Lincoln's Long Shadow:
Recreating the Legal Debate over Habeas Corpus, 1861-1863

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I. Introduction

On April 12, 1861, Confederate batteries in Charleston, South Carolina opened fire on Union-held Fort Sumter. This act began what became the bloodiest war in American history – the U.S. Civil War. In response to the firing on Fort Sumter, President Abraham Lincoln issued a proclamation on April 15 calling forth 75,000 militiamen. To get to Washington, D.C., troops would have to travel through either Virginia or Maryland. Maryland became the only option when, on April 17, Virginia seceded from the Union. On April 18, Massachusetts troops entered Baltimore by train from the North en route to Washington, D.C. In response, Baltimore exploded in a rage of pro-secession fury.[1] Lincoln, sensing trouble, ordered the troops to return to Pennsylvania. Attempting to prevent further troops from entering the state, Maryland's pro-secession militia commander ordered the Baltimore County Horse Guards (a local militia unit) to destroy the bridges and roads as they followed the troops to the Maryland border.[2] One of the

[1] *See* JONATHAN WHITE, ABRAHAM LINCOLN AND TREASON IN THE CIVIL WAR: THE TRIALS OF JOHN MERRYMAN 11-18 (2011).
[2] *Id.* at 19.

members of this unit was First Lieutenant John Merryman. Merryman traveled with the unit, destroying bridges, heckling soldiers, and arresting Union sympathizers and deserters.[3]

Recognizing that losing Maryland would leave the Union's capital surrounded by hostile states, Lincoln suspended the privilege of the writ of habeas corpus on April 27.[4] On May 16, the commander of Fort McHenry, the closest fort to Baltimore, was given authority to arrest and detain persons in the fort under certain conditions regardless of whether the prisoners requested habeas relief.[5] On May 25, John Merryman was arrested on charges of treason.[6] He applied for a writ of habeas corpus to Roger Taney, Chief Justice of the United States, who was then riding circuit in his native Maryland.[7] Taney issued the writ on May 26, which Lincoln ignored. On June 1, Taney filed a written opinion in the case of *Ex parte Merryman* demanding that Merryman be released and blasting what Taney viewed as Lincoln's flagrant violations of the Constitution.[8]

In June 1861, Reverdy Johnson, U.S. Senator from Maryland, sat down to pen a response to *Merryman*. The author of the *Merryman* decision, Chief Justice Taney, had many things in common with Johnson. Both men were Marylanders, Democrats, and former U.S. attorneys general. Both had crossed paths in the legal world, and they were friends.[9] In the case of *Dred Scott v. Sandford*, Johnson had successfully argued on behalf of the slaveholder, John Sanford, in

[3] *Id.* at 20-21.
[4] I use various shorthand phrases for "suspending the privilege of the writ of habeas corpus" throughout this paper (e.g. "habeas suspension," "suspending habeas"). These shorthand phrases all refer to the longer phrase quoted here. As will become clear, the distinction between the writ and the privilege to seek the writ was quite important.
[5] *Id.* at 24.
[6] Merryman was suspected (as it turns out, correctly) of being a pro-secession militia officer who had burned Maryland bridges connecting Northern states to Washington. *Id.* at 1.
[7] *Id.* at 2.
[8] *Ex parte* Merryman, 17 F. Cas. 144 (Taney, Circuit Justice, C.C.D. Md., 1861) (No. 9,487).
[9] BERNARD STEINER, LIFE OF ROGER BROOKE TANEY 530 (1922).

front of a Supreme Court led by Taney.[10] However, Reverdy Johnson was not sitting down to write an opinion supporting his good friend and fellow Democrat – Johnson's response provided support for the suspension of habeas corpus by the administration in contravention of Taney's opinion.[11] Johnson was not the only lawyer who took a position seemingly at odds with his social or political background during this extraordinary period in American history. Unfortunately, like many of the lawyers who debated the scope of executive power at the time of the Civil War, Johnson's story and his arguments have been obscured by the laser-like focus of historians and lawyers on the arguments of a single man – Abraham Lincoln.

Lincoln's long shadow has obscured the vibrant role law played, separate and apart from politics, in debating the actions Lincoln took during the war. One need not look far to find evidence of this long shadow: most books about legal history and the Civil War tend to have "Lincoln" in the title. *Lincoln's Constitution*, *Lincoln and the Constitution*, *Lincoln's Code*, and *Constitutional Problems under Lincoln* are just a few examples of this trend. Within these books and articles, most authors focus the bulk of their attention on Lincoln's arguments, with any other legal arguments relegated either to footnotes, passing remarks about Lincoln's cabinet, or the amorphous phrase "other critics."[12] With the exception of a few biographies of Civil War lawyers,[13] the only attorneys who ever seems to get much attention besides Lincoln are his early

[10] Dread Scott v. Sandford, 60 U.S. 393 (1857). *Dred Scott* held that African Americans were not citizens under the Constitution and struck down the Missouri Compromise, which banned slavery in parts of the territories in the Midwest (note: the case reporter misspelled Sanford's name as "Sandford"). *See also* WHITE, supra note 1, at 348, 374. Interestingly, Johnson took to the stage at a memorial for Taney among Maryland lawyers to defend Taney against the smears that had been leveled against him by Northern newspapers after *Dred Scott*.
[11] BRIAN MCGINTY, THE BODY OF JOHN MERRYMAN: ABRAHAM LINCOLN AND THE SUSPENSION OF HABEAS CORPUS 107-16 (2011); REVERDY JOHNSON, POWER OF THE PRESIDENT TO SUSPEND THE HABEAS CORPUS WRIT (1861), *reprinted in* 2 THE REBELLION RECORD 185-93 (Frank Moore ed., 1862).
[12] *See, e.g.*, WHITE, *supra* note 1, at 32-43 (focusing on newspaper responses to *Merryman* and lumping lawyers critical of Lincoln together into the category of "Taney and other critics").
[13] *See, e.g.*, STUART STREICHLER, JUSTICE CURTIS IN THE CIVIL WAR ERA 156-61 (2005).

sparring partner, Roger Taney, and his attorney general, Edward Bates.[14] But delving into the work of other lawyers, who are not as well known today, reveals that law played a crucial role in the debates about the suspension of habeas corpus – a role which was not simply a fig leaf for the political beliefs of the lawyers involved.

The focus on Lincoln is misplaced, though it is perhaps understandable as a case of hindsight bias. Looking back, it is easy to see how Lincoln won and Taney lost. The suspension of habeas corpus stood, and Lincoln's administration spent much of the rest of the war ignoring Taney's pronouncements.[15] The story of a struggle between giants is understandably appealing,[16] but it obscures the constitutional developments of the Civil War era. When the biases of future knowledge are eliminated, a serious debate between lawyers emerges.

This debate is important because it demonstrates that legal doctrine constrained the actions of lawyers in the Civil War era. Only a few lawyers subscribed to Lincoln's view of the law as a tool to be manipulated.[17] Most of the lawyers in this era turned to American antebellum precedents and British common law for answers to the most pressing questions of the day. By focusing only on Lincoln, scholars have drawn the conclusion that the Civil War was a period devoid of doctrine, where necessity and exigency carried the day.[18] In fact, the debates of the era show a marked continuity between the world before the Civil War and the world of the Civil War: lawyers felt constrained to justify their position in relation to pre-existing doctrine.

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[14] *See, e.g.*, MARVIN CAIN, LINCOLN'S ATTORNEY GENERAL: EDWARD BATES OF MISSOURI 147-50 (1965). Brian McGinty looks to Horace Binney and Reverdy Johnson; however, roughly half of his chapter on the legal ramifications of suspending habeas is devoted to analyzing Lincoln's thinking about habeas, including a structural analysis of Lincoln's draft speeches to Congress on the subject. MCGINTY, *supra* note 10, at 96-116.
[15] WHITE, *supra* note 1, at 37.
[16] *See* WHITE, *supra* note 1, at 8-9.
[17] *See* JOHN FABIAN WITT, LINCOLN'S CODE 146-49 (2012).
[18] For a review of some of these scholars, *see* Cynthia Nicoletti, *Writing the Social History of Legal Doctrine*, 64 BUFF. L. REV. 121, 124-27 (2016).

Civil War lawyers in the North turned to the Constitution in debating the propriety of Lincoln's suspension, though they came to different results and for different reasons. Some lawyers looked to the Constitution to support Lincoln's position with radical new theories of interpretation – like importing the laws of war into the Constitution in times of war. Other lawyers took more traditional approaches to interpreting the Constitution in favor Lincoln, relying on Anglo-American precedent. Still other lawyers found Lincoln's actions to be wrong using traditional methods of interpreting the Constitution. These categories did not always break into clean political categories – Maryland Democrats could be found among supporters of the president; New England abolitionists could be found among the president's opponents. In other words, law mattered to the men who debated the suspension of habeas corpus.[19]

Part I of this paper offers a brief sketch of the historiography of the debate over the suspension of habeas corpus and demonstrates the failings of the current scholarly conversation on this issue. Part II examines the dearth of writing on how law mattered in the Civil War outside the specific habeas context. Part III offers a brief sketch of American law on habeas prior to the Civil War. Part IV covers the foundations of the debate over the suspension of habeas corpus: the suspension itself and the circuit court case *Ex parte Merryman*. Part V discusses the opinion of Attorney General Edward Bates as a necessary precursor to considering other opinions on the issue. Parts VI-VIII cover the debate between lawyers during the period of 1861-1863 using the categories laid out in the preceding paragraph. Part VI covers lawyers who argued that the suspension was proper using revolutionary interpretations of the Constitution. Part VII deals with lawyers who supported the president but did so using more conventional interpretations of the constitution. Part VIII looks at the lawyers who argued that the Constitution prohibited unilateral

[19] In the 1860s, only men were admitted to practice law in the United States, so only men were involved in the debates I analyze.

suspension by the president, largely using traditional Constitutional interpretation. Part IX concludes with some final reflections on what uncovering this debate adds to the understanding of the role of law in the Civil War.

II. A Brief Sketch of the Historiography

Though study of the suspension of habeas corpus in the Civil War is not new, there has been a noticeable uptick in interest in the subject in recent years as the Supreme Court has taken on the challenge of habeas corpus in the era of terrorism.[20] Unfortunately, the uptick in interest has not led to a closer examination of the debate between lawyers at the time of the Civil War. Books and articles about the suspension of the writ and other Civil War legal issues tend to be written either by historians or by lawyers but rarely by scholars with backgrounds in both history and the law. These two groups of scholars tend to have different goals and different biases in their writings. Habeas is an area ripe with scholarship, so it would be impossible to cover every article or book written on the subject in this paper. The following paragraphs attempt to sketch briefly some of the problems using representative examples from the scholarship

James G. Randall provides one of the earliest and still relevant analyses of the habeas debate in historical scholarship. Randall's seminal *Constitutional Problems under Lincoln* contains an exhaustive survey of constitutional problems that arose during the Civil War. Three chapters are devoted to the suspension of the privilege of the writ of habeas corpus and the constitutional issues the suspension entailed.[21] Unfortunately, Randall's brief treatment of the

[20] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 769 (2008) (citing to *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866)); Tor Ekeland, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, or the United States Constitution and the War on Terror*, 74 FORDHAM L. REV. 1475 (2005); Justin Ewers, *Revoking Civil Liberties: Lincoln's Constitutional Dilemma*, U.S. NEWS & WORLD REP., Feb. 10, 2009; Jonathan Hafetz, *Habeas Corpus and the War on Terror*, AMERICAN CONSTITUTION SOCIETY (Apr. 14, 2011), http://www.acslaw.org/acsblog/habeas-corpus-and-the-war-on-terror; Frank Williams, *Abraham Lincoln and Civil Liberties in Wartime*, HERITAGE FOUNDATION (May 5, 2004), http://www.heritage.org/research/lecture/abraham-lincoln-and-civil-liberties-in-wartime.
[21] JAMES RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 118-85 (1926).

habeas issue is typical of the way historians deal with the issue. Randall focuses primarily on the battle between Lincoln and Taney, going so far as to parse the differences between the original and the published versions of Lincoln's speech to Congress about habeas in July 1861.[22] Randall does go further than most historians, however, in that he also briefly looks at the opinion and pamphlet of Attorney General Bates and Horace Binney respectively.[23] He alludes to further debate but cites to no sources.[24] Randall's book thus gives a fairly adequate overview of the issue given his space constraints, but it is lacking in evaluating the actual debate at the time of the Civil War.

Unfortunately, some historians do not even look to sources outside Lincoln and Taney. Herman Belz's book on Lincoln and the Constitution does not even attempt to look at sources besides Lincoln.[25] Belz, in attempting to prove that Lincoln was not a "constitutional dictator," looks only to Lincoln for legal opinions because Lincoln was "an able lawyer familiar with constitutional analysis."[26] Jonathan White's book on *Merryman* is one of the most comprehensive views of the case to date, seeking to elaborate on who John Merryman was and why he imperiled the war effort. White provides meaningful context to the case in the form of letters and diaries, which create an impressive level of detail about John Merryman, his petition for a writ, and the Congressional debates over the Habeas Corpus Suspension Act of 1863.[27] Yet, when it comes to legal analysis of the *Merryman* case, White looks only to Lincoln's speech to Congress and Taney's writings about the case, with some additional sources, such as Bates'

[22] *Id.* at 123.
[23] *Id.* at 124-27.
[24] *Id.* at 136 ("the views of many Congressmen, the flood of pamphlets …").
[25] HERMAN BELZ, ABRAHAM LINCOLN, CONSTITUTIONALISM, AND EQUAL RIGHTS IN THE CIVIL WAR ERA 35-43 (1998).
[26] *Id.* at 35.
[27] WHITE, *supra* note 1.

opinion mentioned in endnotes.[28] White's book also falls into the trap that many modern lawyers have fallen into – obsessing over whether Taney's opinion was written in his role as a circuit judge or as the Supreme Court Chief Justice.[29] Brian McGinty likewise tells the story of *Merryman* as a clash of titans between Taney and Lincoln but expands on the above sources by looking to Reverdy Johnson and Horace Binney; however, his treatment of Johnson and Binney combined is the same length as his treatment of Lincoln.[30] Most historians follow this pattern of looking to Lincoln, Taney, and one or two other high profile lawyers to argue that Lincoln's actions were not as dubious as Taney made them out to be.[31] However, this analysis by historians is noticeably lacking in the diversity of legal opinions cited.

Before turning to the lawyers who have studied this issue, one recent addition to the historiography of the suspension of habeas bears mentioning – Mark Neely's most recent book, *Lincoln and the Triumph of the Nation*.[32] Neely devotes a whole chapter (roughly fifty pages) to a discussion of Lincoln's suspension of habeas corpus. This chapter does perhaps the best job to date of attempting to recreate the contemporary debate over habeas.[33] Unfortunately, Neely's work misses the forest for a few (albeit large) trees. Neely admirably looks to several well-known lawyers who wrote pamphlets about the issue of habeas suspension: Joel Parker, Horace

[28] *Id.* at 37-38.
[29] *Id.* at 39-42. The issue of whether Taney wrote the opinion as Chief Justice or as a circuit court judge was at best a side argument made by contemporary lawyers if they made it at all.
[30] MCGINTY, *supra* note 10, 96-116.
[31] *See, e.g.*, LAURA EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION 21-23 (2015) (citing Lincoln, Taney, and Bates in a short section about how the suspension of habeas was used during wartime to put down insurrections in border states); HAROLD HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 81-98 (1975) (citing Lincoln, Taney, Bates, Horace Binney, and Henry Dutton to show that Taney was wrong in *Merryman*).
[32] MARK NEELY, LINCOLN AND THE TRIUMPH OF THE NATION: CONSTITUTIONAL CONFLICT IN THE AMERICAN CIVIL WAR 63-111 (2011). Neely has an earlier, Pulitzer-Prize-winning work that deals with habeas in part as well. That work evaluates the habeas issue from a political rather than a legal standpoint, looking to how the policy played out in Congress, the public press, and the internal documents of the State Department and War Department. MARK NEELY, THE FATE OF LIBERTY, 4-31 (1991).
[33] Like me, Neely criticizes a number of historians like McGinty and Neff for failing to evaluate sources like Binney. *Id.* at 358, note 27.

Binney, Lincoln, Benjamin Curtis, William Whiting, and Sidney George Fisher.[34] However, these are the only people Neely looks at in a sea of lawyers who wrote about the issue. One suspects that Neely's selections might have been guided by the argument of his book. Neely argues that nationalism in the form of patriotism led nationalists to support a modest expansion of executive power.[35] Neely suggests that this support for more executive power and the nationalism behind the support were not antithetical to the Constitution as some historians have argued.[36] Missing from his sources, however, is Reverdy Johnson, who, as a Maryland Democrat, was not quite as enamored with the ideas of strong national government but who nonetheless supported Lincoln.[37] Neely's work advances our understanding of the different factions involved in the debate over the suspension of habeas, but it still leaves much uncovered.

Modern lawyers who have evaluated the suspension of habeas corpus have tended to project modern considerations into the past, focusing on issues of importance today and ignoring any other legal arguments (even if they were more central historically). As law professor Michael Paulsen noted over a decade ago: "Constitutional scholarship today tends to focus on yesterday's Supreme Court decision and tomorrow's pending case, ignoring, to our detriment, the more fundamental shaping of the Constitution through great historical events in favor of the latest doctrinal ripples in Supreme Court decisions of middling importance."[38] This quotation somewhat accurately portrays the failing of most lawyers who have evaluated the historical

[34] *Id.* at 63-111.
[35] *Id.* at 107-11. Neely contends that the suspension of habeas corpus ranks second only to emancipation as the expression of a supreme nationalism in the person of the president. The argument of the chapter essentially builds on this idea to suggest that those who supported a strong national government were the supporters of Lincoln's policy.
[36] *Id.* at 12-14, 110-11.
[37] Neely, does however, cite an anonymous *Daily National Intelligencer* article as the creative spark for Horace Binney's pamphlet. That article was almost certainly written by Reverdy Johnson although Neely does not seem to have made that connection. Cf. *Daily National Intelligencer*, June 22, 1861 with JOHNSON, *supra* note 10.
[38] Michael Paulsen, *The Civil War as Constitutional Interpretation (Review of* Lincoln's Constitution *by Daniel Farber)*, 71 U. CHICAGO L. REV. 691, 693 (2004).

debate.[39] Like many historians, lawyers tend to focus on Lincoln and Taney. They also tend to focus on the wrong issues. What I mean by this is that modern lawyers tend to spend the bulk of their arguments looking at issues which in the contemporary debate of the 1860s were at best minor issues or at worst not present at all.

A prime example of ahistorical analysis is found in legal scholar Daniel Farber's *Lincoln's Constitution*. Farber weaves together modern court thinking in analyzing debates about executive power in the Civil War. For instance, when looking at arguments about a president's Article II powers, Farber analyzes whether it was permissible based on the three-zones test laid out by Justice Robert Jackson in *The Steel Seizure Case* – in other words, zones that would not exist until 85 years after the Civil War.[40] In discussing the suspension of habeas, Farber devotes roughly a paragraph to Taney's argument and then gives some brief (one to two sentence) summaries of Bates' opinion and Lincoln's July speech to Congress.[41] However, Farber's primary support for the claim that Lincoln had the authorization for the suspension from Congress comes from a Supreme Court decision in 1909.[42] Most of Farber's analysis compares Lincoln's ideas to twentieth century court cases. This grafting of modern ideas onto 1860s issues is problematic to the legal historian.

Despite a wealth of scholarship on the suspension of habeas corpus, significant gaps remain. The lines between supporters and opponents of the suspension were not always so clear cut. For instance, Benjamin Curtis, who supported the president generally and the mission of the

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[39] *See, e.g.*, Jeffrey Jackson, *The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding Ex Parte Merryman*, 34 U. BALTIMORE L. REV. 11, 11-54 (2004). Despite an impressive list of sources in his footnotes, Jackson only analyzes Bates' and Binney's arguments about the suspension before moving on to discuss how the Supreme Court should analyze the War on Terror's habeas issues.
[40] Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case), 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring); DANIEL FARBER, LINCOLN'S CONSTITUTION 121-32, 136 (2003).
[41] FARBER at 158-59.
[42] *Id*. at 162

war (though not the steps Lincoln took to effectuate the mission), nevertheless found that the nationwide suspension of habeas without Congressional authorization went one step too far.[43] Reverdy Johnson, the Democratic Senator and former slaveholder, supported the suspension throughout the war.[44] Rather than viewing different lawyers' positions as driven by their politics as many historians and legal scholars have done,[45] the debates over the suspension of habeas corpus are better seen as a spectrum based on the author's view of the law. Trying to paint everyone into Lincoln's camp or Taney's camp dilutes the important distinctions between authors based on their doctrinal approach to the problem, which sometimes was at odds with their political views. By teasing out the original participants who have been overlooked by the historiography, it is possible to see differences in the way lawyers thought about the Constitution.

III. Inter Arma Silent Leges?

Legal doctrine mattered in the Civil War. This claim, though it may seem simple, is by no means uncontested. In fact, the idea that doctrine mattered in the Civil War is a relatively novel one. Cynthia Nicoletti recently laid out this serious failing in the historiography of the Civil War.[46] She highlights two primary problems, which arise in the context of considering doctrine in the Civil War era: first, modern scholars act as though "doctrine" as "a dirty word," treating doctrine dismissively in their accounts of the Civil War; second, scholars fail to understand what the law meant to lawyers in different time periods.[47] Recreating the legal debate over the suspension of the privilege of the writ of habeas corpus addresses both of these problems.

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[43] STREICHLER, *supra* note 12, at 156-61.
[44] JOHNSON, *supra* note 10.
[45] *See, e.g.*, HYMAN, *supra* note 30, 88-89 ("Naturally, … Democratic partisans at once employed Taney's Merryman opinion to flay the Republican Administration." "Naturally, Republican stalwarts lined up behind Lincoln.").
[46] Nicoletti, *supra* note 17.
[47] *Id.* at FN8 and 124-25.

Many historians and legal scholars have dismissed doctrine as irrelevant or a fig leaf for other concerns during the Civil War. In describing how the modern legal profession emerged from the Civil War and Reconstruction, Norman Spaulding described post-Civil War lawyering as "rescu[ing] law … because law was so violently displaced by the war."[48] Spaulding argues that the Civil War was full of lawyer elites who wrung their hands over the evisceration of law and its subjugation to power during the Civil War.[49] In Spaulding's account, the legal arguments by lawyers supporting the president were mere denialism.[50] John Witt argues that Lincoln and Seward viewed the law as a tool they could manipulate to their own (potentially unconstitutional) ends.[51] Bruce Ackerman claims that doctrinal law cannot explain the ratification of the Reconstruction Amendments – only "higher lawmaking" can.[52] These sources are but a few of the examples of scholars dismissing the role of doctrine during the Civil War.

Additionally, many scholars fail to grasp what the law was for Civil War lawyers. Some scholars simply write the Civil War out of their histories of law in the nineteenth century as somehow different from the rest of the nineteenth century of law.[53] Farber's use of the *Steel Seizure Cases* to figure out whether Lincoln's actions were constitutional has already been discussed above.[54] Needless to say, nineteenth century lawyers did not have the benefit of Justice Jackson's three-zone test in determining their position on Lincoln's actions. James Dueholm likewise cites the *Steel Seizure Cases* in evaluating Lincoln's actions. Dueholm goes further,

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[48] Norman Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001, 2009-10 (2005).
[49] *Id.*at 2010-11.
[50] *Id.* at 2043-44, FN119 (citing William Whiting's attempts to reconcile the Constitution with Lincoln's actions as an example of denialism).
[51] *See* JOHN FABIAN WITT, LINCOLN'S CODE 146-49 (2012).
[52] BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 99-119 (1998).
[53] *See* MORTON HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1870-1960 vii (1992) (the first volume in the series ended in 1860, a 10-year gap in the history of law in America).
[54] FARBER, *supra* note 39, at 121-32.

however, by looking at the *Prize Cases* and Binney's pamphlets. Though he uses these Civil War sources, Dueholm takes for granted that the president has war powers to suspend habeas corpus as if that proposition was well settled by the Civil War, with the Supreme Court merely applying traditional doctrine.[55] The spirited dissent by four justices in the *Prize Cases* would seem to suggest otherwise.[56] Scholars like these do not adequately think about the law as it was understood by Civil War lawyers in their work.

By exposing the legal debate about habeas, this paper attempts to deconstruct notions that legal doctrine did not play a role in the Civil War and to recreate nineteenth-century American lawyers' understanding of the law. As Nicoletti correctly notes, the lack of attention to doctrine in this era most likely stems from an overemphasis on Lincoln's views of the law.[57] Broadening the scope of sources presents a clear case for the role of doctrine in the Civil War. Even those people who treated the law as a tool to justify their actions are not evidence to the contrary.[58] In fact, as Isabel Hull points out in the context of international law in World War I, the fact that people at the top felt obligated to offer some defense based in the language of the law meant that doctrine mattered even if the people expounding the ideas did not necessarily believe in the doctrine they were citing.[59] Lincoln could view what he said about the source of authority for suspending habeas corpus as a necessary cover for what he felt was right, but the fact that he had to couch his language in terms of a legal argument says a lot.

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[55] James Dueholm, *Lincoln's Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, 29 J. OF THE ABRAHAM LINCOLN ASS'N 47, 47-66 (2008).
[56] *Prize Cases*, 67 U.S. (2 Black) 635, 692-99 (Nelson, J. dissenting).
[57] Nicoletti, *supra* note 17, at 125.
[58] *Id.*
[59] ISABEL HULL, A SCRAP OF PAPER: BREAKING AND MAKING INTERNATIONAL LAW DURING THE GREAT WAR 1-15 (2014). Hull points out that the Germans frequently violated international law, yet they felt compelled when they broke it to justify their actions using more traditional legal doctrine. For example, Germany relied on arguments of military necessity first expounded upon by Francis Lieber in the U.S. Civil War to justify some of the worst atrocities it committed in Belgium. *Id.* at 64-71.

Beyond lawyers like Lincoln and Seward, though, most lawyers discussed the suspension of habeas corpus in terms of analogies to American and British precedents.[60] Taney could be found making arguments based on Blackstone's *Commentaries*.[61] Attorney General Bates pointed to Supreme Court cases authored by Taney to support the president's actions.[62] And almost every lawyer engaged in textual analysis of the Constitution.[63] As these examples illustrate, legal doctrine was at the heart of almost every discussion about the legality of Lincoln's suspension of habeas corpus.

As lawyers struggled to grasp the implications of the war on the law, they turned to legal doctrine to support their positions. Nicoletti notes that before the war, most lawyers viewed doctrine and law as largely synonymous, but that the war changed their perspectives "as law was forged in great haste and with great irregularity, in many cases overwhelming established doctrine and precedent."[64] She argues that American legal thinkers "struggled to reconcile this new reality with their baseline premises about what law was and how it functioned in American society."[65] In the debate over habeas which occurred in the early days of the war, American legal thinkers engaged in this struggle to reconcile the new reality by using existing legal doctrine to understand and justify unprecedented changes in the law.

IV. Habeas on the Eve of Civil War

Most lawyers would have begun the war with a knowledge of the law as it was before the war. However, besides some dicta and nonbinding commentaries, the federal law on suspending

[60] As Dueholm notes, Lincoln relied almost entirely on the reading of war powers into Article II of the Constitution. He sometimes also claimed, without fleshing the idea out, that the Constitution imported the law of war in war time. Dueholm, *supra* note 54, at 47-66.
[61] *Ex parte* Merryman, 17 F. Cas. at 151.
[62] Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74, 84 (1968).
[63] *See, e.g.*, JOHNSON, *supra* note 10, at 187-89.
[64] Nicoletti, *supra* note 17, at 139.
[65] *Id.*

habeas corpus was underdeveloped. This might be because arrests tended to be local, so it was difficult to get habeas cases into federal court. Federal question jurisdiction was not given to courts until 1875; diversity jurisdiction was the primary route to get to federal court.[66] Additionally, habeas had never been suspended prior to the war at the federal level,[67] and it was unclear whether state courts could issue writs of habeas corpus to federal prisoners.[68] Nevertheless, the scant authorities available were the starting points for almost every lawyer who argued about habeas.

The first source is also the original source – the Constitutional Convention in Philadelphia. As noted by Civil War lawyers, the records dealing with the habeas portion of Article I, Section 9 were scant.[69] What is clear is that the original proposal for the provision had explicitly stated that the legislature was the only body that could suspend habeas in case of emergencies. This language was dropped in the final version of the Constitution.[70] Horace Binney, a Civil War lawyer, noted the inconsistencies in the record preserved by Madison – gaps in the record mostly.[71] Nothing is recorded as to why the legislature language was dropped. What is recorded is a debate about whether a time limit should be placed on any suspension.[72] What this language change shows is that the Founders knew how to include "legislature" in the language of the Constitution and chose not to. However, this is not necessarily dispositive

[66] F. Andrew Hessick, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 896-97 (2009).
[67] JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 207 (1833).
[68] The question of whether state courts could issue writs for federal prisoners was decided a few years after the Civil War in a case involving a soldier who was being held for desertion. HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 427-30 (Richard Fallon et al. eds., 7th ed. 2015) (excerpting *Tarble's Case*).
[69] HORACE BINNEY, THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION 26-28 (1862).
[70] *Id.*
[71] *Id.*
[72] *Id.*

because the language about habeas was still included in Article I, which deals with Congress.[73] Original intent is thus not dispositive one way or another.

There were also a few instances of dicta in Supreme Court cases on the issue of suspending habeas. In *Ex parte Bollman*, a case about whether the Supreme Court could issue a writ of habeas corpus, Chief Justice Marshall remarked that the legislature would be the proper organ to suspend habeas corpus.[74] The case was not about who had the power to suspend habeas corpus, so the remarks were dicta. Justice Woodbury, writing in dissent in *Luther v. Borden*, likewise noted that it was for the legislature to decide when to suspend habeas.[75] *Luther* was about a rebellion in Rhode Island and the case was about an arrest by one faction's militia. Borden had received an order from the militia to arrest Luther (without the protection of habeas due to the old legislature declaring martial law), and he and a band of soldiers broke into Luther's house to arrest Luther.[76] The majority resolved the issue on political question grounds.[77] A dissenting opinion is also not binding authority on which to rest a legal judgment. One dissenting opinion and some dicta is also not dispositive on this issue.

A different source for arguments about the suspension of habeas corpus was Justice Story's *Commentaries*. Justice Story wrote, "The power is given to congress to suspend the writ of habeas corpus."[78] However, Story cited to no authority for this proposition.[79] He argued that

[73] John Harrison and Amanda Tyler have both argued that the framers understood the Suspension Clause to limit the power to declare suspensions to Congress based on English precedents. *See* AMANDA TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY (2017); John Harrison, *The Habeas Corpus Suspension Clause as a Limit on Executive Discretion*, (U. of Va. L. Sch. Pub. L. and Legal Theory Working Paper Series, Working Paper No. 123, 2009).
[74] Ex parte Bollman, 8 U.S. 75, 101 (1807).
[75] Luther v. Borden, 48 U.S. 1, 86-87 (1849) (Woodbury, J. dissenting).
[76] *Id.* at 48-49.
[77] *Id.* at 46-47.
[78] STORY, *supra* note 66, at 209.
[79] *Id.*

from this came the logical conclusion that Congress determined when an emergency existed.[80] He cited to *Mott v. Martin* for this conclusion, which he had authored. The main problem is that in *Mott*, Story had held that Congress had delegated to the president the power to determine when an emergency existed.[81] Story's *Commentaries* was thus not terribly persuasive on the question of suspension of habeas corpus, and even if it was, Story was writing as a commentator not as a judge.[82] None of the sources of law on the question of suspending habeas corpus were binding. The question was thus one of first impression. Nevertheless, lawyers on both sides drew on these sources as they made their arguments about who should get to suspend habeas corpus.

V. Taney's Merryman

Lincoln's suspension of habeas corpus was controversial (in some sectors) from the outset. The South and many Northern Democrats were outraged. Chief among them was Chief Justice Roger Taney. The 84-year-old Taney was at this point in poor health, ill almost all the time. Most biographers of Taney paint a picture of a proud, old man, impoverished from losing his the income on Virginia stocks to the war, and bitter from the treatment he received from Lincoln.[83] Nevertheless, Taney, who supposedly had a drawer full of draft opinions opposing many of Lincoln's actions, seized on the opportunity to write an opinion declaring Lincoln's suspension unconstitutional when it presented itself in the form of John Merryman's petition for a writ of habeas corpus.[84]

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[80] *Id.*
[81] Martin v. Mott, 25 U.S. 19, 28-30 (1827). Story wrote for the majority that the Militia Act of 1795 allowed the president to determine when an emergency exists through the plain language of the statute.
[82] *See* BINNEY, *supra* note 68, at 39.
[83] According to Taney's attorney, the recently seceded Virginia government had passed a law which forbade Virginia banks from paying dividends to stockholders who remained in Union ("non-seceding") states. The bank said it would make an exception for Taney, which he refused since he believed such an exception would look like favoritism for a high ranking official. *See, e.g.*, STEINER, *supra* note 8, at 488, 504-05, 506-08.
[84] FED. JUDICIAL CTR., Ex parte *Merryman and Debates on Civil Liberties During the Civil War: Biographies – Roger Brooke Taney (1777-1864)*, http://www.fjc.gov/history/home.nsf/page/tu_merryman_bio_taney.html (last visited Nov. 21, 2016).

Tensions in Maryland had reached a fever pitch in April 1861. By April 27, 1861, Lincoln had had enough of the unrest in Baltimore and the rest of Maryland. Despite some vacillating on the issue earlier in the month, Lincoln resolved to suspend the writ of habeas corpus.[85] This would allow rabble-rousing and violent secessionists in Maryland to be arrested by the military on vague charges of treason and held without the possibility of being freed. Without writing any explicit legal justification, Lincoln sent an order to General Winfield Scott, the general-in-chief of the Army on April 27. The order read, "You are engaged in suppressing an insurrection against the laws of the United States. If at any point … 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 that writ."[86] The first sentence is crucial as it provides the legal condition necessary to suspend the writ under the Constitution.[87] Though the debate would later flesh out who exactly was permitted to declare a state of emergency, at this point the president was making a finding that a state of "rebellion" existed, which would permit the suspension of the privilege of the writ of habeas corpus under Article I, Section 9 of the Constitution. Scott moved quickly to follow these orders.[88] One of the men arrested without habeas was John Merryman, who was arrested by the US Army in the early morning of May 25. Merryman wrote a petition for a writ of habeas corpus

[85] In an earlier letter, Lincoln had said Scott should only suspend the writ in "the most extreme necessity" if shelling Maryland cities did not work. Letter from Abraham Lincoln, President, United States of America, to Winfield Scott, General-in-Chief, United States Army (April 25, 1861) (reproduced at http://teachingamericanhistory.org/library/document/letter-to-winfield-scott/).

[86] Letter from Abraham Lincoln to Winfield Scott (April 27, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 347 (Roy Basler, Marion Pratt, and Lloyd Dunlap, eds., 1953).

[87] U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[88] Interestingly, Scott, like Lincoln, viewed the bombardment of cities in Maryland as less extreme than suspending the writ of habeas corpus. Letter from Winfield Scott, General-in-Chief, United States Army, to Benjamin Franklin Butler, Brigadier General of Militia, United States Army (26 April 1861) (on file at the Gilder Lehrman Institute of American History).

from his cell in Fort McHenry, and within a few days, it had been delivered to Taney. Thus began the saga of *Ex parte Merryman*.[89]

Merryman was a circuit court case with Chief Justice Taney riding circuit in Maryland.[90] Circuit judges acted in different cases as appellate judges and trial judges.[91] Under the operative law at the time, Taney would have been considering the petition for a writ in the trial judge role.[92] Taney produced a written opinion, which included two primary arguments about the separation of powers: (1) the power to suspend the writ and the power to declare a state of rebellion are vested in Congress because the powers are listed in Article I of the Constitution, not Article II; and (2) the powers are vested in Congress because of English and American precedent.

Taney first argued that the power to suspend the writ and declare a state of rebellion rested with Congress because of its placement in Article I. Taney noted that the Suspension Clause is in Article I, Section 9, and "[t]his article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department."[93] He then argued that the Founders would have explicitly laid out the power to suspend habeas corpus in Article II if they had meant for the president to exercise that power because the Framers had jealously

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[89] For more on Merryman's arrest and petition, see WHITE, *supra* note 1, at 28-33.

[90] There is some confusion about this issue, which Taney did not help by attempting to confuse what role he was acting in purposely. He crossed out "Judge of the Circuit Court of the United States in and for the District of Maryland" in the original petition, leaving "Chief Justice of the Supreme Court of the United States". He had originally written that he would file the opinion with the reporter for the Supreme Court, then crossed that out and replaced the wording with the reporter for the circuit court. *See* WHITE, *supra* note 1, at 77. A scan of the original draft opinion with "~~Supreme~~ Circuit Court" can be found at http://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/001500/001543/pdf/memo.pdf.

[91] The legal framework for circuit riding in the Civil War era was created by the Judiciary Act of 1802, 2 Stat. 156. For a description of how circuit riding worked in the 1860s, see Craig Lerner and Nelson Lund, *Supreme Court Justices as Inferior Judges*, THE VOLOKH CONSPIRACY (Jan. 22, 2010), http://volokh.com/2010/01/22/supreme-court-justices-as-inferior-judges/

[92] The Judiciary Act of 1789, 1 Stat. 73, vested the "[individual] justices of the supreme court, as well as the judges of the district courts" with the power to "grant writs of habeas corpus" to persons in federal custody.

[93] *Ex parte* Merryman, 17 F. Cas. 144, 148.

guarded their liberty and were skeptical of the kinds of authority that the king had in England.[94] Taney concluded this section by noting that the notion of inherent sovereignty in the executive was flawed because the federal government was limited and any sovereignty not vested explicitly in the federal government belonged to the states and not the president under the Tenth Amendment.[95] This opinion stood in direct contrast to the views of Lincoln and others who viewed the Constitution as importing the law of war in wartime to Article II – giving the president wide latitude in carrying out a war.[96]

In his second constitutional argument, Taney traced commentaries both British and American to prove that the president did not hold the power to suspend the writ. He first surveyed the British tradition of habeas corpus. Citing to Henry Hallam's *Constitutional History of England* and William Blackstone's *Commentaries on the Laws of England*, Taney argued that in England, only Parliament had the power to suspend the writ of habeas corpus and the power to declare a state of rebellion.[97] Turning to the American side of things, Taney cited Justice Story and Chief Justice Marshall for the proposition that Congress controlled the power of suspension and the power to declare a state of rebellion.[98] Taney thus argued that history and precedent on both sides of the Atlantic forbade the president from unilaterally suspending the writ of habeas

[94] *Id.* at 149.
[95] *Id.* at 149-50.
[96] Lincoln would later make his position on the law of war in the Constitution explicit in the context of the Emancipation Proclamation. Abraham Lincoln, The Emancipation Proclamation, Exec. Proclamation No. 17 (Jan. 1, 1863) (justifying emancipation as "as a fit and necessary war measure for suppressing [the] rebellion" under the Commander-in-Chief Clause of the Constitution). *See also* Dueholm, *supra* note 54, at 58-66 (describing how Lincoln viewed suspension as a war power of the president).
[97] *Id.* at 151.
[98] *Id.* at 151-52. It seems that both British and American sources directly connected the idea of suppressing rebellions with the idea of suspending the writ of habeas corpus. For Americans, this idea was explicit in Article I, Section 9 of the Constitution ("The Privilege of the Writ of Habeas Corpus shall not be suspended, **unless when in Cases of Rebellion** or Invasion the public Safety may require it.") (emphasis added).

corpus. Taney thus began the debate over suspension by framing it in terms of constitutional theories. His critics responded in kind.

VI. The Executive's Official Response

Though Lincoln refused to release Merryman immediately from detention as a result of Taney's decision, he did not ignore *Merryman* entirely: he ordered Attorney General Edward Bates to prepare an official opinion on (1) whether the suspension of habeas corpus was constitutional and (2) if it was constitutional, whether Lincoln could ignore a judge who said otherwise.[99] Bates took up the defense of Lincoln's position with fairly traditional reasoning.[100] For some reason, Bates has gotten a bad reputation in the historiography for this defense.[101] Though there are many valid critiques of Bates (e.g. he did not have a terribly engaging personality), incompetence was not one of them. It seems many commentators take to criticizing this opinion because they believe it to be obvious that the opinion was wrong – Congress had the power to suspend not the president.[102] If that were the case, Bates's fellow supporters don't seem to have realized it, nor did Bates who defended his opinion in his diaries and to friends until the end of his life.[103] Perhaps the modern indictment of Bates can be traced to a failure to grasp Bates's understanding of the law as it stood in 1861. Bates's opinion covered what the proper

[99] Suspension of the Privilege, *supra* note 61, at 74. Recently, there has been some debate about whether Lincoln in fact ignored a legal obligation imposed by Taney. Seth Barrett Tillman has argued that there was no legal obligation involved in the decision for Lincoln to ignore. Seth Barrett Tillman, *Ex Parte Merryman: Myth, History, and Scholarship* 233 MIL. L. REV. 941-1002 (2016).

[100] Bates would normally be slotted in the category for traditional defenses of Lincoln. However, many of the other lawyers reacted directly to the Bates opinion so I have included it separately here as it is necessary context.

[101] *See, e.g.*, WILLIAM REHNQUIST, ALL THE LAWS BUT ONE 36-39 (2000).

[102] *See, e.g.*, John Frank, *Edward Bates, Lincoln's Attorney General*, 10 AM. J. OF LEGAL HIST. 34, 43-44 (1966) (calling Bates' habeas opinion his lone "intellectual failure" because "the power to suspend the writ is so clearly a congressional rather than a presidential power that it is essentially impossible to rationalize what the President did.").

[103] CAIN, *supra* note 13, at 145-50 (noting that, faced with mixed praise and criticism by his contemporaries, Bates maintained his opinion was correct even in 1865 when reflecting on it after he had left office and that he maintained that suspending habeas was preferable to full martial law until the end of his life).

role of the judiciary is, which branch should govern in times of crisis, and what the history of habeas was prior to the Civil War.

Bates first turned to the proper role of the judiciary. He argued that allowing the judiciary to dictate law to the executive would violate the separation of powers and make the judiciary the true sovereign.[104] Bates argued that England and Europe concentrated sovereignty in one body (Parliament in Britain, monarchs in other countries) – an allocation of sovereignty that America had rejected in favor of dividing sovereignty through a system of checks and balances.[105] This made the "departments" (branches of government) co-equal, and "if we allow one of the three to determine the extent of its own powers, and also the extent of the other two, that one can control the whole government, and has in fact achieved the sovereignty."[106] Essentially, Bates was arguing that each branch of government could come to different, "irrevocable" decisions about the meaning of the Constitution without raising any legal problems.[107] Bates concluded that Article III of the Constitution left the judiciary powerless "to impose rules of action and of judgment upon the other departments."[108]

Next, Bates turned to which branch should govern in times of crisis. Bates first asked who should decide when a crisis exists. He asserted that the president's Article II powers necessarily made the executive the one to decide when crises exist. Bates pointed to the Take Care Clause and the Commander-in-Chief Clause to argue that the president is the "active" actor

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[104] Suspension of the Privilege, *supra* note 61, at 75-81.
[105] *Id.* at 75-77. This language might seem strange to a modern reader, since today we consider dividing sovereignty as part of federalism; here, Bates' use of "dividing sovereignty" meant that the sovereign power of the federal government was split between the three branches, with each branch having a little bit checked by another branch.
[106] *Id.* at 76.
[107] Today, this kind of argument is a fairly weak one. However, in the 1860s judicial supremacy was far less enshrined in American legal thought than it is today. In fact, the only exercise of judicial supremacy after the seminal *Marbury v. Madison* was the (even then) divisive opinion in *Dred Scott*. *See* DON FEHRENBACHER, THE DRED SCOTT CASE, ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978) (describing the *Dred Scott* case as powerful attempt to reassert judicial supremacy).
[108] Suspension of the Privilege, *supra* note 61, at 76.

in the government and that he is a civil (as opposed to military) magistrate like a judge who must move to execute the laws of the land by military force if necessary.[109]

Bates buttressed this reading of the Constitution with another argument which may seem strange to the modern reader: the presidential oath supported Lincoln's decision to suspend the writ.[110] Bates contrasted the language of the presidential oath, which requires the president to "preserve, protect, and defend" the Constitution, with the oaths of Congressmen and judges, which requires them to "support" the Constitution.[111] Additionally, Bates pointed to the language in the oath that states that the president "take care that the laws be faithfully executed."[112] He argued that this language, which is addressed only to the president, includes the Constitution. It would be "plainly impossible" for the president to preserve and protect the Constitution if he could not put down rebellions. Pointing to acts of Congress which had authorized previous presidents to put down rebellions (in 1795 and 1807), Bates concluded that both Congress and the Constitution recognized that the president alone was solemnly bound to protect the Constitution through military force, if necessary, because the other branches were "too weak".[113]

However, Bates did not rest solely on his reading of the Constitution; he also cited Supreme Court precedent to prove that the Executive had sole discretion in times of emergency. Bates first cited to the case of *Martin v. Mott* for the proposition that the authority to decide if an

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[109] *Id.* at 80-81.

[110] This argument may seem strange now because the oath argument is not a winning argument today. The issue of whether the oaths of office had significance for each branch was much more controversial in the 1860s, largely because the oaths were taken as much more than just symbolic statements at the time. For more on this argument, see HAROLD HYMAN, ERA OF THE OATH (1954).

[111] Suspension of the Privilege, *supra* note 61, at 81-82.

[112] *Id.* at 82.

[113] *Id.* at 83. The Militia Acts of 1795 were a reauthorization of the Militia Acts of 1792 that had expired with the notable exception that the 1795 version eliminated language which required a judicial officer to be the one to make a determination of whether an emergency existed (and then to tell the president). The Insurrection Act of 1807 used the language "Whenever the President considers" as the trigger mechanism for when force could be used to put down an insurrection.

exigency has arisen rests solely with the executive.[114] *Mott* dealt with a case arising out of the War of 1812; a militiaman did not want to serve and appealed to the Supreme Court contending that the president did not have the authority to determine when the exigencies listed in the Militia Acts of 1795 existed and that Congress had to determine whether such an exigency existed. Justice Story wrote: "We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons." Bates also threw Taney's own words back at him, citing Taney's opinion for a majority of the Court in *Luther v. Borden* for the proposition that the power to decide when an emergency had arisen rested with the president alone and could not be questioned by the courts or Congress.[115] With his citations to Story and Taney, Bates concluded that the president's power to decide when an emergency existed also meant that the president had the power to decide when habeas could be suspended.

Turning to the second question of whether the president could ignore the courts, Bates returned to his earlier argument about the proper role of the courts and added some thoughts on officer suits.[116] He contended that "it can[not] be legally possible for a judge to issue a command to the President … and, in case of disobedience, treat him as a criminal in contempt of superior authority."[117] To allow such a result would be to subordinate a co-equal branch to another branch, making it unequal. Anticipating a common argument, Bates further asserted that this protection would shield the president's subordinates as well: "[The argument that subordinates can be sued even if the president cannot] attempts to take an untenable distinction between the

[114] Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827); *Id.* at 84.
[115] Suspension of the Privilege, *supra* note 61, at 90-91.
[116] Officer suits refers to suits against federal officers acting in their individual capacity for ordinary common law causes of action. The officer could defend on grounds of federal authority. If the authority was found to be lacking or unconstitutional, the officer would be liable for damages just like an ordinary citizen.
[117] *Id.* at 85.

person of the President and his office and legal power. The law takes no such distinction, for it is no respecter of persons."[118] Finally, in this section of his argument, Bates turned to a now-common rejoinder in support of an expansive executive – the political question doctrine.[119] Bates noted, "[T]he whole subject-matter is political and not judicial. The insurrection itself is purely political."[120] By moving the question to a political one, Bates was attempting to remove the issue of suspension from the realm of judicial review and thus the courts.

Bates also made an historical argument about the power of the courts to order the president to produce a prisoner. Bates noted that the Suspension Clause predated the creation of the Judiciary Acts which vested the power to issue the writ of habeas corpus in the federal courts.[121] Bates argued that this vesting of power meant that the power to issue writs was distinct from the privilege of individuals to ask for the writ from the government.[122] The logical conclusion from this fact, according to Bates, is that Congress is the only branch which can legislate "a repeal of all power to issue the writ" – that is, Congress is the only branch which can strip away the power of the judiciary to issue writs.[123] The president, on his own, could strip individuals of their privilege to petition for habeas when they are arrested for aiding a rebellion or insurrection.[124] Thus, Bates concluded the privilege of asking for a writ of habeas corpus was distinct from the writ itself – the president could ignore a detainee asking for a writ on his own but he could not eliminate the writ itself as a tool of the courts without Congress.

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[118] *Id.* at 85-86. The Supreme Court later rejected Bates' argument in *Georgia v. Stanton*, 73 U.S. 50 (1868) (deciding the distinction between subordinates and the president is tenable when bringing suit).
[119] Though the political question doctrine had its origins in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), it has had a long staying power. For a recent example of political question doctrine being used to justify an expansive executive, see, e.g., Al-Aulaqi v. Obama, 727 F. Supp.2d 1 (2010) (holding that determinations of who can be targeted for killing because of an imminent threat to the US is a political question residing with the executive).
[120] Suspension of the Privilege, *supra* note 61, at 86.
[121] *Id.* at 89.
[122] *Id.*
[123] *Id.* at 90.
[124] *Id.* at 90.

Bates finished his opinion on an expansive note. He argued that the president "rules in peace and commands in war, and at this moment he is in full exercise of all functions belonging to both these characters."[125] In other words, the president has peace powers and war powers, and at a time of civil war, the president exercises both functions – the fullest reach of presidential power possible. This conclusion and this opinion satisfied some, incensed others, and left some wanting a more a robust defense. The next sections of this paper turn to precisely this debate.

VII. Transformative Theories of the Constitution

In the debate over habeas, some lawyers turned to transformative theories of the Constitution to argue their case. These lawyers used and interpreted traditional doctrine, like the Constitution or the law of war, in new ways. Some lawyers, like William Whiting, followed in the footsteps of Lincoln, fleshing out the theory that the Constitution imported the law of war in times of war. Others, like Timothy Farrar, looked to revolutionize the way lawyers thought about the Constitution. All of them sought to transform the meaning of the Constitution.

One of the most influential members of this group (within the administration) was William Whiting. Whiting was the solicitor of the War Department. A former patent attorney, he was also an ardent abolitionist, who was willing to stretch the Constitution to allow the president to emancipate the slaves.[126] In one section of his influential *The War Powers of the President*, Whiting went so far as to suggest anyone in rebellion against the United States had abandoned any claim to the protections of the Constitution. In other words, the Constitution did not apply to those in rebellion.[127] He argued that in times of war, the Constitution authorizes the substitution of the international law principles of the law of war in place of normal constitutional protections

[125] *Id.* at 92.
[126] *Id.*
[127] WILLIAM WHITING, THE WAR POWERS OF THE PRESIDENT 51-52 (1862).

and rules.[128] To reach this conclusion, Whiting argued that citizens who took up arms against the government were both belligerents and citizens. Once a citizen became a belligerent against his or her own government, he or she lost the protections of that government (namely, the Constitution). But the law of nations trumped all constitutions in all countries as supreme law, so the law of war would still apply as a default under the Constitution of the United States (as the Constitution would, out of necessity, incorporate the higher law of the law of nations).[129] Like Lincoln, Whiting believed that the Constitution likewise imported the law of war for loyal citizens in loyal areas because to think otherwise would be to think that one area of the Constitution would allow the rest to be nullified – law of war was the baseline in war.[130] This was a novel approach to interpreting the Constitution, but it found support among the likes of Lincoln and Seward.[131] The end result of this approach was that the president could do some things in war time which he could not do in peace time.

A different transformative approach was taken by Timothy Farrar, a former New Hampshire judge, who took up his pen to reimagine how the Constitution should be interpreted. He called his idea the adequate constitution theory. He began with the premise that the past seventy-five years of constitutional interpretation had been wrong. The Framers had made a powerful document that was designed to "render the federal Constitution adequate to the exigencies of government, and the preservation of the Union."[132] Farrar claimed that the Antifederalists, having lost the battle over ratification, forced "the friends of the Constitution" to adopt an artificially narrow construction of the document under the guise of protecting

[128] *Id.* at 56-57.
[129] *Id.* at 49-52.
[130] *Id.* at 60-62.
[131] See note 95 above.
[132] Timothy Farrar, *Adequacy of the Constitution*, 21 THE NEW ENGLANDER 51, 51-73 (1862).

liberties.[133] Under Farrar's view, the Constitution was much more powerful than the narrow interpretation of the past seventy-five years made it out to be. The past decades had turned the Constitution into something close to the Articles of Confederation in weakness.[134] Farrar cited to Hamilton for the proposition that "every government ought to contain in itself the means of its own preservation."[135] He called the Civil War a "practical test" of the true power of the Constitution, and he said that it should contain the powers necessary to keep the Union together whether those powers were enumerated or not.[136] In Farrar's view, the Constitution was a powerful instrument that conferred the right of survival upon the government. It could do what was necessary to preserve itself. This view of the Constitution as an empowering document rather than as a constraining document appears to be new though it drew on ideas from people like Alexander Hamilton and Abraham Lincoln.

Farrar applied this theory to the suspension of habeas corpus by Lincoln. Farrar said that the suspension power is not in fact a power but that habeas "is suspended *ipso facto*" when internal war exists "in the opinion of those it has made responsible for the public safety."[137] The people made responsible for the public safety were the members of the executive department because they had been entrusted with heading the military in times of war – even internal war. Farrar argued that the Constitution could not possibly have envisaged freeing someone who had taken up arms against the state in a time of internal war. To do so would be to aid the enemy to your own destruction.[138] The president had the power to defend the Constitution as stated in his oath. If defending the Constitution required suspending habeas, then the president had the power

[133] *Id.* at 51-52.
[134] *Id.* at 53.
[135] *Id.* at 57.
[136] *Id.* at 53.
[137] *Id.* at 63. This is similar to the idea that the law of war applies *ipso facto* once the fact of war exists which was expounded by the majority in the *Prize Cases*, discussed above at note 55 and on page 12.
[138] *Id.* at 63-64.

to do so.[139] In other words, the Framers must have intended for the Constitution to have adequate powers to protect itself.[140] Farrar's view envisaged a much stronger and far-reaching document than previous constitutional theories had envisaged. In crafting this view, Farrar was reimagining what the Constitution meant.

A third lawyer who took a novel approach to interpreting the Constitution did not believe the President needed to suspend habeas in times of rebellion to have the power to detain citizens without questioning by the court. Silas Stillwell, a New York attorney, wrote a letter to Edward Bates responding to the attorney general's opinion for the government. Stillwell was an attorney who specialized in finance and banking law (writing several treatises on national finance and banking). He served in a few state-level elected offices and was the US Marshal for the Southern District of New York during the Tyler administration.[141] Additionally, he served as a secret adviser to Salmon Chase on financial issues during the first few years of the war, ghostwriting the National Currency Act of 1863.[142]

Stillwell's opinion, which he published in a newspaper, is, as far as I know, unique to him – he believed Lincoln's actions were lawful but that the Constitution did not give the power to suspend to the president. Stillwell's view was that the Constitution granted the power to suspend the writ to no branch of government.[143] Rebels by the act of rebelling suspended the privilege of the writ of habeas corpus. in other words, when rebellion exists, "the privilege of the writ is ipso

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[139] *Id.* at 64.
[140] Farrar appears to be envisioning the Constitution as embodying some form of natural law principles (i.e. that it cannot be a suicide pact containing the instruments of its own destruction).
[141] HERRINGSHAW'S NATIONAL LIBRARY OF AMERICAN BIOGRAPHY 348 (Thomas Herringshaw, ed., 1914).
[142] *The National Finances*, N.Y. TIMES, Dec. 6, 1873, at 5 (noting Stillwell was a secret adviser to Chase). S. REP. NO. 61-582, at 57, 60 (1910) (attributing authorship of and sealed reports in the Senate archives about the National Currency Act of 1863 to Stillwell).
[143] Silas Stillwell, *The Writ of Habeas Corpus: Letter from Hon. Silas M. Stillwell to Hon. Edward Bates, Attorney-General of the United States*, N.Y. TRIBUNE, Sep. 23, 1861.

facto suspended."[144] He analogized the suspension to self-defense in a murder case: if someone committed an act of rebellion against the United States, then the United States could act in self-defense by arresting the person without habeas corpus.[145] Stillwell believed should the judiciary find that a state of rebellion existed as a matter of law, it should not issue writs, stating "I have no authority to grant the writ, as rebellion exists."[146] He based his view on the fact that habeas appears only in Article I, Section 9, which contains a list of things Congress cannot do; since Congress cannot suspend the writ as a power in Section 8 and because suspension is not listed in Article II or III, Stillwell felt that the Constitution did not delegate the authority to suspend to any branch.[147] Stillwell's idiosyncratic views represented a completely different way of thinking about suspension from all other commentators.[148]

There were a few other lawyers who shared similar views of the law's relation to doctrine and the Constitution during the Civil War. Grosvenor Lowrey, a Treasury Department lawyer, and Francis Lieber, the author of General Order 100, are two such lawyers. They believed in times of war the law of war substitutes for the Constitution and the other normal laws of peacetime.[149] However, both men's writings about executive power are directed at the issue of emancipation, so I have not included lengthy analyses of their arguments in this paper.

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[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] Harrison, *supra* note 72, argues that the traditional understanding of what suspending the privilege of the writ of habeas corpus meant was an unbounded discretion to arrest without questioning to the president by Congress. Someone had to act (most likely, Congress) – it was not some form of judicial self-restraint. A discussion with Prof. Harrison has convinced me that Stillwell's view was a novel one in 1861 (and remains a novel idea today).
[149] GROSVENOR LOWREY, THE COMMANDER-IN-CHIEF: A DEFENSE UPON LEGAL GROUNDS OF THE PROCLAMATION OF EMANCIPATION (1863), *reprinted in* 1 UNION PAMPHLETS OF THE CIVIL WAR 474 (Frank Friedel, ed., 1967). JOHN WITT, LINCOLN'S CODE 181-84 (2012).

VIII. The Traditional Defense of Presidential Suspension

Many of the lawyers who supported the suspension of the privilege of the writ of habeas corpus supported it by arguing that the Constitution and existing legal doctrine gave the power to suspend to the president. These arguments were not founded on the idea that the Constitution was inadequate or that it imported the law of war in wartime. The arguments from this group of lawyers more closely followed the language of the Constitution and used the language itself and other legal doctrine to prove that the executive had the power to suspend the writ under the Constitution. Though these men came from different social and political backgrounds, they came to the same conclusion on habeas using legal doctrine and constitutional analysis. This suggests that legal doctrine influenced the way these lawyers thought about habeas to some extent.

One of the more well-known lawyers in this category is Horace Binney. At 81 (in 1861), Binney was one of the few members of the bar during the Civil War who could remember America's earliest days.[150] Mark Neely has noted that his tract on the suspension of habeas corpus was one of the most circulated tracts on the subject.[151] Binney had been engaged by Francis Lieber to defend Lincoln's suspension of habeas corpus.[152] Lieber believed that Lincoln deserved a broader defense than the one put on by Attorney General Bates and picked Binney to

[150] Binney lived an exceptionally long time by nineteenth (and even modern) standards. He died in 1875 at the age of 95. Binney studied law under Jared Ingersoll, who had been part of the Pennsylvania delegation to the Constitutional Convention. CHARLES BINNEY, THE LIFE OF HORACE BINNEY 54 (1903) (noting Ingersoll was a Federalist and member of the Constitutional Convention).

[151] NEELY, *supra* note 31, at 71. Neely comes to this conclusion after using the Online Computer Library Center to determine that more libraries today hold copies of the first edition of the Binney pamphlet than of any other influential pamphlet on the subject. While this is obviously not a perfect estimate, it lends at least some support to the idea that the Binney pamphlet was in wide circulation. *See also* RANDALL, *supra* note 20, 118-39. Randall notes that Binney's pamphlet received at least 10 rejoinders leading to two additional supplements to Binney's pamphlet.

[152] HORACE BINNEY, THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION (1862), *reprinted in* 1 UNION PAMPHLETS OF THE CIVIL WAR 199, 200-01 (Frank Friedel, ed., 1967). It may seem odd to see that I have placed Lieber and Binney in two separate categories. Lieber beseeched Binney to provide a more robust defense of Lincoln than he felt Bates had provided. Binney nevertheless relied heavily on doctrine and the Constitution for his arguments compared to Lieber's views of the law of war supplanting peacetime law.

make this defense.[153] Horace Binney was an inspired choice. He was one of the most imminent lawyers of the Civil War era, and his views carried great weight.[154] Binney rose to the challenge, publishing a pamphlet roughly fifty pages in length, which Attorney General Bates approved of after reading it. The pamphlet breaks down into roughly three primary sections: (1) a section arguing the language and history of the Suspension Clause suggest the executive can suspend the writ; (2) a section doing a point by point refutation of Taney's doctrinal analysis; and (3) a section arguing that the executive department is the best equipped to handle a suspension.

The first main argument Binney advanced was one based on the text and history of the Suspension Clause. Binney's arguments stemmed from his idea that the Suspension Clause must be read in a "broad constitutional and natural" way rather than a "merely legal and artificial" way.[155] Binney first turned to British law. He argued that British law should not hold sway because the phrase "privilege of the writ of habeas corpus" "are not words of the common law, or of any other system of law in particular".[156] Binney noted that there is no analogue to the British Habeas Corpus Act, because habeas corpus is not conferred to the people by legislation in the United States but as a constitutional right that cannot be discretionally suspended unless in times of rebellion or invasion. Binney noted that in England habeas could be suspended in peacetime too.[157] Binney believed the distinctions were important because in Britain, Parliament could suspend the writ or the Habeas Corpus Act, whereas in America, the *privilege* could be suspended (by who was unclear in the text).[158]

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[153] *Id.* (editor's note discussing the correspondence between Lieber and Binney – the note does not explain why Lieber thought Lincoln needed a broader defense than Bates' opinion).
[154] *Id.* at 200.
[155] *Id.* at 202-05.
[156] *Id.* at 206.
[157] *Id.*
[158] *Id.* at 216. *See also* Harrison, *supra* note 72 (discussing how the "privilege" was the right to personal liberty and to receive the remedy of release from jail while the writ was the remedy the courts provided to secure the right to personal liberty).

Binney then turned to the American history of the Clause. He argued that because there was no precedent to using the "privilege" language, the words must be read in a "general or popular" sense rather than in the statutory parlance of the British Habeas Corpus Act.[159] Using the popular sense of "privilege" in the habeas context, Binney argued that suspending the privilege of habeas corpus meant to suspend the privilege of "being bailed, tried, or discharged from imprisonment without delay".[160] Binney concluded this line of thinking by arguing that the only condition that allows the suspension is rebellion or invasion. The determination of when these conditions applied were given to the executive by Congress in early legislation (e.g. the Militia Acts of 1795), so the determination of suspending the privilege of habeas corpus also rested with the executive.[161] Binney next turned to a survey of conflicting language from the Constitutional Convention to show that the original language for the Suspension Clause had included "by the Legislature" and that that language had been rejected in the final draft of the Suspension Clause.[162] He also noted that the clause was originally proposed in the judiciary article (Article III), but got moved later, so arguments based on the placement of the Suspension Clause were, in Binney's mind, weak.[163] This first section used history and textual analysis to argue that the Suspension Clause gave the power to suspend the privilege of habeas corpus to the executive.

The second section of Binney's pamphlet was a point by point refutation of Taney's doctrinal points.[164] Binney turned to Taney's citations to Chief Justice Marshall. Binney argued that *Ex parte Bollman* (the case Taney cited for the proposition that only Congress possessed the

[159] BINNEY, *supra* note 151, at 206.
[160] *Id.* at 207.
[161] *Id.* at 221.
[162] *Id.* at 222-26.
[163] *Id.* at 229-30.
[164] Not included in this section's analysis is a portion of the section where Binney accuses Taney of being a Confederate sympathizer and of being disloyal to the Union.

power to suspend) was not about the suspension of habeas corpus and that the question presented was whether the Supreme Court could issue writs.[165] The answer turned on who had the *power* to issue writs. Binney, the courts, and Bates all agreed that only Congress could grant and rescind the power to issue writs, but Binney argued that this was beside the point when the question was who could suspend the privilege of the writ – in other words, Marshall's comment that only Congress had the power to suspend was *obiter dicta*.[166] Turning to Taney's citation to Justice Story's *Commentaries*, Binney correctly noted that Story was not writing as a judge but as a commentator when he said that only Congress had the power to suspend habeas.[167] Binney thus pushed back against Taney's claims about American precedents.

In the final major section[168] of the pamphlet, Binney argued that the executive was the branch best suited to handling suspensions. Binney began by noting that two conditions are necessary for the suspension of the privilege of the writ of habeas corpus. First, a state of rebellion or invasion must exist; if that state exists, the second requirement is that the public safety must require the suspension.[169] A state of rebellion or invasion can be discerned by the very nature of a situation without any judgment, so, for Binney, the question was who decided when the public safety requires suspension. Binney argued that the answer to this question was resoundingly the executive. He asserted that Congress had long assumed that the president was the person to make this determination because in all legislation about wars and insurrections (e.g. the Militia Act of 1795), the language in statutes presumed that the president would make the determination and only spoke of the actions the president would take once a determination had

[165] *Id.* at 232-33.
[166] *Id.*
[167] *Id.* at 234. In essence, Justice Story had said that Congress had not suspended the writ since the founding while discussing the history of abuses of civil liberties by Parliament pre-Revolutionary War.
[168] There is a short fourth section where Binney provides one sentence responses to objections to his arguments he felt were minor.
[169] *Id.* at 236.

been made.[170] For this reason, the power to suspend would rest with the president. These three sections represented one of the broadest defenses that Lincoln would receive for his decision to suspend the privilege of the writ of habeas corpus: the arguments covered textualist, originalist, and structuralist grounds for why the suspension power should rest with the executive.

Another famous lawyer who supported the president through doctrinal analysis was Reverdy Johnson. Johnson was a Maryland Democrat (and Senator) and friend of Taney, yet he wrote an opinion supporting Lincoln's decision.[171] In many respects, Johnson's analysis looks similar to Bates' largely because Bates consulted with Johnson before writing the official opinion for the government.[172] Like Bates, Johnson looked to the proper role of the courts, citing to Andrew Jackson's refusal to follow the rulings of the Supreme Court in the *Cherokee Nation* cases.[173] He also made the distinction between granting and rescinding the power to issue writs and the power to suspend the privilege of the writ.[174] These portions of Johnson's opinion look like Bates' arguments that the courts could not be superior to the executive in their interpretation of the Constitution s.

Johnson did add one additional feature to his argument that Bates did not cover: Johnson argued that the location of the Suspension Clause in Article I of the Constitution did not mean that the power belonged to Congress. Turning to structuralism, Johnson argued that Article I, Section 10 had nothing to do with Congress and that the Suspension Clause was not in Section 8, which is where all of Congress' enumerated powers are listed.[175] He further argued that the

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[170] *Id.* at 238-40.
[171] I believe that this is the same opinion which was published anonymously in the Daily National Intelligencer, a Whig newspaper that had supported John Bell's Constitutional Union party against Lincoln in 1860. *The Power of the President to Suspend the Writ of Habeas Corpus*, DAILY NAT'L INTELLIGENCER, June 22, 1861, at 2.
[172] *See* CAIN, *supra* note 13, at 145 ("On order from Lincoln, Bates conferred with Reverdy Johnson, a former attorney general, before drafting the administration's reply to Taney.").
[173] JOHNSON, *supra* note 10, at 186.
[174] *Id.* at 192.
[175] *Id*. at 187. Section 10 contains a list of things state legislatures are not allowed to do.

power to withdraw money from the treasury is listed in Article I even though that power is exercised by the executive.[176] Through these examples, Johnson rebutted Taney's argument that the location of the Suspension Clause in Article I meant that Congress had to order the suspension. Johnson's defense was not nearly as wide ranging as Binney's, but it was just as powerful because it came from a Democrat who had defended slaveholders' rights in front of the Supreme Court.

One underexplored lawyer who weighed in on the issue of suspension is Henry Dutton. Dutton was a well-known Connecticut lawyer, who served as the last Whig governor of that state.[177] During the Civil War, Dutton held two positions: professor of law at Yale and associate justice on the Connecticut Supreme Court of Errors.[178] In late 1861, Dutton wrote an article for the *American Law Register*, the oldest American law review,[179] about the suspension of habeas corpus.[180] Like Bates, Binney, and Johnson, Dutton turned to close statutory interpretation and case law to determine who had the power to suspend habeas.

Dutton first looked to statutory and constitutional interpretation. Dutton began with roughly three sentences arguing that Taney's views should only be given the same weight as other lawyer's views and that the balance of authority supported the president's views.[181] Dutton then cited all the relevant constitutional and statutory language on habeas and turned to interpretation. He cited to Bates' opinion for the proposition that the Constitution and presidency

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[176] *Id.*
[177] I have yet to find any secondary literature that looks at Dutton's *American Law Register* article.
[178] *Governor Henry Dutton*, NATIONAL GOVERNORS ASSOCIATION (last viewed Dec. 21, 2012), https://www.nga.org/cms/home/governors/past-governors-bios/page_connecticut/col2-content/main-content-list/title_dutton_henry.html
[179] University of Pennsylvania Law Review Journal Info, *JSTOR*, https://www.jstor.org/journal/univpennlawrevi?decade=1950 (the *ALR* changed its name in 1908).
[180] Henry Dutton, *Writ of Habeas Corpus*, 9 AM. L. REG. 705 (1861).
[181] *Id.* at 706.

preceded the authorization for courts to issue writs.[182] He argued that this must have meant that the president had the power to suspend because Congress was only in session about a third of the year; emergencies by their definition require fast action, so it would be inconceivable that the founders wanted to leave the country potentially open to attack with no power to arrest rebels until Congress could come back together.[183] Dutton then used the exact same comparisons that Johnson used to argue that not every section of Article I of the Constitution refers to Congress, a fact which Dutton claimed made Taney's whole argument "fall[] to the ground."[184]

Dutton last turned to the issue of American legal doctrine. He cited to the case of *Luther v. Borden*. *Luther* was a lawsuit brought against Borden and other state militiamen for trespass by Luther, a rebel member of Dorr's Rebellion.[185] The militiamen had broken into Luther's home to arrest Luther on a writ given to them by their military superiors to arrest and hold Luther without habeas. Chief Justice Taney, writing for the majority, held that Luther could get no recovery because the militiamen had acted with proper authority given by their commanders to put down a rebellion and that the determination of which Rhode Island government was the proper government for the militia to support was a political question not subject to judicial scrutiny.[186] Dutton argued that if Luther had been found and arrested, he would have been in the same position as Merryman: for the militiamen to have been authorized to break down the door to Luther's house, they also had to be legally authorized to arrest him without normal process.[187] Dutton also noted that Taney had said the question of whether an insurrection existed was a question for the executive alone.[188] Dutton concluded the piece by calling Taney a hypocrite for

[182] *Id.* at 708.
[183] *Id.*
[184] *Id.* at 709-10.
[185] Luther v. Borden, 48 U.S. (7 How.) 1 (1849)
[186] *Id.*
[187] DUTTON, *supra* note 179, at 711.
[188] *Id.* at 712.

writing an opinion which was inconsistent with Supreme Court doctrine that Taney himself had written. This law review article was a scathing indictment of Taney and relied heavily on doctrinal analysis to support the conclusion that the president was acting lawfully when he suspended the writ of habeas corpus.

By the time of the Civil War, Joel Parker was a professor of law at Harvard, having previously served as an associate and then chief justice of the New Hampshire Supreme Court.[189] Parker was an early supporter of the legality of Lincoln's suspension, saying as much in a lecture in June 1861, which was published later.[190] Parker is interesting because he later pulled back from his views of presidential power, criticizing Lincoln for going too far in expanding executive power.[191]

Parker's chief argument against Taney in his earlier work was that Taney misapplied case law. Parker suggested that Taney's view of Lincoln's suspension would have been correct if peacetime precedent on the issue were binding in wartime, but he went onto argue that such a reading was unmoored from the Constitution.[192] The Suspension Clause, Parker pointed out, explicitly states that suspensions are to occur only during times of invasion or rebellion, which Parker took to mean wartime.[193] Taney's precedents only spoke to whether the power to issue writs could be suspended in times of peace, to which the answer would be yes; war made for a different situation constitutionally when it came to enforcing the privilege of the writ.[194] As further support for this contention, Parker pointed to English precedent, noting that there had

[189] FRANCIS DRAKE, DICTIONARY OF AMERICAN BIOGRAPHY 688 (1879).
[190] JOEL PARKER, HABEAS CORPUS AND MARTIAL LAW (1862).
[191] JOEL PARKER, THE WAR POWERS OF CONGRESS AND THE PRESIDENT (1863).
[192] PARKER, *supra* note 189, at 8-10.
[193] *Id.*
[194] *Id.*

been no cases where the writ of habeas corpus had been used in England in wartime to effectuate the release of a prisoner detained by military authorities.[195]

Surprisingly, Parker did not evaluate the question of whether the president is able to suspend the privilege under the language of the Constitution. He took issue with Taney's claim that the Suspension Clause is a grant of power (i.e. that it authorizes some governing body to suspend the writ), claiming that the Clause is a restricting clause meant to limit when the writ can be suspended, by whoever is allowed to suspend it.[196] The only thing he said about who is able to suspend the writ is that Attorney General Bates wrote an opinion on the issue which was satisfactory in answering the question.[197] The remainder of Parker's treatise is devoted to using American precedent from previous rebellions to argue that internal rebellions are times when martial law applies, which allows the president to make judgments about when an emergency exists under *Luther* and statutes like the Militia Act of 1795.[198] Parker, like many other legal scholars of the time, turned to doctrine and textual analysis of the Constitution to support the president's suspension of the privilege of the writ of habeas corpus.

All the preceding lawyers supported the legality of Lincoln's suspension of the privilege of the writ of habeas corpus. As the analysis has shown, there were many similar arguments made by each of these lawyers. Certainly, they were all reading each other's works. They all looked to the Constitution for guidance and they all cited to legal doctrine which existed before the Civil War. These men came from different social and political backgrounds but came to the same conclusion using legal doctrine and constitutional analysis. This suggests that legal doctrine transcended political boundaries to some extent and that, far from being unshackled

[195] *Id.* at 12-13.
[196] *Id.* at 23-24.
[197] *Id.* at 24.
[198] *Id.* at 25-47.

from doctrine, legal thinkers were tied to it as they tried to make sense of the new form law was taking in America's bloodiest war.

IX. The Traditional Attacks of Presidential Suspension

Of course, Lincoln's decision was not without its detractors. Some attorneys felt that Lincoln had transgressed constitutional boundaries when he suspended the writ. They too drew on doctrine the way Taney did to argue against what they viewed as a usurpation of power by the executive. Like those lawyers who supported Lincoln, the lawyers who opposed him were not all of the same political persuasion (though, in the general public there were certainly more Democrats in opposition than in support of Lincoln). This section looks at some of the more prominent opposition lawyers.

Edward Ingersoll was a Philadelphia lawyer from a family famous (in Philadelphia) for supporting unpopular causes.[199] Ingersoll was no different from the rest of his family: he vocally took to the streets of Philadelphia to voice his displeasure with the Lincoln administration and to support the Confederacy.[200] He was arrested twice for his unpopular opinions, and, ironically, was released on a writ of habeas corpus the first time. His pamphlet on the issue of the suspension of habeas corpus lambasted the president for trampling on civil liberties in wartime.

In his opening remarks, Ingersoll noted that he was explicitly intending to take on Attorney General Bates, Joel Parker, Reverdy Johnson, and Horace Binney. He made a snide footnote remark to the effect that Binney dedicated his pamphlet supporting the president to Lieber, who had, before the war, said that the power to suspend the writ lay with Congress only.[201] Ingersoll went on to say that English precedent was clear on the issue and that its answer

[199] EDWARD INGERSOLL, PERSONAL LIBERTY AND MARTIAL LAW: A REVIEW OF SOME PAMPHLETS OF THE DAY (1862) *in* 1 UNION PAMPHLETS OF THE CIVIL WAR 253 (Frank Friedel, ed., 1967).
[200] *Id.*
[201] *Id.* at 257, FN1.

to whether the president can suspend the writ was "written in the skies" (namely, he can't).[202] Ingersoll blasted Binney for trying to do legal gymnastics to ignore English precedent because it would undermine the president's position.[203] Ingersoll also argued that Binney's claims that the location of a clause in the Constitution didn't matter were weak and that Article I is the legislative powers section, so a clause there would apply to the legislature.[204] Ingersoll concluded this section of his arguments by asserting that supporters who claimed only the executive could act in times of emergency were supporting dictatorial powers, that allowing Congress to keep the power of suspension was historically proper, and that any damage that happened in the meantime was the price of a republic.[205]

The rest of the pamphlet surveyed martial law powers across different countries in Europe and concluded that America was supposed to be different from those other countries, so the executive should not be given dictatorial powers.[206] Throughout the latter portion of the argument and in the first portion, Ingersoll pointed to court cases, laws both foreign and domestic, and the Constitution. Thus, he used doctrine to challenge the claims of Lincoln's supporters.

A surprising opponent of Lincoln's policy was Benjamin Curtis. Curtis was a former US Supreme Court associate justice who had resigned in protest over *Dred Scott* (he was one of two dissenters). A former Whig, he would later defend Andrew Johnson in Johnson's impeachment hearings in the Senate.[207] Though most of his writings center on the issue of emancipation (to which he was opposed), Curtis did produce some letters and passages on the issue of habeas

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[202] *Id.* at 257.
[203] *Id.*
[204] *Id.* at 265.
[205] *Id.* at 270-73.
[206] *Id.*at 278-90
[207] BENJAMIN ROBBINS CURTIS, EXECUTIVE POWER (1862) *in* 1 UNION PAMPHLETS OF THE CIVIL WAR 450 (Frank Friedel, ed., 1967).

suspension. In his treatise on executive power, Curtis devoted a paragraph to the habeas issue. He noted that all the binding legal precedent weighed against the president, but conceded that it was at least a plausible argument that the president could prevent some individuals from exercising their privilege to obtain a writ.[208] In an appendix to his memoirs, Curtis seems to have had only one real issue with Lincoln's conduct, which is that Lincoln ignored Taney's orders. Curtis argued that there was no precedent to support the president ignoring the orders of a court; he conceded that there were times when a president had differed with Congress on questions of constitutional interpretation, but he felt that ignoring a court order was a different ball game.[209] Curtis worried that to allow the president to ignore court orders would be to leave the president as "the sole judge of the extent of his powers" which would mean that "there is no limit to the powers which he may practically exercise."[210] Curtis looked to legal doctrine to determine the extent of the president's power. His view was that precedent and the Constitution bound the executive to follow certain limits. Legal doctrine was key to his thinking.

Taney and former president Franklin Pierce appear to have corresponded on the issue of suspending habeas. Unfortunately, Pierce's initial letter to Taney has been lost, but at least some of the content can be inferred from Taney's letter. A lawyer by training, Franklin Pierce was a former president and an outspoken critic of Abraham Lincoln. Having suffered many tragedies in his life (including the death of his last remaining son in a train wreck on the way to his inauguration), by the 1860s, Pierce had turned to reclusiveness and alcohol.[211] It is clear from

[208] *Id.* at 460. He uses this discussion to highlight that though there was disagreement here, no one had attempted to argue that the power to suspend the privilege of the writ of habeas corpus allowed the president to annul state laws (i.e. emancipate slaves).
[209] BENJAMIN ROBBINS CURTIS, A MEMOIR OF BENJAMIN ROBBINS CURTIS 461-62 (1879). As noted above, Andrew Jackson's refusal to follow court orders in the *Cherokee Nation* cases would seem to suggest there was precedent for presidents ignoring court orders.
[210] *Id.* at 462.
[211] *Franklin Pierce Essays*, UNIVERSITY OF VIRGINIA MILLER CENTER AMERICAN PRESIDENTS (last visited Dec. 21, 2016), http://millercenter.org/president/biography/pierce-life-after-the-presidency

Taney's letter that Pierce supported the outcome of *Merryman*.[212] Taney was of the opinion that the suspension of habeas corpus was driven more by "delirium" and "hate" stirred up by the passions of civil war than by law and clear thinking.[213] Though Taney did not discuss legal doctrine in his letter, the letter clearly shows that Taney (and presumably Pierce) viewed Lincoln's policies as lawless because they did not follow Taney's decision in *Merryman*.

One of the more prolific opponents of Lincoln was John Pruyn. Pruyn was a New York lawyer and railroad executive, who spearheaded the Democratic opposition in New York to Lincoln's suspension of the writ.[214] Pruyn's extant pamphlet was written after the Habeas Corpus Suspension Act of 1863 was passed, but it still claimed the suspension of habeas as laid out in the Act was illegal. Drawing on legal precedent, Pruyn argued that the suspension was a legislative power and that it cannot be delegated to any other branch (i.e. Congress had to determine where and when to suspend the privilege of the writ rather than delegating the authority to determine the time and place of suspension to the president as the Act did).[215] One argument Pruyn made that other commentators did not was that the suspension was illegal as applied to a certain subset of arrestees – namely those imprisoned for their political views. Pruyn argued that the constitutional prohibition on *ex post facto* laws prevented the president from arresting people for their speech when their speech would have been protected by the First Amendment.[216] In his view, even if the writ had been properly suspended, someone would have

[212] ROGER TANEY, LETTER TO FRANKLIN PIERCE (June 12, 1861) *in* 10 AM. HIST. REV. 368 (1905).
[213] *Id.*
[214] MARK NEELY, THE FATE OF LIBERTY 192-99 (1991).
[215] JOHN PRUYN ET AL., REPLY TO PRESIDENT LINCOLN'S LETTER OF 12TH JUNE, 1863 (1863) *in* 2 UNION PAMPHLETS OF THE CIVIL WAR 752, 757-58 (Frank Friedel, ed., 1967).
[216] *Id.* at 758. Pruyn was probably thinking of people like Clement Vallandigham and Ingersoll who had been arrested for what he viewed as simply speaking unpopular political views. Needless to say, the Lincoln administration disagreed with Pruyn about what speech constituted treason. For more on how the Lincoln administration defined and prosecuted treason, see WILLIAM BLAIR, WITH MALICE TOWARDS SOME: TREASON AND LOYALTY IN THE CIVIL WAR ERA (2015).

to take an action beyond speech to be jailable without habeas.[217] Pruyn thus used doctrine to attack Lincoln's suspension of habeas corpus even after it had been sanctioned by Congress in 1863.

S. S. (Samuel Smith) Nicholas, a Kentucky Unionist and judge on the Kentucky Court of Appeals, wrote several pamphlets about the habeas suspension, including one directly answering Binney's pamphlet.[218] Nicholas relied on a close reading of the Constitution and prior doctrine to reject Binney's arguments. He first argued that if there had been no language in the Constitution about habeas at all, then the power over habeas would have undoubtedly rested with Congress, for it was the body which created the power to issue writs to the courts. Language in the Constitution could not alter who had the power to suspend without more explicit instructions.[219] He cited founders like Patrick Henry to support his position that the power remained with Congress.[220] Nicholas also looked to the precedent of Thomas Jefferson, who asked Congress to suspend the writ, so he could arrest Burr and Burr's conspirators in 1803. The fact that Congress refused to suspend the writ and Jefferson acquiesced proved to Nicholas that Jefferson understood who had the power to suspend the writ.[221] Nicholas concluded that historical practice in America and in Britain definitively answered the question of who could suspend – Congress and only Congress.[222] Like his fellow opponents of presidential suspension, Nicholas relied on traditional forms of constitutional interpretation and on a close reading of historical precedent to support his position.

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[217] PRUYN ET AL., *supra* note 214, at 758.
[218] LUCIEN KNIGHT, BIOGRAPHICAL DICTIONARY OF SOUTHERN AUTHORS 320 (1978).
[219] S. S. NICHOLAS, HABEAS CORPUS, THE LAW OF WAR, AND CONFISCATION 2 (1862). Nicholas dismissed the distinction between the privilege of seeking the writ and the writ itself as sheet semantics.
[220] *Id.*
[221] *Id.* at 3-4.
[222] *Id.* at 6-8.

All the lawyers surveyed here who opposed Lincoln's suspension of the writ turned to legal doctrine to inform their views of why Lincoln was acting against the law. They worried that the passions aroused by the Civil War were leading to the destruction of traditional laws and civil liberties (like the right to a speedy trial and free speech). They attempted to use legal doctrine as a shield against these changes. Though they were not successful in getting Congress (or the Lincoln administration) to agree with them that the suspensions prior to Congressional authorization were illegal,[223] their struggles show just how important doctrine was for the lawyers of the Civil War.

X. A Debate Recreated

From 1861-1863, lawyers across America debated the issue of whether the president had the power to suspend the writ of habeas corpus. The naysayers who argued that suspension could only be done by Congress, eventually had their argument settled by Congress. In 1863, Congress passed the Habeas Corpus Suspension Act of 1863 which effectively legalized Lincoln's practice and approved of his pre-Act suspensions retroactively.[224] Though the debate over who could suspend continued throughout the war, that debate after 1863 became largely academic rather than practical.[225] In those early years, however, as feelings of loyalty, patriotism, and concern for civil liberties clashed, lawyers got swept up in some of the most fundamental questions of the war. The lawyers who debated the issues brought different political and social backgrounds to the debate. They used traditional doctrine, and they proposed new ways of thinking about the

[223] The passage of the Habeas Corpus Suspension Act of 1863, 12 Stat. 755, does not necessarily demonstrate success. One of the Act's sponsors and authors, Thaddeus Stephens, despite saying he thought Congress had the power to suspend habeas, said he thought Lincoln had acted properly and that the Act was only meant to indemnify Lincoln in case some court disagreed with Lincoln. CONG. GLOBE, 37th Cong., 3d Sess. 22 (1862).
[224] Habeas Corpus Suspension Act of 1863, 12 Stat. 755.
[225] The practical debate turned to whether Lincoln was following the requirements of the Habeas Corpus Suspension Act.

Constitution. They supported Lincoln's policies and opposed them. They talked with each other explicitly and called each other out by name. But they all relied on doctrine to make their cases.

This debate exposed surprising alliances and fault lines. There was Reverdy Johnson, Maryland Democrat and Taney friend, who supported Lincoln's suspension of habeas corpus and even helped Bates write his opinion. Benjamin Curtis, the former Supreme Court justice who resigned in protest over *Dred Scott*, argued that Lincoln was overstepping his bounds in locking up traitors in a war which had many of the states' rights issues at its core that were present in *Dred Scott*. As these examples show, who supported Lincoln and who opposed Lincoln on the issue of habeas did not always follow party lines. The law was not always a fig leaf for political views. Something about the law convinced participants that their view was right.

The scholarship up until now has been hobbled by a failure to recognize the role law played in the pressing issues of the Civil War and a failure to understand what the content of the law was for Civil War lawyers. These failures have been at least partly supported by the narrow focus on a few, high-profile lawyers like Lincoln, Taney, and Bates. Exposing the wider debate about habeas helps to correct some of these failures. For the lawyers of the Civil War, legal doctrine was the weapon with which they fought. Some said it supported the president's actions, some said it didn't. By evaluating all these different positions, it becomes clear that doctrine plaid an influential in the legal consciousness of the Civil War. As the law changed rapidly to accommodate the exigencies of the war, lawyers grappled with these changes through the lens of pre-existing legal doctrine and constitutional analysis – a lens which did not always align with personal political preferences. In sum, not only was there a vibrant debate about the suspension of habeas corpus in the early 1860s but that that debate has important lessons for our

understanding of how the war was perceived by the lawyers who argued about and fought in the war.