proposal to ban African-Americans from moving to the state received serious consideration before being defeated.\(^{338}\)

Although the final document created a more democratic government than the prior constitution, two suffrage provisions were soundly voted down. A

\(^{334}\) KERN & WILSON, supra note 193 at 142-143.

\(^{335}\) KNEPPER, supra note 3 at 201.

\(^{336}\) Ohio’s earliest settlers hailed from the Piedmont, the Blue Ridge Mountains, the Shenandoah Valley and the Appalachian and Interior Low plateaus of the Upland South. Most arrived on flatboats via the Ohio River, except those who settled northern Ohio from New England. R. HURT, supra note 23 at 248-249.

\(^{337}\) An Act to regulate black and mulatto persons, 2 Laws of Ohio 63 (1804); An Act to amend the act, entitled ‘An Act Regulating black mulatto persons, Laws of Ohio 53 (1807) (Act of 1807).

\(^{338}\) KERN & WILSON, supra note 193 at 212-213.
proposal to enfranchise African-American men was defeated 75 to 13, and an amendment dropping the word "male" from the voting requirements failed by a vote of 72 to 7. Provisions to ban further African immigration and to deport all current African-Americans residing in the state received more votes than the suffrage provisions, but these provisions were also defeated. However, a temperance provision barring the state from licensing the sale of alcohol was placed on the ballot as a separate amendment and passed by a vote of 113,237 to 104,255.

In 1852, Rutherford B. Hayes, then a young attorney practicing Cincinnati, summed up the general feelings behind the new Constitution:

Government no longer has its ancient importance. Its duties and powers no longer reach to the happiness of the people. The people’s progress, progress of every sort, no longer depends on government.

Although the 1851 Constitution has been amended over 150 times since its ratification, it still remains as the fundamental law of the State.

Summary

Congress created the United States District Court for the District of Ohio upon Ohio’s admission to the Union in 1803. This Court served as both a District Court and a Circuit Court until Congress established the Seventh Circuit in 1807. In its early years there were few cases before the court; most involved the

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339 All of the supporters of both amendments represented the counties of the Western Reserve.
340 Kern & Wilson, supra note 193 at 204.
341 The History of Ohio Law, supra note 16 at 60.
342 Rutherford B. Hayes, diary entry, September 24, 1852, in Diary and Letters of Rutherford BircharD Hayes, 19th President of the United States (Charles Richard Williams ed., Columbus: Ohio Archaeological and Historical Society, Iss. 422, 1922).
collection of money based on diversity jurisdiction. Congress added to the Court's docket when they enacted the Bankruptcy Act of 1841 and the Fugitive Slave Act of 1850. By 1850 the Congress divided Ohio's federal courts into a northern and a southern district.

By 1850 Ohio had grown from fewer than 60,000 residents to more than 2 million. The state courts had fallen behind on their dockets and the General Assembly still controlled most of the governmental power. Several proposals to call a constitutional convention had been rejected by the voters, but in 1849 a Democratic – Free Soil coalition passed, and the voters approved, a referendum for a new Constitution. The delegates met in Columbus in May, 1850. A cholera outbreak forced the convention to recess until December, when the delegates reassembled in Cincinnati. The convention completed their work in March, 1851, and that June Ohio's white male electorate approved the new document.

The new Constitution addressed judicial reform and adjusted the power between the branches of government, but suffrage for African – Americans and women was overwhelmingly defeated. A temperance provision was placed before the voters and approved as a separate issue. The delegates also placed a Bill of Rights, much more expansive than its federal counterpart, at the beginning of the document, as Article I.

The new Constitution established the offices of Lieutenant–Governor and Attorney General and provided that officials in the Executive Branch and the Judiciary would now be elected. A debt ceiling was established and some of the Governor's power, with the exception of the veto, was restored. The requirement
that the Supreme Court meet annually in every county was also eliminated. District Courts with appellate jurisdiction and Probate Courts were also established.

Ohio's 1851 Constitution, with several amendments added in the intervening years, remains as the supreme law of the state.
CHAPTER 6:
THE DISCORDANT DECADE: 1850-1860

Disunion and civil war are at hand; and yet I fear disunion far less than compromise. We can recover from them. The free States alone, if we must go on alone, will make a glorious nation.

--Rutherford Birchard Hayes, 4 January 1861

I. Introduction

Once its new Constitution was drafted and ratified, Ohioans could look to developments on the national scene, and how those developments would lead them into Civil War in the next decade. Events starting with 1) the Compromise of 1850, with its more stringent Fugitive Slave Act and the question of whether or not the new territories acquired as a result of the War with Mexico would be open to slavery, 2) the regional bloodshed that occurred as a result of the Kansas-Nebraska Act of 1854 later known as Bleeding Kansas, 3) the decision of the United States Supreme Court in Dred Scott v. Sandford, 4) the publication of the antislavery novel Uncle Tom’s Cabin, 5) the activities of the Underground Railroad, and 6) the election of Abraham Lincoln in 1860 all pointed the country down the path to war. The common thread among these rather disparate issues was the peculiar institution of slavery.

Ohioans have always been torn on the issue of slavery. While the Northwest Ordinance and the 1802 Constitution banned slavery, the General Assembly enacted Black Codes designed to restrict African-American liberties as well as their economic freedom. There was a strong abolitionist movement in the
Western Reserve, but efforts to enfranchise African-Americans had gone down to defeat in both of Ohio’s constitutional conventions. Finally, Ohioans largely ignored the federal Fugitive Slave Act of 1793, and some Ohioans had actively assisted runaways since the state’s early years, but a movement in the 1851 constitutional debates to prohibit African-American immigration to the state, and to deport those already residing here, was only defeated after much debate.\textsuperscript{343}

II. The Compromise of 1850

The United States fought a war with Mexico from 1846 to 1848. As part of the treaty of Guadalupe Hidalgo, signed on February 2, 1848 and ending the war, the United States acquired a vast tract of land in the American Southwest, including the modern states of Arizona, New Mexico, California, and parts of Colorado, Utah, and Nevada.

The issue of the expansion of slavery into the territories had been percolating for several years. Previously this issue had been addressed by Congress in the Compromise of 1820. That Bill admitted Maine as a free-state and Missouri as a slave state, again equalizing the number of free and slave states in the Union. The Bill further prohibited slavery in all parts of the Louisiana Territory north of 36°30’ north latitude, except within the borders of Missouri.

Over the next three decades, Congress attempted to continue the balance between the slave and free states by admitting states from each category including Arkansas (1836) and Michigan (1837), Florida (1845) and Iowa (1846),

and Texas (1845) and Wisconsin (1848). California, whose population exploded following the Gold Rush of 1849, threatened to disrupt this balance of power when it sought admission to the Union as a free state in 1850. The slaveholding states, already a minority in the House of Representatives because of their smaller populations, saw a threat to their “peculiar institution” of slavery if they became a minority in the Senate as well.\footnote{CARL H. MONEYHON, THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON ARKANSAS 90-91 (The University of Arkansas Press, 2002).}

In response to this “Crisis of 1850,” Kentucky Senator Henry Clay joined forces with Illinois Senator Stephen A. Douglas to propose the Compromise of 1850.\footnote{KERN & WILSON, supra note 161 at 216-218.} The final Bill was actually a series of five bills, providing for, among other things:

- The admission of California as a free state;
- The organization of the remainder of the new territories without regard to the slave trade;\footnote{This provision would effectively repeal the 36° 30’ provision of the Missouri Compromise.}
- A prohibition of the slave trade (but not slavery itself) within the District of Columbia;
- Transfer of Texas’ state debt to the federal government in exchange for Texas ceding its claim to New Mexico; and,
- Enactment of a far more stringent Fugitive Slave Act.\footnote{THE CAMBRIDGE HISTORY OF LAW IN AMERICA, SUPRA NOTE 6 AT 307-308 (quoting Ariella Gross, Slavery, Anti-Slavery and the Coming of the Civil War) (Grossberg & Tomlins, eds.).}
The Compromise attempted to defuse sectional rivalry by granting concessions to both sides of the slavery issue. Instead, the Compromise actually increased tensions between the sections, particularly with regard to the new Fugitive Slave Act, adopted in large part to placate the slaveholding states. The new Fugitive Slave Act provoked hostility and resistance throughout the North. Mobs attacked slave catchers and vigilance committees actively interfered with masters attempting to retrieve their property. Southern states became convinced that their comrades in the north had no intention of supporting, or complying with the new act.\textsuperscript{348}

The new act’s predecessor was the Fugitive Slave Act of 1793. That law guaranteed a slave holder the right to recover his escaped slaves.\textsuperscript{349} The owner or his agent simply had to appear before a federal judge and provide proof of ownership to obtain an order that allowed the removal of the slave from the state to which he or she fled.\textsuperscript{350}

In spite of Ohio’s resistance to granting the franchise to African-Americans, the state had a long-standing policy of protecting free blacks from kidnapping. In Ohio’s early days, the ownership of fugitive slaves had to be proven to the

\textsuperscript{348} THE HISTORY OF OHIO LAW, supra note 42 at 769-770 (quoting Paul Finkleman, Race, Slavery, and Law in Antebellum Ohio).
\textsuperscript{349} The original Act gave effect to Article IV, Section 2 of the United States Constitution, which provides that “No Person held to Service for Labour in one State, under the laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour, may be due.
satisfaction of an Ohio judge before the alleged slave could be returned.\textsuperscript{351} The United States Supreme Court addressed this issue in the case of \textit{Prigg v. Pennsylvania},\textsuperscript{352} where the Court held that the states were precluded from regulating the return of fugitive slaves. In response, the General Assembly repealed this “Fugitive Labor” law, but in 1831 they reinstated a statute that punished individuals who kidnapped free blacks.\textsuperscript{353}

The new Fugitive Slave Act provided for stiff penalties against any federal marshal or other official who refused to aid in the capture of suspected runaways. The suspected slave was prohibited from requesting a jury trial or testifying in his or her own behalf and fines of up to $1000 and imprisonment awaited individuals convicted of aiding their escape. Abolitionists referred to this law as the “Bloodhound Law” after the dogs the slave owners used to track their runaway slaves.\textsuperscript{354}

As with the earlier Fugitive Slave Act, northern states actively opposed the enforcement of the new act. In the case of \textit{Ableman v. Booth},\textsuperscript{355} the Defendant Booth was arrested by United States Marshals for violating the Fugitive Slave Act. A Wisconsin state judge granted a writ of habeas corpus, and released Booth from incarceration. The marshals appealed, and the Wisconsin Supreme Court found that the Fugitive Slave Act was unconstitutional and again ordered

\textsuperscript{351} An Act relating to Fugitives from labor or service from other States, 37 Laws of Ohio 38 (1839).
\textsuperscript{352} \textit{Prigg v. Pennsylvania}, 41 U.S. 539 (1842).
\textsuperscript{353} \textsc{The History of Ohio Law}, supra note 42 at 764 (quoting Paul Finkleman. \textit{Race, Slavery, and Law in Antebellum Ohio}).
\textsuperscript{354} The full text of the Fugitive Slave Act of 1850 is available at: \url{http://www.nationalcenter.org/FugitiveSlaveAct.html}
\textsuperscript{355} \textit{Ableman v. Booth}, 62 U.S. 506 (1859).
Booth’s release. The case then went before the United States Supreme Court. Chief Justice Roger Taney, writing for a unanimous majority, reversed the decision of the Wisconsin Court, finding that the Wisconsin courts could not annul a judgment of conviction issued by a federal court.

State courts in Ohio were no less inclined to enforce the act than was the Wisconsin court. In March, 1855, federal officers arrested a slave named Rosetta on a warrant from U.S. Commissioner John L. Pendry. Attorney Salmon P. Chase sought and obtained a writ of habeas corpus, and Rosetta was brought before Judge Parker of the Hamilton County (Ohio) Common Pleas Court. Judge Parker determined that Rosetta was a free woman and ordered her release. Federal Marshall H. H. Robinson then rearrested Rosetta under the federal warrant. State officers arrested Marshall Robinson and jailed him for contempt of court. Robinson applied for a writ of habeas corpus to U.S. Supreme Court Justice John MacLean. Justice MacLean, invoking the supremacy clause of the US Constitution, held that state officials cannot interfere with federal officers performing duties on behalf of the federal government.

The General Assembly also passed legislation making the Fugitive Slave Act more difficult to enforce in this state. In 1857, the Republican-dominated legislature enacted three new personal liberty laws. The first made holding a person as a slave in the state a criminal offense. The second declared that

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357 As early as 1817, an Ohio justice held that slaves transported to Ohio by their masters were free. ERVIN H. POLLACK, OHIO UNREPORTED DECISIONS 33, State v. Carneal (1817).
358 Ex Parte Robinson, 6 McLean 355, 20 F. Cas. 969 (S.D. Ohio, 1855).
Ohio’s jails were unavailable to slave catchers, and the third punished individuals who kidnapped free blacks. The next year, the General Assembly, now controlled by Democrats, repealed the latter two laws. In 1858 another law, requiring jailers to accept fugitive slaves when they are in the company of federal officials was enacted by the Democrats.

In 1856, the Ohio Supreme Court issued another decision on the transient issue in the case of Anderson v. Poindexter. Anderson was a slaveholder who resided in the state of Kentucky; Poindexter was Anderson’s slave. For several years, Anderson allowed Poindexter to hire himself out as a laborer, sometimes performing work within the State of Ohio. Anderson agreed to allow Poindexter to purchase his freedom and Poindexter signed several notes purchasing his freedom, that were cosigned by his friends in Ohio. When Poindexter and his friends refused to pay on the notes, Anderson sued Poindexter for the value of the notes.

Justice Ozias Bowen held that Poindexter became free once he entered Ohio; his return to Kentucky did not make him a slave again. Therefore, Poindexter was free when he made the contract with Anderson, and since he was free when he signed the contract purchasing his freedom, the Court found

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359 An Act To prohibit the confinement of fugitives from slavery in the jails of Ohio, 54 Laws of Ohio 170 (1857).
360 An Act To prevent kidnapping, 54 Laws of Ohio 221 (1857).
361 An Act To repeal an act entitled 'An act to prohibit the confinement of fugitives from slavery in the jails of Ohio,' 55 Laws of Ohio 10 (1858); An Act To repeal an act therein named, 55 Laws of Ohio 19 (1858).
362 An Act To amend section one of an act for the confinement of persons under the authority of the United States in the jails of this state, passed December 20, 1806, and to repeal section two of said act, 56 Laws of Ohio 158 (1859).
363 Anderson v. Poindexter, 6 Ohio St. 622 (1856).
that the contract between Anderson and Poindexter was void for want of consideration.

Justice Bowen also noted that in Kentucky a contract between a free person and a slave was void ab initio. Had the court enforced the laws of Kentucky rather than the laws of Ohio, he wrote, Anderson still could not enforce payment of the notes.\(^{364}\)

In *Commonwealth of Kentucky v. Dennison*,\(^ {365}\) the U.S Supreme Court declined to issue a writ of mandamus against the Governor of Ohio. The Commonwealth requested the writ, commanding the Governor to deliver a fugitive slave to the agent of the Commonwealth.

Chief Justice Taney, writing for the majority, held that it is the duty of the Governor to cause the slave to be delivered to the agent of the Governor of Kentucky. The Court further held that the Governor’s duty was ministerial, with no discretionary power. The word “duty” in the Fugitive Slave Act of 1793, he wrote, means the moral obligation of the State to perform a compact in the Constitution, Congress cannot coerce a state officer to perform any duty by act of Congress. The state officer may perform if he thinks proper, and it may be a moral duty to perform it. But if he refuses, no law of Congress can compel him.\(^ {366}\)

Perhaps the most noteworthy of the fugitive cases from Ohio during this decade was the Oberlin–Wellington Rescue and trials of 1858–1859. John Price


\(^{366}\) Id., at syllabus.
was a slave who escaped from his master in Kentucky. Price had recently been staying in the home of James Armstrong, who resided in Oberlin. On September 13, 1858, a group of slave catchers captured Price and rode to the nearby town of Wellington for the night.

When the news of this incident reached the community of Oberlin, a crowd of residents, including Oberlin College students, professors, townspeople, and free blacks rode to Wellington, recaptured Price from his captors, and returned to Oberlin. Price was hidden in the home of Oberlin Professor James Fairchild, and he was taken across the border to Canada a few days later.

The United States Marshalls arrested 37 of the rescuers on federal warrants for violating the fugitive slave law. Two of the conspirators, Simeon Bushnell, a white clerk and printer, and Charles Langston, a black schoolteacher, were convicted and sentenced to 60 days and 20 days in jail respectively. Both Defendants appealed their convictions to the Ohio Supreme Court. The Court, citing Supremacy Clause of the U.S. Constitution, affirmed the convictions.

State authorities then arrested Price’s kidnappers, including a federal marshal, and charged them with kidnapping. After negotiations, the federal charges against the remaining rescuers were dropped, and in exchange, Ohio officials dismissed the charges against the Kentucky kidnappers.367 The continued tension between slave and free states reached the Kansas-Nebraska region in 1854.

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367 Kern & Wilson, supra note 161 at 220-221.
III. Bleeding Kansas

In 1854, Senator Stephen A. Douglas of Illinois introduced the Kansas-Nebraska Act to Congress. This Act would create the new territories of Kansas and Nebraska from the Louisiana Purchase. The prohibition of slavery above the line of 36° 30’ from the Missouri Compromise was removed, and the voters of the territory would be allowed to determine whether slavery should exist there. Soon, pro-slavery “Border Ruffians” and anti-slavery “Free Staters” flooded into the territory in order to influence the election of the non-voting delegate to Congress.

On May 21, 1856, anti-slavery Missourians destroyed the town of Lawrence, Kansas. Three days later, abolitionists led by John Brown, a native of Summit County Ohio, kidnapped five pro-slavery men and hacked them to death with broadswords. Brown and his men survived a retaliatory raid against their settlement soon afterwards, but one of his sons was killed. Brown and his men escaped, and the party ended up in Harper’s Ferry, Virginia in 1859.368 Brown’s attempt to seize the Harpers Ferry arsenal and incite a full-blown slave revolt was quelled by United States Marines under the command of Colonel Robert E Lee. Two more of Brown’s sons were killed in the raid, while another son escaped. Brown, who was wounded in the raid, was tried and convicted of treason and hanged on December 2, 1859.

The sectional violence was not confined to the states of Kansas and Nebraska. On May 22, 1856, Congressman Preston Brooks, a Democrat from

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South Carolina, bludgeoned Free-Soil Senator Charles Sumner of Massachusetts on the floor of the Senate chamber with a heavy cane. The attack came in response to a speech Sumner had given two days earlier criticizing Brooks’ uncle, Democratic Senator Andrew Butler from South Carolina. Sumner suffered serious injuries to his brain and spinal cord, and as a result he was unable to serve for three years. Brooks’ actions were applauded throughout the southern states, but condemned in the North. The Governor of South Carolina presented Brooks with a new walking stick in honor of his actions.  

The Kansas-Nebraska Act and bleeding Kansas sounded the final death knell of the Whig party. Begun in the 1830s to oppose the policies of President Andrew Jackson, the Whigs were a national force that elected two presidents (William Henry Harrison and Zachary Taylor) and several governors. Unable to deal with the slavery issue, the Whigs eventually split into Northern and Southern factions. Northern or “conscience” Whigs eventually joined forces with the new Republican Party, while Southern, or “Cotton” Whigs eventually joined the Democrats.  

A new political coalition came into being in 1854. Made up of former Free-Soilers, anti-Nebraska Democrats, “Conscience” Whigs, and other unaligned elements, the coalition soon adopted the name “Republican” to describe their new party. Known as the Fusion party in Ohio, the coalition swept the

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370 Id., at 307-308.
371 Id., at 180-181.
statewide elections in 1854 and elected anti-slavery advocate Salmon P. Chase to the Governor’s office in 1855. On a national level, the Supreme Court would hear a case that would make the conflict between slave and free states worse.

IV. Dred Scott Decision

In the case of *Dred Scott v. Sandford*, the United States Supreme Court issued a landmark decision on the slavery issue, addressing issues similar to, but not the same as those raised by *Prigg v. Pennsylvania*. In *Scott*, the issue revolved around the fate of a temporary resident of a free territory rather than that of a fugitive in a free state.

Dred Scott was a slave born in the slave state of Missouri. However, Scott’s master, an Army surgeon, relocated to the free state of Illinois with Scott and his family. Scott and his family later lived as slaves in the free territory of Minnesota. Upon the family’s return to Missouri, Scott sued for his freedom.

The case was heard in various state and federal courts, including the Supreme Court of Missouri, and finally came before the U.S. Supreme Court for argument in 1856. The issue was whether Scott’s living in a free state rendered him free when moved there by his master. The Court first ruled that neither Scott

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372 KNEPPER, *supra* note 27 at 210-212.
nor any person of African descent could be a “citizen of a state,” so the Court lacked the jurisdiction to hear the case.\footnote{The Cambridge History of Law America, supra note 6 at 308-311.}

Initially, the Court was ready to issue an opinion that focused on the jurisdictional issue alone and did not analyze the constitutionality of the Missouri Compromise of 1820. However, the Court later decided to address the broader slavery issue. Chief Justice Roger Taney, writing for the majority, held that a slave did not acquire freedom simply by being taken to a state where slavery is not permitted. The Court also held that slaves could never become citizens and that the federal government did not have the authority to ban slavery in the territories.

Justice Benjamin R. Curtis dissented from the Court’s opinion because he felt that if the Court lacked the jurisdiction to hear the case, the merits of the claims should not have been addressed.\footnote{Scott v. Sandford, 60 U.S. 393, 564-565 (1857).} Justice John MacLean of Ohio also dissented from the Court’s opinion. Justice MacLean cited the case of \textit{Marie Louise v. Marot},\footnote{Louise v. Marot, 9 Louisiana Rep. 476, 1836.} (1836) wherein the Supreme Court of Louisiana held that a slave who is taken into a country where slavery is prohibited is immediately emancipated. Once the slave becomes free, he cannot be returned to slavery.\footnote{Scott v. Sandford, 60 U.S. 393, 561 (1857).}

Many legal scholars claim that the Dred Scott decision is the worst decision in the entire history of the United States Supreme Court.\footnote{Paul Finkelman, Scott v. Sandford: The Court’s Most Dreadful Case and How It Changed History, 82 Chi.-Kent L. Rev. 3, 3-48 (2007).} Each of
the nine justices issued their own opinion with intermingled concurrences and
dissents. The result served only to inflame the tensions between the North and
the South even more as Southerners celebrated the decision while Northerners
condemned it.\footnote{GOODWIN, supra note 369 at 189.} Additionally, the decision represented only the second time that
the Supreme Court overturned an act of Congress.

Among those who criticized the decision were political rivals Abraham
Lincoln and William Seward. Lincoln pointed out that in at least five states, free
African-Americans voted to ratify the Constitution and were thus a part of the We
the People mentioned in the Preamble. William Seward, noting that the decision
was announced a mere two days after the new President James Buchanan was
inaugurated, accused the new President and the Chief Justice of engaging a
conspiracy.\footnote{GOODWIN, supra note 369 at 191.} During this time, the horrors of southern slavery would be
expressed by Stowe in her book Uncle Tom’s Cabin.

V. Uncle Tom’s Cabin

Harriet Beecher Stowe was born in Litchfield, Connecticut on June 14,
1811. Harriet was one of 13 children born to New England preacher Lyman
Beecher. Seven of her brothers became ministers, including her younger brother

\footnote{Justice Felix Frankfurter referred to the Dred Scott case as “one of the Court's great self-inflicted wounds.” GOODWIN, supra note 369 at 189.}

\footnote{DANIEL A. FARBER, LINCOLN’S CONSTITUTION 10 (Chicago: University of Chicago Press, 2004).}

\footnote{GOODWIN, supra note 369 at 191.}
Henry Ward Beecher. Harriet received a classical education in a school run by her older sister.

Stowe moved to Cincinnati, Ohio at the age of 21, when her father became the head of the Lane Theological Seminary. While in Cincinnati, Stowe witnessed firsthand the proslavery Cincinnati Riots of 1836. Stowe then became involved in religion, feminism, and the abolition of slavery. She met and married Calvin Stowe, a Lane graduate, in 1836, and the pair moved to Brunswick, Maine, where her husband was teaching at Bowdoin College.

Stowe wrote *Uncle Tom’s Cabin* in part as a response to the Fugitive Slave Act of 1850. Stowe’s goal was to expose the horrors of Southern slavery to the northern population as a whole. Her book also served to lionize those slaves who escaped their captivity to flee to Canada and freedom. Cincinnati Attorney Salmon P. Chase contended that the character of John Van Trope, the abolitionist former slaveholder in *Uncle Tom’s Cabin*, was based on his client John Van Zandt, whom he defended in a suit for monetary damages, brought by a slaveholder whose escaped slaves were aided by Van Zandt. Chase lost the case, but the trial brought a great deal of attention to the abolitionist cause.

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385 One of Stowe’s students at Bowdoin was Joshua Lawrence Chamberlain, who later won the Congressional Medal of Honor defending Little Round Top, during the Second Day of the Battle of Gettysburg.
386 HARRIET BEECHER STOWE. UNCLE TOM’S CABIN. SparkNotes.com Available at: http://www.sparknotes.com/lit/uncletom/context.html
388 KERN & WILSON, supra note 161 at 125-126.
The National Era published Uncle Tom’s Cabin as a series of articles in 1851 and 1852. The book was published in its entirety the next year and immediately became a bestseller; over 300,000 copies were sold initially, and by the end of 1853 over 1.5 million copies had been sold. Except for the Bible, Uncle Tom’s Cabin was the highest selling book of the 19th century.\textsuperscript{389} Ironically, Stowe once remarked to her publisher that: “I hope it will make enough so that I may have a silk dress.”\textsuperscript{390} The response to Stowe’s book was so great, both pro and con, that 10 years later, a smiling President Abraham Lincoln greeted her with: “So you’re the little woman who wrote the book that made this great war.”\textsuperscript{391}

In addition, the Underground Railroad allowed many slaves to escape the horror of slavery described by Stowe.

VI. The Underground Railroad

One of the most active segments of the abolitionist movement was the organization known as the Underground Railroad. First of all, the Underground Railroad was neither underground nor a railroad. The Underground Railroad was a network of secret routes and safe houses established by Northerners committed to helping escaped slaves. Several of the primary escape routes ran across the Buckeye state, partly because Ohio bordered both the slave states and Canada and was the shortest distance between those two locations for many of the escaped slaves. Two of the most famous conductors of the Underground

Railroad resided in Ohio, Levi Coffin, from Cincinnati and John Rankin from Ripley. Coffin, sometimes referred to as “The President of the Underground Railroad” began assisting escaped slaves in 1847 and may have helped as many as 3000 slaves on their journey to freedom. Rankin, who built his home on a high bluff overlooking the Ohio River, would hang a lantern outside his home to help guide the escaped slaves to his safe house. Rankin may have aided as many as 2000 slaves that escaped from captivity in the South. Some of the conductors had religious motivations while others simply opposed the peculiar institution.  

Finally, the culmination of these events was met with the election of Abraham Lincoln and would bring the country towards the brink of war.

VII. The Election of 1860

At the Republican Convention in Chicago in May, the Ohio delegation stood behind its candidates Senator William Seward of New York, and two of her favorite sons, former Governor Salmon P. Chase and current Senator Benjamin F. Wade. By the fourth ballot, the delegates, including those from Ohio, had switched their votes to Abraham Lincoln, who became the Republican nominee. The party platform bitterly opposed the idea of extending slavery to the territories.

Kern and Wilson, supra note 161 at 157-158. For an excellent account of the activities of the Underground Railroad during this era, see, Eric Foner. GATEWAY TO FREEDOM: THE HIDDEN HISTORY OF THE UNDERGROUND RAILROAD. (W.W. Norton & Co., Inc., New York, 2015). Foner’s book concerns itself mostly with the routes along the eastern corridor and terminating in New York City, however, it is an excellent reference source.
but did not threaten the institution where it already existed. Ohio Governor William Dennison returned to Ohio, pledging to work for Lincoln’s election.\(^{393}\)

The Democrats held their convention in Charleston, South Carolina, in April 1860. Ohio’s delegates were solidly behind Illinois Senator Stephen A. Douglas. Delegates from the states in the Deep South bolted from the convention over a platform dispute. Six candidates were nominated, with Senator Douglas garnering most votes. By the 57th ballot, Douglas was still leading, but he fell short of the number of votes required for the nomination. On May 3, the delegates agreed to adjourn without nominating a presidential candidate.

The convention reconvened in Baltimore on June 18. The delegates from the Deep South again walked out of the convention when a resolution permitting slavery in the territories did not receive the required number of votes. Douglas eventually garnered the nomination, while Herschel Johnson Georgia received the nod for Vice President.

The Constitutional Union Party, made up of former Southern Whigs and Know-Nothings, met in Baltimore and nominated former Tennessee Senator John Bell as their candidate. Bell formerly served as Speaker of the House and as Secretary of War. A slave owner, Bell opposed the extension of slavery and campaigned against secession. Bell and his followers believed that secession could be best avoided by ignoring the slavery question altogether.\(^{394}\)


\(^{394}\) Goodwin, supra note 369 at 259-260.
The Southern delegates, who walked out of the Democratic Convention in Baltimore, reconvened five days later and nominated former Vice President John C. Breckenridge as their candidate for President. Joseph Lane of Oregon was nominated for Vice President. Lincoln and Douglas were the main rivals in the Northern states, while Breckenridge and Bell were the primary candidates in the Southern states.

Although Lincoln only carried 40% (39%) of the popular vote nationwide, he carried almost all of the states above Mason-Dixon Line as well as California and Oregon. Lincoln prevailed in the Electoral College with 180 electoral votes, even though he did not carry a single slaveholding state. He won 54% of the Northern popular vote, but nationwide, his opponents garnered nearly a million votes more than he did. Douglas carried only the states of Missouri and New Jersey, while Breckenridge and Bell failed to carry any states outside their section. Lincoln won Ohio, receiving 231,600 and votes, while Douglas received 187,232 votes. A mere 23,600 Buckeye votes were cast for Breckenridge and Bell combined.

Summary

Several occurrences during the 1850s set the stage for Civil War in the next decade. Ohio was at the center of these events; her political leaders helped to shape events on a national scale and her resources contributed significantly to the country's wealth. The Compromise of 1850, with its more stringent Fugitive

395 Kern & Wilson, supra note 161 at 221-222.
Slave Act, the regional effect of the Kansas – Nebraska Act, the Dred Scott Decision, the publication of Uncle Tom's Cabin, the activities of the Underground Railroad and the election of 1860 contributed to the sectional tension during this decade. The common thread among all of these issues was the peculiar institution of slavery.

The California Gold Rush of 1849 swelled the population of that territory significantly, and by the next year a petition for statehood was forwarded to Washington. Up to this time, the slave and the free states had been admitted mostly in tandem, but admitting California as a free state would tip the balance in the Senate to the free states. Senators Henry Clay and Stephen A. Douglas fashioned the Compromise of 1850 to mollify Southerners concerned about the "peculiar institution." Instead, the new Fugitive Slave Act provoked hostility and resistance throughout the northern states, including Ohio.

The Kansas – Nebraska Act provided that the voters of those respective territories would decide for themselves whether slavery should be allowed. This concept, called "popular sovereignty" was good in theory, but it caused free – soil advocates called Jayhawkers from the North as well as "Border- Ruffians" from Missouri to flood the territories in an attempt to influence the local elections. Open warfare broke out between the two factions, and the federal army was dispatched to restore peace to the area.

In the case of Dred Scott versus Sanford, the U.S. Supreme Court was called on to decide whether Scott, who was born as a slave but lived for several years in free territory, was still a slave. The Court determined that neither Scott,
nor any African–American, could be a "citizen of a state," so the Court lacked jurisdiction to hear the case. More importantly, the Court held that the federal government did not have the authority to ban slavery in the territories. Ohio's Justice John MacLean was one of two dissenting justices in the case.

Harriet Beecher Stowe, a resident of Cincinnati, wrote Uncle Tom's Cabin in response to the Fugitive Slave Act. Her goal was to expose the horrors of slavery to the northern population. The book became a runaway bestseller, and, except for the Bible, it was the highest selling book of the 19th century. Stowe's book helped to popularize the abolitionist movement known as the Underground Railroad, a series of secret routes and safe houses designed to assist escaped slaves.

The Election of 1860 proved to be one of the most decisive in the country's early history. Republican Abraham Lincoln squared off against Democrat Stephen A. Douglas. Southern Democrats bolted the convention and nominated John C Breckenridge, while a coalition of former Whigs and Know–Nothings nominated John Bell. Lincoln prevailed in the Electoral College while garnering 40% of the popular vote nationwide. Lincoln won Ohio's vote, but he failed to carry any slaveholding state.
CHAPTER 7:

OHIO MUST LEAD

Ohio must lead throughout the War!

Ohio Governor William Dennison, 1861.

I. Introduction.

The Executive has frequently bent the Constitution and individual rights during times of war.\textsuperscript{396} From 1789 to about 1846, the President largely respected Congressional authority concerning declarations of war.\textsuperscript{397} But from that point on, the President has stretched his executive power beyond the constitutional limits when it comes to war.\textsuperscript{398} It is often argued, "when national security is genuinely threatened, the President must be permitted to do whatever needs to be done to protect the United States."\textsuperscript{399} This idea allows the President to burden individual rights in the name of security objectives while bypassing Congressional approval.\textsuperscript{400} The President’s paramount responsibility is to protect the people of the United States and to keep the country secure even if it means bending the Constitution to accomplish those purposes.\textsuperscript{401} President Abraham Lincoln was no different when the Civil War broke out in 1861.\textsuperscript{402}

\textsuperscript{396} See, generally, LOUIS FISHER, PRESIDENTIAL WAR POWER 47 (2d ed. 2004) (discussing the Presidential war power through history).
\textsuperscript{397} Id., at 17-39.
\textsuperscript{398} Id., at 40–260. The majority of Fisher’s book concerns itself with the ways in which the President has stretched his war power throughout the history of the country.
\textsuperscript{399} SCOTT M. MATHESON, JR., PRESIDENTIAL CONSTITUTIONALISM IN PERILOUS TIMES 17 (2009).
\textsuperscript{400} Id.
\textsuperscript{401} Id. at 33.
\textsuperscript{402} Id. at 33.
Seven southern states passed Ordinances of Secession from the Union in the wake of Lincoln’s election. These states formed the Confederate States of America in early 1861, with its capital in Montgomery, Alabama and Jefferson Davis as its first President. Hostilities commenced when Confederate forces in Charleston, South Carolina opened fire on Union forces occupying Fort Sumter in Charleston harbor. Four years later, more than 620,000 Union and Confederate soldiers were dead, the Southern infrastructure, including rail and riverboat service, was destroyed, the world’s most advanced agrarian economy was in ruins, and slavery was abolished once and for all.

Lincoln responded to the attack on Fort Sumter by calling forth the state militias, suspending habeas corpus, and declaring a naval blockade of all southern ports. Lincoln did this all while the Congress was in recess. However, Lincoln did not claim that he had the authority to do these acts. He acknowledged that he exceeded his executive powers when he asked Congress to validate his actions. He explained why he did the things he did by stating, “whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them.” Congress approved and legalized Lincoln’s acts as if they had been done under the express authority of Congress.

403 FISHER, supra note 396 at 47.
404 Id., at 47.
405 Id., at 48.
406 Id.,
407 Id.,
408 Id.,
actions caused another four states to secede, and four additional border (slave) states with pro-Confederate sympathies seriously considered joining their comrades.

President Lincoln resorted to other extraordinary measures to preserve the Union. During the four-year conflict, Lincoln assumed near-dictatorial powers that strained the Constitution in ways never seen before or since.

Lincoln gave his inaugural speech on March 4, 1861, before a crowd of approximately 30,000 spectators. The speech itself was edited by Seward, and the tone was firm but conciliatory. Lincoln had “no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.”

However, Lincoln intended “to hold, occupy, and possess the property, and places belonging to the government, and to collect the duties and imposts; but beyond what may be necessary for these objects, there will be no invasion—no using of force against, or among the people anywhere…” Lincoln closed his speech with the words: “In your hands, my dissatisfied fellow countrymen, and not in mine, is the momentous issue of civil war. The government will not assail you. You can have no conflict, without being your selves the aggressors.”

Ohio’s Republican Governor, William Dennison, also stretched his more limited powers to the breaking point in dealing with the secession crisis. When

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410 FARBER, supra note 382 at 16. Missouri, Kentucky, Maryland, and Delaware remained in the Union.
411 GOODWIN, supra note 369 at 326-328.
Lincoln called for 75,000 volunteers for the Army, with 13,000 as Ohio’s share, more than 30,000 men appeared in Columbus to enlist. Ohio’s First and Second Volunteer Infantry Regiments organized themselves so quickly that Dennison sent them to Washington to help protect the capital.\textsuperscript{412} Dennison quickly appointed George B. McClellan, a railroad executive and West Point graduate, as Major General and commander of the Ohio troops. Delaware County native and West Point graduate William S. Rosecrans was appointed as Brigadier General and second in command.\textsuperscript{413} In May, 1861, Dennison telegraphed former Governor Salmon P. Chase, now serving as Secretary of the Treasury. Dennison was seeking a three-year commission as Major General for McClellan, insisting that “Ohio must lead throughout the war.”\textsuperscript{414} President Lincoln soon appointed McClellan as Major General in the Regular Army, to rank above all officers except commanding General Winfield Scott.

Dennison took additional steps that stretched his rather limited governing powers to the breaking point. Dennison took control over the railroads and telegraph lines to help with supply and communication problems. Dennison established several training camps for the troops and he helped raise over 100,000 troops for the Union Army. Without waiting for Washington’s approval, Dennison also convinced General McClellan to dispatch troops to western Virginia to aid the loyalists in that area and to control the line of the Baltimore &

\textsuperscript{412} Kern & Wilson, supra note 161 at 222-224.  
\textsuperscript{413} Id., at 222-224.  
\textsuperscript{414} Id., at 224.
Ohio Railroad.\textsuperscript{415} By July, 1861, Union forces had driven the Confederates from the pro-Union region of western Virginia.\textsuperscript{416} These pro-Union counties seceded from the State of Virginia and were admitted to the Union as the State of West Virginia in 1863.

Dennison’s actions helped Ohio gain a war footing in record time, but he made powerful enemies in the process. Feeling that Dennison was a political liability, Republicans and War Democrats dumped Dennison in favor of Youngstown businessman David Tod for the gubernatorial nomination in 1861. Tod easily defeated Peace Democrat Hugh J. Jewett that November.\textsuperscript{417} Dennison went on to Chair the Republican National Convention in 1864, and he served as Postmaster General in the Lincoln administration.\textsuperscript{418}

Most historians describe the month of July 1863 as the turning point in the war. In that month Union forces captured the Confederate strongholds at Vicksburg and Port Hudson, thus opening the Mississippi River to the Union Navy. General George Meade defeated Lee’s Army of Northern Virginia at Gettysburg; Lee attempted no further strategic offensives for the remainder of war. At the same time, William Rosecrans maneuvered Confederate General Braxton Bragg out of his strong defensive positions at Tullahoma, Tennessee in an almost bloodless campaign. The siege of the port of Charleston, South

\textsuperscript{415} KNEPPER, supra note 27 at 223-224.  
\textsuperscript{417} KNEPPER, supra note 27 at 224-25.  
\textsuperscript{418} GOODWIN, supra note 369 at 659.
Carolina continued, and the African-American 54th Massachusetts Regiment unsuccessfully attacked Battery Wagner in Charleston harbor.

A thumbnail sketch of July, 1863 also demonstrates the contribution of Ohio and its citizens to the war effort. Union General Ulysses S. Grant (Point Pleasant) accepted the surrender of Confederate forces at Vicksburg, Mississippi. Two of his corps commanders were William Tecumseh Sherman (Lancaster) and James B. McPherson (Clyde).

William Starke Rosecrans (Delaware County), commanding the Army of the Cumberland, drove General Bragg’s Army from Tullahoma in middle Tennessee to northern Georgia. Brigadier General and future President James A. Garfield (Orange Township) served as Rosecrans’ Chief of Staff. Troops commanded by Generals Alexander McCook (Columbiana County) as well as the 9th Ohio Infantry regiment held critical mountain passes that allowed Rosecrans to advance relatively unimpeded by Confederate forces. Major General Phillip Henry Sheridan (Somerset) commanded the Union division that first entered Tullahoma. Colonel and future President Benjamin Harrison (North Bend) commanded a regiment that guarded Rosecrans’ supply lines in Kentucky and Tennessee.

July 1863 also saw the capture of Port Hudson, Louisiana by forces under General Nathaniel Banks. Banks’ division commanders included Godfrey Weitzel (born in Germany but living in Cincinnati) and Halbert Paine (Chardon). At Gettysburg, Brigadier General George Armstrong Custer (New Rumley) defeated a Confederate cavalry force attempting to attack the rear of the Union
lines, while the 8th Ohio Infantry helped blunt the left-flank attack during Pickett’s charge on the third day of the battle. In Charleston Harbor, Union troops attacked the harbor defenses commanded by Confederate General Roswell Ripley (Worthington).

Back in Ohio, Confederate cavalry under General John Hunt Morgan invaded Ohio and were defeated by Union troops, including the 23rd Ohio Infantry Regiment, with future Presidents Rutherford B. Hayes (Delaware) and William McKinley (Niles), at the Battle of Buffington Island. Copperhead Congressman Clement Vallandigham (Lisbon), recently convicted of making disloyal statements by a military commission and banished to the South by President Lincoln, accepted his party’s nomination to run for Governor, in absentia.

In his book entitled *Lincoln’s Constitution*, Professor Daniel Farber examines the Constitutional crisis that was the American Civil War. Farber gives particular emphasis to the secession crisis itself, the debate over state sovereignty versus federal supremacy, the legality of secession, the uses (and abuses) of presidential power, and the curtailment of individual rights.

Some curtailment of individual rights should have been expected in the theatre of war. The imposition of martial law, the seizure and destruction of personal property without compensation, and the liberation of millions of

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419 FARBER, supra note 382 at 14.
420 Farber serves as Sho Sato Professor of Law at the University of California, Berkeley.
slaves\textsuperscript{421} are natural consequences of warfare. Such intrusions were more difficult to justify in the states remaining loyal to the Union.

The intrusions on individual rights in the northern states, while of a more limited nature, still existed. Farber writes that at least 13,000 civilians were held under military arrest during the Civil War. Some of the arrestees, particularly draft dodgers, deserters, and blockade runners, were arguably under military jurisdiction. Others, most notably citizens of the Confederacy, those northern citizens caught trading with the Confederacy, and individuals accused of disloyal speech, were often denied their constitutional right to jury trial and other protections.\textsuperscript{422}

Farber wrote in detail concerning four infringements on individual rights during this era, notably the suspension of \textit{habeas corpus}, arrests without trials, trials of civilians by military commissions, and infringements on free speech.\textsuperscript{423} This Chapter will analyze the history of the Writ of Habeas Corpus; Lincoln’s first suspension of Habeas Corpus; Suspension and arbitrary arrests in Ohio; and other suspensions during Lincoln’s presidency.

II. The Origin of the Great Writ

A. Habeas at English Common Law

Habeas corpus is a “judicial mandate directing a government official to present an individual held in custody to the court so that it can determine whether

\textsuperscript{421} Farber, \textit{supra} note 369 at 144. This article discusses Lincoln’s actual reluctance in freeing the slaves because of its Constitutional problems.
\textsuperscript{422} Farber, \textit{supra} note 369 at 145.
\textsuperscript{423} See, generally, Farber, \textit{supra} note 369 at Chapter 7.
his detention is lawful."\textsuperscript{424} A writ of habeas corpus “directs an agent of the crown
detaining a citizen ‘to produce the body of the prisoner, or person detained’ in
order to ‘test the legality of the detention or imprisonment,’ rather than to
establish the guilt or innocence of the party.” It is regarded as the “Great Writ”
because it is the “sacred right of the people against sovereign authority.”\textsuperscript{425} When
the Founders drafted the Constitution, they understood it in the context of the
English Habeas Corpus Act and with the belief that “national security interests
should [not] be balanced against the right to individual liberty enjoyed by persons
within protection, save one exception: in the event of a ‘Rebellion or Invasion’
where the political branches have taken the dramatic step of suspending the
privilege.”\textsuperscript{426} The Suspension Clause was intended “to bestow on the new
government a particular lever, drawn from English and colonial practice, by which
it could-- in a formal, transparent, and dramatic way--balance the needs of
national security against the individual rights enshrined in the Constitution.”\textsuperscript{427}

The writ of habeas corpus came about in England, and has since been
recognized as the “‘bulwark of our liberties’ and the embodiment of the ‘natural
inherent right’ of the ‘personal liberty of the subject.’”\textsuperscript{428} The writ is connected to
“English conceptions of due process rooted in Magna Carta.”\textsuperscript{429}

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H. Rehnquist, All the Laws But One: Civil Liberties in Wartime (1998)); Black’s Law
Dictionary (9th ed. 2009).
\textsuperscript{426} Amanda L. Tyler, The Forgotten Core Meaning of the Suspension Clause, 125 Harv. L. Rev.
901, 921 (2012).
\textsuperscript{427} Id. at 922.
\textsuperscript{428} Id. at 924.
\textsuperscript{429} Id. at 924.
\end{flushright}
Constitution was ratified, the writ of habeas existed in England as the specific right “not to be jailed on mere suspicion of criminal activity or of posing a danger to the state, but instead only upon formal criminal charges and timely trials commensurate with well-established procedural safeguards.”\textsuperscript{430} The writ was essentially “‘a powerful guarantee that individuals would not be detained on executive fiat instead of legally recognized grounds.’”\textsuperscript{431}

In 1627, the court in “Darnel’s Case” simply stated that the prisoners were held “by the special command of the King.”\textsuperscript{432} The prisoners argued that due process must be afforded them, “‘either by presentment or by indictment.’”\textsuperscript{433} The prisoners’ argument failed, but it laid the important groundwork for the parliamentary created Petition of Right.\textsuperscript{434} The Petition of Right “essentially repudiated the holding in Darnel’s Case” when Parliament cited the due process laid out in the Magna Carta and demanded that the King give cause before imprisoning and detaining his subjects.\textsuperscript{435} The King signed the Petition, giving the formerly declaratory statement the teeth to limit the power of the Executive to arrest and detain “except upon a criminal charge or conviction, or for a civil debt.”\textsuperscript{436} Thus, while the writ was not codified until 1679, the “common law writ of habeas corpus, which continued to serve as the vehicle for redress available in

\textsuperscript{430} Id. at 924.
\textsuperscript{431} Id. at 925
\textsuperscript{432} Id. at 925.
\textsuperscript{433} Id. at 925-26.
\textsuperscript{434} Id. at 926.
\textsuperscript{435} Id. at 926.
\textsuperscript{436} Id. at 925-26.
‘all . . . cases of unjust imprisonment’ that were not covered by the [Habeas Corpus Act.]"  

B. The Habeas Corpus Act

The Habeas Corpus Act, promulgated in 1679, promised speedy trial, and release when a speedy trial was not held. The writ under the Act was described as “‘the first security of civil liberty’ that ‘protect[ed] the subject from unfounded suspicions, from the aggressions of power, and from abuses in the administration of justice.’” The Act also included specific provisions to protect individuals accused of treason that “would have been largely superfluous if the Crown could simply ignore them in the ordinary course by detaining persons thought to pose a danger to the state without charges in the first instance.” The Act did not have any exceptions for times of war. The Trial of Treasons Act of 1696 added more protections for those specifically accused of treason. All of these developments together made it clear to the Drafters of our Constitution that “‘[t]he right to be either tried according to law or released is really the right that habeas corpus is supposed to secure.’"

C. Parliamentary Suspensions of the Habeas Corpus Act

The British Parliament first suspended the writ ten years after the Habeas

437 Id. at 927.
438 Id. at 928-29.
439 Id. at 929.
440 Id. at 929-30.
441 Id. at 930.
442 Id. at 931.
443 Id. at 932.
Corpus Act was promulgated, “in response to the events of the Glorious Revolution of 1688, which spurred James II to flight and installed William and Mary on the throne.”\textsuperscript{444} The Crown began to arrest those suspected of treason, all the while fearing “that persons detained without formal charges would be ‘deliver[ed]’ by habeas corpus” under the Act.\textsuperscript{445} Charles Boscawen asked the House of Commons for “a short Bill, for two or three months, to enable the King to commit such persons as he shall have cause to suspect, without the benefit of Habeas Corpus.”\textsuperscript{446} After some debate, both houses of Parliament passed the first suspension of the Habeas Corpus Act.\textsuperscript{447} Parliament later expanded the scope of the suspension of the Act and lengthened its duration.\textsuperscript{448} The suspension was later extended again for five more months.\textsuperscript{449} A third attempt to extend the suspension was unsuccessful.\textsuperscript{450}

In February of 1696, Parliament suspended the Act again for six months after an assassination attempt on King William’s life.\textsuperscript{451} The Act was again suspended in 1708, 1715, 1722, and 1744.\textsuperscript{452} Notably, in 1777, “Parliament responded to the outbreak of rebellion in the colonies by enacting new suspension legislation. It provided:

‘Whereas a Rebellion and War have been openly and traitorously

\textsuperscript{444} Id. at 934.
\textsuperscript{445} Id. at 936.
\textsuperscript{446} Id. at 935.
\textsuperscript{447} Id. at 936.
\textsuperscript{448} Id. at 938.
\textsuperscript{449} Id. at 940.
\textsuperscript{450} Id. at 941.
\textsuperscript{451} Id. at 942.
\textsuperscript{452} Id. at 942-43.
levied and carried on in certain of His Majesty's Colonies and Plantations in America, and Acts of Treason and Piracy have been committed on the High Seas, and upon the Ships and Goods of his Majesty's Subjects, and many Persons have been seised and taken, who are expressly charged or strongly suspected of such Treasons and Felonies, and many more such Persons may be hereafter so seised and taken: And whereas such Persons have been, or may be brought into this Kingdom, and into other Parts of his Majesty's Dominions, and it may be inconvenient in many such Cases to proceed forthwith to the Trial of such Criminals, and at the same Time of evil Example to suffer them to go at large; be it therefore enacted . . . That all and every Person or Persons who have been, or shall hereafter be seised or taken in the Act of High Treason . . . or in the Act of Piracy, or who are or shall be charged with or suspected of the Crime of High Treason . . . and who have been, or shall be committed, in any Part of his Majesty's Dominions, for such Crimes . . . or for Suspicion of such Crimes . . . shall and may be thereupon secured and detained in safe Custody, without Bail or Mainprize . . . any Law, Statute, or Usage, to the contrary in anywise notwithstanding."

D. Habeas Corpus in the Colonies

Arrestees were not afforded the protections of the Habeas Corpus Act in the colonies.\footnote{453} However, if they were captured and taken on English soil, English subjects were protected and owed due process.\footnote{454} Therefore, during the American Revolution, Americans were detained on English ships, until their number become unmanageable.\footnote{455} Parliament then suspended the Habeas Corpus Act in 1777 for any prisoners.\footnote{457} Instead of renewing the suspension in 1782, Parliament recognized Americans as members of a “wholly separate nation” and passed a statute authorizing the King “to hold and detain . . . as
Prisoners of War, all Natives or other Inhabitants of the thirteen revolted Colonies not at His Majesty’s Peace.”  

Americans were outraged at the disparate treatment. In 1774, the Continental Congress wrote to the British “decrying the denial to the colonists of ‘trial by jury’ and ‘the benefit of the habeas corpus Act, that great bulwark and palladium of English liberty.” The Continental Congress later wrote about the importance of habeas corpus:

“If a subject is seized and imprisoned, tho’ by order of Government, he may, by virtue of this right, immediately obtain a writ, termed a Habeas Corpus, from a Judge, whose sworn duty it is to grant it, and thereupon procure any illegal restraint to be quickly enquired into and redressed.”

Thus, the colonists, having been denied the writ, intrinsically understood its fundamental importance and “[i]n breaking away from England, the colonists would claim the privilege as their own and in time incorporate it into a new constitutional framework that entrenched its protections from suspension far more than English law had.”

Before the federal right to habeas was enshrined in the Constitution, “every state in the Union secured the writ of habeas corpus either by common law or state constitutional law.” The federal privilege was intended to protect the States’ remedies. Thus, the debate surrounding

458 Id. at 950-51.  
459 Id. at 955.  
460 Id. at 955.  
461 Id. at 955.  
462 Id. at 955.  
464 Id.
the incorporation of the suspension clause related to the allocation of power.\textsuperscript{465} The Founders agreed that the suspension may be necessary in some cases.\textsuperscript{466} Therefore, the provision in the Constitution as enacted in 1787 still reads: “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”\textsuperscript{467}

E. Context of the First Suspension

Lincoln was faced with extremely difficult circumstances immediately after becoming President. Lincoln committed severe abuses of civil rights, including the suspension of the writ of habeas corpus, in order to preserve the Union. Craig Lerner argues that in saving the Constitution, Lincoln “often took actions that skirted the outermost boundaries, and possibly exceeded his constitutional authority.”\textsuperscript{468} However, Lerner asserts that damage to the integrity of the Constitution is an inevitable cost of war.\textsuperscript{469} Indeed, “Lincoln could count, and he knew he had the votes of both the people and the Congress” in restricting the rights and privileges in the Constitution.\textsuperscript{470} Despite these abuses, “[t]he verdict of history is that Lincoln’s use of power did not constitute abuse. Every survey of historians ranks Lincoln as number one among the great presidents.”\textsuperscript{471}

Lincoln’s first inauguration took place on March 4, 1861.\textsuperscript{472} He “immediately confronted a country literally splitting apart” as he watched states of

\begin{itemize}
\item \textsuperscript{465} Id.
\item \textsuperscript{466} Id.
\item \textsuperscript{467} U.S. CONST. art. I, § 9, cl. 2.
\item \textsuperscript{468} Craig S. Lerner, \textit{Saving the Constitution: Lincoln, Secession, and the Price of Union}, 102 MICH. L. REV. 1263, 1285, 1285 (2004).
\item \textsuperscript{469} Id. at 1285.
\item \textsuperscript{470} Frank J. Williams, \textit{Abraham Lincoln, Civil Liberties and the Croning Letter}, 5 ROGER WILLIAMS U. L. REV. 319, 321 (2000).
\item \textsuperscript{471} Id. at 321.
\item \textsuperscript{472} Id. at 322.
\end{itemize}
the “Lower South,” including South Carolina, Georgia, Florida, Alabama, and Mississippi, Louisiana, and Texas secede. \footnote{Margaret A. Garvin, All the Laws but One: Civil Liberties in Wartime, 16 CONST. COMMENT 691, 693 (1999); William H. Rehnquist, Civil Liberty and the Civil War: The Indianapolis Treason Trials, 72 IND. L.J. 927, 927 (1997).} Lincoln tried to prevent the “Upper South” states including Virginia, North Carolina, Tennessee, and Arkansas, and the “Border States” that included Missouri, Kentucky, and Maryland. \footnote{Rehnquist, supra note 473 at 927.}

Geoffrey R. Stone described the “tangled knot of complications” leading up to Lincoln’s suspension of the Writ well:

sharply divided loyalties, fluid and often uncertain military and political boundaries, and easy opportunities for espionage and sabotage. He also faced a set of additional dilemmas because of his need to retain the loyalty of the border states, address divisive questions of race, slavery, and emancipation, and impose conscription for the first time in the nation’s history. Bitter disagreement, even within the Union, was inevitable. \footnote{STONE, supra note 424 at 84.}

On April 12, 1861, only a month after Lincoln became President, the South fired on Union troops at Fort Sumter. \footnote{Michael B. Brennan, Book Review, 83 MARQ. L. REV. 221, 222 (1999) (Reviewing WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998)); Garvin, supra note 473 at 694.} The Union surrendered the Fort on April 14. \footnote{Garvin, supra note 473 at 694.} Lincoln called up the 75,000 members of the militia. \footnote{Rehnquist, supra note 473 at 928.} The “Upper South” states immediately seceded, and Maryland threatened to secede, leaving “the Capital nearly surrounded by secessionists and their sympathizers.” \footnote{Garvin, supra note 473 at 694; Rehnquist, supra note 473 at 928.}
Former Chief Justice William H. Rehnquist explained how these events affected the dynamics between the South and the Union, putting Lincoln in a tight position.

Their secession dramatically changed the military status of the nation's capital in Washington. When only the states of the “Lower South” had seceded, the border between the Confederate states and the United States was the southern border of North Carolina. But after Fort Sumter, that border was the Potomac River which separates Maryland from Virginia. Washington went from being an interior capital to a capital on the very frontier of the Union, raising the definite possibility of raids and even investment and capture by the Confederate forces. Lincoln, fully aware of this danger, was most anxious that the 75,000 volunteers for whom he had called would arrive in Washington and defend the city against a possible Confederate attack. The North, as a whole, had rallied to Lincoln's call to arms, and new volunteer regiments and brigades were oversubscribed. But the only rail connections from the North into Washington ran through the city of Baltimore, forty miles to the northeast. Herein lay a problem: there were numerous Confederate sympathizers in Baltimore, and the city itself, at that time, had a reputation for unruliness—it was known as “Mob City.” Three rail lines—one from Philadelphia and the northeast, another from Harrisburg and the northwest, and the B&O from the west, converged in the city or close to it. \[480\]

Maryland was “seething with secessionist tendencies.” \[481\] Lincoln already had to avoid Baltimore on route to the Capital for his inauguration because of an assassination attempt. \[482\] No one was sure what Maryland’s intentions were, but

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\[480\] Rehnquist, supra note 473 at 928.
\[481\] Williams, supra note 470 at 322.
\[482\] Brennan, supra note 476 at 222,
it was clear that “if Maryland joined the Confederacy, the U.S. Capitol would sit inside Confederate lines.”

On April 19, “a violent mob” attacked Union soldiers from the 6th Massachusetts militia “with bricks, stones, and pistols, to which they responded by firing into the crowd,” which resulted in the deaths of four soldiers and twelve civilians. The Governor of Maryland, Thomas Hicks, allowed Confederates to burn bridges and interfere with telegraph lines and postal delivery to frustrate the Union troops’ efforts to enter the city of Baltimore.

Governor Hicks also “convened the Maryland legislature on April 26 to discuss secession, and urged the General Assembly to adopt “a resolution affirming the preservation of Maryland’s neutral posture.”

F. Lincoln First Suspends the Writ

On April 27, 1861, because “Lincoln believed that a military threat against Washington could have ended the War in favor of the South, or at least severely weakened the Union and put it in a compromising position at any future treaty negotiations,” and the dissolution of the Union would threaten “the very existence of republican government, at home and abroad,” he authorized the first suspension of habeas corpus “at any point he deemed necessary along the rail line from Philadelphia to Washington.” Lincoln wrote to the Commanding General of the Army of the United States, Winfield Scott:

483 Bracknell, supra note 425 at 210-11.
484 Palomares, supra note 463 at 110-11; Williams, supra note 439 at 322.
485 Bracknell, supra note 425 at 210-11.
486 Bracknell, supra note 425 at 210-11.
488 Rehnquist, supra note 473 at 928.
You are engaged in suppressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military line which is now or which shall be used between the city of Philadelphia and the city of Washington you find resistance which renders it necessary to suspend the writ of habeas corpus for the public safety, you personally, or through the officer in command at the point where resistance occurs, are authorized to suspend the writ.489

Frank J. Williams emphasizes that Lincoln did not suspend the Great Writ lightly.490 “The right of habeas corpus was so important, that the President considered the bombardment of Maryland cities as preferable to its suspension.” Lincoln authorized General Scott to suspend the writ only “in the extremest necessity.”491 Lincoln’s Secretary of State, William H. Seward, said that the only reason the writ had not been suspended up to this point was “‘because of Mr. Lincoln’s extreme reluctance at that period to assume such a responsibility.”492

G. Precedent for the Suspension

Lincoln did not have strong precedent to back his decision.493 Before the Civil War, no branch of the government had suspended the writ.494 Thomas Jefferson had attempted to suspend the writ during Ex parte Bollman,495 but

489 Bracknell, supra note 425 at 211; Palomares, supra note 463 at 112; Garvin, supra note 473 at 694.
490 Williams, supra note 470 at 322.
491 Williams, supra note 470 at 322. See, also, FRANK J. WILLIAMS. JUDGING LINCOLN 62 (Southern Illinois Press, 1st Edition, 2002)
492 Palomares, supra note 432 at 111.
493 Palomares, supra note 432 at 111.
495 8 U.S. (Cranch 4) 75 (1807).
Jefferson did not even consider unilateral executive action when the bill passed in the Senate, but was rejected in the House.\footnote{Palomares, \textit{supra} note 463 at 111; Prakash, \textit{supra} note 494 at 578.} In fact, Jefferson “could not conceive of a situation where the President should suspend the writ even during insurrection or rebellion.”\footnote{Palomares, \textit{supra} note 463 at 111.}

Therefore, Lincoln asked his Attorney General, Edward Bates, for advice.\footnote{GOODWIN, \textit{supra} note 369 at 355; \url{http://www.fjc.gov/history/home.nsf/page/tu_merryman_doc_6.html}} Bates’ assistant, Titian J. Coffey, prepared a memorandum citing Matthew Hales, William Blackstone, and Joseph Story’s \textit{Commentaries on the Constitution}.\footnote{STONE, \textit{supra} note 424 at 121.} Story wrote, “[h]itherto no suspension of the writ has ever been authorized by congress . . . [i]t would seem, as the power is given to congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge, whether exigency had arisen, must exclusively belong to that body.”\footnote{2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1336 (1833).}

H. Ex parte Merryman

Many did not appreciate Lincoln’s internal struggle, and felt that “Lincoln’s suspension of the writ for the sake of military expedience struck a merciless blow to civil liberties.”\footnote{Bracknell, \textit{supra} note 425 at 210-11.} At this time there were several dissenters in Maryland. John Merryman was a state legislator and a member of a secessionist unit of the Calvary.\footnote{Williams, \textit{supra} note 424 at 323; Palomares, \textit{supra} note 463 at 112.} He was a “Lieutenant Drillmaster.” Thus, he not only exercised his Constitutional right to disagree with what the government was doing, but he
engaged in raising an armed group to attack and to attempt to destroy the government.\textsuperscript{503} Just about a month after Lincoln suspended the writ, on May 25, 1861\textsuperscript{504}, Merryman was arrested for “speaking out against the Union, recruiting soldiers to serve in the Confederate Army, and participating in the destruction of rail lines.”\textsuperscript{505} Merryman immediately petitioned for a writ of habeas corpus, claiming he was being held illegally at Fort McHenry in Maryland.\textsuperscript{506} Chief Justice Taney of the Supreme Court, famous for his decision in \textit{Dred Scott}\textsuperscript{507}, acting in his capacity as a Circuit Judge, quickly granted the writ on May 26.\textsuperscript{508} Geoffrey R. Stone notes that Taney “welcomed the opportunity to consider Merryman’s petition.” Taney then issued the following Order:

\begin{quote}
Ordered, this 26th day of May, A. D. 1861, that the writ of habeas corpus issue in this case, as prayed, and that the same be directed to General George Cadwalader, and be issued in the usual form, by Thomas Spicer, clerk of the circuit court of the United States in and for the district of Maryland, and that the said writ of habeas corpus be returnable at eleven o’clock, on Monday, the 27th of May 1861, at the circuit court room, in the Masonic Hall, in the city of Baltimore, before me, chief justice of the supreme court of United States. R. B. Taney.\textsuperscript{509}
\end{quote}

Taney’s clerk, Mr. Spicer then issued the following writ to General Cadwalader:

\textsuperscript{503} Williams, \textit{supra} note 470 at 323.
\textsuperscript{504} Palomares, \textit{supra} note 463 at 112.
\textsuperscript{505} Garvin, \textit{supra} note 473 at 694.
\textsuperscript{506} Palomares, \textit{supra} note 473 at 112; \textit{STONE, supra} note 424 at 85.
\textsuperscript{507} \textit{STONE, supra} note 424 at 85; Williams, \textit{supra} note 470 at 323.
\textsuperscript{508} Garvin, \textit{supra} note 473 at 694; \textit{STONE, supra} note 424 at 87.
\textsuperscript{509} \textit{Ex parte Merryman}, 17 F. Cas. 144, 146 (C.C.D. Md. 1861).
You are hereby commanded to be and appear before the Honorable Roger B. Taney, chief justice of the supreme court of the United States, at the United States court-room, in the Masonic Hall, in the city of Baltimore, on Monday, the 27th day of May 1861, at eleven o'clock in the morning, and that you have with you the body of John Merryman, of Baltimore county, and now in your custody, and that you certify and make known the day and cause of the caption and detention of the said John Merryman, and that you then and there, do, submit to, and receive whatsoever the said chief justice shall determine upon concerning you on this behalf, according to law, and have you then and there this writ.\textsuperscript{510}

The marshal served the writ on General Cadwalader on May 26. General Cadwalader replied by letter on May 27. He refused to comply, arguing that Colonel Yohe was authorized under Lincoln’s suspension on April 27 to arrest and hold Merryman:

[H]e is duly authorized by the president of the United States, in such cases, to suspend the writ of habeas corpus, for the public safety. This is a high and delicate trust, and it has been enjoined upon him that it should be executed with judgment and discretion, but he is nevertheless also instructed that in times of civil strife, errors, if any, should be on the side of the safety of the country. He most respectfully submits for your consideration, that those who should co-operate in the present trying and painful position in which our country is placed, should not, by any unnecessary want of confidence in each other, increase our embarrassments. He, therefore, respectfully requests that you will postpone further action upon this case, until he can receive instructions from the president of the United States, when you shall hear further from him.\textsuperscript{511}

Therefore, when George Cadwalader failed to comply, Taney wrote the

\textsuperscript{510} Id.

\textsuperscript{511} Id.
famous opinion in *Ex Parte Merryman*, and issued an attachment for Cadwalader for contempt.\(^{512}\) Taney held that “only Congress was authorized to suspend the writ of habeas corpus,” making Lincoln’s executive order suspending the writ unconstitutional.\(^{513}\) Taney believed the right belonged to Congress “because permissible suspension was in Article I § 9 of the Constitution, the section describing Congressional duties,” despite “the fact that it was placed there by the Committee on Drafting at the Constitutional Convention in 1787 as a matter of form, not substance.”\(^{514}\) Taney did not “acknowledge that a rebellion was in progress,” threatening the fate of the Union.\(^{515}\)

“Moreover, because Merryman was not a member of the military forces of the United States, and because the civil courts in Maryland were open and functioning, Taney held that ordinary judicial process, rather than military authority, had jurisdiction over the matter.”\(^{516}\) Taney wrote:

I ordered this attachment yesterday, because, upon the face of the return, the detention of the prisoner was unlawful, upon the grounds: 1. That the president, under the constitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it. 2. A military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control; and if the party be arrested by the military, it is the duty of the

\(^{512}\) Garvin, *supra* note 473 at 694; Williams, *supra* note 470.
\(^{513}\) STONE, *supra* note 424 at 87.
\(^{514}\) Id., at 87.
\(^{515}\) Id., at 87.
\(^{516}\) Id., at 87.
officer to deliver him over immediately to the civil authority, to be dealt with according to law. It is, therefore, very clear that John Merryman, the petitioner, is entitled to be set at liberty and discharged immediately from imprisonment. I forbore yesterday to state orally the provisions of the constitution of the United States, which make those principles the fundamental law of the Union, because an oral statement might be misunderstood in some portions of it, and I shall therefore put my opinion in writing, and file it in the office of the clerk of the circuit court, in the course of this week. 517

According to Eli Palomares, Taney’s decision was based on four independent grounds:

First, President Jefferson believed that the President possessed no power to suspend the writ. Second, Taney reasoned that the location of the suspension clause in Article I, which deals with congressional powers, meant that Congress should have the sole power to suspend the writ. Third, Taney relied on Blackstone’s Commentaries, which indicated that in England only Parliament could suspend the writ, and on Justice Story’s Commentaries on the Constitution of the United States, which asserted that Congress had the sole power to suspend the writ. Finally, he relied on Chief Justice Marshall’s statement in *Ex parte Bollman*, that “[i]f at any time the public safety should require the suspension of the powers vested by [the Judiciary Act of 1789] in the courts of the United States, it is for the legislature to say so.” 518

Taney’s opinion reveals his Jacksonian constitutional philosophy, the belief that “power and liberty were at odds with each other and that concentrated power—whether political or economic—posed a grave threat to individual liberty.” 519 Accordingly, Taney believed that “the courts possessed the authority

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517 *Ex parte Merryman*, *supra* note 509.
518 Palomares, *supra* note 463 at 115.
to define the President’s duty to faithfully execute the laws, and to command that
the execution of laws conform to the interpretation of the law by the courts.\textsuperscript{520} As
Eli Palomares explains, this “assertion of judicial supremacy” went beyond Chief
Justice Marshall’s definition of judicial review in \textit{Marbury v. Madison}.\textsuperscript{521} While this
was a stretch in actual judicial authority, a President is required to faithfully
execute the laws, as interpreted by the judiciary. For this reason, Taney
concluded the opinion with a reminder to the President: “[i]t will then remain for
that high officer, in fulfillment of his constitutional obligation to ‘take care that the
laws be faithfully executed,’ to determine what measures he will take to cause
the civil process of the United States to be respected and enforced.”\textsuperscript{522}

However, it was easy for Lincoln to ignore Taney’s opinion because

Taney’s response to Lincoln’s suspension of the writ
[wa]s problematic. He ignored the general’s request
for postponement and made his ruling without the
benefit of hearing the government’s argument . . .
Taney’s quick ruling without the benefit of oral
argument foreclosed the opportunity for a more
democratic resolution of the important issue of
presidential authority to suspend the writ of habeas
corpus under the Constitution. Although in the end
Taney might not have changed his mind, a resolution
after hearing the government’s position would have
legitimized his ruling.\textsuperscript{523}

I. Lincoln Responds to Taney’s Opinion

Lincoln had no difficulty disregarding Taney’s ruling, in fact, Lincoln’s

\textsuperscript{520} Palomares, \textit{supra} note 463 at 115.
\textsuperscript{521} \textit{Id.}, at 115.
\textsuperscript{522} \textit{Ex parte Merryman, supra} note 509.
\textsuperscript{523} Palomares, \textit{supra} note 463 at 116.
administration did not even directly respond to Taney’s opinion or order. After the *Merryman* decision was handed down, Lincoln continued to delegate the suspension of the writ. The suspension soon “became an effective tool to silence those interfering with the Administration’s policies. Lincoln demonstrated that he was willing to sacrifice an individual’s privilege of the writ of habeas corpus to fulfill what he believed to be his duty as Commander in Chief.” Soon after *Merryman*, on June 20, 1861, Lincoln allowed the suspension of the writ in Florida, “and along the ‘military line’ from New York to Washington.”

J. Lincoln’s Constitutional Philosophy

Lincoln was a Republican, but he held many beliefs of the lifeless Whig Party, including “a deep respect for order and the rule of law.” In one of his most famous speeches, the “Lyceum Address,” Lincoln said:

> Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap--let it be taught in schools, in seminaries, and in colleges; let it be written in Primers, spelling books, and in Almanacs;--let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation; and let the old and the young, the rich and the poor, the grave and the gay, of all

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525 Prakash, *supra* note 494 at 579.
526 Palomares, *supra* note 463 at 113.
527 4 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, 19 (Published by Authority of Congress, 1900). Lincoln wrote to Winfield Scott: “You or any officer you may designate will, in your discretion, suspend the writ of habeas corpus so far as may relate to Major Chase, lately of the Engineer Corps of the Army of the United States, now alleged to be guilty of treasonable practices against this government.”
528 Prakash, *supra* note 494 at 579.
529 Huebner, *supra* note 519 at 627.
sexes and tongues, and colors and conditions, sacrifice unceasingly upon its altars.\textsuperscript{530}

This idea seems to contradict Lincoln’s treatment of civil liberties during the Civil War. Lincoln was committed to applying the Constitution in all circumstances, but “embrace[d] the view that the Constitution may be different in ‘application’ in these different circumstances. He derive[d] this largely from the habeas corpus provision of the Constitution, which allows the writ to be suspended in time of ‘Rebellion or Invasion.’”\textsuperscript{531} In a famous letter to Erastus Corning, in which Lincoln defended later suspensions, he stated:

If I be wrong on this question of constitutional power, my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or Invasion, the public Safety requires them, which would not be constitutional when, in absence of rebellion or invasion, the public Safety does not require them.\textsuperscript{532}

In Lincoln’s constitutional “religion,” “[t]he Declaration of Independence is the sacred text . . . and represents the interpretive key to why he acted the way he did in particular circumstances . . . [a]bove all, Lincoln subordinated the particular provisions of the Constitution to its overall purpose of securing liberty and the true aims of republican government.”\textsuperscript{533} Lincoln also believed the preservation of the Union was his duty under the Presidential Oath in the “take care” clause in the Constitution since “[a]ny attempt at secession would be a breach of the fundamental law of the land. For this reason, he treated the

\textsuperscript{530} Huebner, \textit{supra} note 519 at 627.
\textsuperscript{532} Palomares, \textit{supra} note 463 at 127.
\textsuperscript{533} Adkins, \textit{supra} note 487 at 213.
Confederacy as a rebellion rather than a foreign state.”\textsuperscript{534} Lincoln’s understanding of the clause was that “the existence of such a constitutional duty of the President very strongly implies the existence of legitimate constitutional power on the part of the President to carry out that duty.”\textsuperscript{535} A letter Lincoln wrote to Albert Hodges, the editor of a Kentucky newspaper, on April 4, 1864, evinces his construction of constitutional necessity:\textsuperscript{536}

\begin{quote}
It was in the oath I took that I would, to the best of my ability, preserve, protect, and defend the Constitution of the United States. I could not take the office without taking the oath. Nor was it my view that I might take an oath to get power, and break the oath in using the power . . . I did understand however, that my oath to preserve the constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—that nation of which that constitution was the organic law. Was it possible to lose the nation, and yet preserve the constitution?
\end{quote}

Lincoln analogized this duty to medicine, “noting that a limb must be sometimes be amputated to save a life, but that life must never be given to save a limb.”\textsuperscript{537} This belief justified ignoring Taney’s opinion because “[o]therwise, there are few real checks on judicial power—an absurd result for a body considered by the Founders to be the ‘least dangerous [branch].’”\textsuperscript{538}

\begin{flushright}
\textsuperscript{534} U.S. CONST. art. II, § 3, cl. 8; Jason A. Adkins, supra note 487 at 243.
\textsuperscript{536} Abraham Lincoln to Albert G. Hodges, THE ABRAHAM LINCOLN PAPERS AT THE LIBRARY OF CONGRESS, SERIES 1. GENERAL CORRESPONDENCE. 1833-1916, April 4, 1864, available at: http://memory.loc.gov/cgi-bin/ampage?collId=mal&fileName=mal1/320/3207700/malpage.db&recNum=0
\textsuperscript{537} STONE, supra note 424 at 88.
\textsuperscript{538} Adkins, supra note 487 at 239-40.
\end{flushright}
K. Lincoln’s Defense Before Congress

Lincoln defended his actions in an address to a Special Session of Congress on July 4, 1861.\textsuperscript{539} “By addressing Congress, Lincoln ignored Taney.”\textsuperscript{540} Jason A. Adkins posits that “the question in Lincoln’s mind when he ignored Taney’s opinion was: “How can we let the great experiment in republican government falter because of a slavish adherence to a legal doctrine in which the Constitution was unclear in proper application?”\textsuperscript{541} Lincoln’s famous words to Congress were:

\begin{quote}
[T]he attention of the country has been called to the proposition that one who is sworn to ‘take care that the laws be faithfully executed, should not himself violate them. Of course some consideration was given to the questions of power, and propriety, before this matter was acted upon. The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen’s liberty, that practically, it relieves more of the guilty, than of the innocent, should, to very limited extent, be violated? To state the question more directly, are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?
\end{quote}

\textsuperscript{539} Paulsen, supra note 535 at 1265; Williams, supra note 470 at 324; Rehnquist, supra note 473 at 929; STONE, supra note 424. 
\textsuperscript{540} Williams, supra note 470 at 324. 
\textsuperscript{541} Adkins, supra note 487 at 241. 
\textsuperscript{542} Paulsen, supra note 535 at 1265; Williams, supra note 470 at 324; Rehnquist, supra note 473 at 929; STONE, supra note 424 at 121.
In other words, Lincoln was willing to do whatever “was necessary to prevent the government from being overthrown, even if it meant ‘disregarding’ a ‘single law,’ because the alternative was the failure to execute all the laws, but that one.”  

L. Attorney General Bates’ Defense

Lincoln asked his Attorney General, Edward Bates, to address “the issue of whether the President was justified in refusing to obey a writ of habeas corpus issued by a judge.” On July 5, 1861, Bates wrote, “[o]ur fathers, having divided the government into co-ordinate departments . . . left [them] by design . . . each independent and free, to act out its own granted powers, without any ordained or legal superior possessing the power to revise and reverse its action.” Bates supported Lincoln’s decisions with “the sort of arguments made first in Federalist No. 49, and thereafter by Jefferson (pardoning those convicted under the Alien and Sedition Acts) and Jackson (vetoing the Bank), that the three co-ordinate federal branches each reserve the right to interpret the Constitution.” Bates believed the President’s power was limited; however, and his suspension of the privilege was “‘temporary and exceptional.’ It was temporary, however, in the sense that it applied only when there was a rebellion or invasion. It was exceptional in that it sprung into existence only when the

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543 Paulsen, supra note 535 at 1265.
544 Palomares, supra note 463 at 118.
545 Garvin, supra note 473 at 695.
546 Palomares, supra note 463 at 118.
547 Lerner, supra note 468 at 1285 and 1289.
‘ordinary course of judicial proceeding’ was too weak and ineffectual.”

Bates concluded his argument by claiming that he “discussed habeas corpus only because others had raised the matter,” comparing it to suspending the writ of replevin in order to seize arms from enemy troops.”

Saikrishna Bangalore Prakash explains that this claim was remarkable for two reasons:

First, Lincoln had hinted that an Attorney General opinion would defend his assertion of suspension authority. The actual opinion, however, suggested that a defense was wholly gratuitous. Second, Lincoln’s orders had authorized the suspension of the writ of habeas corpus. If Bates was right, however, these authorizations were superfluous because suspensions of habeas corpus were unnecessary. Indefinite detention of the rebels was legal even without any suspension of habeas corpus. In other words, Bates’ opinion argued that all the hand-wringing (by the President, Taney, and others) about the writ of habeas corpus and any orders Lincoln had issued were much ado about nothing.

M. John Merryman’s Fate

John Merryman was never tried because Taney refused to participate in a trial in his capacity as a Circuit Judge, and would not allow Merryman to be tried while he was serving as a Supreme Court Justice. It is very possible that Taney’s obstinacy saved Merryman’s life because rather than being executed under Lincoln’s order, he was eventually freed on bail.

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548 Prakash, supra note 494 at 582.
549 Id., at 582-83.
550 Id., at 583.
551 Brennan, supra note 476 at 224.
552 Bracknell, supra note 425 at 213; Brennan, supra note 476 at 224.
II. Suspension and Arbitrary Arrests in Ohio: *Ex Parte Vallandigham*

A. General Burnside Issues General Order No. 38

Lincoln appointed General Ambrose Burnside as the Commanding General of the Department of Ohio in March of 1863, assuming that it was a safe position for a “‘man of zealous and impulsive character.’” When Burnside arrived in Ohio, “[h]e was appalled to discover that newspapers in Ohio were full of ‘reasonable expressions’ and the ‘large public meetings were held, at which our Government authorities and our gallant soldiers in the field were openly and loudly denounced for their efforts to suppress the rebellion.’” Burnside “assumed that it was for the military to define the boundaries of legitimate dissent that any criticism of the administration was treasonable, and that civil officials and civil courts had failed in their duty to suppress such expression.”

Therefore, on April 19, 1863, Burnside issued General Order No. 38, without informing Lincoln or receiving his approval. The Order warned that “[t]he habit of declaring sympathy for the enemy will no longer be tolerated in this Department. Persons committing such offenses will be at once arrested’ and subject to military procedures.” The Order further stated that “‘all persons

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553 STONE, *supra* note 424 at 95.
554 *Id.*, at 96.
555 *Id.*, at 98.
found within our lines who commit acts for the benefit of the enemies of our
country, will be tried as spies or traitors, and, if convicted, will suffer death.”

B. “Mr. V” Criticizes “King Lincoln”

Clement Laird Vallandigham was a prominent Ohio “Copperhead,” known
for his criticism of Lincoln and abolitionists, who he blamed for the war. Vallandigham’s philosophy was Jeffersonian, and he advocated for a limited government and popular sovereignty.

Vallandigham “opposed the war, the draft, the military arrest of civilians,
the suspension of habeas corpus, and the Emancipation Proclamation.” On July 10, 1861, Vallandigham criticized Lincoln before Congress for his

“[W]icked and hazardous experiment” of calling the people to arms without counsel and authority of Congress; with violating the Constitution in declaring a blockade of Southern ports; with “contemptuously” setting at defiance the Constitution in suspending the writ of habeas corpus; and with “coolly” coming before the Congress and pleading that he was only “preserving and protecting” the Constitution and demanding and expecting the thanks of Congress and the country for his “usurpations of power.”

In efforts to secure the Democratic nomination for Governor of Ohio, on May 1, 1863, Vallandigham challenged Burnside’s General Order, and called the

558 Williams, supra note 470 at 329.
559 Adkins, supra note 487 at 241; STONE, supra note 424 at 98.
560 STONE, supra note 424 at 98.
561 Id.
562 Williams, supra note 470 at 328-29.
war “‘wicked, cruel, and unnecessary.’”

Vallandigham “defended the constitutional right of people to debate the policies of the national administration.” Vallandigham’s speech “brought cheers from the largely antiwar, anti-Lincoln crowd” of 15,000-20,000. Vallandigham ended his speech with the plea to the public to “‘hurl King Lincoln from his throne.’”

C. Vallandigham’s Arrest and Detention

General Burnside arrested Vallandigham without consulting the President or his superiors after two of his captains, disguised as civilians, witnessed the speech. On May 5, over 100 soldiers arrived at Vallandigham’s home, arrested him, and then took him to a military prison in Cincinnati. Despite Vallandigham’s arguments that “he was being persecuted for mere ‘word of criticisms of the public policy, of the public servants of the people,’” since no one could claim that he “‘counseled disobedience to the Constitution or resistance to law or lawful authority, Vallandigham was found guilty by a military tribunal.”

After a two-day trial, he was convicted of “‘publicly expressing, in violation of general Orders No. 38, . . . sympathy for those in arms against the government of the United States, and declaring disloyal sentiments and opinions with the object and purpose of weakening the power of the government in its efforts to suppress

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563 Williams, supra note 470 at 329; STONE, supra note 424 at 101; Garvin, supra note 473 at 697; STONE, supra note 424 at 100.

564 Id., at 101.

565 Id.

566 Brennan, supra note 476 at 226.

567 Id.; Williams, supra note 470 at 330.

568 Id.

569 STONE, supra note 424 at 101. Judge Leavitt’s opinion can be found in ORW, Series II, Volume 5, pp. 573-584.
an unlawful rebellion."\(^{570}\) Vallandigham was then incarcerated at Fort Warren in Boston Harbor.\(^{571}\)

Vallandigham’s lawyer immediately filed a petition for a writ of habeas corpus from the Circuit Court in Cincinnati, arguing that he was denied due process, access to a grand jury, and opportunity to summon and confront witnesses.\(^{572}\) Judge Humphrey H. Leavitt denied the writ, although it was not suspended in the area at the time.\(^{573}\) Judge Leavitt’s decision was a balancing test between the suspension of fundamental rights enumerated in the Constitution and the preservation of the Constitution itself.\(^{574}\) Judge Leavitt’s justification was that “the president . . . is invested with very high powers,’ and ‘in deciding what he may rightfully do’ under these powers, ‘the president is guided solely by his own judgment and discretion, and is only amenable for an abused of his authority by impeachment.’”\(^{575}\) He held that General Burnside’s actions were

\(^{570}\) Stone, supra note 424 at 101. The transcript of the Vallandigham trial can be found at ORW, Series II, Volume 5, pp. 633-646. It is interesting to note that the tribunal granted Vallandigham a ½ hour continuance in order for him to secure counsel.

\(^{571}\) Stone, supra note 424 at 101; Williams, supra note 470 at 330.

\(^{572}\) Stone, supra note 424 at 11; Stone, supra note 424 at 103.

\(^{573}\) Stone, supra note 531 at 11; Stone, supra note 424 at 103.

\(^{574}\) Stone, supra note 531 at 11 (“Judge Leavitt reasoned that ‘[t]he court cannot shut its eyes to the grave fact that war exists, involving the most imminent public danger, and threatening the subversion and destruction of the constitution itself.’ ‘Self-preservation,’ he added ‘is a paramount law,’ and this is ‘not a time when anyone connected with the judicial department’ should in any way ‘embarrass or thwart the executive in his efforts to deliver the country from the dangers which press so heavily upon it.’ In the face of a rebellion, Leavitt argued, ‘the president . . . is invested with very high powers,’ and ‘in deciding what he may rightfully do’ under these powers, ‘the president is guided solely by his own judgment and discretion, and is only amenable for an abuse of his authority by impeachment.’”)

\(^{575}\) Stone, supra note 424 at 103.
reasonable in view of the “pestilential leaven of disloyalty in the community,” that
“must learn that they cannot stab its vitals with impunity.”\textsuperscript{576}

Vallandigham petitioned the Supreme Court for a writ of certiorari to
review Judge Leavitt’s decision, but this was also denied for lack of
jurisdiction.\textsuperscript{577} The Court said:

Whatever may be the force of Vallandigham’s protest,
that he was not triable by a court of military
commission, it is certain that his petition cannot be
brought within the [Judiciary Act of 1789]; and further,
that the court cannot, without disregarding its frequent
decisions and interpretations of the Constitution in
respect to its judicial power, originate a writ of
certiorari to review or pronounce any opinion upon the
proceedings of a military commission.\textsuperscript{578}

During his incarceration, Vallandigham continued to speak out against the
government. On his first day in prison, he wrote to “the Democracy of Ohio” and
“urged his fellow Democrats to ‘stand firm.’”\textsuperscript{579} Vallandigham pledged that he
would “‘adhere to every principle’” and “‘make good through imprisonment and
life itself, every pledge and declaration which [he had] ever made, uttered or
maintained from the beginning.’”\textsuperscript{580} Vallandigham maintained that he was “‘in a
military bastille for no other offense than [his] political opinions.’”\textsuperscript{581}

\textsuperscript{576} Stone, supra note 531 at 11-12.
\textsuperscript{577} Garvin, supra note 473 at 698; Williams, supra note 470 at 330.
\textsuperscript{578} Garvin, supra note 473 at 697-98.
\textsuperscript{579} Williams, supra note 470 at 330.
\textsuperscript{580} Id.
\textsuperscript{581} STONE, supra note 424 at 105-06.
D. Lincoln Responds to Public Outcry

While many of Lincoln’s abuses of civil liberties were ignored by the press and generally accepted by the public, “the Vallandigham case was important, and newspapers did pay attention to it.” \(^{582}\) In Vallandigham’s hometown, Dayton, Ohio, a mob of “Peace Democrats” burned down the Republican newspaper building. \(^{583}\) Almost every major Northern city experienced a similar public outcry, spurred on by local Democratic press. \(^{584}\) Many Republicans also criticized Vallandigham’s detention. \(^{585}\)

General Burnside was not dismayed by the public outrage, in fact, he caused further public outcry when he closed down the *Chicago Times* for criticizing Lincoln’s handling of the Vallandigham situation. \(^{586}\) However, Judge Thomas Drummond issued a restraining order preventing “General Burnside from taking action against The *Chicago Times* or its editor Wilbur Fiske Storey” \(^{587}\) Lincoln himself was extremely embarrassed and surprised by Vallandigham’s arrest. \(^{588}\) Once again, he was in a difficult position: should he allow the incarceration to continue, fueling secessionist movements, or undermine his own appointed General? \(^{589}\) Lincoln chose to defend General Burnside’s actions, while ultimately commuting Vallandigham’s sentence to banishment from the


\(^{583}\) STONE, *supra* note 424 at 105-06.

\(^{584}\) Id., at 105-06.

\(^{585}\) Id., at 82.

\(^{586}\) Id., at 107.

\(^{587}\) Id., at 107-08.

\(^{588}\) Id., at 108.

\(^{589}\) Id., at 109.
A group of Democrats met in May of 1863 in Albany, New York to draft a set of resolutions criticizing Lincoln for the Vallandigham debacle. Lincoln responded to the “Albany Resolves” with two defenses: “first, the entire country was a war zone and military arrests were justified anywhere the enemy used speech or the press to conduct war; and second, the arrest was not for Vallandigham’s speaking in public but for his war on the military.”

Lincoln responded to Erastus Corning on June 29, 1863:

You claim . . . that according to my own position in the Albany response, Mr. V. should be released; and this because, as you claim, he has not damaged the military service, by discouraging enlistments, encouraging desertions, or otherwise . . . . I certainly do not know that Mr. V. has specifically, and by direct language, advised against enlistments, and in favor of desertion, and resistance to drafting. We all know that combinations, armed in some instances, to resist the arrest of deserters, began several months ago . . . . These had to be met by military force, and this . . . has led to bloodshed and death. And now, under a sense of responsibility more weighty and enduring than any which is merely official, I solemnly declare my belief that this hindrance, of the military, including maiming and murder, is due to the course in which Mr. V. has been engaged, in a greater degree than . . . to any other one man. These things have been . . . known to all, and of course known to Mr. V. . . . When it is known that the whole burthen of his speeches has been to stir up men against the prosecution [sic] of the war, and that in the midst of resistance to it, he has not been known, in any instance, to counsel against such resistance, it is next to impossible to repel the inference that he has counseled directly in

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590 Williams, supra note 470 at 330.
591 Garvin, supra note 473 at 698.
That same month, the Ohio Democratic Convention met in Columbus to nominate a candidate for Governor. They chose the still exiled Vallandigham and approved resolutions that challenged the suspension of the writ of habeas corpus and demanded Vallandigham’s release. On June 25, Judge Mathias Birchard personally delivered the resolutions to Lincoln at the White House. Lincoln’s response was prompt, and almost identical to his response to Erastus Corning:

“You claim that men may, if they choose, embarrass those whose duty it is to combat a giant rebellion, and then be dealt with in turn, only as if there was no rebellion. The constitution itself rejects this view. The military arrests and detentions, which have been made, including those of Mr. V. which are not different in principle from the others, have been for prevention and not for punishment -- as injunctions to stay injury, as proceedings to keep the peace.”

Lincoln agreed to release Vallandigham if a majority of members of the committee would agree:

“1) That there is now a rebellion in the United States, the object and tendency of which is to destroy the national Union; and that in your opinion, an army and navy are constitutional means for suppressing the rebellion. 2) That no one of you will do anything which in his own judgment, will tend to hinder the increase, or favor the decrease, or lessen the efficiency of the army or navy, while engaged in the effort to suppress
that rebellion; and, 3) That each of you will, in his own sphere, do all he can to have the officers, soldiers and seamen of the army and navy, while engaged in the effort to suppress the rebellion, paid, fed, clad, and otherwise well provided and supported.\textsuperscript{597}

The Cleveland Herald thought the President’s letter was “a perfect response” and begged everyone to read it, saying, “[t]he temper and the abnegation of self are charming traits in the President’s reply, while the sound, invulnerable logic will command the respect of every man who has sense enough to appreciate correct deductions.”\textsuperscript{598} Of course the Democratic press thought differently: “[t]he president’s constitutional justification for suspending habeas corpus meant that “[t]he people . . . have no liberties, but hold them and their lives simply at the pleasure of Mr. Lincoln. The Constitution is utterly swept away and annihilated.”\textsuperscript{599} The Ohio committee quickly replied, and “spurned Lincoln’s concluding proposals and asked for the revocation of the order of banishment, not as a favor, but as a right, without sacrifice of their dignity and self-respect.”\textsuperscript{600} Lincoln did not answer.\textsuperscript{601}

III. Other Suspensions During Lincoln’s Presidency

A. Habeas Corpus Act of 1863

The question of who could suspend the writ became moot when Congress authorized it in the 1863 Habeas Corpus Act. The Act “permitted the President

\textsuperscript{597} Williams, supra note 470 at 335.
\textsuperscript{598} Benedict, supra note 582 at 1364-65.
\textsuperscript{599} Id., at 1364-65.
\textsuperscript{600} Williams, supra note 470 at 335.
\textsuperscript{601} Id.
the right to suspend the writ while the rebellion continued."\textsuperscript{602} The language of
the Act implies that Congress “did not believe that the President had such
authority under the Constitution itself,” but nonetheless wanted to support the
President’s emergency measures.\textsuperscript{603} The Act was silent on whether Lincoln’s
suspensions over the past two years were authorized.\textsuperscript{604} It also placed limits on
the President’s power to suspend habeas corpus.\textsuperscript{605} It required the Secretary of
State and the Secretary of War to provide a list of all the persons arrested by the
military to the local judge.\textsuperscript{606} It also required a judge to order prisoners who had
not been indicted by a grand jury to be discharged. If either of these conditions
was not met within twenty days, “any person or prisoner could petition for
release.”\textsuperscript{607} While Lincoln cited the Act as authorization for future suspensions\textsuperscript{608},
he did not comply with these Act’s limitations.\textsuperscript{609}

B. Extent of the Suspensions under Lincoln

Not only did Lincoln exercise what he believed was his authority under the
Constitution, to suspend the privilege of habeas corpus in times of “Rebellion or
Invasion,” but he also delegated that authority to his generals and cabinet
members.\textsuperscript{610} Lincoln’s Secretary of State, William H. Seward, had over 800

\textsuperscript{602} Williams, \textit{supra} note 470 at 324.
\textsuperscript{603} Prakash, \textit{supra} note 494 at 584.
\textsuperscript{604} Palomares, \textit{supra} note 463 at 122.
\textsuperscript{605} Palomares, \textit{supra} note 463 at 123.
\textsuperscript{606} Palomares, \textit{supra} note 463 at 123.
\textsuperscript{607} Palomares, \textit{supra} note 463 at 123.
\textsuperscript{608} Palomares, \textit{supra} note 463 at 123.
\textsuperscript{609} Prakash, \textit{supra} note 494 at 585.
civilians arrested by the military. Lincoln granted him “authority to arrest all persons suspected of disloyalty in those areas where habeas corpus has been suspended.” Seward is rumored to have told the British Prime Minister, “I can touch a bell on my right hand and order the arrest of a citizen in Ohio. I can touch the bell again and order the imprisonment of a citizen in New York, and no power on earth but that of the President can release them. Can the Queen of England, in her dominions, say as much?”

Despite Seward’s bragging, it was Lincoln’s Secretary of War, Edwin M. Stanton, who truly took advantage of this power. Under Stanton, the “suspension of the writ was used to arrest draft resisters and ‘persons arrested for disloyal practices,’” resulting the arrest of over 13,000 people. All in all, scholars estimate that there were from 13,000 to 38,000 military arrests and detentions of civilians during the Civil War.

C. Other Suspensions of the Writ under Lincoln

The writ of habeas corpus was suspended eight times during Lincoln’s presidency. Lincoln first suspended the writ around Baltimore on April 27, 1861. Soon after, he suspended the writ in all of Florida on May 10, 1861.

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611 STONE, supra note 424 at 88.
612 Id., at 124.
614 Bracknell, supra note 425 at 213.
615 Sempa, supra note 613 at 39.
616 STONE, supra note 424 at 124.
617 Id., at 120.
618 See supra Section II.b.
619 See supra Section II.e.
On June 20, Lincoln suspended the writ with regard to “Major Chase” of the Army Engineer Corps. Just two days before Lincoln’s speech before Congress, “he authorized General Scott to suspend the writ ‘at any point, on or in the vicinity of any military line which is now, or which shall be used between the City of New York and the city of Washington.” Unlike the preceding two suspensions, which were “narrowly tailored to protect the capital from imminent attack,” the suspension on July 2, 1861, “aimed to stop any resistance to the Union forces over a broad area. Furthermore, this suspension was neither directed at an imminent harm nor aimed at protecting the public safety.”

The next suspension order occurred on October 14, 1861. It similarly “extended the military line to Bangor, Maine, even though no record of disturbances in New England existed to justify this action”. The Militia Act authorized conscription in 1862. Riots broke out in Pennsylvania, Wisconsin, Ohio, and Indiana. Nicholas Kemp, one of the leaders of the resistance in Wisconsin, was arrested and obtained a writ of habeas corpus from the Supreme Court of Wisconsin. On September 24, 1862, Lincoln issued a nationwide proclamation “discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels’ should ‘be subject to

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620 See supra Section II.e.; Palomares, supra note 432 at 120.
621 Palomares, supra note 463 at 120.
622 Id., at 120-21.
623 Id.
624 Id., at 122.
626 Brennan, supra note 476; STONE, supra note 424 at 91-92.
martial law and liable to trial and punishment by Courts Martial or Military
Commission." The jailer at the military prison refused because Lincoln had
suspended the writ nationwide on September 24, 1862. The Supreme Court
of Wisconsin held "that the President did not have the authority by himself to
suspend the writ of habeas corpus, and that martial law could not control in areas
of the country where there was no insurrection or combat." However, the court
refused to have the jailer arrested "out of respect for federal authorities."

On August 8, 1862, the President empowered the Secretary of War to
suspend the writ. On that same day Lincoln issued an order authorizing "all
U.S. marshals and police chiefs to 'arrest and imprison any person or persons
who may be engaged, by act, speech, or writing, in discouraging volunteer
enlistments, or in any way giving aid and comfort to the enemy, or in any other
disloyal practice against the United States.'" Lincoln suspended the writ in
Kentucky on July 5, 1864, citing his authority from the Habeas Corpus Act and
the Constitution.

D. Events in Ohio

Union Army Records show that no fewer than three facilities held civilian
prisoners under military arrest during the War. As early as July, 1862, when the

627 Garvin, supra note 473 at 697.
628 STONE, supra note 424 at 91-92.
629 Brennan, supra note 476 at 225.
630 Brennan, supra note 476 at 225; STONE, supra note 29 at 91-92.
631 Palomares, supra note 463 at 121-22.
632 Id.
633 Prakash, supra note 463 at 582.
recordkeeping began, Camp Chase held 550 civilian prisoners and 1726 military prisoners. The number of civilian prisoners soon swelled, reaching a high of 738 in October 1862. These numbers dropped off quickly, but for the remainder of the War, Camp Chase usually held between 100 and 200 civilians under military arrest.

MacLean Barracks held as many as many as 60 citizens in November 1863 and as few as 14 in September 1864. No returns are recorded for Camp Chase after December 1864. Records also show that the Ohio Penitentiary housed one civilian under military arrest in February and March 1864. Other records indicate that Johnson’s Island housed civilians “who were deemed disloyal to the Union.”

IV. THE FINAL WORD: EX PARTE MILLIGAN.

A. Background

The final member of our triumvirate of Civil War individual rights cases is *Ex Parte Milligan*. Milligan is significant because it was the first such case decided after the War was over and the issue of civil liberties was easier to discuss. A Latin maxim provides that: *silent leges inter arma*, which means that during times of war the laws are silent and the guns speak. With *Milligan*, the Court was able to calmly reflect on issues in a more rationally than when the war ended.

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634 A War Department Circular dated 7 July 1862 required returns on prisoners. Those individuals, both civilian and military, detained in civilian prisons and hospitals are not counted in the returns. Other returns do not distinguish between civilian and military prisoners.
635 ORW, Series II, Volume 8, pp. 986-1004.
636 Id.
637 Docnews.com-the magazine. REBEL SOLDIERS LIVED AND DIED IN JOHNSON’S ISLAND PRISON ON LAKE ERIE. Available at: http://www.docsnews.com/johnsons.html
638 *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).
was raging. The principal Defendant, Lambdin Purdy Milligan, like Vallandigham, was a vocal opponent of President Lincoln and the War. Like Vallandigham, Milligan was arrested, tried by a military commission, and sentenced to death. Unlike Vallandigham, when Milligan’s death sentence was forwarded to Lincoln for approval, Lincoln returned the commission’s record for correction of certain errors. Lincoln was assassinated before the record was returned to him, and Milligan’s conviction was quickly approved by Lincoln successor, President Andrew Johnson.

Born in Belmont County Ohio, Milligan studied law with Edwin M. Stanton, Lincoln’s future Secretary of War. When he completed his law studies, Milligan married, moved to Fort Wayne Indiana, and opened a law practice. Dissatisfied with Lincoln’s conduct of the war, particularly the Emancipation Proclamation, Milligan joined the Knights of the Golden Circle, a secret political society hostile to the government. Founded in the 1850s, the Knights’ purpose was to colonize a Mexico that permitted slavery, and to align this new country with the American South. After some public disclosure of its activities, the members changed the society’s name to the Order of the Sons of Liberty (OSL), and Milligan became a prominent member.639

B. Unrest in the Heartland

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639 At about the same time, Union supporters formed “Union Clubs” or “Loyalty Leagues.” One of the goals of these organizations was to spy on the Democratic societies and individual suspected of disloyalty. GILBERT TREADWAY, DEMOCRATIC OPPOSITION TO THE LINCOLN ADMINISTRATION IN INDIANA 122-23 (Indianapolis: Indiana Historical Bureau, 1973); JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 599 (New York, Oxford University Press).
By 1863, many citizens of the states in the Old Northwest Territory were becoming disillusioned by the war. A series of Union defeats on the battlefield coupled with an unpopular draft law cooled the ardor of some of these individuals. States like Ohio, which had opposed slavery from the beginning of its history, still opposed granting full citizenship to African-Americans. By issuing the Emancipation Proclamation, Lincoln changed the nature of the war from preserving the Union to abolishing slavery. In the election of 1862, the Democrats actually gained control of the state legislatures in Indiana, Illinois, and Ohio. Battlefield successes for the Union were for few and far between during this period, and the farmers in these states felt they were being gouged by railroads who charged excessively high prices to ship their goods to market.

Indiana, like Ohio and Illinois, was initially settled by transplanted Southerners who migrated down the Ohio River or through the Cumberland Gap. Starting in the 1820’s these settlers were joined by immigrants from New York and New England, travelling across New York State via the newly-completed Erie Canal. By 1860, all three states had a significant portion of their population with close ties, both familial and economic, to the Southern states. In the political culture of the day, the Democratic Party stood for states’ rights and generally favored the institution of slavery. Conversely, the new Republican Party desired a strong federal government and the abolition of slavery. Milligan, a staunch Democrat, spoke out loudly and often about his opposition to Lincoln’s policies, which quickly became known to Indiana Republicans.
Milligan was not alone in his sentiments. The Fort Wayne Sentinel expressed the following opinion and editorial dated September 27, 1862:

The Constitution has been set aside, freedom of speech and the press destroyed, are citizens subjected to arbitrary arrests, and the right of habeas corpus suspended. If the overthrow of the Constitution... Is to be excused on the plea of military necessity, it must be obvious that the sooner the war is brought to an end the better.\textsuperscript{640}

B. Governor Morton Responds

Two events served to galvanize the Republican response to the secret societies in Indiana. The first event was a Democratic triumph in the elections of November, 1862. Although Governor Oliver Morton, a Republican and staunch Lincoln ally, was not up for election, the Democrats took over the Indiana legislature. The second event was the raid of Confederate General John Hunt Morgan into Indiana during the summer of 1863. General Henry Carrington, the Commander of the Military District of Indiana, predicted that Morgan’s forces could be potentially joined by as many as 20,000 Indiana citizens, and that the secret societies had actually persuaded Morgan to invade the state.\textsuperscript{641}

A failed assassination attempt against Governor Morton strengthened the governor’s resolve to wipe out the secret societies.\textsuperscript{642} Morton continued his attacks against the societies from the lectern while Carrington increased the surveillance against the societies. Once Morgan’s troops were forced from the

\textsuperscript{640} \textsc{Treadway}, supra note 639 at 24.
\textsuperscript{641} \textsc{William Dudley Foulke}, \textit{Life of Oliver P. Morton} 374 (Indianapolis: The Bowen-Merrill Company, 1899).
\textsuperscript{642} \textsc{Treadway}, supra note 639 at 383-84.
state the panic subsided somewhat, but by the summer of 1864 another election, and still another threat of invasion increased the scrutiny again.\footnote{Morgan was captured by Union forces in late July, 1863. He was imprisoned in the Ohio State Penitentiary, but escaped his confinement in November and returned to active service. In June, 1864, Morgan led his troops into Kentucky and threatened to cross the Ohio River a second time. Morgan was killed in September 1864 during a raid near Greenville, Tennessee. \textsc{Lester V. Horwitz}, \textit{The Longest Raid of the Civil War} 356-78 (Cincinnati: Farmcourt Publishing, Inc., 2001)}

C. The Plot

The Democratic National Convention was to convene in Chicago in late August, 1864. Confederate agents and sympathizers were scheduled to be in Chicago at the same time, and some plans were made to secure a cache of arms, free the Confederate prisoners held at Camp Douglas, near Chicago, and start an uprising.\footnote{The plan was remarkably similar in scope and intent to John Brown’s Harper’s Ferry Raid in 1859.} Acting on a tip, Carrington’s soldiers raided the office of Harrison H. Dodd, the “Grand Commander” of the Order in Indiana. The soldiers seized hundreds of firearms and thousands of rounds of ammunition, and, perhaps more importantly, correspondence that linked several prominent Democratic politicians, including Milligan, to the Order of the Sons of Liberty.\footnote{A similar plot was unfolding in Ohio at about the same time. Confederate agents and sympathizers planned to steal a steamboat on Lake Erie, capture a federal gunboat, and use the gunboat to free the Confederate prisoners held at Johnson’s Island. The newly freed prisoners would then travel to Camp Chase in Columbus, free the prisoners held there, and conduct raids throughout Ohio. The perpetrators were captured soon after they stole the steamboat, and the plot came to nothing. \textsc{Kern & Wilson}, \textit{supra} note 161 at 232-33.}

Carrington, using the information he had discovered in the raid, and ordered the arrest of Dodd, Milligan, William Bowles, Stephen Horsey, Andrew
Humphries, Horace Heffren, and J.J. Bingham. Carrington wanted to try the prisoners in federal court; however he bowed to the wishes of Governor Morton and War Secretary and Edwin M. Stanton to try the Defendants before a military commission. Dodd’s trial began on September 17, 1864, but before the trial concluded he escaped from confinement and fled to Canada. The commission convicted him *in absentia* and sentenced him to death.

D. Trial by a Military Commission

Bingham, who was the editor of the Indianapolis Sentinel, was released, but the remaining five Defendants faced the commission in October in what was called the Indianapolis Treason Trials, even though none of the Defendants were actually charged with treason.

Milligan and his cohorts were charged with “conspiracy against the government of the United States,” “affording aid and comfort to rebels,” “inciting insurrection,” “disloyal practices,” and “violations of the laws of war,” none of which were actually part of the United States Criminal Code. Further, the Defendants were not accorded many of the rights of Defendants facing trial in federal court. Under the Sixth Amendment, Defendants are entitled to:

> “… A speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed…”

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646 Major Henry Burnett, the Judge Advocate, estimated that some three to four hundred prisoners were being held at the Soldiers’ Home after the OSL arrests. TREADWAY, *supra* note 639 at 219.
647 Rehnquist, *supra* note 473 at 82-4.
648 *Id.*
649 *U.S. CONST.* amend. VI.
In contrast, when tried before a military commission, a Defendant has no guarantee that members of the commission be residents of Indiana, and a unanimous verdict was not required for conviction. In addition, the Defendant tried before a military commission has no protection against *ex post facto* laws, as guaranteed to civil Defendants in Article I of the Constitution. The deck was clearly stacked against the Defendants from the beginning.

The trial began on October 21, 1864 and the testimony ended on December 1st. A review of the testimony showed damning evidence against Dodd, but little against the other Defendants other than attending a few meetings, accepting offices in the organization, and making some vague plans. The charges against Heffren were dropped midtrial, and Humphreys’ sentence of hard labor for the duration of the war was commuted to parole by General Hovey, who had succeeded Carrington. Milligan, Bowles and Horsey were found guilty and sentenced them to be hanged. The commission then forwarded a record of the trial to President Lincoln for approval, but by that time Lincoln had been handily reelected, the war was winding down, and punishment was no longer the order of the day.

E. Temporary Reprieve

Once the record was returned, President Andrew Johnson, who had succeeded Lincoln, quickly approved the sentences and General Hovey set the execution date for May 9, 1865.
Just prior to the scheduled execution date, lawyers for the Milligan, Bowles and Horsey filed a petition for a writ of habeas corpus with the Circuit Court. Johnson, perhaps bowing to popular opinion, commuted the sentence of Horsey to life imprisonment and granted a stay of execution until June 1st for the two remaining Defendants.\(^{650}\) By the end of May, Johnson had commuted the sentences of Milligan and Horsey and Bowles to life imprisonment. In spite of the commutation, the petition for habeas corpus went forward. The petitioners continued to argue that military court could sentence them.

The case was heard by Supreme Court Justice David Davis,\(^ {651}\) sitting in his capacity as Circuit Judge, and David McDonald, a recently appointed District Judge. The judges were in a difficult position. If they issued the writ, the military was likely to disregard it, as they had disregarded Chief Justice Taney’s writ in \textit{Merryman}. Instead, after hearing testimony, the judges issued a split decision and certified the issue to the U.S. Supreme Court for resolution.

\textbf{F. U. S. Supreme Court}

Oral arguments before the Supreme Court began on March 6, 1866 and continued for six days. Ohio was well represented among the appellate counsel, with Henry Stanbery, Future U.S. Attorney General, and Johnson’s lead counsel during his impeachment proceedings, as well as current Attorney General James Speed, and Benjamin Butler, current Massachusetts Congressman and former

\(^{650}\) Rehnquist, \textit{supra} note 473 at 104.

\(^{651}\) Davis and Lincoln had ridden the 8th Judicial Circuit in Illinois together. Davis served as Lincoln’s campaign manager in 1860 and helped him to secure the Republican Presidential nomination that year. Lincoln appointed Davis as Associate Justice of the Supreme Court in 1862.
Union Major General representing the government. Congressman and former Union Major General James Garfield,\textsuperscript{652} former Attorney General and Secretary of State Jeremiah Black, Ohio native and future Indiana Senator Joseph E. McDonald, and David Dudley Field, brother of Justice Stephen J. Field, represented the petitioners.\textsuperscript{653}

Oral arguments ended on March 13, 1866 and on April 3\textsuperscript{rd}, the Court issued an order directing that the writ should issue. The opinion itself was not released until December. Justice Davis wrote the majority opinion, joined by Justices Field, Nelson, Clifford and Grier. Chief Justice Chase wrote a concurring opinion, joined by Justices Swayne, Miller and Wayne.

Both court factions agreed that the Defendants’ trials by military commission were contrary to law and that they should be released from confinement. Both factions also agreed that the Bill of Rights could be suspended during times of war or rebellion. Davis opined that civilians could not be tried in a military court so long as the civilian courts were open and operating. Davis also opined that neither Congress nor the President could authorize military trials under these circumstances. Chase, conversely, wrote that under the Habeas Corpus Act of 1863, Congress could authorize such trials, even though Congress never tried to do so.\textsuperscript{654}

\textsuperscript{652} Garfield made his first oral argument in any courtroom here. ALLEN PESKIN. GARFIELD: A BIOGRAPHY 270. (Kent State University Press, 1978).

\textsuperscript{653} Rehnquist, supra note 473 at 118-26.

\textsuperscript{654} Id., at 128-29.
This split decision occurred because the Court attempted to address an issue that was not before it; whether Congress could authorize military commissions to try civilian Defendants when the federal courts were open and operating. All of the justices agreed that the *Milligan* commission was contrary to law and that the guarantees contained in the Bill of Rights were not suspended during wartime. The inclusion of *obiter dicta* by the Justices resulted in a far lesser impact than a unanimous opinion on the issue before it would have had.

The *Milligan* decision could have caused a severe blow to Congress’ attempts at reconstructing the governments in the southern states. Although the Court did not address the issue, Radical Reconstruction included the installation of military governments in the former Confederate states. The Court could have easily applied the doctrine to determine the insurrection was over and that martial law could not be used indefinitely in these conquered regions.

Although Davis’ opinion was a stunning reversal of his policies, Governor Morton suffered little or no political backlash for his actions. His actions seeking clemency for the condemned men greatly gained him more publicity than his role in their arrests and trials, which were largely orchestrated by General Hovey. Morton continued as governor and in 1867 he was elected to the U.S. Senate. He remained in that post until his death ten years later.655

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655 TREADWAY, *supra* note 639 at 254-255.
Summary

Seven southern states enacted Ordinances of Secession in the weeks after Lincoln’s election. These states formed the Confederate States of America with its capital in Montgomery, Alabama, and Jefferson Davis as its first President. Hostilities began when Confederate forces in Charleston, South Carolina opened fire on the federal garrison at Fort Sumter, located in Charleston Harbor.

In response, Lincoln called forth the state militias, suspended habeas corpus, and declared a naval blockade of all southern ports; he also assumed near – dictatorial powers in order to preserve the Union. During this period, Ohioans were subjected to infringements on their rights of speech and press, suspension of habeas corpus, arrests without trials, and trials of civilians by military commission, among others. These infringements certainly violated the rights of Ohioans under both the federal and the state Bill of Rights. Most of the infringements were the result of federal, not state action, and the majority of these infringements ceased at the conclusion of the conflict.

Ohio was quick to respond to Lincoln’s call. Ohio Governor William Dennison quickly dispatched two Ohio regiments to Washington to protect the capital. He also sent troops to Western Virginia to guard the line of the Baltimore & Ohio Railroad and to drive Confederate troops from the area.

Ohio's military and political leaders had a prominent role in the conflict. Ohio's generals, including Ulysses Grant, William Shermian and Philip Sheridan led the Armies while over 350,000 of their fellow Ohioans served in the ranks.
Future Presidents Grant, Rutherford B. Hayes, James A. Garfield, Benjamin Harrison and William McKinley held commissions in the Union Army. Although only one military campaign occurred within the state boundaries, that being Morgan's Raid in July, 1863, over 35,000 Ohioans lost their lives during the War.
CHAPTER 8:
PRESERVING THE FRUITS OF VICTORY

I repeat again, the people of the United States have the right to say when those rebels may again exercise the rights and powers of States in the Union, and, in my judgment, should see that they are not so restored except upon conditions of security for the future, if not also indemnity for the past.

--John A. Bingham, 1865

I. Introduction

The surrender of General Robert E. Lee and the ratification of the 13th Amendment to the Constitution in 1865 created a whole new set of problems for the now-reunited country. The Union had incurred a huge war debt that needed to be paid, and the fate of some 4 million former African slaves, emancipated by the 13th Amendment, had to be resolved. Meanwhile, several Southern states passed ‘Black Codes’ meant to restrict the freedom of the former slaves. Vigilante groups such as the Ku Klux Klan terrorized freedmen who attempted to vote, run for political office, or purchase land.

Furthermore, the issue of whether former Confederates should be allowed to vote and hold office needed resolution. Throughout the South, former Confederate military officers and government officials were elected to local and national offices while the former slaves were denied the right to vote. President Johnson, who supported a moderate approach to Reconstruction and reunification, was issuing wholesale pardons to former Confederates and was attempting to reconstruct the governments of the Southern states without Congressional input.
Nearly 320,000 Ohioans served during the four year conflict, over 35,000 of these were killed and many times that number were wounded or permanently disabled by illness. After such catastrophic losses, it is not surprising that Ohioans would think that to merely win the war was not enough. Instead, they needed to take measures to ensure that the issues that led to the war were fully resolved.\(^{656}\)

The feelings of many Ohioans were expressed by first-term Congressman Martin Welker, who in a speech before Congress on reconstruction policy, declared:

> Let these men so lately engaged in the rebellion have time to satisfy us that they are thoroughly cured of many of the heresies they have heretofore entertained. They can afford to wait after what they have done against their Government, after the great injury they have inflicted upon the country—the deluge of blood, the ravages of war they have caused all over our broad land, the widows and orphans may have made, the crippled and maimed soldiers they have scattered everywhere among us. There is much for them to do in the way of improvements and reforms in their localities before they are ready to assume all responsibilities of Government. As a matter of law most of them have forfeited their lives, and if the laws were enforced strictly against them, many of them would be hung for treason, as they ought to be. They should remember that during these bloody four years they have caused the sacrifice of millions of precious lives and thousands of millions of treasure in this mad attempt to disconnect themselves from the Government, and establish forever the infernal institution of slavery.\(^{657}\)

The 39\(^{th}\) Congress left its own mark on the Reconstruction Era.


\(^{657}\) Congressional Globe, 39\(^{th}\) Cong., 1\(^{st}\) Sess. at 727 (1866).
II. The 39th Congress

William Horatio Barnes chronicled, and Richard L. Aynes summarized the history of the 39th Congress. Aynes’ work was published as part of the University of Akron Constitutional Law Center 39th Congress Project. The Project is an excellent source of research material and biographical summaries of members of the 39th Congress. Magliocca referred to this Congress as “the most important Congress since the first one in 1789.”

The 39th Congress held session from March 4, 1865 to March 3, 1867. When the session began, Abraham Lincoln was still President and the Civil War was still in progress. Robert E. Lee surrendered his army to Ulysses S. Grant on April 9, 1865, but Confederate troops were in the field and fighting until almost the end of 1865. President Johnson did not declare the insurrection to be officially at an end until August 20, 1866.

As a result of the election of 1864, the Republican majority in the House of Representatives increased from 56% to 77%, and the Republican percentage in the U.S. Senate increased from 64% to 79%. This majority gained for the

659 More information about the 39th Congress Project is available online at: http://www.uakron.edu/law/constitutionallaw/39th-congress-project/
662 Ohio’s Delegation to the 39th Congress is listed in Appendix C.
663 Aynes, supra note 658 at 5-6.
664 It was assumed that peace would restore the constitutional checks and balances that were in place before the war. Some scholars have suggested that it was up to the national government to decide exactly when peace had arrived. This gave the national government the ability to extract concessions from the former Confederate states in exchange for a declaration that peace had been restored. MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863-1869. (Norton; 1st edition, 1974).
Republicans not only a veto-proof Congress, but also the supermajority necessary to propose constitutional amendments. This majority not only allowed the Congress to ignore veto threats from the President, it also gave them very little incentive to negotiate with the Democratic minority. In addition to their overwhelming Congressional majority, the prestige and authority of the U.S. Supreme Court had been in decline since the *Dred Scott* decision, so the actions of Congress could go virtually unchallenged.

Three great challenges faced the 39th Congress: 1) the losses of life and property in the war; 2) the uncertainty about whether the war was really over; and 3) the enormity of the task of economic and political reconstruction.

During its term, the 39th Congress passed 714 pieces of legislation, more than any Congress had passed up to that time. Included in the legislation enacted by this Congress was: 1) the Civil Rights Act of 1866; 2) the extension of the Freedman’s Bureau for another two years; and 3) the 14th Amendment. Congress also established the Joint Committee of Fifteen on Reconstruction, made up of leading members of the House and Senate, and tasked this committee with addressing the issues involved in securing a final peace. This Congress also enacted the Judicial Circuits Act which reduced the number of

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665 BARNES, supra note 660 at 577–624.
666 Aynes supra note 658 at 4.
667 In contrast, the 113th Congress enacted fewer than 60 bills from the beginning of 2013 through December 26, 2013. CNN Political Unit. *Poll: This is a ‘do-nothing’ Congress.* Available at: [http://politicalticker.blogs.cnn.com/2013/12/26/poll-this-is-a-do-nothing-congress/](http://politicalticker.blogs.cnn.com/2013/12/26/poll-this-is-a-do-nothing-congress/)
federal circuits from ten to nine and the number of Supreme Court Justices from nine to seven.

Ohio’s contribution to the 39th Congress came from John Armor Bingham.

III. John Armor Bingham

John Armor Bingham (1815-1900), then serving as Congressman from Ohio’s 16th House District, was the principal author of section 1 of the 14th Amendment. Born in Pennsylvania, Bingham moved to Ohio, studied law at Franklin College, and began a law practice in 1840. Bingham served as district attorney for Tuscarawas County, from 1846 to 1849.

Elected to Congress in 1855, he served until defeated for reelection in 1863. After his defeat, President Lincoln appointed Bingham as judge advocate; he served in this capacity during the trial of the Lincoln assassination conspirators and as chairman of the seven House managers in the impeachment trial of President Andrew Johnson.

As early as 1859, Bingham had argued that “whenever the Constitution guarantees to its citizens a right, either natural or conventional, such a guarantee is in itself a limitation upon the States.” Bingham’s view was contrary to the precedent established by the U.S. Supreme Court in its holdings in Barron v.

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671 Magliocca describes Franklin College as “a haven for abolitionists led by a member of the Underground Railroad,” and suggests that Bingham’s relationship with Titus Basfield, an ex-slave and one of the first African-Americans to receive a college degree in Ohio, influenced his opposition to slavery and his belief in racial equality. Gerard N. Magliocca, The Father of the 14th Amendment, THE NEW YORK TIMES OPINIONATOR, September 17, 2013. available at: http://opinionator.blogs.nytimes.com/2013/09/17/the-father-of-the-14th-amendment/?_r=0

672 MAGLIOCCA, supra note 661 at 111.

673 CONG. GLOBE, 35th Cong., 2nd Sess. 982 (1859).
In those cases the Court found that the Fifth Amendment’s guarantee that government takings of private property for public use required just compensation and are restrictions on the federal government alone. By 1866, Bingham was advocating a constitutional amendment binding the states to the Bill of Rights. Bingham was not the first person to refer to the first ten amendments as the “Bill of Rights,” but his use of that term was innovative for that time.

In spite of being a freshman Congressman, Bingham had a formidable reputation in Washington due to his previous Congressional service, the fame he gained from the Lincoln Conspirators Trial, and because he represented Ohio, a large and influential State. Bingham needed to craft the proposed amendment in such terms as to satisfy the competing interests of President Johnson and his followers, who thought that no amendment was necessary at all, with those of Thaddeus Stevens and the Radical Republicans, who believed that a much harsher Reconstruction policy was required. Bingham wasted no time in introducing a proposed amendment seeking to “empower Congress to pass all necessary and proper laws to secure to all persons in every State of the Union equal protection in their rights, life, liberty and property.”

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676 CONG. GLOBE, 39th Cong., 1st Sess. 1088-94 (1866).
677 For example, both Article VIII of Ohio’s 1802 Constitution and Article I of Ohio’s 1851 Constitution were entitled “Bill of Rights.”
678 MAGLIOCCA, supra note 661 at 114-115.
Rather than act on Bingham’s proposed amendment, Congress established the Joint Committee on Reconstruction, consisting of six members from the Senate and nine members from the House, including Bingham. The Committee became known as the Committee of Fifteen, with twelve members from the Republican Party and the remaining three from the Democrats, leading to the enactment of the 14th Amendment.

IV. The Fourteenth Amendment

Before the Civil War, few individual rights merited protection from the national government. The Founding Fathers saw state officials as the most likely threat to human rights, since human affairs were mostly governed by the states. Most states, including Ohio, wrote specific guarantees protecting individual rights into their state constitutions, and they looked to state courts as guarantors of individual rights. In an attempt to protect the civil rights of the newly-freed slaves, particularly in the former Confederate states, Congress passed the Civil Rights Act of 1866 over President Johnson’s veto. However many politicians, including the Radical Republicans, supported a Constitutional amendment guaranteeing African-American rights rather than relying on temporary political majorities.

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A. The Debates

The State of Ohio played a leading role in the drafting and ratification of the 14th Amendment, thought by some scholars to be the most important amendment to the Constitution. The purpose of the 14th Amendment was to finally settle the issues that led to the U.S. Civil War. This Amendment created a constitutional definition of U.S. and state citizenship, and prohibited the abridgment of privileges and immunities of U.S. citizens. The Amendment secured the rights of equal protection and due process of law, determined the basis of representation in Congress, disqualified individuals from holding office if they had previously taken an oath to support the Constitution and later joined the rebellion, guaranteed the (U.S.) public debt while repudiating the Confederate debt, and granted Congress the authority to enforce the amendment by enacting the appropriate legislation.

James Madison, future President and principal author of the Virginia Plan at the Federal (Constitutional) Convention of 1787, kept an unofficial record of the daily proceedings in the convention that drafted the U.S. Constitution. Madison’s notes are the only comprehensive record of what occurred during the convention and have served as a valuable historical tool in discerning the intent of the drafters.

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Like the Constitutional Convention, the debates surrounding the framing of the 14th Amendment are veiled in secrecy. Unfortunately, the Joint Committee of Fifteen had no Madison present to transcribe the daily debates and other activities that led to the enactment of the 14th Amendment. In his essay Debating the Fourteenth Amendment, The Promise and Perils of Using Congressional Sources, Professor Daniel Hamilton describes the limits and possibilities of using Congressional sources to write the history of the 14th Amendment.

Hamilton dissected 14th Amendment originalism into its two component parts: that originalism practiced by lawyers and judges and that practiced by historians and constitutional scholars. The first group used originalism in an attempt to answer constitutional questions, while the second group were seeking answers to questions such as: 1) Did the framers of the Amendment intend to apply the Bill of Rights to the States?, Did the framers intend to prohibit individual discrimination or just state action?, and Did they intend to prohibit racial discrimination? These questions remain unanswered, since the framers left no definitive record of their intent.

B. The Joint Committee of Fifteen

The Joint Committee of Fifteen first met on January 6, 1866. The early meetings focused on the issue of apportionment, but on January 12th Bingham introduced his first draft of the proposed amendment, which read as follows:

685 Id. at 76-77.
The Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property.\textsuperscript{686}

It is apparent that Bingham favored African-American suffrage, but when asked about the subject, he replied “I will answer with all of my heart that I am ready to go for that. But a majority of those with whom I am associated think that this is all that is needed at present.”\textsuperscript{687}

The Committee met again on April 21, 1866 and Congressmen Stevens introduced the second draft of the amendment, which was substantially similar to the final product. Bingham moved to delete Section 1 of the current draft, which prohibited discrimination based on race, color or previous condition of servitude and substitute his language, which became the final version of Section 1.\textsuperscript{688}

Section 1 of the proposed amendment contained four important clauses: the citizenship clause; the privileges and immunities clause; the due process clause; and the equal protection clause. The citizenship clause specifically repudiated the holding of the U.S. Supreme Court in the \textit{Dred Scott Decision}.\textsuperscript{689}

The privileges and immunities clause was crafted in broad terms to protect liberty, human dignity, or property from governmental action. The due process clause protects against any act of Congress or a state that is unduly restrictive to the enjoyment of personal liberty, the use of property, or fundamental rights. The equal protection clause was designed to protect the former slaves, but in practice

\textsuperscript{686} Kendrick, \textit{supra} note 669 at 46 (1914).
\textsuperscript{687} \textit{CONG. GLOBE}, 39\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. 431 (1866).
\textsuperscript{688} \textit{HISTORY OF OHIO LAW}, \textit{supra} note 42 at 383.
\textsuperscript{689} \textit{Dred Scott v. Sandford}, 60 U.S. 393 (1857), discussed \textit{supra}.
it extended to women, minorities and other victims of discrimination. As with the recently ratified 13th Amendment, the final section granted Congress the power to enforce the prohibitions by appropriate legislation.

Historians today spend most of their time discussing Section 1 of the Amendment, however, politicians of the day considered other sections more important. Congressmen Stevens once declared that Section 2 and Section 3, addressing apportionment and enfranchisement of former Confederates to be far more critical as these would determine control of the country for the next several years.

C. Enactment and Ratification

The 14th Amendment passed the House by a vote of 128-37, with Bingham delivering the final speech in support. Ohio’s delegation voted strictly on party lines, with the 19 Republicans voting in favor of the Amendment and the two Democrats voting against. The Senate approved the measure by a vote of 33-11, with both of Ohio’s Senators voting in favor. The House approved the Senate’s amendments to the bill on June 13, 1866. The Radicals were happy with the Amendment but disappointed that it did not secure political rights, including the right to vote, for the former slaves.

Connecticut was the first state to ratify the new amendment on June 30, 1866, and by the end of that year six states, including Tennessee, had ratified.

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690 Cox, supra note 681 at 112-113.
691 AMAR, SUPRA NOTE 14.
692 Ayres, supra note  at 658 at 384-385.
693 Congress enacted the 15th Amendment two years later to address those concerns.
Twenty two states ratified by June 1867, and on July 9, 1868 South Carolina, the
twenty eighth state, ratified. In the meantime, two states, Ohio and New
Jersey, attempted to rescind their ratifications. Congress refused to recognize
the two states’ attempt to rescind ratification, and on July 20, 1868 Secretary of
State Seward certified that the Amendment had become part of the
Constitution.

The 14th Amendment became the foundation for sustaining the Union and
readmitting the rebel states. The 14th Amendment would later serve as the legal
basis for the desegregating public schools, securing equality for women, and
creating a right of privacy. Today, the 14th Amendment is the basis of more
litigation than all other provisions of the Constitution.

V. The Reconstruction Era 1863-1877

The rejection of the 14th Amendment by ten of the Southern states posed
a dilemma for Congress. Since there were 36 states at the time, including the
states still “excluded” from Congress, some 27 states needed to ratify the
Amendment for it to become law. Proponents of the Amendment offered three
proposals to ensure ratification: 1) Admit more states to the Union; 2) Keep the
ten holdout states in political limbo until they ratified the amendment; and, 3)

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694 JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT 11-219 (Macon, Ga.:
695 Id. at 282-286. Both states subsequently re-ratified the Amendment in 2003.
696 Id. at 294-298.
697 Brown v. Board of Education of Topeka, 347 U.S 483 (1954); West Coast Hotel v. Parrish, 300
U.S. 379 (1937); and Griswold v. Connecticut, 381 U.S. 479 (1965) are probably the best known
examples.
("[The 14th Amendment] is probably the largest source of the Court’s business.").
Declare that the ten holdouts to not be “states” for the purpose of ratifying the amendment. None of these proposals was considered to be politically viable.

Instead, the 39th Congress enacted the Reconstruction Acts on March 2, 1867. This series of four acts, established military rule for the former Confederate States required that each seceding state draft a new state Constitution, ratify the 14th Amendment, and grant voting rights to African-American males before their Congressional delegates would be seated.699 The initial legislation was entitled “an act to provide for the more efficient government of the Rebel States” and was codified as March 2, 1867, 14 Stat. 428-430, c. 153. This Act and the remaining three acts passed by Congress on March 23, 1867, July 19, 1867, and March 11, 1868, applied to all of the former Confederate states except Tennessee, which had already ratified the 14th Amendment and was readmitted to the Union. When the original Reconstruction Act was presented to President Johnson for approval, he promptly vetoed it, and Congress promptly overrode his veto.700

Soon, the term “Reconstruction” became synonymous with the era from 1863-1877. Most scholars agree that Reconstruction began with the Emancipation Proclamation, on January 1, 1863, and concluded with the informal Compromise of 1877. Historians typically divide Reconstruction into three separate eras: 1) Wartime Reconstruction, from January 1, 1863 until the termination of hostilities in 1865; 2) Presidential Reconstruction, from the end of the War until after the Congressional elections of 1866, and 3) Congressional

700 Id., at 276.
(Radical) Reconstruction, from the 1866 elections until the end of the Era in 1877.

A. Wartime Reconstruction

President Lincoln announced his first plan for Reconstruction on December 8, 1863. Entitled a “Proclamation of Amnesty and Reconstruction,” Lincoln established a plan for full pardon and restoration of rights, except the right to own slaves, to individuals in the seceding states. Some individuals, most notably high Confederate civil and military officials, were excluded. When 10% of the electorate in 1860 took a loyalty oath and repudiated slavery, a new government could be established.\textsuperscript{701} Lincoln’s plan was hardly comprehensive, but it was a start.

Andrew Johnson, who succeeded to the Presidency on Lincoln’s assassination, agreed with Lincoln’s moderate approach to Reconstruction. Johnson, a Democrat, previously served as Congressman, Governor, and Senator from his native Tennessee. A strong Unionist, Lincoln appointed Johnson as Military Governor of Tennessee in 1862, soon after Union forces had retaken control of the state. As Military Governor, Johnson helped implement Lincoln’s Reconstruction policies in Tennessee. Partly as a result of Johnson’s efforts, Tennessee ratified the 13\textsuperscript{th}, and later the 14\textsuperscript{th} Amendment, and its

\textsuperscript{701} \textbf{Foner, supra} note 699 at 35-36.
Congressional delegation was seated in the U.S. Congress on July 24, 1866, the first of the seceding states to gain readmission.\textsuperscript{702}

B. Presidential Reconstruction

Johnson was Lincoln’s running mate in the 1864 presidential election, and six weeks after he was sworn in as Vice President, he became President upon Lincoln’s death.\textsuperscript{703} Lincoln believed that since secession was contrary to the Constitution, the Confederate States were still part of the Union. Lincoln also felt that he should be in control of Reconstruction policies in his capacity as commander-in-chief. Congress, on the other hand, wanted to treat the former Confederate states as defeated territory, and that they should be in charge of Reconstruction.\textsuperscript{704}

Johnson acted quickly to initiate his plan. While Congress was in recess he moved to readmit the former Confederate States, provided that they accept the 13\textsuperscript{th} Amendment and rescind their ordinances of secession. Former high-ranking Confederate civil and military officers were not automatically pardoned, but Johnson would consider pardoning those former officials who applied personally.\textsuperscript{705}

By the summer of 1865, most of the former Confederate states were reorganizing under Johnson’s plan. While they complied by rescinding their secession ordinances and renouncing slavery, many of the reorganized states

\textsuperscript{703} FONER, supra note 699 at 42-43.
\textsuperscript{704} II THE CAMBRIDGE HISTORY OF LAW IN AMERICA, SUPRA NOTE 6 AT 328-329.
\textsuperscript{705} Id.
attempted to withhold civil rights from the former slaves, such as limiting their access and participation in the court system, requiring them to work and carry passes from their employers, to marry and enter into contracts. That fall, delegates from the defeated states, including many former Confederates, arrived in Washington to take their seats in Congress, but Congress had other plans.

C. Congressional (Radical) Reconstruction

Early in the new Congressional Session, Congressman Thaddeus Stevens introduced three new resolutions: 1) declaring that the task of Reconstruction was “the exclusive business of Congress;” 2) finding that President Johnson’s policies were provisional and subject to oversight by Congress; and 3) denying seats to members elected from the former Confederate States. Thus began the period of Congressional Reconstruction. Congressional Reconstruction was characterized by: 1) Congress repudiating Johnson’s policies; 2) Johnson vetoing Congressional legislation, and 3) Congress overriding Johnson’s vetoes.

From the beginning of 1866 until the end of his term, a political struggle ensued between Johnson and Congress. The former Confederate States were divided into military districts, and Congress required major changes to the legal and social structure of these states in order for them to gain readmission,

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706 Id. at 329.
including ratifying the 14th Amendment and enfranchising the former slaves.\footnote{\citenum{CambridgeHistoryLaw} \text{supra} note 704 at 329.} The Radicals were in no great hurry to readmit the Southern states, because their admission could dilute the overwhelming Republican majority in Congress. Congress also passed the Tenure of Office Act, which restricted the ability of the President to remove officers of the Executive Branch without Senate approval.\footnote{\citenum{Foner} \text{supra} note 699 at 333-336.}

The elections of 1867 featured President Johnson, who opposed the 14th Amendment and was attempting to block its ratification, and Congressman Stevens, who thought the 14th Amendment did not go far enough and who urged a much more strict Reconstruction policy. In Ohio, Democrat Allen Thurman ran against war hero Rutherford B. Hayes for Governor, and the Democratic platform stood for opposing African-American suffrage and rescinding Ohio’s ratification of the 14th Amendment. Hayes won the Governorship by 2,983 votes, but the Democrats gained control of the General Assembly and the suffrage measure lost by 50,000 votes.\footnote{\citenum{KernWilson} \text{supra} note 161 at 242.} Johnson stated that he was “gratified, but not surprised by the result of the recent elections,”\footnote{\citenum{TrefousseJohnson} \text{Andrew Johnson: A Biography} 299. (New York: W.W. Norton, 1989).} Bingham, on the other hand, interpreted the results as the voters’ rejection of Stevens’ more radical Reconstruction policies.\footnote{\citenum{Magliocca} \text{supra} note 661 at 141.} On the National level, Republicans triumphed in the Southern states, due to a large turnout among African-American voters combined with white voter apathy and the continued disenfranchisement of former Confederates, but in the
Northern states, Democrats cut steeply into the Republican majority and suffrage issues were defeated in Minnesota and Kansas, as well as Ohio.\(^\text{713}\)

VI. Impeachment and McCardle

The battle between Congress and the President reached its zenith in 1868. Their defeat in the 1867 elections convinced the Radicals that the 14\(^{th}\) Amendment needed to be in place before another Presidential election. When impeachment of the President seemed to be their only recourse, Johnson touched the match to the fuse by suspending War Secretary Edwin Stanton, an Ohio native, during the Congressional recess. When Congress reconvened in December Johnson reported Stanton’s suspension to the Senate. The Senate promptly refused to sanction Johnson’s actions, and Grant, who served as Interim Secretary, allowed Stanton to return to his office in the War Department. Stanton immediately began interfering with Johnson’s orders to his military commanders, and in January, 1868, Johnson fired Stanton and appointed General Lorenzo Thomas to serve as Interim Secretary. Meanwhile, Stanton refused to relinquish power and for a brief period there were actually two War Secretaries issuing conflicting orders to the Army commanders in the field.\(^\text{714}\)

On February 24, 1868 the House approved an impeachment resolution, accusing Johnson of “high crimes and misdemeanors” by violating the Tenure of

\(^{713}\) FONER, supra note 699 at 314-315.
Office Act, by a vote of 126-47. On February 25th, Congressmen Bingham and Stevens formally notified the Senate of the impeachment vote.715

As was the case with the War, Ohioans played a pivotal role in the impeachment trial, which began in the Senate on March 30, 1868. Chase, in his role as Chief Justice, presided over the trial. Bingham, who refused to serve under Butler and threatened to resign, was selected as chairman of the seven impeachment managers, whose duty was to try the case before the Senate. Stanton was the victim of Johnson's illegal action, and Benjamin Wade, then serving as President pro tem of the Senate, would have become the 18th President had Johnson been convicted.716

Johnson's trial began on March 30, 1868. Bingham played only a small role in this part of the trial, mostly arguing procedural issues. The “jury” of Senators was torn, did Johnson really violate the law or was he being tried for opposing the ratification of the 14th Amendment? Bingham, who had been receiving death threats from the Ku Klux Klan, delivered the closing argument on May 4, 1868.717

Johnson had argued throughout the trial that as President, he had the right to either execute or disregard what he considered to be an unconstitutional law. Years before, Thomas Jefferson had voiced a similar opinion. Bingham rejected that theory outright. Congress, he argued, could pass an invalid law over Presidential veto and Johnson had no power to stop it. Congress’ actions in that

715 MAGLICCA, supra note 661 at 144.
716 Id., 661 at 146.
717 Id., at 147.
instance could only be overruled by the Courts, or by the voters in the next election.\textsuperscript{718}

On May 16\textsuperscript{th} the Senate voted on Article 11 of the impeachment, the catch-all provision, and fell one vote short of the 2/3 majority necessary for conviction. The Senate then recessed briefly so the Congressman and Senators could attend the Republican National Convention. Upon reconvening on May 26\textsuperscript{th}, the Senate again fell one vote short of conviction on Articles 2 and 3.

Johnson may have helped secure his acquittal by actions he took in April and May. First, he appointed General John Schofield, a candidate perfectly acceptable to moderate Republicans, as Stanton’s replacement. Next he let it be known that he would stop actively opposing the ratification of the 14\textsuperscript{th} Amendment. Finally, Johnson provided patronage, and perhaps some outright bribes, to some of the undecided Senators.\textsuperscript{719}

In a way, the impeachment trial benefitted both sides. Johnson was allowed to continue to serve as President until the end of his term, and in exchange he stopped interfering with the ratification process. Bingham also got what he wanted, because in the next two months six former Confederate states ratified the Amendment, and on July 28\textsuperscript{th}, Secretary of State Seward declared that the proposed Amendment had been adopted.\textsuperscript{720} The Johnson era came to a close when General Grant, another Ohioan, took the oath as President on March 4, 1869.

\textsuperscript{718} Id., at 148-149.
\textsuperscript{719} Id., at 152.
\textsuperscript{720} Id., at 152-153.
Another issue came to a head when William McCardle, a newspaper editor from Mississippi was arrested for advocating violent resistance to Radical Reconstruction policies. While awaiting trial before a military commission, McCardle applied for a writ of Habeas corpus to the Circuit Court of the Southern District of Mississippi, alleging that his detention was contrary to law. The Court promptly denied his petition and remanded him to the Army for trial. Since the Vallandigham matter set the precedent that the U.S. Supreme Court had no jurisdiction to hear appeals from military commissions, McCardle instead sought to invoke the Habeas Corpus Act of 1867,721 a bill originally sponsored by Bingham.722

After the oral arguments were heard, but before a decision was announced, Congress suspended the jurisdiction of the Supreme Court to hear McCardle’s petition. The Court then unanimously upheld Congress’ authority to strip the Court of jurisdiction pursuant to Article III, Section 2 of the Constitution.723

VII. Grant and the Retreat from Reconstruction.

Ohio native Ulysses Grant assumed the Presidency in March 1869. Born in Point Pleasant in 1822, Grant had an average upbringing. Using his political influence, Grant’s father Jesse secured a coveted appointment at West Point for

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722 This law allowed nonresident Plaintiffs, as well as Defendants, to transfer or “remove” certain cases in state courts, involving questions of national importance, to federal courts if the petitioner can show that he would be unable to obtain justice in the state court system. HYMAN, supra note 714 at 473.
723 Ex Parte McCardle, 74 U.S. (7 Wall.) 506. The full text of Ex Parte McCardle is available at: https://supreme.justia.com/cases/federal/us/74/506/case.html
his son. Grant graduated in 1843, 21st in his class of 39 cadets. Grant excelled at mathematics; drawing and horsemanship while a student, and not much else. In spite of being disillusioned by the War with Mexico, Grant won brevet promotions to First Lieutenant at the Battle of Molino Del Ray and to Captain at the Battle of Chapultepec. Upon his return from the War, Grant married Julia Dent, the sister of his West Point roommate.

Grant resigned from the Army in 1854 because of allegations of drunkenness. Bouncing from job to job throughout the late 1850’s, Grant was working in his father’s dry goods store in Galena, Illinois at the start of the Civil War. Dogged by the past allegations of drunkenness, Grant was initially unable to secure a commission with the rapidly-expanding Army.

With the help of his political supporter, Illinois Congressman Elihu B. Washburne, Grant was commissioned first as a Colonel, then a Brigadier General in the Volunteer Army. After suffering a tactical defeat at Belmont Missouri in November, 1861, Grant’s forces captured the Confederate Forts Henry and Donaldson in early February 1862.

On April 6, 1862, Grant’s Army was surprised by Confederate forces under Albert Sidney Johnston at Pittsburg Landing (Shiloh) Tennessee. Initially driven
back towards the Tennessee River, Grant’s Army drove the Confederates from the field the next day.\textsuperscript{730} In 1863, Grant won major victories at Vicksburg\textsuperscript{731} and Chattanooga, and in March 1864 Lincoln promoted him to command all the Union Armies. Thirteen months later Grant accepted the surrender of Robert E. Lee and the Confederate Army of Northern Virginia, effectively ending the War.\textsuperscript{732}

After the War Grant remained in the Army and took charge of the Army’s efforts at Reconstruction. Initially Grant agreed with Johnson’s moderate approach to Reconstruction, but his compliance with the Reconstruction Acts put him at odds with the President.\textsuperscript{733} In July, 1866 Congress established the rank of General of the Army of the United States, and promoted Grant into the position.\textsuperscript{734} Grant also served briefly as Interim Secretary of War when Johnson suspended Edwin M. Stanton during a Congressional recess, but when the Senate refused to sanction the suspension, Grant surrendered the office to Stanton.\textsuperscript{735} Johnson subsequently fired Stanton and the House drew up articles of impeachment against him for violating the Tenure of Office Act.\textsuperscript{736}

The Radicals hoped that a Johnson conviction, which would place their fellow Radical, Ohio Senator Benjamin Wade in the Presidency, and help secure the 1868 Republican nomination for Wade. When Johnson was acquitted, the

\textsuperscript{730} \textsc{Foote, supra} note 416 at 333-350.
\textsuperscript{731} \textsc{McPherson, supra} note 639 at 636.
\textsuperscript{732} \textit{Id.} at 725-726.
\textsuperscript{733} \textsc{Foner, supra} note 699 at 337. See, also, \textsc{Hyman, supra} note 714 at 501-514.
\textsuperscript{734} \textsc{Ulysses S. Grant.} Available at: \url{http://www.granthomepage.com/grantchronology.htm}
\textsuperscript{735} \textsc{William S. McFeely, Grant: A Biography} 275. (New York: \textsc{W.W. Norton & Company}, 1981).
\textsuperscript{736} \textsc{Magliocca, supra} note 661 at 144. Discussed at page 215, \textit{supra}. 
nomination went to Grant, who campaigned under the slogan “Let Us Have Peace.”\(^{737}\)

The most immediate effect of Grant’s election was a truce in the war between the Executive and the Legislative branches. As commander of the Army, Grant was charged with implementing Reconstruction policy in the conquered South. However, Grant played no role in the impeachment or Johnson’s trial.

Several events that occurred during Grant’s Presidency led to the decline, and finally the end of Reconstruction. Among these events were the adoption and ratification of the 15\(^{th}\) Amendment, the need to use the Army for frontier duty, several scandals that occurred among Grant’s closest advisors, the economic Panic of 1873, the reemergence of the Democratic Party and the establishment of the Democratic “Solid South”, and finally the Election of 1876.

A. The Fifteenth Amendment

Although the Reconstruction Acts established African-American suffrage in the former Confederate states, eleven of the 21 northern states, including Ohio, still refused to allow African-American citizens to vote. Between the time of Grant’s election in November and his inauguration in March, Congress crafted the Fifteenth Amendment to address this issue. Three different versions were proposed:

- Prohibited the States from denying the vote to any citizen because of race, color or previous condition of servitude;

\(^{737}\) FONER, supra note 699 at 338.
- Prevented the States from denying the vote to any citizen because of issues relating to property, literacy, or the condition of their births; and
- Ensured that all male citizens over the age of 21 have the right to vote.\textsuperscript{738}

Citing concerns about ratification in the Northern States, Congress finally settled on the first and most moderate version. This version passed Congress on February 26, 1869, just days before Grant assumed office.

The proposed Amendment faced a firestorm of opposition. The Radicals complained because the proposed Amendment failed to establish nationwide voting standards. States could easily enact literacy or property standards in order to deny the vote. Further, the proposed Amendment made no guarantees regarding the right to hold office. Democrats, on the other hand, considered the proposed amendment as an attempt by the Radicals to establish equality for the former slaves.\textsuperscript{739}

Bingham sided with the Radicals in opposing the moderate verbiage. He feared that some states might establish religious, educational and property requirements in order to vote.\textsuperscript{740} Even some Northern states restricted the right to vote. California, for instance, denied Chinese residents the right to vote. Rhode Island required that non native-born citizens own property and Pennsylvania

\textsuperscript{738} PBS.Org. Ulysses S. Grant: The Passage of the Fifteenth Amendment. Available at: http://www.pbs.org/wgbh/amERICANexperience/features/general-article/grant-fifteenth/
\textsuperscript{739} Foner, supra note 699 at 446.
\textsuperscript{740} Id.
required the payment of state taxes. Massachusetts and Connecticut had a literacy test.\(^741\) Bingham proposed adding the words “creed” and “property” to the proposed language, but the House-Senate conference committee removed Bingham's language.\(^742\)

Women’s rights groups also opposed the amendment. Suffragists complained that the amendment would allow barely-educated African-Americans to make laws while denying educated and refined women the right to vote.\(^743\) The controversy caused a split in the abolitionist-feminist alliance that had existed for decades.\(^744\)

Three quarters of the States (29 of 37) needed to ratify the Amendment in order for it to become part of the Constitution. Nevada was the first state to ratify the Fifteenth Amendment, on March 1, 1869. By the end of that month, eleven other states had ratified. In April, Senator Oliver Morton of Indiana proposed legislation requiring those Southern states not yet “readmitted” to the Union to ratify the Amendment in order to gain readmission. Congress quickly enacted Morton’s proposals.\(^745\) Ohio ratified the Amendment by one vote in the Senate and two votes in the House, on January 27, 1870,\(^746\) and on March 31\(^{st}\),

\(^{741}\) \textit{Id.}, at 447.
\(^{742}\) \textit{MAGLIOCCA}, \textit{supra} note 661 at 156.
\(^{743}\) \textit{FONER}, \textit{supra} note 699 at 447-448.
\(^{744}\) \textit{Id.}, at 447.
\(^{745}\) \textit{FIFTEENTH AMENDMENT RATIFICATION}, HARPWEAK. Available at \url{http://15thamendment.harpweek.com/HubPages/CommentaryPage.asp?Commentary=03Ratification}
\(^{746}\) Kern & Wilson, \textit{supra} note 161 at 244.
Secretary of State Hamilton Fish declared that the Amendment had become part of the Constitution.\textsuperscript{747}

B. The Army.

By the summer of 1866, the Union Army, Lincoln’s “Terrible Swift Sword” was a shadow of its’ former self. Almost one million volunteers had been mustered out by that time, and the Regular Army now consisted of about 30,000 troops, up from a prewar strength of about 18,000.\textsuperscript{748}

In July, Congress passed An Act to increase and fix the military peace establishment of the United States, which established the organization of the postwar army. The Army created by this act was a mixture of Regulars and Civil War veterans, and the officers were a mixture of West Point graduates and former volunteer officers. Four regiments of Infantry and two regiments of Cavalry were to consist entirely of African-American soldiers, commanded by white officers.\textsuperscript{749}

Congress enacted a series of cutbacks during the next several years that severely weakened the Army. In 1869 Congress cut the number of infantry regiments from forty five to twenty five, and the authorized strength was set at 37,313. The next year Congress limited the number of enlisted men to 30,000. By 1874 the authorized strength was capped at 25,000, but because of

\textsuperscript{747} HARPWEEK, supra note 745.
\textsuperscript{748} ROBERT M. UTLEY, FRONTIER REGULARS: THE UNITED STATES ARMY AND THE INDIAN 1866-1891, 11 (Lincoln: University of Nebraska Press, 1973).
\textsuperscript{749} Id., at 11.
desertions, discharges and death, the rolls at the regimental level rarely exceeded 19,000 men.750

Once the War was over, migration westward began to increase dramatically. The population of the western states increased by one million between 1860 and 1870, and by another 2 ½ million between 1870 and 1880.751 Some of the migrants sought to strike it rich in the gold and silver mines, others wanted to take advantage of the free land offered by the government via the Homestead Act. The construction of the Transcontinental Railroad brought more settlers west.752

By 1866, there were about 270,000 Native Americans on the frontier. There were about ten times as many white settlers, and thousands more were on the way. Some of the tribes chose to coexist peacefully with the whites. Some of the tribes had clashed with whites before the War and were defeated. Some of the tribes had been so decimated by war and disease that they were incapable of resisting the whites. Only a few of the remaining tribes had the numbers to contest white settlement.753

During this era the Army served two masters, the President on the frontier and Congress in the Reconstruction South. Events in the West had increased the need for troops in that region, and Reconstruction duties required up to one-third

750 Id., at 16.
751 Id., at 2.
752 Id., at 3.
753 Id., at 5.
of the Army’s strength. Only in Texas, which at the time was part Old South and part frontier, did the Army’s duties come together.

The duties of the Army in the South also evolved over time. From military occupation as a tactical concept, to military government for conquered territory, to Reconstruction, Army commanders struggled to enforce civilian rules without much guidance. Vengeful Southerners filed lawsuits in state courts against federal officials and soldiers throughout the South. Defendants did not receive much sympathy from Southern juries. In response, Grant issued orders allowing transfer of such cases to federal courts.

As part of their Reconstruction duties, military commanders had to deal with rioting, moonshining, horse theft, as well as registering voters, supervising elections, establishing procedures for civil courts, and approving constitutions. The Army also engaged in irregular warfare with former Confederates, who were determined to resist federal authority, preserve white supremacy, and maintain local rule. As the Southern states were restored to full status, and with the public outcry for more troops in the West, the number of troops on occupation duty dwindled. Once a state was readmitted to full status, the Army could only intervene upon the request of the civil authorities.

754 Id., at 12.
755 HYMAN, supra note 714 at 157.
757 MILLETT & MASLOWSKI, supra note 756 at 257.
In 1867, about 12,000 troops were on occupation duty in the South. Nine years later, fewer than 2,800 federal troops were garrisoning the eleven former Confederate States.\textsuperscript{759} In 1866, 2,000 troops helped supervise elections in Louisiana, but just two years later the number dwindled to 598. As the number of troops decreased, the instances of violence against the freedmen spiked.\textsuperscript{760} In spite of the rise in violence, Congress gradually reduced the Army’s presence from one soldier to every 708 southern civilians to one soldier to every 3,160 southern civilians.\textsuperscript{761} By 1871, the principal duty of the Army was to support federal marshals that were trying to suppress the activities of the Ku Klux Klan.\textsuperscript{762}

In 1876 the Republicans nominated Ohio native Rutherford B. Hayes as President. Hayes, a Harvard graduate served as a Major General in the War, Ohio Representative to the 39\textsuperscript{th} Congress, and three-time Governor.\textsuperscript{763} In a contest against Democratic Governor Samuel Tilden of New York, Republican election boards in four Southern states had invalidated enough votes to give the election to Hayes. Democrats, naturally, disputed the results.\textsuperscript{764}

Rival state governments were established in South Carolina and Louisiana, while in Florida the state supreme court determined that the Democratic candidate prevailed, but they let Hayes’ margin of victory stand.\textsuperscript{765} In order to solve the crisis, Congress appointed a fifteen-member commission to determine

\textsuperscript{760} \textit{Id.}, at 287.
\textsuperscript{761} \textit{Id.}, at 313.
\textsuperscript{762} \textit{Id.}, at 313.
\textsuperscript{763} FONER, supra note 699 at 569.
\textsuperscript{764} \textit{Id.}, at 575-576.
\textsuperscript{765} \textit{Id.}, at 575-576
the victor. While the committee deliberated, Hayes’ supporters secretly met with moderate Southern Democrats. The opposing sides reached a compromise: the Democrats withdrew their opposition to Hayes, and, in exchange, the remaining occupation troops were withdrawn from the South and assigned to other duties.\textsuperscript{766}

C. Scandals.

During Grant’s administration, several scandals took place among Grant’s closest friends and advisors that shifted the focus of the country away from Reconstruction issues. Among these scandals were the Black Friday Gold Panic, the Whiskey Ring, the Trading Post Scandal, the Credit Mobilier Scandal\textsuperscript{767} and several others. Allegations of nepotism also dogged the administration.

The first of these scandals was the Black Friday Gold Scandal. This scandal was the result of an attempt by Wall Street financiers Jay Gould and James “Diamond Jim” Fisk to corner the gold market. Gould and Fisk enlisted the aid of Grant’s brother-in-law Abel Rathbone Corwin. Corwin hoped to convince Grant to stop selling gold on the open market in order to increase the price of American agricultural products overseas. Concerned about the price of agricultural products, Grant initially agreed to stop the government sales of gold.\textsuperscript{768}

\textsuperscript{766} HISTORİE.COM, COMPROMİSE OF 1877. Available at: http://www.history.com/topics/us-presidents/compromise-of-1877
\textsuperscript{767} Since the Credit Mobilier was formed during Lincoln’s Administration, some historians credit Lincoln with this scandal.
\textsuperscript{768} KENNETH ACKERMAN, THE GOLD RİNG: JİM FİSK, JAY GOULD AND BLACK FRİDAY 1869, 91. (DeCampo Press, January 10, 2005)
Starting in September, 1869, Gould and Fisk began buying gold. When the price quickly rose from $37 to $141 per ounce, Grant asked his Treasury Secretary George Boutwell, to investigate.\footnote{JEAN EDWARD SMITH, GRANT 481-490 (New York: Simon and Schuster, 2001).} Corbin wrote to Grant urging him to withhold gold sales. By this time Gould and Fisk jointly owned some $50 to $60 million in gold. Grant, at Boutwell’s urging, began selling gold on the open market again. Grant did not reply directly to Corbin’s letter, but Julia wrote a letter to Corbin’s wife urging her to stop speculating in gold.\footnote{ULYSSES S. GRANT 96-98 (Josiah Bunting III & A.M. Schlesinger Jr., eds., Times Books, Henry Holt and Company, LLC, 2001).}

Gould learned about Julia’s letter and Grant’s suspicions, so he began selling gold, while still purchasing small amounts to avoid suspicion. Gould never informed Fisk of Grant’s suspicions, so Fisk kept buying gold.\footnote{Id.} By September 23, 1869, the price of gold peaked at $160 per ounce. In order to foil the scheme, Boutwell released $4 million in gold to the market and purchased $4 million in government bonds.\footnote{SMITH, supra note 769 at 481-490.} The market crashed and investors, including Grant’s private secretary, were ruined. The economy tanked, and the prices of stock and agricultural products dipped. Thousands of farmers were ruined.\footnote{Id., at 481-490.}

Another scandal involved an organized network of (mostly Republican) politicians, government revenue agents, and whiskey distillers and distributors intent on bilking the government of millions in tax revenues, known as The Whiskey Ring. The Ring began in St. Louis but quickly spread to other cities.\footnote{FONER, supra note 699 at 486.}
Treasury Secretary Benjamin Bristow broke the Ring in 1875, and several high-ranking politicians, including Grant’s personal Secretary Orville Babcock and his personal friend General John McDonald were implicated. Grant refused to believe the allegations against his friend, and he planned to travel to St. Louis to testify at Babcock’s trial. More pressing duties kept Grant in Washington, but he signed an affidavit in support of Babcock, who was eventually acquitted of the charges.\textsuperscript{775}

The Trading Post Scandal erupted soon after the Whiskey Ring trials concluded. Early in Grant’s administration, War Secretary William W. Belknap convinced Congress to authorize his department to award trading post contracts for the posts around the country who traded with the Native Americans. Belknap was accused of accepting kickbacks from the government-appointed Indian trader at Ft. Sill, Oklahoma, Caleb P. Marsh, a personal friend of Belknap’s wife.\textsuperscript{776}

Marsh testified before a House committee that both Belknap and his wife accepted bribes in return for the trading post concession at Ft. Sill. Lt. Colonel George Custer later gave testimony before the same committee that supported Marsh’s allegations,\textsuperscript{777} incurring Grant’s wrath in the process. Belknap resigned to avoid impeachment by the House.\textsuperscript{778}

\textsuperscript{775} FONER, supra note 699 at 566. See, also, RALPH KIRSCHNER, THE CLASS OF 1861: CUSTER, AMES, AND THEIR CLASSMATES AFTER WEST POINT 132-135 (Carbondale: Southern Illinois University Press, 1999).  
\textsuperscript{776} Id.  
\textsuperscript{778} FONER, supra note 699 at 566.
The Credit Mobilier Scandal actually had its origins in the Lincoln administration. In 1864 the government chartered the Union Pacific Railroad and tasked that agency with building the Transcontinental Railroad. Certain railroad officials, including Thomas C. Durant, created a sham corporation, the Credit Mobilier, to give the impression that the Railroad had hired an independent company to be the primary construction contractor. The actual purpose of establishing a separate company was to shield the Railroad’s officials from personal liability.

Because of wartime needs, construction on the railroad was nearly at a standstill. In 1865, Lincoln asked Congressman Oakes Ames of Massachusetts to take control of the Union Pacific.779 Ames didn’t want Congress to discover that the Credit Mobilier was a sham corporation, so he began selling shares to influential members of Congress, including Bingham, at a price below market value. When Bingham sold his shares back to Ames the next year, he realized a profit of $6500.780 A House investigating committee cleared Bingham of any wrongdoing, but also recommended that Ames be expelled from that body.781

Other party leaders, including Vice-President Schuyler Colfax and Ohio Congressman James Garfield were also named in the scandal.782 Garfield

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780 MAGLIOCCA, supra note 661 at 165. See, also, New York Herald, February 19, 1873, claiming that Bingham realized a profit in excess of $10,000 on the sale of his shares.

781 MAGLIOCCA, supra note 661 at 166.

782 Kern & Wilson, supra note 161 at 244.
emerged from the scandal relatively unscathed, and was elected President in 1880. Colfax was not nominated for another term as Vice-President; he was replaced on the ticket by Henry Wilson, who was also implicated.

Finally, on the last day of its session, the 42nd Congress enacted a bill that would double the salary of the President and Supreme Court justices, but also included was a provision to increase the salaries of members of Congress by 50%. After a public outcry, the next Congress quickly repealed this “Salary Grab” law.

D. The Panic of 1873

The Panic of 1873 was the largest economic downturn in America’s history, lasting from October 1873 to March 1879. The seeds of this panic were sewn during the Civil War, when the United States released paper greenbacks into circulation in order to fuel the Union war machine. A greenback is basically a promissory note, redeemable in gold or silver. Adding fuel to the fire was a decision by several European countries to end the use of silver as currency.

When Germany put the deutschmark on the gold standard in 1871, a worldwide glut of silver was the result, meaning less value per ounce. For countries like the United States, which backed its currency with gold and silver, it

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783 HISTORY.COM, JAMES A. GARFIELD-U.S. PRESIDENTS-. Available at: http://www.history.com/topics/us-presidents/james-a-garfield
784 THE EXPULSION CASE OF JAMES W. PATTERSON OF NEW HAMPSHIRE (1873) (Credit Mobilier Scandal. U.S. Senate Historical Office. Available at: http://www.senate.gov/artandhistory/history/common/expulsion_cases/064JamesPatterson_expulsion.htm
786 MAGLIOCCA, supra note 661 at 166.
was possible to exchange devalued silver for precious gold, and devaluing the relative value of the U.S. dollar. This deflation caused a ripple effect throughout countries that still used silver and gold to back their currency.\textsuperscript{787}

Pressured to follow Germany’s lead, Congress passed the Coinage Act of 1873, which set the country on the road to the gold standard. This Act ended the government’s purchase of silver at market value and ended the minting of the silver dollar. Western silver producing states were outraged by the Act. Senator William Stewart of Nevada wrote the following:

\begin{quote}
I am persuaded history will write (the Act of 1873) down as the greatest legislative crime in the most stupendous conspiracy against the welfare of the people of the United States and of Europe which this or any other age has witnessed.\textsuperscript{788}
\end{quote}

The immediate effect of this act was to decrease the supply of money available, which was limited by the amount of gold held by the Treasury. Investors’ access to currency and credit shrank and interest rates skyrocketed.

The banking industry was one of the first to notice the change. The investment bank owned by Jay Gould & Co. was one of the biggest investors in the Northern Pacific Railroad. The railroad would receive huge land grants from the federal government for every mile of track they built. The railroad would then use the land grants as collateral for new loans. Less available currency made it difficult for private investors to buy up the railroad lands, making less money available to the railroads to pay its debts.

\textsuperscript{787} TEACHING HISTORY.ORG: PANIC OF 1873. Available at: \url{http://teachinghistory.org/history-content/beyond-the-textbook/24579}

\textsuperscript{788} MILTON FRIEDMAN, THE CRIME OF 1873. Available at: \url{file:///C:/Users/tminahan/Downloads/E-89-12.pdf}
Unable to pay its debts, the Cooke Company filed for bankruptcy protection in September 1873. The stock markets, investment houses and banks, and railroads and other industries felt the pinch. Thousands of American companies defaulted on their loans, 9 of every 10 railroad companies folded, and wages fell by up to 25%. Jobs disappeared, the price of agricultural products dropped, and Grant had no solution.

The Panic, combined with the Grant administration scandals discussed supra, cooled the ardor of most northerners towards Reconstruction. Grant and the Republicans were blamed for the crisis, but the root causes went well beyond the Grant administration.

E. Revival of the Democrats

During the course of the Civil War, the Democratic Party split into two factions, the War Democrats, who supported the Union and Lincoln’s policies, and the Peace Democrats or Copperheads, who opposed the War. After the nominal head of the party, Senator Stephen A. Douglas, died in June 1861, the War Democrats were without a national leader. In the meantime, the Copperheads gained strength. The story of one of their national leaders, Congressman Clement Vallandigham, is discussed supra.

Nationally, the Democrats made gains in the 1862 elections, an increase of 34 members in the House, the legislatures of Indiana and Illinois, the New York

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789 Teaching History, supra note 787.
790 Kern & Wilson, supra note 161 at 245.
791 Teaching History, supra note 787.
792 McPherson, supra note 639 at 274-275.
governor, and the governor and legislature of New Jersey. Historian James McPherson considered it fortuitous that the elections in Pennsylvania and Ohio were held in odd-numbered years, and that the Republican governors in Indiana and Illinois were elected to four-year terms in 1860, or these offices may have gone to the Democrats that year as well.

Conversely, most of the Democratic gains were in the six lower-North states from New York to Illinois, and the margins in these states was very small, including just 6,000 votes in Ohio. The absence of soldiers at the front could have easily explained away the Democratic gains. In addition, the Republicans retained the governor's mansion in seventeen of the nineteen northern states, as well as sixteen of the state legislatures. Republicans gained five seats in the U.S. Senate and had a 25 vote majority in the House.

By 1864 the Republicans were in trouble. Two of the main reasons were the lack of success on the battlefield and the impression that the War was being fought for abolition, not reunification. In an attempt to satisfy both the Peace Democrats and the War Democrats, the party nominated disgraced General George McClellan for President and Congressman George Pendleton, an Ohio Copperhead and Vallandigham supporter, for Vice-President on a peace platform.

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793 Id., at 561.
794 Id., at 561.
795 Id., at 561-562.
796 Id., at 561.
797 Id., at 771-772. This information is discussed in more detail in Chapter 6, supra.
Lincoln expected to be beaten by McClellan. If Lincoln was defeated, he planned to cooperate with the President-elect, and to try to save the Union in the months between the election in November and the inauguration the following March.\textsuperscript{798}

As it turned out, Lincoln and his supporters were worried needlessly. Admiral Farragut’s capture of Mobile Bay in August and General Sherman’s capture of Atlanta in September reenergized the Republicans.\textsuperscript{799} Later that month the Union forces were buoyed by General Phil Sheridan’s victory over Confederate General Jubal Early at Winchester, Virginia.\textsuperscript{800} Additionally, General McClellan had to run a gauntlet between the Peace Democrats and the War Democrats, and in the end he succeeded in pleasing neither faction.\textsuperscript{801}

When the votes were counted, Lincoln had prevailed by half a million votes and by an electoral count of 212-21. As in 1860, Lincoln won big majorities in the states of the upper North, including New England. Democrats were strongest in the southern Midwest. Republicans won all of the states except Kentucky, Delaware (both slaveholding states) and New Jersey (McClellan’s home state). As discussed supra, Republicans won a “supermajority” (a large enough majority to propose Constitutional Amendments and override Presidential vetoes) in Congress that year.\textsuperscript{802}

\begin{flushright}
\textsuperscript{798} Id., at 561.
\textsuperscript{799} GOODWIN, supra note 369 at 652-657.
\textsuperscript{800} MCPHERSON, supra note 639 at 776-777.
\textsuperscript{801} GOODWIN, supra note 369 at 652-657.
\textsuperscript{802} MCPHERSON, supra note 639 at 804-805.
\end{flushright}
By 1866, the election had become a referendum on Reconstruction. Johnson campaigned against the Radical Republicans over whether the policy should be lenient or harsh. Bingham used his reelection campaign to stump for ratification of the 14th Amendment.\textsuperscript{803} Grant, believing that hostilities were about to resume, removed the arms from southern arsenals and had them quietly relocated in northern warehouses.\textsuperscript{804}

Republicans won in another landslide, winning every state but Delaware, Kentucky and Maryland. Republicans also retained their “supermajority” in Congress for another two years. Republicans interpreted this landslide as an endorsement of Reconstruction and the 14th Amendment, while Democrats saw the defeat of several African-American suffrage issues as a repudiation of Radical Reconstruction policies.\textsuperscript{805}

By 1868, things had changed. Radicals hoped that Grant’s nomination would help them keep their Congressional majority, but the failed impeachment bid cast them in a bad light. The party platform endorsed Radical Reconstruction, but left the issue of African-American suffrage to the Northern states, while demanding suffrage in the former Confederate states.\textsuperscript{806}

The Radicals retained control of Congress by a wide margin, but Grant won by only 300,000 votes nationwide and Bingham won his seat by only 416

\textsuperscript{803} MAGLIOCCA, supra note 661 at 124-127.

\textsuperscript{804} JOSEPH WHEELEN, TERRIBLE SWIFT SWORD: THE LIFE OF GENERAL PHILLIP H. SHERIDAN 221-222 (DeCappo Press, 2012).

\textsuperscript{805} WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION 1869-1879, 9-10 (Baton Rouge: Louisiana State University Press, 1979).

\textsuperscript{806} Id. at 12-13.
votes. By 1870, Republicans still retained control of Congress, but their “supermajority” was gone. By this time, however, actions of the Ku Klux Klan and other paramilitary groups threatened to destroy the Republican Party in the Southern States. Historians coined the term “Redemption” to describe the process where white Southern Democrats regained control of the Southern state governments. Redemption ushered in an era where the interests of the planter aristocracy and the business interests were supported over the interests of small farmers and laborers, and where the government did little or nothing to promote the interests of the freedmen.

By 1872, the scandals discussed previously began to haunt the Grant administration. The liberal wing of the Republican Party, opposed to corruption, nominated Horace Greeley to oppose the President, and the Democrats soon nominated Greeley as well. Grant jettisoned the scandal-plagued Schuyler Colfax as Vice President and the party added Senator Henry Wilson of Massachusetts to the ticket. Southern freedmen only remembered Grant’s enthusiastic endorsement of the Fifteenth Amendment, and that was enough for them. Perhaps by riding Grant’s coattails, the Republicans gained over sixty

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807 MAGLIOCCA, supra note 61 at 154-155.
808 EGERTON, supra note 759 at 295.
809 NEW GEORGIA ENCYCLOPEDIA. CIVIL WAR AND RECONSTRUCTION: Available at: http://www.georgiaencyclopedia.org/articles/history-archaeology/redemption
810 EARL DUDLEY ROSS, THE LIBERAL REPUBLICAN MOVEMENT (1910). Available at: http://books.google.com/books?id=ZX2q-h-XYFcc&pg=PA202&dq=%22liberal+republicans%22+%22consent%22&lr=&num=100&as_brr=0&ei=su24SKSzAY32sgPo8pDFDg#v=onepage&q=%22liberal%20republicans%22%20%22consent%22&f=false
811 EGERTON, supra note 759 at 280.
seats in the House, but Bingham, a victim of Congressional redistricting, lost his seat in the primary. 812

As a practical matter, the Election of 1874 spelled the end of Reconstruction. Democrats, who opposed Radical Reconstruction and the Regular Army that carried out its policies, gained control of the House. Sixty-two incumbent Republicans were not re-elected and the large Republican majority in the House gave way to a 79-member Democratic majority. 813 Except for a short period (1881-83, 1889-91), the Democrats maintained control of the House for the next 20 years. Starting with intimidation and fraud, Southern Democrats and paramilitary groups like the Ku Klux Klan resorted to targeting leading African-Americans and Republicans in order to prevail at the ballot box. 814 Fatigue and indifference towards Reconstruction in the Northern States helped this shift in control. 815

Perhaps the death knell of Reconstruction was sounded when the lame-duck 43rd Congress passed the Civil Rights Act of 1875. 816 First proposed by Senator Charles Sumner (1811-1874) of Massachusetts in 1870, the bill was passed by Congress in February 1875 and signed by President Grant on March 1, 1875. 817 Sumner had long argued that since equality was now the law of the land, racial

812 MAGLIOCCA, supra note 661 at 164-165.
814 II THE CAMBRIDGE HISTORY OF LAW, supra note 6 at 334.
815 HYMAN, supra note 714 at 538.
816 18 Stat. 335-337.
817 Civil Rights Bill of 1875, supra note 813.
segregation was contrary to law. He intended to sweep away the last vestiges of segregation with one “all-encompassing” bill.\textsuperscript{818}

The Bill as written provided for equal access to “public accommodations” such as railroads, stagecoaches, steamboats, streetcars, hotels and theatres.\textsuperscript{819} The Bill also provided for equal entry into schools and land-grant colleges as well as the right to serve on juries.\textsuperscript{820} After much delay and debate, three versions of the Bill were introduced: the Senate Bill, with its provisions to desegregate and federally-fund common schools, the amended House version, which called for “separate but equal” public schools, and a last-minute version which deleted all references to education.\textsuperscript{821} The third version was eventually passed by both the House and Senate.\textsuperscript{822} This “watered-down” version accomplished very little, and was struck down by the U.S. Supreme Court in 1883.\textsuperscript{823}

\textbf{F. The Election of 1876.}

The Election of 1876 served to drive the final nail into the casket of Reconstruction. Democrats, sensing their first victory in a presidential election since 1856, nominated the reform Governor of New York, Samuel J. Tilden. Although primarily responsible for the overthrow of the “Boss Tweed” corruption ring in New York City, Tilden was wealthy himself and had the backing of the

\begin{footnote}
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\textsuperscript{818} \textit{Gillette, supra} note 805 at 196-197.
\textsuperscript{819} \textit{Id.}, at 196-197.
\textsuperscript{820} \textit{Id.}, at 196-197.
\textsuperscript{821} \textit{Civil Rights Bill of 1875, supra} note 813.
\textsuperscript{822} \textit{Civil Rights Bill of 1875, supra} note 813.
\textsuperscript{823} \textit{Foner, supra} note 699 at 587.
\end{footnote}
country’s leading industrialists, including Jay Gould and Jim Fisk, lately of the Gold Scandal. 824

Former House Speaker James G. Blaine was the Republicans’ first choice as nominee, but a series of scandals and accusations of influence-peddling marred his candidacy. When Blaine failed to gain a majority of the delegates in the early convention balloting, the party again turned towards the moderate Midwest and nominated Ohio Governor and Union Major General Rutherford B. Hayes. Hayes, a Harvard law graduate, was the first choice of very few of the delegates; however, in the end he was the one candidate who was acceptable to all. 825 Hayes was a former Congressman and had voted for the 14th Amendment, but he spent most of the Reconstruction years in Ohio, and thus he escaped most of the taint of Radical Reconstruction and the accompanying corruption. 826

The election was held on November 7, 1876. The early election returns foretold a Tilden victory. 827 Tilden led in popular votes by some 250,000 and garnered 184 electoral votes, one short of a majority, to Hayes’ 165. Tilden carried New York and most of the Southern states while Hayes prevailed in New England, the Midwest, and the West. Twenty electoral votes, from the still-Republican controlled States of Louisiana, Florida, and South Carolina, plus one from Oregon, were disputed. 828


825 FONER, supra note 699 at 567. REHNQUIST, supra note 824 at 54-55.

826 GILLETTE, supra note 805 at 303-304.

827 REHNQUIST, supra note 824 at 95-96.

828 FONER, supra note 699 at 575-576.
Republican election boards in the three Southern States, citing fraud and voter intimidation, invalidated enough Democratic votes to allow Hayes to prevail in all three states. Hayes also ended up with all three of Oregon’s electoral votes. By contrast, South Carolina and Louisiana established rival administrations, one Democratic and one Republican, while Florida awarded the gubernatorial contest to the Democratic candidate while certifying Hayes’ victory.\textsuperscript{829}

Article II, Section 1 of the U.S. Constitution provides as follows:

\begin{quote}
The President of the Senate shall, in the presence of the Senate and the House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President…\textsuperscript{830}
\end{quote}

Republican leaders determined that this clause meant the President Pro Tempore of the Senate, Republican Senator Thomas W. Ferry of Michigan,\textsuperscript{831} would determine which electors were legitimate, and thus which electoral votes to count, while the Democrats, who controlled the House, determined that Congress should have a role in the process. Unfortunately, the Constitution did not address this dilemma. Grant, claiming to be neutral, stationed troops around the three Southern capitals to prop up their Republican legislatures, and he moved more troops to Washington, D.C. to prevent unrest in the capital.\textsuperscript{832}

In response to the crisis, Congress created the Electoral Commission. A panel of fifteen members, five each from the Senate and the House, as well as five Supreme Court justices, would make up the Commission. The Commission

\textsuperscript{829} Id., at 575-576.
\textsuperscript{830} U.S. CONST., art. II, § 1.
\textsuperscript{831} FONER, supra note 699 at 576. REHNQUIST, supra note 824 at 113.
\textsuperscript{832} GILLETTE, supra note 805 at 325.
was initially intended to consist of seven Republicans and seven Democrats, with Justice David Davis, a Republican with close ties to the Democrats and liberals, to be the deciding vote. Before the commission met, the Illinois legislature selected Davis as their next Senator, and he promptly resigned from the commission.\footnote{Foner, supra note 699 at 580.} Three members of the commission (20\% of the total members) hailed from the Ohio, Senator Allen G. Thurman (D), and Congressmen James A. Garfield (R) and Henry B. Payne (R).\footnote{Renoquist, supra note 824 at 163.}

Davis was quickly replaced by Justice Joseph P. Bradley, a Republican, and in a series of 8-7 party line votes, the Commission awarded all 20 of the disputed electors, and the election, to Hayes. Tilden’s supporters, unhappy with the outcome, threatened to obstruct the electoral vote count in the House and prevent a March 4\textsuperscript{th} inauguration.\footnote{Foner, supra note 699 at 580.} Opponents were already referring to Hayes as “Rutherfraud” and “His Fraudulency.”\footnote{Kern & Wilson, supra note 161 at 264-265.}

As part of the informal Compromise of 1877, Southern Democrats agreed to support Hayes for President, and Hayes agreed to withdraw the remaining federal troops from the South. Hayes also agreed to appoint a Southerner to his cabinet; David M. Key from Tennessee was soon appointed as Postmaster General. Hayes also promised to support a Pacific Railroad, with its eastern terminus in Texas.\footnote{Foner, supra note 699 at 580. Knepper, supra note 27 at 254-255.} In this way, the era of the Solid South, where “the base of
the Democratic Party was the white, voting South,” began and continued until after Lyndon Johnson signed the Voting Rights Act of 1965 into law.\textsuperscript{838}

G. The Reconstruction Era in Ohio

In his book The Impact of the Civil War and Reconstruction on Arkansas,\textsuperscript{839} author Carl Moneyhon describes the level of devastation in that state at the end of the War. While some property was either stolen or seized by federal authorities, other property was put to the torch or otherwise wasted. The armies had confiscated all of the horses and other animals and the government was controlled by a completely different set of people.

County tax records showed that the number of horses and mares decreased by 50% from 1860 levels, while the number of cattle decreased by 43% and the number of mules, essential to an agrarian economy, decreased by 39%. The value of jewelry dropped by over 60%. However, the greatest property loss came from emancipation.\textsuperscript{840}

The tax records from 1860 showed Arkansas with 60,799 slaves with a value of over $45 million, by far the most valuable property in the state. Over 110,000 slaves were actually counted in the 1860 census, and using the average value above, these were worth over $100 million. The accompanying loss of labor also caused land values to decline by another $34 million.\textsuperscript{841}

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\textsuperscript{838} PBS, \textsc{The American Experience: Freedom Riders}. Available at: http://www.pbs.org/wgbh/amERICANEXPERIENCE/freedomriders/issues/the-solid-south
\textsuperscript{839} CARL H. MONEYHON, \textsc{The Impact of the Civil War and Reconstruction on Arkansas 175-189} (Fayetteville, The University of Arkansas Press, 2002).
\textsuperscript{840} \textit{Id.} at 176.
\textsuperscript{841} \textit{Id.}
\end{flushright}
Such was not the case in Ohio. Even though over 35,000 Ohio soldiers lost their lives in the War, Ohio’s overall population actually increased by almost 14% between 1860 and 1870. By 1865, most of the state had been cleared for farming, except for the Great Black Swamp area of Northwest Ohio.\(^{842}\) Since agriculture in Ohio was based on a free market economy, emancipation did not cause the massive property losses and labor shortages that occurred in the Southern states. Unlike the Southern states, where sharecropping replaced the antebellum plantation economy, in Ohio most of the farmers worked their own land.\(^{843}\)

The Morrill Act, passed in 1862, granted federal land to the states for the purpose of establishing colleges to teach agriculture and mechanical arts. The General Assembly accepted the federal allocation, and in 1870 Ohio chartered the Ohio Mechanical and Agricultural College, to be located on the Neil farm north of Columbus. In 1878 the college was renamed as the Ohio State University.\(^{844}\)

Cincinnati was the center of Ohio manufacturing before the War, and it became a major port for transporting men and materials to the Union armies farther south. By the end of the War the steel industry was getting started. Cleveland mills were smelting steel using Lake Superior iron ore, Pennsylvania coal and Ohio limestone.\(^{845}\) In 1870 Dr. B.F. Goodrich relocated his rubber factory to Akron, in an area where the automobile industry would later get its

\(^{842}\) KNEPPER, supra note 27 at 276.  
\(^{843}\) Id., at 276.  
\(^{844}\) Id., at 277.  
\(^{845}\) Id., at 279.
start. The oil industry set up its early refineries in the Cleveland area, midway between the oil fields in western Pennsylvania and those in northwest Ohio. By the 1880's Toledo had become a major port and refining center, and Findlay became the center of a natural gas boom. Edwin Libbey relocated his glass factory to Toledo, which soon became a major glass producing center.

At first glance, it might seem like the Republicans controlled Ohio politics during this era. Ohio elected the first Republican governor, Salmon P. Chase in 1856, and except for 1874-76, Republican or Union party governors controlled the Governor's mansion throughout Reconstruction. More importantly, Republicans dominated Ohio's delegations to the 39th and the 40th Congresses. Because of the exclusion of Southern Congressmen from the House, Ohio's delegation made up almost one-eighth of the Republican Congressional Caucus, and also one-eighth of the entire House.

By 1867, Ohioans had grown tired of the Radical agenda. Politicians promised that Reconstruction would end once the former Confederate states ratified the Fourteenth Amendment. When the Southern states rejected the Amendment, Reconstruction began anew, with far more stringent terms than

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846 Id., at 279.
847 Id., at 280.
848 Id., at 281.
849 NATIONAL GOVERNOR’S ASSOCIATION. OHIO: PAST GOVERNOR’S BIOS. Available at: http://www.nga.org/cms/home/governors/past-governors-bios/page_ohio_default.html?begin25341aeb-2c72-425f-902c-d68a3c60362c=25&end25341aeb-2c72-425f-902c-d68a3c60362c=49&pagesize25341aeb-2c72-425f-902c-d68a3c60362c=25
850 KERN & WILSON, supra note 161 at 234.
before. Ohioans then grudgingly lent their support to the new Congressional policy.\(^{851}\)

Ohio Republicans nominated Rutherford B. Hayes for Governor, and he prevailed by less than 3,000 votes statewide. However, a provision to remove the word “white” from the state constitution\(^{852}\) was defeated by 50,000 votes and Democrats won control of the General Assembly. The General Assembly quickly rescinded its earlier ratification of the 14\(^{th}\) Amendment\(^{853}\) and replaced Radical Republican Senator Benjamin Wade with Democrat Allen G. Thurman, who served until 1881.\(^{854}\)

H. A New Constitution?

In 1873, the Ohio Republicans were damaged by the Panic of 1873. As a result, former Peace Democrat William Allen was elected as Governor, and Democrats again gained control of the General Assembly.\(^{855}\) By this time most Ohioans had grown weary of Reconstruction and African-American rights, and economic issues, industrialization, and immigration became more important.\(^{856}\)

\(^{851}\) SAWREY, supra note 656 at 97-98.

\(^{852}\) Article V, Section 1 of Ohio’s 1851 Constitution provides: “Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the State one year next preceding the election, and of the county, township or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote in all elections.”

\(^{853}\) NELSON, supra note 656 at 59-60. Congress refused to recognize this action and the Amendment became part of the Constitution on July 28, 1868. \textit{Id.}

\(^{854}\) KNEPPER, supra note 27 at 250. Thurman served as one of the seven Democrats on the Electoral Commission, which selected Hayes as President in 1877. HARpwEEK. HAYES VS. TILDEN: THE ELECTORAL CONTROVERSY OF 1876-1877. Available at: http://elections.harpweek.com/09Ver2Controversy/Overview-3.htm

\(^{855}\) KERN & WILSON, supra note 161 at 245.

\(^{856}\) \textit{Id.}, at 245.
Ohio’s 1851 Constitution contained a provision to put a question before the voters every 20 years whether to hold a constitutional convention. By 1871, several groups with mostly unrelated interests endorsed a constitutional convention. By this time Ohio’s growing population caused a spike in legal issues, and Ohio courts were overwhelmed. The economy was changing from an economy based on agriculture to one based on industry, and women were demanding the right to vote. The issues discussed by the delegates included:

- The Court system, including the Supreme Court, which was four years behind on its docket;
- More legislative control over corporations, including railroads;
- Alcohol issues, both pro and con;
- Women’s suffrage.

The delegates assembled in Columbus in May 1873. The members included 50 Republicans, 46 Democrats and 9 Independents. The convention deliberated until August, then reconvened in Cincinnati in December, and adjourned in May, 1874.

The end product provided for extensive changes to the judiciary, including 10-year terms for Supreme Court justices as well as intermediate appellate Courts, called Circuit Courts, to hear appeals from Courts of Common Pleas. The alcohol issue was discussed, and the delegates decided to place this issue before the voters as a separate amendment.

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857 OHIO CONST., art. XVI, § 3
858 History of Ohio Law, supra note 42 at 60.
The Governor was granted the veto, subject to a 3/5 override by the General Assembly. Elections would be every two years instead of annually, and fixed salaries for legislators and county officials were adopted. The women’s suffrage issue failed to gain a majority of the delegates’ votes.  

Although the proposed Constitution had bipartisan political support, voters rejected it by a vote of 250,169 to 102,885. Temperance advocates turned out in high numbers to vote down the alcohol amendment. Most of these voters believed that the new constitution was connected with the alcohol amendment and defeated both.

I. Other Issues

During the conflict, the federal courts in Ohio dealt with issues such as the naval blockade, libel and revenue issues, and treason and confiscation cases, among others. Judge Leavitt dealt with five cases involving treason or disobedience of orders, including Ex parte Vallandigham. After the War’s end, the Court’s docket actually increased because of two major factors.

First, the Reconstruction Congress passed several bills including the Civil Rights Acts of 1866 and 1875, the Bankruptcy Act of 1867, the Habeas Corpus Act of 1867 and the Jurisdiction and Removal Act of 1875. This legislation served to shift power from the states to the federal government in
order to enforce federally-mandated rights, including civil and political rights for the freedmen.\textsuperscript{868} Second, the increasing levels of business and commerce in the post War years also served to significantly increase the Court’s docket.\textsuperscript{869}

Congressman Bingham, who Justice Hugo Black referred to as “the Madison of the Fourteenth Amendment,”\textsuperscript{870} like Douglas MacArthur’s old soldier, didn’t die, he just faded away. Bingham was reelected to his seat in 1868 and 1870, but by 1872 local forces had aligned against him. The Congressional redistricting occasioned by the census of 1870 moved Bingham’s base of power, Tuscarawas County to another district, and his home, Cadiz, was a political backwater. As a result, Bingham was defeated for reelection in the primary.\textsuperscript{871}

Before leaving office, Bingham was cleared of any wrongdoing in the Credit Mobilier Scandal, but his reputation was dealt a major blow when he voted for a retroactive Congressional pay raise that was quickly rescinded by the next Congress.\textsuperscript{872} However, in June 1873 President Grant nominated Bingham to serve as the first American minister plenipotentiary to Japan, and he served in this role for the next twelve years, effectively removing him from the national political scene.\textsuperscript{873} It is easy to speculate that the Supreme Court’s interpretation of the Fourteenth Amendment in cases such as the Slaughterhouse Cases,\textsuperscript{874}

\textsuperscript{868} 18 Stat. 470, 1875.  
\textsuperscript{869} 18 Stat. 470, 1875.  
\textsuperscript{870} Richard L. Aynes. The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment. U. 36 Akron L. Rev. 589, 590.  
\textsuperscript{871} MAGLIOCCA, supra note 661 at 164-165.  
\textsuperscript{872} Id., at 166.  
\textsuperscript{873} Id., at 167.  
\textsuperscript{874} 83 U.S. 36 (1873). (Privileges and Immunities clause only forbids the states from withholding the privileges and immunities of American citizenship, not state citizenship).
United States v Cruikshank,\textsuperscript{875} or the Civil Rights Cases\textsuperscript{876} might have been different had Bingham been present to lend his voice to the debate.

Summary

The 39\textsuperscript{th} Congress played a major role in the Reconstruction Era by using the Fourteenth Amendment to place protection of individual rights in the hands of the federal government, to establish a foundation to eliminate future conflict based on civil war issues, and to reunite the Union and rebel states. Ohio's contribution came from Bingham and the 39\textsuperscript{th} Congress as part of the Committee of Fifteen and President Grant. Because of need for the Army on the frontier, scandals, and the economic Panic of 1873 among other things, Grant's Administration still managed to bring peace between the Legislative and Executive branches and saw the ratification of the 15\textsuperscript{th} Amendment.

The effects of Reconstruction on Ohio were not as devastating as other areas but still meaningful, 35,000 soldiers lost their lives. Most of Ohio was farm land but was transitioning to an industry based economy. In the years immediately after the War, Ohio became a manufacturing hub of steel, iron ore, limestone, rubber, natural gas, glass and oil. But, only about 36,700 African-Americans resided in Ohio in 1860, and presumably most of these had jobs and homes. The end of the War did not result in thousands of homeless and jobless

\textsuperscript{875} 92 U.S. 542 (1875). (Due process and equal protection clauses apply only to state action, not the actions of private citizens).
\textsuperscript{876} 109 U.S. 3 (1883). (Discrimination by private organizations or individuals does not offend the Constitution).
former slaves, as in the Southern states. 877 Finally, a new constitution was proposed to work on issues with the Court system, legislative control over corporations, alcohol issues, and women’s suffrage. This Constitution was overwhelmingly rejected. All in all, Ohio saw many changes during the Reconstruction Era, but was able to sustain growth without the same economic issues most southern states had to deal with.

877 Ohio History Central, African Americans. Available at: http://www.ohiohistorycentral.org/w/African_Americans
CHAPTER 9:  

OBSERVATIONS AND CONCLUSIONS

Reconstruction upon a loyal basis is a success and though the Democracy and the rebels may gnash their teeth, the great majority of the people of the country will rejoice that the vexed question of reconstruction will soon be among the things of the past.

--Marion (Ohio) Independent, 1868

I. Lessons From Reconstruction

Regardless of whether the Reconstruction Era in itself was a success or a failure, a combination of factors, including a temporary Congressional Republican “supermajority,” the requirement that the former Confederate states ratify the Fourteenth and Fifteenth Amendments to regain full status in the Union, and a group of right-minded representatives like Bingham, ensured that the Fourteenth and Fifteenth Amendments would be approved and ratified. Opposed by the Radicals, who demanded a more punitive policy, and President Johnson, who thought no reconstruction policy was necessary, Bingham and his colleagues crafted these two Amendments in a way to ensure ratification by states that had grown weary of war and Reconstruction policies, like Ohio.\(^{878}\)

An essential element of the Amendments was the ability to enforce their provisions. Bingham had argued for years that one of the failings of the original Bill of Rights was that it lacked the ability to enforce its provisions. With the two Amendments, Bingham and the other proponents ensured that the appropriate enabling clauses were included in the text of the Amendments. These clauses

\(^{878}\) Both Amendments were somewhat limited in scope. The Fourteenth did not grant suffrage to the freedmen. The Fifteenth did not grant anything, it just prohibited voter discrimination based on race, color or previous condition of servitude.
would be an essential element of the “Second Reconstruction” in the next century.

Of the authors relied upon heavily in this work, Foner believed that Reconstruction was a failure. Edwards and Hyman believed that the lofty goals of Reconstruction were left largely unfinished, or unfulfilled. Kern and Wilson call Reconstruction “a significant episode in Ohio and National history.”\textsuperscript{879} Knepper called Reconstruction a watershed in Ohio and National politics, with uneven pace and mixed results.\textsuperscript{880} DuBois, by contrast, highlighted the accomplishments, rather than the failures, of Reconstruction.\textsuperscript{881} As for Sawrey, the title of his work (Dubious Victory) says it all.\textsuperscript{882} Former Indiana Governor Oliver Morton opined in 1877 that if Reconstruction was a failure, it was because it had been “resisted by armed and murderous organizations, by terrorism and proscription the most wicked and cruel of the age.”\textsuperscript{883} However, once loyal governments were installed in the seceding states, the slaves freed, and some nominal rights secured for the freedmen, the goals of Reconstruction for moderate states like Ohio were met.

Hyman even went so far as to speculate that no great change in the relationships of the citizens to their government occurred during this era. Hyman quoted former Wisconsin Senator James B. Doolittle, who in 1879 estimated that 90 percent of a citizen's contact with the government was with the states and their political subdivisions, Only those few who travelled overseas, paid federal

\textsuperscript{879} KERN \& WILSON, supra note 161 at 245-246.
\textsuperscript{880} KNEPPER, supra note 27 at 251-252.
\textsuperscript{881} Egerton, supra note 759 at 337-338.
\textsuperscript{882} SAWREY, supra note 656 at 656.
\textsuperscript{883} EGERTON, supra note 759 at 347-348.
income taxes, or held national offices were touched by the national government, as was the case before the War.

Professor Bruce Ackerman argues that today’s Constitution is the product of three great constitutional moments; the Founding, Reconstruction, and the New Deal. Ackerman then calls for constitutional interpretation that “synthesizes” the founder’s intent at each of these moments. Amar concurs with Ackerman’s first two moments; he calls it the “Founding–Reconstruction” synthesis, but is less enthusiastic about the third moment, the New Deal. Amar suggests that perhaps the progressive amendments, ratified in the 1910s, served to enlarge federal power at the expense of the states in a more profound way than the unwritten changes which occurred during the 1930s.

II. Ohio and Reconstruction

The State of Ohio was a primary component of this constitutional revolution. Ohio’s soldiers and military leaders played a primary role in winning the War, and its political leaders played a leading role in securing the peace. The Reconstruction policies of this era were designed to ensure the support of moderate states, like Ohio.

In the previous seven chapters, we have presented a thumbnail sketch of Ohio’s history, laws, politics and culture. In the 70 years preceding the Civil War,

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884 Ackerman is Sterling Professor of Law and Political Science at Yale.
885 The 16th Amendment, ratified February 3, 1913, authorized a national income tax. The 17th Amendment, ratified April 8, 1913, mandated popular election of US senators, and the 19th Amendment, ratified August 18, 1920, mandated women’s suffrage, even in state elections.
886 One could also argue that the Court’s opinion in West Coast Hotel v. Parrish, 300 U.S. 379 (1937) called “the Court’s surrender to the New Deal,” and which overturned 30 years of constitutional jurisprudence centered around the “Liberty of Contract” analysis first proposed in Lochner v. New York, 198 U.S. 45 (1905), was the pivotal moment to which Ackerman alluded.
Ohio was transformed from a wilderness populated by a few Native Americans, into a vibrant and bustling state with a population of 2 million citizens, a developed agriculture, and a developing industrial base.

Ohioans have always been an independent group. When it came to removing the threat from indigenous Native-Americans, or building roads, canals, railroads and other infrastructure, Ohioans have generally agreed with national policies. Ohioans had enthusiastically supported the War, and almost as enthusiastically supported emancipation and the early goals of (Presidential) Reconstruction.

On the other hand, Ohioans had on more than one occasion demonstrated a contentious streak. Ohio’s first constitution stressed local control. Its legislature held almost all of the governmental power, and at various times it declared war on the other branches. Ohio helped pioneer the concept of Nullification that led to the Civil War less than four decades later. Ohio flexed its political muscles to wrest the Toledo Strip away from Michigan, and it placed all sorts of procedural obstacles in the way of enforcing the Fugitive Slave Act.

Ohioans considered the Fourteenth Amendment an outline of the final terms of the peace treaty to end the Civil War. Congress directed the first four sections of the Fourteenth Amendment specifically towards the former Confederate states, and the fifth section empowered Congress to enforce the other four. However, Bingham and the other authors must have realized that this Amendment would profoundly affect their states as well. Because of these concerns, because of Ohio’s prominence in the Union, and because Ohio then,
as now, was a political “swing” state, the Republican Congress crafted the Amendment in moderate terms with states like Ohio in mind.

Southern states almost immediately rejected the Fourteenth Amendment, supposedly to get a “better deal” if Democrats took over the Presidency and Congress in 1868. Ohioans did not take rejection lightly, and they lent their support to Radical Reconstruction. Their enthusiasm waned quickly, and by the time Ulysses S. Grant took office in March, 1869, most Ohioans considered Reconstruction to be at an end. By this time, African-American suffrage was a vote killer and the Republicans tried to avoid this issue at all costs. The General Assembly ratified the Fifteenth Amendment the next year, only because Independents joined Republicans in voting for the measure. The scandals that occurred during the Grant administration and the Panic of 1873 diverted Ohioans attention away from the issue of Reconstruction, and by the time Rutherford B. Hayes took office in 1877, Reconstruction, as a practical matter, was long gone.

III. Transformation

In the years before the War, courts interpreted the first ten amendments in a way that emphasized protecting states’ rights. Amar cites two cases that affirmed Barron in support of his argument. In Fox v. Ohio\textsuperscript{887} the Court addressed an Ohio law forbidding the passing of counterfeit coin. In its’ opinion, the Court upheld the statute as not repugnant to the Constitution, but the Court further held that “the prohibitions contained in the amendments to the Constitution were intended to be restrictions upon the federal government, and not upon the

\textsuperscript{887} Fox v. State of Ohio, 46 U.S. 410 (1847).
authority of the states.”\textsuperscript{888} In *Withers v. Buckley*,\textsuperscript{889} the Court held that “the Fifth Amendment must be understood as restraining the power of the general government, not as applicable to the states.”\textsuperscript{890} Amar contrasted the first ten amendments, which originally served to protect states’ rights, with state bills of rights (like Ohio’s) designed to protect the rights of citizens.\textsuperscript{891}

Bingham is clearly the protagonist/hero in Amar’s tale. After all, Madison proposed a “No State shall…” amendment in the 1790s and failed, whereas Bingham proposed his “No State shall” amendment in the 1860s and succeeded. Thanks to Bingham, the first ten (or eight or nine) Amendments are set apart from the rest. Finally, Bingham began referring to the first ten amendments as a “Bill of Rights” in the 1850s, and in the next decade he set forth to make it into one. His efforts also helped to remove the taint of slavery from the original document.\textsuperscript{892}

Incorporation, Amar writes, allowed federal judges to strike state and local laws. However, the Courts did not begin the process of First Amendment incorporation until the 1920s\textsuperscript{893} and did not strike down an act of Congress in this area until 1965.\textsuperscript{894} It became a simple task to incorporate First Amendment rights (speech, religion, assembly and press) against the States via the Fourteenth

\begin{footnotes}
\item[888] *Id.* at 411.
\item[889] 61 U.S. 84 (1857).
\item[890] *Id.* at 91.
\item[891] Amar, *supra* note 14 at 286.
\item[894] Lamont v. Postmaster General, 381 U.S. 301 (1965).
\end{footnotes}
Federal judges, rather than local juries, became the guardians of free speech.

Amar writes that the original intent of the Second Amendment was to provide for state – organized militias in lieu of a standing federal army. Bearing arms at that time was a political right equivalent to voting, jury service or holding office. Reconstruction redefined bearing arms as a core civil right. The purpose of bearing arms was now to protect one’s home and not because the owner served in the militia. Bearing arms thus became an individual, rather than a collective right.

The Third Amendment was not a good candidate for mechanical incorporation. Its original purpose reflected the Founders’ disdain for standing armies. By Reconstruction, this disdain had largely faded. The Third Amendment became the foundation for a right of privacy in the home that the Supreme Court had formulated in *Griswold v. Connecticut*. By contrast, the Fourth Amendment had from the beginning protected private persons, and their private papers in their private homes.

Reconstructing the Fifth Amendment was easy; Bingham wrote the first section of the 14th Amendment specifically to overrule *Barron*, a property rights case. Even before the war, judges in nearly every state enforced a just compensation rule if one existed in the state Constitution or inferred it if such a

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895 Amar, supra note 14 at 234.
896 Id., at 242.
897 Id., at 258-259.
898 381 U.S. 479 (1965).
899 Amar, supra note 14 at 267.
clause did not exist.\textsuperscript{900} This theme continued after the war, but was now sanctioned by federal legislation.

The Founders had considered the jury—grand, petit, and civil, as the foundation of local control. Juries could refuse to enforce acts they consider unconstitutional, and they could easily decide cases in favor of local litigants and against the “Big Brother” that was the federal government.\textsuperscript{901} Even before the war, abolitionist lawyers like Salmon P. Chase argued that a free black woman was entitled to a trial by jury before freedom could be taken away. However, the Fugitive Slave Act of 1850 laid the issue of a fugitive’s freedom in the hands of a commissioner instead of a jury.\textsuperscript{902}

The Reconstruction Congress noted the paradox in this right. Would an African-American criminal defendant benefit from a local jury in which all African-Americans were excluded? Similarly, would African-Americans in the South benefit if an all-white grand jury refused to indict whites who terrorized them?

Eventually it became clear that southern jury review and jury nullification could be countered by reconstructing juries that impaneled both African-Americans and white citizens. Removal of cases to the federal court system helped accomplish this purpose.\textsuperscript{903} Once the 15\textsuperscript{th} Amendment was ratified, African-Americans would have the right to vote not only for representatives, but also in juries and in legislatures.

\textsuperscript{900} Id., at 269.
\textsuperscript{901} Id., at 98, 103-104.
\textsuperscript{902} Id., at 270.
\textsuperscript{903} Id., at 272-273.
Conclusion

It is quite clear that the Civil War and Reconstruction Era (1861-1877) had a profound effect on Ohio and its laws. Ohioans enthusiastically supported the War; over 300,000 Ohioans served the Union cause and over 35,000 died. Ohio citizens endured abuses of their rights of speech and press, as well as arrests of its citizens without trials, suspension of habeas corpus and trials of civilians by military commissions. During the Reconstruction Era, Ohioans saw the enactment of the Fourteenth and Fifteenth Amendments by the barest of margins, and the General Assembly actually repudiated their ratification of the Fourteenth Amendment. The enabling legislation that was a part of the Reconstruction Amendments allowed Congress to expand the jurisdiction of the federal courts, and to remove some cases from local juries and transfer the issues to the federal courts.

However, it is equally evident that Ohio and its citizens had an even more profound effect on the Civil War and Reconstruction. Ohio’s citizens responded to the call to arms in record numbers. Its military leaders commanded and served in every major theatre of the War. Ohio’s farms and factories fueled the Union war machine, and its transportation and logistics facilities helped transport war materials to the troops at the front. Only one military campaign touched Ohio, Morgan’s Raid in July, 1863, and that was but a small affair.

In addition, Ohio’s political leaders helped to secure the peace, and its military leaders enforced Reconstruction in the former Confederate states. Two of its citizens (Grant and Sherman) commanded the Army during the
Reconstruction era, two served as President of the United States (Grant and Hayes), and another (Wade) would have succeeded to the Presidency had the Senate removed Andrew Johnson from the Presidency. Another Ohioan (Chase) served as Chief Justice and presided over the first presidential impeachment trial in the country’s history. Even more importantly, one of its citizens, whose name is largely lost to history (John Bingham), took advantage of a temporary Congressional Republican “supermajority” to craft and enact the Fourteenth Amendment. This omnibus Amendment served not only to answer all of the questions left unanswered at the end of the conflict, but it gave a new definition to the term “citizenship” and spelled out the rights of every citizen and also every person living in this country.

Bingham and the other “Reconstructors” crafted both the Fourteenth and Fifteenth Amendments with moderate states like Ohio in mind. Once the seceding states pledged their loyalty to the Union, renounced slavery and ratified the Fourteenth Amendment, the goals of Reconstruction were fulfilled for most Ohioans. The Removal legislation did increase the jurisdiction and the docket of the federal courts in Ohio, but the increase in commerce and business transactions in this era had much more impact on the courts. While the Radicals in Congress supported a more punitive Reconstruction policy and more expansive Fourteenth and Fifteenth Amendments, Bingham and his moderate colleagues realized that such policies and the Amendments that resulted would never be approved by his constituents. If Ohioans had rejected the Fourteenth
and Fifteenth Amendments, it is unlikely that these amendments would have been ratified.

It is also clear that Ohio Congressman John Armor Bingham, the man Magliocca calls “America’s Founding Son,” is the protagonist/hero in this story as well.
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APPENDIX A

THE RECONSTRUCTION AMENDMENTS

AMENDMENT XIII[^04]

Section 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 their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV[^05]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right

[^04]: The Thirteenth Amendment was ratified on December 6, 1865.
[^05]: The Fourteenth Amendment was ratified on July 9, 1868.
to vote at any election for the choice of electors for President and Vice
President of the United States, Representatives in Congress, the
Executive and Judicial officers of a State, or members of the Legislature
thereof, is denied to any of the male inhabitants of such State, being
twenty-one years of age, and citizens of the United States, or in any way
abridged, except for participation in rebellion, or other crime, the basis of
representation therein shall be reduced in the proportion which the
number of such male citizens shall bear to the whole number of male
citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress,
or elector of President and Vice President, or hold any office, civil or
military, under the United States, or under any State, who, having
previously taken an oath, as a member of Congress, or as an officer of the
United States, or as a member of any State legislature, or as an executive
or judicial officer of any State, to support the Constitution of the United
States, shall have engaged in insurrection or rebellion against the same,
or given aid or comfort to the enemies thereof. But Congress may by a
vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized
by law, including debts incurred for payment of pensions and bounties for
services in suppressing insurrection or rebellion, shall not be questioned.
But neither the United States nor any State shall assume or pay any debt
or obligation incurred in aid of insurrection or rebellion against the United
States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.
APPENDIX B

TIMELINE

September 3, 1783: Treaty of Paris Signed;

July 13, 1787: Northwest Ordinance Enacted by Congress;

September 17, 1787: U.S Constitution adopted by Constitutional Convention;

April 7, 1788: Marietta established by the Ohio Company;

August 3, 1795: Treaty of Greenville signed, opened Ohio country to settlement;

November 1802: First Ohio Constitution drafted;

March 1, 1803: Ohio becomes the 17th state;

September 1850: Compromise of 1850, including a stronger Fugitive Slave Act, enacted by Congress;

June 17, 1851: Second Ohio Constitution approved by voters;

March 6, 1857: Dred Scott Decision handed down by U.S. Supreme Court;

December 20, 1860: South Carolina secedes from Union;

April 13, 1861: Fort Sumter surrenders to Confederate forces;

January 1, 1863: Lincoln issues the Emancipation Proclamation;

April 9, 1865: Lee surrenders Army of Northern Virginia;

April 9, 1866: Congress enacts the Civil Rights Act of 1866 over Johnson’s veto;

June 18, 1866: 14th Amendment passes both houses of Congress;

January 11, 1867: Ohio ratifies 14th Amendment (Rescinded ratification on January 13, 1868; ratified March 12, 2003;
March 2, 1867-March 11, 1868: Congress passes four statutes known collectively as the Reconstruction Acts;

July 9, 1868: 14th Amendment ratified by the States and becomes part of the Constitution;

November 3, 1868: Ohio native Ulysses S. Grant elected President;

August 18, 1874: Ohio voters overwhelmingly reject proposed Constitution of 1873-74;

March 2, 1877: Ohioan Rutherford B. Hayes selected as President by 15-member Electoral Commission. The informal *Compromise of 1877* effectively ends Reconstruction.
APPENDIX C

39th CONGRESS, OHIO DELEGATION

March 4, 1865 to March 4, 1867

Sessions:

Special: March 4, 1865 – March 11, 1865.

1st: December 4, 1865 – July 28, 1866.
2nd: December 3, 1866 – March 4, 1867.

Full Membership: 54 Senators, 193 Representatives, nine nonvoting members.

Leadership:

Senate:

Vice President: Andrew Johnson (R): March 4, 1865 – April 15, 1865. Vacant thereafter.

President pro tempore: Lafayette S. Foster (R), March 4, 1865 – March 2, 1867.

Benjamin F. Wade (R), March 2, 1867 – March 4, 1867.

House of Representatives:

Speaker: Schuyler Colfax (R).

Republican Conference Chairman: Justin S. Morrill (R).

Major Legislation:

1. December 18, 1865: 13th Amendment declared ratified.

2. April 9, 1866: Civil Rights Act of 1866, Sess. 1ch. 31, 14 Stat. 27.

3. June 13, 1866: 14th Amendment passed Congress and sent to the states for ratification.

5. July 23, 1866: Judicial Circuits Act, Sess. 1, ch. 210, 14 Stat. 209, reduced the number of the United States circuit courts the nine and the number of Supreme Court justices to seven.


OHIO DELEGATION:

Senate:

Benjamin F. Wade (R).

John Sherman (R).

House: (by district).

1. Benjamin Eggleston (R).

2. Rutherford B. Hayes (R).


4. William Lawrence (R).

5. Francis C. Le Blond (D).

6. Reader W. Clarke (R).

7. Samuel Shellabarger (R).
10. James M. Ashley (R).
11. Hezekiah S. Bundy (R).
13. Columbus Delano (R).
14. Martin Welker (R).
15. Tobias A. Plants (R).
16. John A. Bingham (R).
17. Ephriam R. Eckley (R).
18. Rufus P. Spalding (R).
19. James A. Garfield