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HABEAS CORPUS, SUSPENSION, AND DETENTION: ANOTHER VIEW

*David L. Shapiro**

“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.”¹

INTRODUCTION

The Suspension Clause, as the quoted language is generally described, is as straightforward as an English sentence can be. And to those familiar with the Great Writ,² its meaning, at least at first reading, does not seem obscure.

Yet few clauses in the Constitution have proved so elusive. Scholars have debated a remarkable range of questions about its meaning ever since its inclusion in the text submitted to the states for ratifica-

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1 U.S. CONST. art. I, § 9, cl. 2.

2 The writ of habeas corpus has many varieties and purposes, all involving the literal (or, later on, figurative) production of a detainee before the court, and some forms of the writ have developed more recently than others. For the range and forms of its current use, see BLACK'S LAW DICTIONARY 728 (8th ed. 2004). For informative histories of the evolution of the writ, see, for example, WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980); ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS (Albany, W.C. Little & Co. 1858); ROBERT S. WALKER, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY (1960).

The most significant form of the writ, and the one most relevant to the meaning and application of the Suspension Clause, has been known before and since adoption of the Constitution as the writ of habeas corpus *ad subjiciendum*, the form designed to test the lawfulness of the petitioner's detention. It is the form sometimes referred to as “The Great Writ.”

tion, and some of the most difficult of these have yet to be resolved by the Court that regards itself as the final arbiter of constitutional disputes.³ Any list of the most significant of these questions would surely include:

- Does the Clause impose on the federal government not only an explicit prohibition (subject to explicit exceptions), but also an implicit obligation?
- If it does, what is the nature of the obligation?
- Which branch or branches of the federal government have authority to suspend the writ?⁴
- What constitutes a “suspension” of the writ?
- Is the decision by an authorized branch of the government to suspend the writ subject to judicial review, and if so, under what standard?
- What are the consequences of a valid suspension of the writ? In particular, does a suspension simply render unavailable a particular remedy, or does it modify or abrogate any otherwise existing rights?

Given the historical and present value of the writ as a safeguard of individual liberty, every one of these questions can have profound importance, especially in a time of national crisis, and each will be addressed, at least briefly, in this Article. Indeed, to separate out any one for completely independent consideration would challenge even the most artful of lawyers—a clan that, it is said, possesses the special skill of separating the inseparable.

But my principal focus will be on the last question—the consequences of a valid suspension. This question, in itself, raises challenging issues about the nature of law and the relation between rights and remedies—issues that intrigue legal theorists at any time but that, at

3 The debate about the relative roles of the three branches of the federal government in interpreting the Constitution is a continuing one. See RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 88–92 (4th ed. 1996). (Space limitations compelled the unfortunate omission of this material in the next edition.) But there is little doubt that the Court today views its role—limited only by the doctrines of jurisdiction and justiciability—as that of final arbiter of the meaning and application of the Constitution. See, e.g., *United States v. Nixon*, 418 U.S. 683, 704–05 (1974); cf. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (rejecting state officials' claim that they had no enforceable duty to comply with federal court orders resting on the Supreme Court's interpretation of the Constitution).

4 Although lawyers and judges generally speak of suspension of the writ, the text actually refers to suspension of “[t]he Privilege of the Writ.” U.S. CONST. art. I, § 9, cl. 2. There may be a difference between the two phrases, but for convenience, the shorter form will be used here.

this writing, may also affect the practice of law by criminal and civil rights lawyers, the decisions of judges, and the fates of prisoners.

My point of departure, in some respects, is a recent article by Professor Trevor Morrison in which he argues that a valid suspension serves only to withdraw from the courts the power to grant habeas corpus but does not modify or abrogate any underlying constitutional (or other legal) right.⁵ My view is that while such a result is not implausible, it cannot be squared with either the essence of the Great Writ or with a proper understanding of the Suspension Clause.

This conclusion may jar, or even offend, those who would resist any interpretation of the Constitution that would appear to threaten basic liberties. But I hope to convince at least some of these critics that the interpretation I advocate is fair to the needs of government in crisis and—if properly understood as a limited authorization of the exercise of extraordinary power in times of urgent need—is at the same time as protective of the rights of individuals as such a crisis reasonably permits. Indeed, adoption of Morrison's position could nullify, or at least severely undermine, the objective envisioned by the granting of authority to suspend.

I. PRELIMINARY ISSUES

Each of the questions posed in the Introduction is worthy of at least brief discussion in this Article. Moreover, some consideration of each is proper, if not necessary, to an understanding of the major question under consideration here.

A. *The Question of Obligation*

Habeas corpus is the only common law writ referred to in the Constitution, and the reference appears only as a conditional prohibition on the exercise of federal authority. In the absence of a specific grant of authority, then, can this Clause, or any other clause of the Constitution, be read to mandate the existence of authority to grant the writ? Or does the Clause mean simply that the federal govern-

⁵ Trevor W. Morrison, *Hamdi's Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411, 415 (2006). Among the many other scholarly discussions of the Suspension Clause, perhaps the one that touches most closely on the central issue in this essay is James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497 (2006). And for insightful discussion of a closely related problem, see Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135 (2005); Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755 (2004) [hereinafter Kontorovich, *Liability Rules*].

ment is barred (with the specified exceptions) from denying the ability to grant the writ to any court in the United States that has been given that authority either by common or positive law? If the latter, perhaps the Clause simply protects state judiciaries from federal intrusion on whatever power they may have to entertain and to grant a habeas petition.⁶

Textual support for this view may be found not only in the language of the Clause but in its location—not in the list of delegated powers in Section 8 of Article I, but in a list of prohibitions in Section 9.⁷ Moreover, the writ is referred to as a “privilege,” not a right.⁸ And historical support for the narrower view may be garnered from the facts that an earlier draft did contain an affirmative guarantee of the availability of the writ, and that at least some contemporary observers apparently thought or assumed that the final version submitted for ratification contained no such guarantee.⁹

But the contemporary history, both during the Convention and after, turns out to be more ambiguous, and to leave the present-day observer—perhaps even a dyed-in-the-wool originalist—uncertain.¹⁰ As for the text, the drafters’ use of the words “habeas corpus”—a term familiar to all lawyers schooled on a heavy diet of Blackstone¹¹—could

6 William Duker devotes most of an entire chapter (chapter 3, pages 126–80) to an argument that the Suspension Clause was intended “only to restrict Congressional power to suspend state habeas for federal prisoners.” DUKER, *supra* note 2, at 126; see also *INS v. St. Cyr*, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting) (contending that the Suspension Clause does not guarantee any content to, or even the existence of, the writ; rather it limits only the ability of Congress to withhold temporarily whatever it has already authorized by statute); Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 342 (1952) (noting contemporary criticism of the negative form of the text of the Suspension Clause); Dallin H. Oaks, *Habeas Corpus in the States—1776–1865*, 32 U. CHI. L. REV. 243, 248–49 (1965) (suggesting that at the time the Suspension Clause was drafted, the question whether the Constitution guaranteed the privilege of the writ was not a matter of concern, perhaps because the writ was then available in every state).

7 U.S. CONST. art. I, § 9, cl. 2.

8 *Id.*

9 See Milton Cantor, *The Writ of Habeas Corpus: Early American Origins and Development*, in *FREEDOM AND REFORM* 55, 75 (Harold M. Hyman & Leonard W. Levy eds., 1967) (noting uncertainty about whether the Clause guaranteed the availability of the writ or simply assumed its existence at common law); Collings, *supra* note 6, at 340–41.

10 For further discussion and references, see RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1289–93 (5th ed. 2003) [hereinafter *HART & WECHSLER*].

11 Blackstone, whose work is generally recognized as the colonies and later in the states in the years leading up to and following the adoption of the Constitution, refers

well be taken as an implicit recognition that this well-known and highly respected writ would of course exist unless the specified conditions of crisis warranted its suspension. And since at the time there were states whose own constitutions did not guarantee the writ's availability,¹² that assumption could be understood as carrying with it a federal guarantee. (The question was mooted, at least in part, by the specific grant of authority to issue the writ in one of the earliest federal statutes—the Judiciary Act of 1789.¹³)

Like many others, I believe that the broader view—that the writ is in fact guaranteed by implication in the Suspension Clause—is an appropriate (and, for me, the most plausible) reading of Chief Justice Marshall's somewhat cryptic discussion in *Ex parte Bollman*.¹⁴ While stating that the authority of the federal courts to grant the writ is both created and defined by the relevant Act of Congress, he also makes it

to the writ generally as “the most celebrated writ in the English law.” WILLIAM BLACKSTONE, 3 COMMENTARIES *129. He also refers to *habeas corpus ad subjiciendum* as “the great and efficacious writ, in all manner of illegal confinement.” *Id.* at *131. He goes on to extol the significance of the writ in maintaining “the glory of the English law,” *id.* at *133, by requiring the custodian to express “upon every commitment the reason for which it is made, that the court, upon a *habeas corpus*, may examine into its validity,” *id.* at *134.

12 Indeed, although the writ was known and available in at least some form in every original state, *see* DUKER, *supra* note 2, at 116, a significant majority of those states did not guarantee the availability of the writ in their own constitutions, *see* Oaks, *supra* note 6, at 247.

13 Section 14 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, 81–82, provided that the courts of the United States

shall have power to issue writs of *scire facias*, *habeas corpus*, . . . and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And . . . either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.

In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), the Court read these provisions as authorizing not only issuance of the writ as auxiliary to jurisdiction already conferred but also as authorizing an independent action in *habeas corpus*; the power expressly conferred on individual justices and judges by the second quoted sentence was held to be implicitly vested in the courts. *Id.* at 95–96; *see* HART & WECHSLER, *supra* note 10, at 1286.

14 8 U.S. (4 Cranch) 75, 95 (1807). The issue discussed in this paragraph of text divided the Court in *INS v. St. Cyr*, 533 U.S. 289, 291–92 (2001). After concluding, in dictum, that the Suspension Clause at a minimum protected the writ as it existed in 1789, the majority viewed the language of the Court in *Bollman* as consistent with this protection. *See id.* at 304 n.24. Justice Scalia, speaking for himself and two other Justices on this point, argued that under *Bollman*, the Suspension Clause conferred no inherent power to grant the writ. *See id.* at 339–41 (Scalia, J., dissenting).

clear that, in his (the Court's) view, the Suspension Clause imposed on Congress an obligation to confer habeas corpus jurisdiction on the judiciary.¹⁵ These two notions are not inconsistent: after all, the Constitution explicitly mandates the existence of a Supreme Court, but it is difficult to see how a resistant Congress could have been compelled by some external authority to create it.¹⁶ And at the same time, Marshall's view does not have to be understood to require the creation of a judicial system capable of entertaining petitions for the writ, for Congress could surely have vested that power in the state courts.¹⁷

Another argument for the existence of an affirmative guarantee: the habeas corpus remedy is essential to the full realization of certain other guarantees, most particularly that of due process of law in the Fifth Amendment. True, the Bill of Rights followed ratification, but there was a widespread understanding that it would follow, and the development of the writ in England was closely linked with the need to make effective the guarantees of the Magna Carta, especially that of due process of law.¹⁸ Indeed, the notion that a remedy of this kind is

15 *Bollman*, 8 U.S. (4 Cranch) at 95. Chief Justice Marshall's precise language, admittedly subject to a range of interpretations, was:

Acting under the immediate influence of this injunction [the Suspension Clause], they [Congress] must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give, to all courts, the power of awarding writs of *habeas corpus*.

Id.

16 Of course, the obligation here could have been regarded as self-executing, and some day that issue may have to be squarely faced. But so far, it has not.

17 The word "surely" is often used, as here, to indicate that the author's certainty is not universally shared. Indeed, a number of Supreme Court decisions, including *Ableman v. Booth*, 62 U.S. (21 How.) 506, 526 (1859), and *Tarble's Case*, 80 U.S. (13 Wall.) 397, 411-12 (1872), can be read as holding that the states are constitutionally precluded from granting a writ of habeas corpus *ad subjiciendum* to a petitioner held in federal custody. But they can also be read as simply asserting (implied) exclusive federal jurisdiction to grant such a writ, and if read more broadly, may well run afoul of basic concepts of the role of the state courts in enforcing federal, and especially constitutional, rights. See HART & WECHSLER, *supra* note 10, at 437-39.

18 As noted by Walker, during the sixteenth and seventeenth centuries:

[T]he Charter [Magna Carta] and the writ of habeas corpus became inextricably intertwined In the battle against royal despotism the Charter was adduced as evidence of the illegality of arbitrary executive commitments and the writ of habeas corpus was seized upon as the most likely instrument by which such commitments could be subjected to due process. The result was the clear emergence of the Charter as the touchstone of the subject's liberty and the habeas corpus as the instrumental guarantee of his right.

essential to the realization of the due process rights of those in custody might well support the conclusion that, had there been no Suspension Clause, such a remedy would still be implicitly mandated by the Constitution.

At any rate, I happily join the judges and commentators who draw on text, history, context, and policy to conclude that our Federal Constitution provides more than a limitation on federal power to suspend the writ—that it embodies a guarantee of its availability in the absence of the conditions allowing that limitation to be put into effect.¹⁹ Indeed, as I will try to explain later, this conclusion lends support to my view of the effect of a valid suspension on the scope of underlying individual rights.

B. *The Nature of the Obligation*

Not surprisingly, crossing one threshold brings us to another—one I describe here as the nature of the obligation that is imposed. Once again, the text is far from definitive, since it refers to “Habeas Corpus” but makes no effort to define the term.²⁰

At the very least, the term appears to carry with it whatever comprised the general understanding of the writ at the time the Suspension Clause was adopted. And that understanding was informed by the writings of Blackstone,²¹ use of the writ in this country,²² and whatever knowledge may have existed of the many English cases exploring the scope of the writ over the preceding centuries.²³

WALKER, *supra* note 2, at 88; *see also* BLACKSTONE, *supra* note 11, at *133–34 (linking the guarantees of Magna Carta and the role of the writ of habeas corpus).

19 Professor Freedman reached a similar conclusion (though differently phrased) after examination of the records of the Constitutional Convention and of the ratification debates: “[The records suggest] that all parties read it [the Suspension Clause] as protecting broadly against Congressional interference with the power that federal and state courts were each assumed to possess: to order the release on *habeas corpus* of both federal and state prisoners.” Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 *BUFF. L. REV.* 451, 468 (1996).

20 U.S. CONST. art. I, § 9, cl. 2.

21 *See supra* note 11.

22 *See generally* DUKER, *supra* note 2, at 95–116 (describing the extension of the writ in the British colonies in North America).

23 *See generally* William F. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 *N.Y.U. L. REV.* 983 (1978) (arguing that the “Great Writ” developed over time into an instrument protecting personal liberty, but began as a means of facilitating a monarchical judicial process).

One major difficulty is that, as even Blackstone acknowledged,²⁴ the story of the writ's development has not been one of either transparency or unimpeded progress. And as American courts often noted, the history of the writ has always been marked by a considerable degree of discretion.²⁵ Moreover, the writ has served different purposes at different times. Sometimes, it has been a device for asserting jurisdictional primacy over a competing court.²⁶ Sometimes it has been the principal technique by which the common-law courts contested the power of the Crown and sometimes it has given way before the insistence of the executive on exclusive authority to determine the basis, duration, and nature of detention.²⁷ Indeed, on several occasions, Parliament saw fit, either by resolution²⁸ or by statute,²⁹ to remind the courts and the Crown of the importance of the writ in confining detentions to occasions duly authorized by existing law.

The core of the Great Writ (*habeas corpus ad subjiciendum*), however, can fairly be summarized throughout this period as the vehicle

24 Blackstone noted that legislative action had on occasion been required—as a result of various “evasions” and “abuses” by some English courts. BLACKSTONE, *supra* note 11, at *134–35. And Cantor referred not only to the writ’s “dark and hazy past” and its development in the United Kingdom through “trial-and-error usage, and compromise arrangements,” Cantor, *supra* note 9, at 58, but also to the frequent denial of relief in the American colonies when habeas was sought to curb the exercise of arbitrary power, *id.* at 60–73. But he concludes that by the late eighteenth century, “habeas corpus was deeply embedded in the interstices of colonial thought, much like the common law itself.” *Id.* at 73.

25 *E.g.*, *In re Lincoln*, 202 U.S. 178, 180 (1906); *Ex parte Royall*, 117 U.S. 241, 251 (1886); *Ex parte Siebold*, 100 U.S. 371, 375 (1880).

26 DUKER, *supra* note 2, at 27–33.

27 For an informative discussion of the role of habeas corpus in delineating executive authority during the sixteenth and seventeenth centuries, see *id.*, at 40–48.

28 The Petition of Right, 1627, 3 Car. 1, c. 1 (Eng.), noted in WALKER, *supra* note 2, at 66–70, was essentially supplicatory, and fell short of its goal, at least at the outset.

29 Act of 1679, 31 Car. 2, c. 2 (Eng.). Though frequently referred to by historians as one of the most famous and important statutes in the annals of English law, see, e.g., DUKER, *supra* note 2, at 52, Henry Hallam notes that the Act introduced no principle and conferred no new rights, HENRY HALLAM, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 430–31 (William Smith ed., 9th ed. 1905). Rather it sought to remedy several abuses that had developed, for example, by authorizing individual judges to grant the writ during the vacation and by extending the geographical reach of the writ (to thwart efforts to move the prisoner outside the court’s jurisdiction). *Id.* at 431–32. But it did not empower courts to inquire into the validity of facts alleged in the warrant ordering the detention, and extended only limited guarantees (requiring that if an indictment was not filed within a certain period, the petitioner had a right to release on bail) in cases of commitment for treason or felony. *Id.* at 432. To a significant extent, then, petitioners, even after enactment of the 1679 Act, were thrown back on the habeas remedy as it had existed, and continued to exist, at common law. *Id.*

for determining the lawfulness of confinement—a writ directed to the custodian to produce the prisoner, together with a statement of the cause of his detention.³⁰ And if the statement did not satisfy the court of the lawfulness of the custody, the remedy was discharge (or release on the giving of surety, if that was appropriate).³¹

But to state the core is, in turn, to raise a host of questions.³² What was the territorial reach of the court to which the prisoner applied for relief? When the detention was not pursuant to the order of a court but solely on command of the executive (often the Crown), were there situations in which the executive did not have to supply any explanation beyond the vaguest statement that the prisoner was detained pursuant to executive command? And when a more informative reason was required, to what extent could the court entertaining the petition inquire into the validity of the reason given, especially when it raised a question of fact? As to detentions pursuant to judicial order, how relevant to the court's power was the character of the court that issued the detention order (e.g., was it "inferior" in the sense that unlike courts of general jurisdiction, it was not necessarily a court of record and its authority extended only to limited categories of cases)? And what was the appropriate scope of the writ when the detention was not based solely on a charge of wrongdoing but on a trial and conviction? Was the only question in that context whether the convicting court had "jurisdiction" to try the case, and if so, how was this chameleon-like term to be defined?³³

30 See HART & WECHSLER, *supra* note 10, at 1284.

31 *Id.* at 1284–85.

32 Many of the questions raised in this paragraph are explored in the following historical studies: DUKER, *supra* note 2; HALLAM, *supra* note 29; HURD, *supra* note 2; WALKER, *supra* note 2; Cantor, *supra* note 9; Oaks, *supra* note 6. For further discussion and debate of some of these questions, see, for example, Edward Jenks, *The Story of the Habeas Corpus*, 18 LAW Q. REV. 64 (1902); Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993).

33 A case sometimes relied on by judges and commentators to show that the inquiry on a habeas petition did not stop at the question of "jurisdiction" is *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670) (use of the writ in this famous case has been regarded as establishing that jurors could not be imprisoned for bringing in a verdict believed by the court to be unacceptable). But as one scholar has noted, *Bushell's Case* involved an attack on the judgment not of a court of general jurisdiction but of an "inferior" court (i.e., one not having general jurisdiction to try offenses). See DUKER, *supra* note 2, at 227. Such courts stood on a different footing when their actions were challenged by a habeas petition in a "superior" court. *Id.* at 226–27; Oaks, *supra* note 32, at 462–67 (noting five other special factors relating to *Bushell's Case* that have been overlooked by those seeking to rely on it).

Given the difficulty of taking a readily perceptible snapshot of the writ as it existed at the time of ratification, especially in light of the range of state law understandings then in effect,³⁴ even a committed originalist would find the task of defining the exact contours of the constitutional guarantee a daunting one. But one who is not a strict originalist must also ask whether, and to what extent, developments since ratification have affected the scope of the guarantee. These developments include such changes (brought on by constitutional amendment, statute, and judicial development) as: (1) expansion in the notion of “custody” entitling a petitioner to seek relief;³⁵ (2) elimination of the need to produce the body of the prisoner in order to inquire into the lawfulness of custody;³⁶ (3) expansion and ultimate abandonment of the concept of “jurisdiction” as the key question in determining the lawfulness of custody pursuant to a judgment of conviction;³⁷ (4) expansion of the scope of the remedy, to the point that an order of release could be conditioned on such matters as failure to improve the conditions of detention or failure to accord the prisoner a new trial;³⁸ and (5) dilution of the distinction among the various

34 See DUKER, *supra* note 2, at 95–116 (noting that by the time of ratification the writ was recognized in all the states and documenting the range of use and recognition of the writ in the states and the predecessor colonies).

35 See HART & WECHSLER, *supra* note 10, at 1395–99 (citing additional supporting authorities). Among the most significant cases are *Jones v. Cunningham*, 371 U.S. 236, 242–43 (1963), which held that one is still in “custody” while on parole, and *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968), which held that the petitioner’s unconstitutional release did not moot a case in which the habeas petition had been filed during the period of the petitioner’s imprisonment.

36 See Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 592 (2002).

37 In the view of some, “jurisdiction” was never the definitive test in the federal courts for the validity of detention, even detention pursuant to a judgment of conviction. See, e.g., Gary Peller, *In Defense of Federal Habeas Corpus Rerelitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 603–63 (1982). In the view of others, “jurisdiction” was relevant in certain types of cases, but the definition of the term was gradually enlarged until, in decisions leading up to and culminating in *Brown v. Allen*, 344 U.S. 443 (1953), it became irrelevant, even in the context of a federal collateral attack on a state conviction. See, e.g., Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 483–500 (1963). See generally HART & WECHSLER, *supra* note 10, at 1314–17 (contrasting differing historical views of jurisdiction and habeas corpus).

38 Indeed, in *Peyton v. Rowe*, 391 U.S. 54, 55 (1968), the Court, overruling an earlier decision, held that a habeas petitioner could challenge the validity of the second of two consecutive sentences while still serving the first.

types of tribunals or other authorities that had ordered the detention.³⁹

At the same time, recent decades have seen a rolling back of the scope of protection afforded by the writ, especially (but by no means exclusively) as it relates to the availability of a federal remedy for state prisoners.⁴⁰ To what extent this erosion may lie within the discretion of the legislative and judicial branches depends in part on whether the boundaries of the constitutional guarantee have expanded over the preceding century and a half.

The Justices of the Supreme Court have had occasion to express some views on these issues as recently as 2001, in *INS v. St. Cyr*.⁴¹ Justice Scalia, for three Justices, argued that the Constitution did not guarantee any content to, or even the existence of, the writ.⁴² Justice Stevens, for the majority, took a diametrically opposite position in what may be only dictum, but is written in the strongest of terms.⁴³ At

39 The former distinction between “inferior” courts (i.e., courts that had limited jurisdiction and that might not be courts of record) and courts of general jurisdiction, discussed, *inter alia*, by Woolhandler, has ceased to be important, but the distinction between detention pursuant to court order and detention solely on the basis of executive decision remains significant. Woolhandler, *supra* note 32, at 589–90; *see, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998).

40 The retreat from the extensions of the writ during the Warren Court era focused primarily on its use by state prisoners complaining that their convictions violated their federal constitutional rights. Starting with such decisions as *Stone v. Powell*, 428 U.S. 465 (1976), *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Teague v. Lane*, 489 U.S. 288 (1989), the retreat was given further momentum by Congress in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, & 42 U.S.C.), which contains a number of provisions restricting the writ’s availability, perhaps most notably the section, codified in 28 U.S.C. § 2254(d) (2000), requiring increased deference to the factual and legal determinations of the state courts. *See generally* HART & WECHSLER, *supra* note 10, at 1296–1399 (tracing the availability of federal review of state court convictions from the antebellum era through the passage of the AEDPA in 1996 and its aftermath).

41 533 U.S. 289 (2001).

42 *Id.* at 337 (Scalia, J., dissenting).

43 *Id.* at 300–01 (majority opinion). One of the questions before the Court was whether, in imposing restrictions on judicial review in certain statutory amendments to the immigration laws, Congress had limited the jurisdiction of the federal courts to entertain habeas corpus petitions, under 28 U.S.C. § 2241, raising legal challenges to petitioner’s detention. *St. Cyr*, 533 U.S. at 298. The Court held that it had not, and in doing so, relied on the presumption in favor of judicial review, as well as on the substantial constitutional questions that, in its view, would be presented under the Suspension Clause if habeas corpus relief, as well as adequate alternative remedies, were unavailable. *Id.* at 298–314.

its core (and as “the absolute minimum”),⁴⁴ he said, “the Suspension Clause protects the writ ‘as it existed in 1789,’”⁴⁵ and in the context of executive detention, where its protection is strongest, it embraces the legality (i.e., lawfulness, whether grounded in the Constitution or not) of the detention.⁴⁶

To explore the other side of this coin—the question of determining what limitations on the availability of the writ would violate the constitutional guarantee—requires further elaboration. But there is an important question that needs to be addressed prior to that elaboration (in Part I.C, below): where does the authority rest to suspend the writ when and if the conditions for suspension are met?

C. *The Locus of Authority to Suspend the Writ*

Assuming, then, some consensus on—or at least willingness to assume for purposes of further discussion—the basic contours of the constitutional guarantee, a natural follow-up question is whether the authority to suspend the writ is limited to any branch or branches of the federal government.

The federal government has (at least) three branches (four, by some counts), and one of those is the judicial. And an early draft of the Suspension Clause appeared in what became Article III.⁴⁷ Yet I have seen no argument that the writ may be suspended by the judicial branch acting on its own. Is the suggestion wholly implausible?

Perhaps so, since it is hard to imagine a petition being dismissed because a rebellion or invasion justifies suspension unless the custodian asks for dismissal on that ground. Theoretically, perhaps, one can imagine a situation in which the executive branch is so (temporarily?) incapacitated that it is unable to respond to a petition. But the breakdown of civil authority in such a situation would probably be so complete that a functioning judiciary is difficult to envision. Moreover, the Clause did not remain in the Article establishing the judicial branch, but ended up in Article I, dealing principally with the authority of the legislative branch.

Realistically, then, the question is whether the authority is vested in either or both the legislative and executive branches. Though our history includes very few executive efforts to suspend the writ without

44 *St. Cyr*, 533 U.S. at 300–01.

45 *Id.* (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996)).

46 *Id.* at 301 (citing *Swain v. Pressley*, 430 U.S. 372, 380 n.13 (1977)). The Court relied on a similar statement (also dictum) in *Felker*. 518 U.S. at 663–64.

47 See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 435 (Max Farrand ed., 1966) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

legislative authorization,⁴⁸ the arguments that the power to authorize suspension is vested exclusively in the legislature are powerful, and, for me, convincing.⁴⁹

First, under the English tradition from which we derived our understanding of the writ, suspension was, at least as a matter of practice, the exclusive prerogative of Parliament—a prerogative exercised on a number of occasions.⁵⁰ Second, the Suspension Clause, as noted, appears in Article I, the article dealing with the powers of Congress, and to the extent it contains an explicit authorization, the inference that the power to authorize belongs to the legislature seems a natural one.⁵¹ And finally, though there is no square Supreme Court holding, several Justices have endorsed the view that the authority to suspend is

48 President Lincoln ordered suspension of the writ during the Civil War (and prior to legislative authorization of suspension), an action that Chief Justice Taney held unconstitutional in *Ex parte Merryman*, 17 F. Cas. 144, 151–53 (C.C.D. Md. 1861) (No. 9487). (There is debate over whether the petition in *Merryman* was directed to Taney in his capacity as a circuit justice or as Chief Justice. See Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 90 n.27 (1993)).

In addition, the writ was suspended (without legislative authorization) by (then General) Andrew Jackson as commander at New Orleans. See DANIEL FARBER, LINCOLN'S CONSTITUTION 160 (2003); Morrison, *supra* note 5, at 428, 429 & n.102. (Also, President Andrew Johnson reportedly suspended the writ for one of the conspirators involved in Lincoln's assassination. See WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 165 (1998)). See generally Tor Ekeland, Note, *Suspending Habeas Corpus: Article I, Section 9, Clause 2 of the United States Constitution and the War on Terror*, 74 FORDHAM L. REV. 1475, 1487–88 (2005).

49 See generally Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding Ex parte Merryman*, 34 U. BALT. L. REV. 11 (2004) (providing perhaps the most exhaustive discussion of this question).

50 Parliament effectively suspended the writ a number of times during the seventeenth and eighteenth centuries. See Collings, *supra* note 6, at 339–40 (listing instances and collecting citations).

51 To be sure, Section 9, the provision of Article I where the Suspension Clause appears, contains some prohibitions applicable to the Executive (e.g., bans on the granting of titles of nobility, U.S. CONST. art. I, § 9, cl. 8, and on the acceptance of any gift from a foreign state without the consent of Congress, *id.*). But the wording in these instances leaves no doubt of their scope. Moreover, these prohibitions do not contain exceptions authorizing actions in the absence of legislative authorization or approval.

Also, the first version of the Suspension Clause explicitly stated that the privileges and benefit of habeas corpus “shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding _____ months.” RECORDS OF THE FEDERAL CONVENTION, *supra* note 47, at 334 (emphasis added). But after a later version appeared in the judiciary article, see *id.* at 341, the final version came to rest in Article I.

For a fuller discussion of this evolution, see Ekeland, *supra* note 48, at 1484–86.

delegated only to Congress.⁵² To my knowledge, no Justice has expressed disagreement with that view.

There is at least one question raised by this conclusion, though. What if, in a clear emergency, Congress cannot act quickly enough? (Suppose, for example, that it must first be called into session, and then some member stalls efforts to circumvent the ordinarily cumbersome legislative process.) Should the courts recognize at least a temporary power, residing in the Executive, to deal with such emergency situations?

Necessity may well demand the existence of such authority, and I assume that the Executive, in dire circumstances, would in any event run the risk of eventual rejection of any emergency power. But with this limited qualification, the historical, textual, and structural arguments for exclusive legislative authority are, in my view, convincing.⁵³

*D. When Does a Limitation on the Availability of the Writ Violate the Guarantee?*⁵⁴

We have traveled far enough to conclude (or for skeptics—I hope—to assume) that the Suspension Clause, perhaps coupled with other provisions, especially the guarantee of due process, imposes an

⁵² Most notably, Chief Justice Taney in *Ex parte Merryman*, 17 F. Cas. at 151–52. This view was also expressed by Chief Justice Marshall in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807), and Justice Scalia, whose dissenting opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), noted with approval the general assumption that only Congress may authorize suspension of the writ, *id.* at 562 (Scalia, J., dissenting).

⁵³ See Ekeland, *supra* note 48, at 1517 (suggesting that this conclusion can be squared with the argument that an emergency could require immediate executive action when, say, Congress is not in session on the ground that “[t]he President could hold a detainee until Congress reconvenes and decides whether habeas corpus should be suspended”). In any event, I have little doubt that the Executive would act in this situation, and that Congress would later seek to ratify his action. Note that Congress’s authorization of suspension of the writ, Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755, followed Lincoln’s initial decision to suspend the writ early in the Civil War in Proclamation No. 1, 13 Stat. 730 (Sept. 24, 1862).

⁵⁴ Among the issues not explored in this section are (a) whether and to what extent the guarantee of the writ extends extraterritorially, and (b) whether and to what extent the guarantee permits distinctions to be drawn between U.S. citizens and aliens. Richard Fallon and Daniel Meltzer explore in detail these and related issues. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. (forthcoming June 2007).

The questions explored by Fallon and Meltzer are especially critical in considering the validity of restrictions on the availability of habeas corpus to aliens detained at Guantanamo Bay, Cuba—restrictions imposed by 28 U.S.C.A. § 2241(e) (West Supp. 2006) (see *infra* note 69)—and of even broader restrictions on the availability of the writ to aliens detained as “enemy combatant[s]” that would be

obligation on the federal government to make the essence of the Great Writ available in some judicial forum, and that only Congress (in the absence of an emergency requiring interim action) can authorize suspension of this guarantee. If the conditions warranting suspension concededly do not exist, what kinds of limitations on the availability of the writ would violate that guarantee?

To begin, if the conclusion in Part I.C, above, is sound, virtually any suspension of the guarantee, whether or not warranted by invasion or rebellion, would violate the Constitution unless authorized by Congress.⁵⁵ (I say "virtually" because of the possibility that a limited authority may exist in the Executive if the emergency is so immediate that suspension must be allowed before Congress can be expected to act.)

On many occasions, defenders of the writ, and even on some occasions advocates of its expansion, have argued, or at least suggested, that to reject their contentions would run afoul of the constitutional guarantee. Such statements, for example (some more persuasive than others), have been made by: (1) opponents of the legislature's substitution of 28 U.S.C. § 2255 for the writ in cases of post-conviction challenges by persons in federal custody;⁵⁶ (2) the Court itself in holding that an adequate state ground barring direct review was not necessarily a bar to collateral habeas attack on a state conviction;⁵⁷ (3) the Court itself in holding that Congress had not precluded use of the writ in its effort to curtail review of certain immigration matters;⁵⁸ (4) a scholarly article contending that, in view of the fundamental changes wrought by the Fourteenth Amendment, the guarantee mandates federal court authority to entertain a habeas petition by a prisoner held pursuant to the judgment of a state court.⁵⁹ And on one occasion, Chief Justice Rehnquist, speaking for the Court en route to a holding that Congress could constitutionally restrict the ability of state prisoners to file successive petitions in federal court, was willing

imposed by several bills pending at the time this Article went to press. See, e.g., S. 3901, 109th Cong. § 6 (2006); S. 3861, 109th Cong. § 5 (2006).

55 See *supra* notes 47-53 and accompanying text.

56 See *United States v. Hayman*, 342 U.S. 205, 219 (1952) (upholding the sufficiency of the statutory procedure).

57 See *Fay v. Noia*, 372 U.S. 391, 428-34 (1963).

58 See *INS v. St. Cyr*, 533 U.S. 289, 314 (2001). For a study relied on by the majority in *St. Cyr*, 533 U.S. at 302 n.16, see Neuman, *supra* note 39, at 990-1004.

59 See Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 888-99 (1994).

to "assume, for purposes of decision here, that the . . . Clause . . . refers to the writ as it exists today, rather than as it existed in 1789."⁶⁰

Aside from the unremarkable inference that those arguing for a particular result are prone to invoke the Constitution whenever it is plausible to do so, what conclusions is one to draw about all this, and more pointedly, about the proper interpretation of the constitutional guarantee? Surely, the guarantee is not a one-way ratchet, in which every advance in the availability of the writ becomes part of the guarantee itself.⁶¹ (Indeed, such a possibility might serve as a disincentive to experimental expansion of the remedy.) At the same time, the guarantee would be stripped of virtually all meaning if it did not include what might fairly be viewed as the essence of the writ at the time of ratification, perhaps defined to embrace those clarifications in its scope that attended its later development.

Of course, such a definition begs the question of distinguishing between the area of "clarification," or molecular development, and that of more radical expansion of the traditional uses of the writ. But to dramatize the point, if in recent years, the courts, with or without legislative direction, had developed the habeas remedy to the point that it had become a generally available device for collateral review of a criminal conviction, whether or not the petitioner is, or ever was, in custody pursuant to the conviction, surely a legislative decision to roll back the remedy to situations involving present custody, realistically defined, would present no Suspension Clause problem.

Some particularization may be useful, even though it leaves open some difficult issues. In my view, as noted above, the heart of the writ as it existed in 1789 was its availability to test the lawfulness of detention.⁶² In all instances, this extended to a determination of the adequacy of the custodian's return, but "adequacy," for example, might or might not include the ability to test the accuracy of the statements in the return, and might or might not include the ability to probe beyond the competency of the committing authority to order the

60 *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996). But he did go on to say, citing *Bollman*, that the authority of a federal court to grant the writ must be given by written law, *id.* at 664; "that judgments about the proper scope of the writ are 'normally for Congress to make,'" *id.*; and that newly enacted statutory restrictions on successive petitions did not violate the Suspension Clause because they were "well within the compass of this evolutionary process," *id.* (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996)).

61 *See St. Cyr*, 533 U.S. at 342 (Scalia, J., dissenting) (criticizing the view that the Clause is a "one-way ratchet that enshrines in the Constitution every grant of habeas jurisdiction").

62 *See supra* note 30 and accompanying text.

commitment. And I have found little if any indication that the custodian was required repeatedly to justify a detention that had already been unsuccessfully challenged. But there is no doubt that by the late eighteenth and early nineteenth centuries, the test of lawfulness was especially rigorous when the committing authority was not a "superior" court but rather the executive or an "inferior" court (i.e., a court not necessarily "of record" and not having a broad general jurisdiction to try offenses),⁶³ and particularly when the commitment was not pursuant to a trial and conviction by a "superior" court with competence to try the offense.⁶⁴

Turning to the special features of the American federal system, one draws little aid from the English experience, but our own history does cast some light. It suggests that the guarantee does not mandate the availability of a federal forum for the filing of a petition by one in state custody,⁶⁵ though it may well preclude federal interference with the availability of the writ in state courts, at least in the absence of an available federal forum.⁶⁶ And in the absence of a federal forum, it may also mandate the availability of a state forum for the bringing of a petition (on grounds previously unavailable) when the claim of unlawful custody is based on federal law.⁶⁷ But this last question is made

63 See, e.g., Neuman, *supra* note 39, at 982–83; Woolhandler, *supra* note 32, at 589–90 (discussing the status and nature of "inferior" courts); see also Neuman, *supra* note 39, at 1020–59 (discussing the use of the writ to test the validity of executive detentions).

64 See HART & WECHSLER, *supra* note 10, at 1290 (noting the difference between cases where the committing authority was a court of general criminal jurisdiction and those where detention was not authorized by any court).

65 A proviso to § 14 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, 81–82, stated that the writ "shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same." Specific exceptions to this proviso were enacted before the Civil War, but expansion of the writ to encompass generally prisoners in state custody did not occur until 1867. Act of Feb. 5, 1867, ch. 27, 14 Stat. 385, 385. But see Steiker, *supra* note 59, at 888–99 (contending that the effect of the Fourteenth Amendment was to make the constitutional privilege of the writ applicable to those in state custody). Even if accepted, this argument may not guarantee a petitioner access to a federal court. See HART & WECHSLER, *supra* note 10, at 1292.

66 See *supra* note 6 and accompanying text. The possible conflict between this proposition and the result in such decisions as *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872), is discussed *supra* note 17.

67 The question of a state's obligation to afford some sort of post-conviction process, other than direct review (when direct review was for some reason not an adequate alternative with respect to a particular federal claim), was presented but not decided in *Case v. Nebraska*, 381 U.S. 336, 337 (1965). The question was posed in terms not of the reach of the Suspension Clause, but of the requirements of due process. *Id.* But as noted above at *supra* text accompanying note 18, the habeas rem-

murkier by the many unresolved issues involving the extent to which federal law may “commandeer” the state courts in situations where those courts are not discriminating against federal claims.⁶⁸

Finally, precedent supports the common sense proposition that the substitution of a reasonable alternative remedy for the traditional writ does not constitute an invalid suspension, though of course the question whether the available alternative is a sufficient one is not subject to a simple litmus test.⁶⁹ And an alternative remedy may well include one not available until a later date, especially if the only harm claimed in the interim is the necessity of undergoing proceedings before a competent tribunal.⁷⁰

edy (or an adequate alternative) and the right of a detainee not to be deprived of liberty without due process are intertwined.

68 For the possible impact of such “anti-commandeering” decisions as *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), on the question of the extent to which federal constitutional obligations may be imposed on state courts, see HART & WECHSLER, *supra* note 10, at 451–53.

69 The Supreme Court has frequently recognized the authority of a federal court to grant a writ of habeas corpus in a particular case but has held that petitioner should (first, or instead) be required to resort to his remedies on direct review (including direct review by the Supreme Court itself). See, e.g., *Tinsley v. Anderson*, 171 U.S. 101, 104–05 (1898); *Whitten v. Tomlinson*, 160 U.S. 231, 239–42 (1895); see also *United States v. Hayman*, 342 U.S. 205, 214–19 (1952) (holding that the statutory remedy under 28 U.S.C. § 2255 had not been shown to be an inadequate alternative to a writ of habeas corpus).

In the important recent decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2753–54 (2006)—an action involving petitions for mandamus and habeas corpus—the Court held, on certiorari review, that the Executive had exceeded its authority in establishing a military commission to try the petitioner (an alien in custody at Guantanamo Bay, Cuba) for certain crimes. The Court had to deal at the outset with a statutory provision, passed while the case was pending before it, providing that “no court . . . shall have jurisdiction to hear or consider . . . an application for . . . habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay.” 28 U.S.C.A. § 2241(e) (West Supp. 2006). The majority, avoiding any constitutional issues, held as a matter of statutory construction that the provision did not apply to the case at bar. *Hamdan*, 126 S. Ct. at 2753–54. Justice Scalia, joined by Justices Thomas and Alito in dissent, argued that the provision did apply but concluded that it presented no problem under the Suspension Clause both because Guantanamo Bay was “outside the sovereign ‘territorial jurisdiction’ of the United States,” *id.* at 2818, and because the availability of direct federal court review after conviction (under other provisions of the DTA) constituted an adequate substitute for the writ, *id.* at 2818–19.

70 See, e.g., *Henry v. Henkel*, 235 U.S. 219, 228–29 (1914); *Ex parte Royall*, 117 U.S. 241, 250 (1846). A related question—whether, in the absence of a valid suspension, special conditions may warrant the exercise of a court’s discretion to deny the writ in favor of ex post remedies—is discussed by Kontorovich, *Liability Rules*, *supra* note 5.

In sum, then, I submit that the case for violation of the guarantee is strongest when the writ (or an acceptable alternative) is unavailable to challenge the lawfulness of present detention itself, and an adequate opportunity to challenge that detention in a judicial forum (not necessarily a federal one) has not previously been afforded. The case for violation of the guarantee becomes steadily weaker as one moves away from this core—if, for example, the writ is unavailable when the petitioner seeks to challenge not the detention itself but rather the conditions or other related aspects of the detention, when the petitioner has resorted to (or at least was aware of and in a position to resort to) earlier opportunities to assert such a challenge in a court of competent jurisdiction,⁷¹ or when the existence of “custody” is founded not on some form of imprisonment but rather on a significantly less onerous restriction on freedom of movement.

E. *Judicial Review of a Decision to Suspend*⁷²

Now suppose that Congress, influenced by what it regards as a crisis situation, enacts a statute announcing that because of a “rebellion or invasion,” the privilege of the writ of habeas corpus is suspended in certain designated respects. This supposition assumes that if no claim were or could be made that the textual conditions for suspension existed, the statute would violate the implicit guarantee of the writ’s availability, and that the language of the statute satisfies any “clear legislative statement” rule⁷³—a rule that, in my view, should be a requirement for such a significant step.

Judges and commentators have suggested, often with little or no explanation, that such a legislative determination is not in any way subject to judicial review.⁷⁴ Probably the strongest justification would

71 See, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977); *Glasgow v. Moyer*, 225 U.S. 420, 430 (1912).

72 Much of what follows in this brief section is drawn from an excellent article by Professor Amanda L. Tyler, *Is Suspension a Political Question?*, 59 *STAN. L. REV.* (forthcoming Nov. 2006).

73 *Seminole Tribe v. Florida*, 517 U.S. 44, 55–56 (1996) (calling it a rule that since the “Eleventh Amendment and the broader principles that it reflects” play an important constitutional role, “Congress’s intent to abrogate [states’ sovereign immunity] must be obvious from a ‘clear legislative statement’” (quoting *Blatchford v. Native Vill. of Noatak*, 504 U.S. 775, 786 (1991))).

74 See *Hamdi v. Rumsfeld*, 542 U.S. 507, 577–78 (2004) (Scalia, J., dissenting); *id.* at 594 n.4 (Thomas, J., dissenting); *Ex parte Merryman*, 17 F. Cas. 144, 151–52 (C.C.D. Md. 1861) (No. 9487) (“It would seem, as the power is given to congress to suspend the writ of habeas corpus, in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body.” (quoting 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1336

rest on the view that such a judgment is so political in nature, and so related to the war power and even to the country's very survival, that judicial supervision of Congress's determination would be wholly out of order.⁷⁵

This justification has considerable force, and in circumstances of perceived crisis, may well carry the day. But the Supreme Court has never squarely ruled on the issue. And at least one scholar has explored the issue in depth, concluding that some form of judicial supervision is appropriate.⁷⁶ I will not undertake to rehearse her arguments in detail here, but only to note a few points. First, some aspects affecting the authority to suspend are undoubtedly subject to judicial review, for example, whether or not that power is vested exclusively in the legislative branch,⁷⁷ whether the branch with authority to suspend has in fact exercised that authority,⁷⁸ and whether the terms of a suspension include the case at bar.⁷⁹

Second, unlike some matters that have been held, or at least forcefully argued, to lie beyond the scope of judicial review, the issue is not one that relates solely to a question of the internal operations of

(Boston, Little Brown & Co., 3d ed. 1858)); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807); 3 STORY, *supra*, § 1342. The language used in some of these references—about an authority that is vested exclusively in the legislature—may have been intended to say only that the suspension power was not vested in the Executive, and thus may not have been addressed to the question of judicial review.

75 This argument would bring the issue within the scope of the political question doctrine. For a survey and analysis of this doctrine, see HART & WECHSLER, *supra* note 10, at 244–67.

76 See Tyler, *supra* note 72.

77 See *Merryman*, 17 F. Cas. at 152.

78 As noted in *INS v. St. Cyr*, 533 U.S. 289, 299 & nn.10–11 (2001), this issue is a strong candidate for a “clear statement” rule of the kind often imposed by the Court, especially when important constitutional interests are at stake. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991); *Quern v. Jordan*, 440 U.S. 332, 343 (1979).

Significantly, in the recent decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), no Justice on the Court suggested that the provision of a 2005 statute that withdrew habeas corpus jurisdiction for aliens detained at Guantanamo Bay constituted an effort by Congress to exercise its power under the Suspension Clause. The majority held that the withdrawal of jurisdiction did not apply to the case at bar, *id.* at 2762–69, and the dissenters argued that the provision presented “no suspension problem” for reasons stated *supra* note 69, *Hamdan*, 126 S. Ct. at 2818 (Scalia, J., dissenting).

79 The leading example of such review is the famous decision in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), which is discussed more fully below, see *infra* text accompanying notes 95–100. See also Ekeland, *supra* note 48, at 1495–96, 1509; *id.* at 1496 (noting that the Court in *Milligan* found that “suspension of the privilege of the writ of habeas corpus does not suspend the writ itself” (quoting *Milligan*, 71 U.S. at 130–31)).

the legislative branch or the processes of enacting a bill or constitutional amendment into law.⁸⁰ Nor does it involve the kind of action that may fall within the courts' discretion not to adjudicate because it affects all equally and rather abstractly.⁸¹ Rather, it necessarily and specifically affects those particular individuals whose access to the writ is withdrawn.

Third, nothing in the text of the Constitution manifests a "demonstrable constitutional commitment" of all aspects of the decision to the legislative branch, immune from judicial oversight.⁸² Indeed, the text indicates a possible difference between the relatively straightforward question whether there is a state of "Rebellion or Invasion" and the question whether under such circumstances, the public safety "may" require suspension.⁸³ In other words, the text suggests that the existence of the predicate for suspension is not a matter committed to legislative discretion, but that there is broad, perhaps unreviewable discretion to determine whether, if that predicate is present, the public safety requires suspension.⁸⁴

Fourth, the courts may well have authority to determine whether an enactment authorizing suspension involves an invidious classifica-

80 On the Court's reluctance to get involved in questions involving the amending process, see *Coleman v. Miller*, 307 U.S. 433, 435–56 (1939) and *id.* at 459, 469–70 (Black, J., concurring). For a decision holding that the Constitution leaves to Congress the determination of how to authenticate that a bill has been passed, see *Field v. Clark*, 143 U.S. 649, 671–73 (1892). And for a decision in which the Justices disagreed on whether and to what extent the question of compliance with the Origination Clause of the Constitution, art. I, § 7, cl. 1 (requiring revenue bills to originate in the House of Representatives), is subject to judicial review, see *United States v. Munoz-Flores*, 495 U.S. 385, 401 (1990) (Stevens, J., concurring); *id.* at 408 (Scalia, J., concurring).

81 Consider, for example, the Court's treatment of the issue of standing to sue in *United States v. Richardson*, 418 U.S. 166, 176–78 (1974), and the discussion of that case in *Federal Election Commission v. Akins*, 524 U.S. 11, 21–23 (1998).

82 The phrase "textually demonstrable constitutional commitment" was quoted and used in this context in *Nixon v. United States*, 506 U.S. 224, 228 (1993), which held nonjusticiable, for this and other reasons, a claim that the Senate had failed to comply with the requirements of the Impeachment Clause, art. I, § 3, cl. 6. *Nixon*, 506 U.S. at 237–38.

83 U.S. CONST. art. I, § 9, cl. 2.

84 Even if the question of suspension *vel non* in the face of an acknowledged rebellion or invasion is one vested entirely in the discretion of Congress, there may be limits on the extent of that discretion on such issues as the scope and duration of the suspension. Thus the very word "suspension" suggests limited duration. And a rebellion in a particular locality, such as Shays' Rebellion in Massachusetts—an uprising very much in the mind of the Framers, see Ekeland, *supra* note 48, at 1483–84 & nn.63–64—might not warrant a grant of authority to suspend the writ throughout the country.

tion (based, for example, on race, ethnicity, or religion) that cannot be justified on the basis of the particular circumstances warranting the suspension.⁸⁵

Fifth, the argument that the matter is beyond the scope of judicial review because it is related to the exercise of the war power is contradicted by a host of cases in which the validity of actions related to that power have been considered by the courts.⁸⁶

Finally, to conclude that there is some room for review is not to deny the importance of substantial deference to the legislature's judgment.⁸⁷ It is one thing to reject, for example, a legislative determination (if one were made) that the crossing of the Rio Grande by Mexicans looking for work is an "invasion" within the meaning of the Clause, and another to gainsay the judgment of Congress that an invasion has occurred when an intercontinental missile attack is launched against American territory, even if the missiles landed in the ocean short of their target.⁸⁸ But to uphold the authority of the federal courts to consider both cases (in an appropriate judicial proceeding) is to reaffirm the significance of judicial review as a basic aspect of our governmental structure.

II. THE EFFECT OF A VALID SUSPENSION ON UNDERLYING RIGHTS

With this background, let us assume that Congress has made the judgment that a suspension of the privilege of the writ is warranted by a state of rebellion or invasion, and that the judgment is embodied in a statute that would be sustained on judicial review. No one would doubt that the effect of the suspension is, at a minimum, to require dismissal of a habeas petition if the return establishes that the particular custody is within the scope of the statute.⁸⁹ But does the statute also modify or even abrogate any underlying substantive constitutional

85 For analogous discussion of "external" restraints (*i.e.*, restraints external to the provisions of Article III) on legislative authority to limit the subject matter jurisdiction of the federal courts, see HART & WECHSLER, *supra* note 10, at 334-35.

86 For numerous examples, see Tyler, *supra* note 72.

87 The considerations relevant to the difficult question of the standard of review are discussed in detail in Tyler, *supra* note 72.

88 For an argument favoring a temporary and limited suspension of the writ for purposes of dealing with the war on terror, see Ekeland, *supra* note 48, at 1518.

89 Perhaps the explanation lies in the phrasing of the Suspension Clause when it speaks of "[t]he privilege" of the writ, but in any event, courts and commentators have assumed that an exercise of the suspension power does not itself bar a petitioner from seeking habeas corpus and, at a minimum, obtaining a determination of whether his case falls within the scope of the suspension. See *e.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall) 2, 130-31 (1866) ("The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and on the

or other legal rights in a case in which it requires dismissal of the petition? Can one who is or has been a detainee still maintain, for example, that his detention is (or was) unconstitutional or otherwise unlawful, and that he has recourse to other remedies, including damages (now or later), declaratory relief, and perhaps even injunctive relief?

A. *Professor Morrison's Thesis*

In what is perhaps the first exhaustive consideration of this question, Professor Trevor Morrison has contended that the answer to the general question is yes, though he is less clear on precisely what remedies are or should be available to the detainee.⁹⁰ But since I disagree with his basic conclusion, I will try to summarize his arguments, and to respond to them, before explaining why and to what extent I come out on the other side.

At the risk of oversimplification, I submit the following abridgement of Morrison's thesis, but I urge those who seek a fuller understanding of his arguments to read his article in full.

Morrison emphasizes what in some respects is his strongest point: the writ of habeas corpus is itself a procedural remedy, not a substantive right.⁹¹ To analogize the civil wrong of breach of contract, the remedy of specific performance may be unavailable in some instances, but that does not abrogate the contractual right; rather it limits the available remedy to (expectancy) damages.⁹² So here, Morrison contends, the remedy of the writ is unavailable but underlying rights remain intact and enforceable by other means.⁹³

Moreover, the distinction is one recognized in the common law history of the writ and in at least one crucial decision of our own Supreme Court. In England, "[b]y themselves, suspension acts did not insulate the detaining authority from later-imposed liability [in damages] for unlawful arrest and detention. To do that, Parliament typically accompanied suspension acts with acts of indemnity."⁹⁴ And in

return made to it the court decides whether the party applying is denied the right of proceeding any further with it.").

⁹⁰ See Morrison, *supra* note 5, at 416.

⁹¹ See, e.g., *id.* at 427.

⁹² For discussion of this concept in the contracts context, see RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1981) and related commentary.

⁹³ See Morrison, *supra* note 5, at 437.

⁹⁴ *Id.* at 432 (citing DUKER, *supra* note 2, at 171 n.118; ROBERT J. SHARPE, THE LAW OF HABEAS CORPUS 95 (2d ed. 1989)). Pfander also notes the availability of other remedies as alternatives to habeas corpus and cites *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 337 (1806), as an example of a case in which the Supreme Court allowed a suit

our own jurisprudence, the landmark decision in *Ex parte Milligan*⁹⁵—a decision rendered by a Court unanimous as to the result but divided on this very issue—lends further support to the proposition.⁹⁶ In *Milligan*, Morrison notes, the Court first concluded that the Act of Congress suspending the writ did not in terms apply in Milligan's case, and then went on to hold (a) that Congress had not authorized Milligan's trial by military tribunal in a jurisdiction where the civil courts were open and available, and (b) that Congress in any event could not have done so constitutionally in view of the guarantees that such a trial would violate.⁹⁷ Four Justices (who concurred in the result) specifically disagreed on (b), contending that the power to suspend carried with it the power to arrest and to try the prisoner before a military tribunal.⁹⁸ And in the course of making these arguments, Morrison also notes that the Suspension Clause is, after all, phrased as a prohibition with exceptions, and thus cannot reasonably be read as a delegation of authority to Congress to modify or abrogate any substantive rights.⁹⁹

In answer to the possible objection that it makes little difference whether, if the habeas remedy is unavailable, there are any underlying rights, Morrison notes the possibility of alternative remedies, such as damages, as well as the independently restraining effect of those underlying rights on executive abuse.¹⁰⁰ And in answer to the possible objection that these very responses cast doubt on the utility of the power to suspend, Morrison asserts that suspension serves to avoid the burden of litigation in cases of lawful detentions, and to limit the consequences to the executive when the detention is unlawful.¹⁰¹

for damages in trespass against the officer who took away the plaintiff's goods in order to enforce a criminal fine imposed by a court-martial that lacked jurisdiction to try and convict him. See Pfander, *supra* note 5, at 500 n.13, 515, 525–37. (Note that habeas was unavailable in this case not because Congress had exercised its authority to suspend the writ but because the plaintiff was not in custody.)

95 71 U.S. (4 Wall.) 2 (1866). In this case, Milligan, in his petition for a writ of habeas corpus, challenged the jurisdiction of a military tribunal to try an American citizen, living in Indiana, for conspiring to aid the Confederacy. *Id.* at 79–80.

96 *Id.* at 140.

97 Morrison, *supra* note 5, at 431 & n.121 (citing *Milligan*, 71 U.S. at 127).

98 *Milligan*, 71 U.S. at 136–37 (opinion of Chase, C.J.) The Chief Justice's separate opinion is not characterized in the official report, except as an opinion, and has been variously characterized by commentators. In my view, as explained in the text, it is a concurrence in the judgment, or result, but not in all of the reasoning of the majority.

99 Morrison, *supra* note 5, at 431 & n.121.

100 *Id.* at 434–37.

101 *Id.* at 437–40. In the course of his discussion, Morrison draws an analogy to the famous distinction drawn by Calabresi and Melamed between property rules and

Morrison concludes by urging that perhaps the most important purpose served by his analysis is to preserve some role for the judiciary even in times of crisis, and even when Congress has exercised properly its authority to suspend the writ—a role that is critical to the preservation of our system of separation and allocation of powers.¹⁰²

B. Response

Each of Morrison's principal historical arguments—that based on the English experience and that based on *Ex parte Milligan*—is vulnerable and, in the end, not persuasive. First, although the English experience is admittedly relevant to our understanding of the writ, there is a critical difference between the context of that experience and our own. Though Parliament did not operate free from constraints, those constraints were essentially imposed by custom and not by law. Given the concept of Parliamentary supremacy, and the unavailability of judicial review of the validity of statutes, the legislature was legally free to suspend the writ whenever it chose to do so, and if it also wished to make sure that no other remedy lay for detention pursuant to such a suspension of the writ (as Morrison acknowledges it routinely did¹⁰³), such legislative action also was subject to no legal restraint. Here, as Morrison and most observers agree, the availability of the writ is constitutionally guaranteed, subject only to narrow and explicit exceptions. (And of course, we also have other constitutional restraints on the ability of the legislature to abridge certain rights.)

liability rules. *Id.* at 439 n.150 (citing Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972)). The authors of that article note that the availability of an injunctive remedy gives the property owner a right that is legally immunized from interference (and thus constitutes a “property rule”), Calabresi & Melamed, *supra* at 1092, while a damages remedy gives the owner only legal recourse to monetary compensation for harm resulting from the interference (and is thus a “liability rule”), *id.* The habeas remedy, Morrison suggests, “is closer to a property rule than [to] a liability rule.” Morrison, *supra* note 5, at 439 n.150.

102 Morrison argues that his approach, like that of Justice O'Connor (speaking for a plurality in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)), has the virtue of allowing congressional authorization and judicial review to coexist, thus preserving a role for all three branches in a time of national crisis. Morrison, *supra* note 5, at 448–51. (Justice O'Connor, in *Hamdi*, concluded that Congress's authorization of detention without trial of U.S. citizens deemed to be enemy combatants did not preclude judicial inquiry into such basic constitutional issues as the adequacy of the processes used to determine whether a detainee is in fact an enemy combatant. *Hamdi*, 542 U.S. at 524–39 (O'Connor, J., plurality opinion). Of course, as she noted, Congress had not taken any action to suspend the habeas writ. *Id.* at 536–37.)

103 Morrison, *supra* note 5, at 432–33.

One might view the existence (even if implied) of a constitutional guarantee as suggesting that suspension of the writ should, if anything, result in less disruption to individual liberty than if the implied guarantee were lacking. But I see the guarantee, when coupled with the explicit power to suspend, as cutting quite differently—as supporting the conclusion that the presence of the specified justifications for a valid suspension of the writ has more far-reaching consequences under our law than did an analogous suspension in England by an unfettered legislature.¹⁰⁴ Moreover, though in theory other remedies may have been available for “unlawful” detention on those occasions when Parliament suspended the availability of the writ, I know of no actual case in which a plaintiff was awarded such a remedy.¹⁰⁵

Second, Morrison’s reliance on *Milligan* rests, in my view, on a misunderstanding of the rationale of the majority and the disagreement of four Justices who concurred in the result. As Morrison notes, the Court did not consider the merits of Milligan’s claim in his habeas petition until it determined that the Act suspending the writ did not apply to his case.¹⁰⁶ It then went on to hold that Congress did not, and constitutionally could not, authorize Milligan’s trial by military tribunal on the admitted facts of his case.¹⁰⁷ That the disagreement of four Justices with the majority went essentially to the latter point is made clear in their opinion itself, which expressed the view that “there are cases in which, the privilege of the writ being suspended, trial and punishment by military commission, in states where civil courts are open, may be authorized by Congress, as well as arrest and detention.”¹⁰⁸

Thus no Justice on the Court said or implied that, despite the Act of suspension, detentions covered by its terms could be held unlawful.

104 As Morrison notes, discussion at the Constitutional Convention evidently did not touch on the question whether a suspension would constitute affirmative authorization of detention that would otherwise be unlawful. *Id.* at 433 n.131. But the implications of that fact are surely limited. Compare the implications of the Convention’s relative silence on the question whether explicit authorization of suspension of the writ constituted tacit recognition that absent the conditions requisite to suspension, the privilege of the writ was affirmatively guaranteed as a matter of federal law. On that question, see *supra* discussion Part I.D.

105 Interestingly, Collings states that when Parliament enacted a suspension of the writ in England, causing the Habeas Corpus Act to cease to operate, the result was to “allow[] confinement without bail, indictment, or other judicial process.” Collings, *supra* note 6, at 340.

106 Morrison, *supra* note 5, at 431 (citing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 130–31 (1866)).

107 *Id.* (citing *Milligan*, 71 U.S. at 106–07, 130–31).

108 *Milligan*, 71 U.S. (4 Wall.) 2, 137 (1866) (opinion of Chase, C.J.).

The disagreement was whether there were circumstances in which a valid suspension could be accompanied by a valid authorization to try a detainee before a military commission. Yet Morrison's thesis, and the conclusion with which I disagree, is that a valid suspension does not render the detention itself beyond legal challenge.

In the only somewhat puzzling aspect of *Milligan* on this question, four Justices also express disagreement with the majority on the issue of whether "when the writ is suspended, the Executive is authorized to arrest as well as to detain."¹⁰⁹ (Note the implication in this quote that suspension implies authority "to detain".) While detention without trial is not only conceivable but was in fact condoned in the particular circumstances presented in the important recent decision in *Hamdi v. Rumsfeld*,¹¹⁰ it is hard to see how detention can occur without some form of physical seizure or arrest, unless the detainee voluntarily walks into custody. But a full reading of the lengthy *Milligan* opinions reveals that the essential concern of both related to the question of trial, not to the arrest.¹¹¹ And in any event, no member of the Court suggested that, if a valid Act of Congress suspending the writ had been applicable in *Milligan's* case, the detention itself would have been unconstitutional or otherwise unlawful.

Though I will develop the point more fully in the following section, Part II.C, a few words are appropriate here in response to Morrison's basic argument—that the writ is but a remedy, and the unavailability of a remedy does not affect the existence of the underlying right.¹¹² Of course, Morrison recognizes—in his analogy to the powerful distinction between property rules and liability rules drawn

109 *Id.*

110 See 542 U.S. at 516–24 (O'Connor, J., plurality opinion). For a brief statement of Justice O'Connor's conclusions in *Hamdi*, see *supra* note 102.

111 See, e.g., *Milligan*, 71 U.S. at 118 (stating that the "controlling question in the case" was one of "jurisdiction"); *id.* at 132 (opinion of Chase, C.J.) (acknowledging that the issue was one of jurisdiction).

112 In *Hamdi*, Justice Thomas, the only Justice addressing this issue, evidently agreed with Morrison:

I do not see how suspension would make constitutional otherwise unconstitutional detentions ordered by the President. It simply removes a remedy. Justice Scalia's position might therefore require one or both of the political branches to act unconstitutionally in order to protect the Nation. But the power to protect the Nation must be the power to do so lawfully.

Hamdi, 542 U.S. at 594 (Thomas, J., dissenting). Note that Justice Thomas uses this point to argue in favor of inherent executive branch authority to detain independently of any implicit authorization accompanying a valid suspension of the writ, and whether or not the conditions for suspension exist. *Id.* at 580–94. This is a position I reject, and I'm sure Morrison does too.

by Calabresi and Melamed—that the character of the right is profoundly affected by the nature of the available remedy.¹¹³ But he does not consider Professor Daryl Levinson’s later and fuller development of the relationship between right and remedy in his important article on the subject written in 1999.¹¹⁴ Levinson argues that the relationship is in many ways so close that “the cash value of a right is often nothing more than what the courts (or some other institution with enforcement authority, for example, Congress) will do if the right is violated.”¹¹⁵ Though I do not fully endorse his thesis, to the extent that it challenges the right-remedy distinction across the board, I believe it highlights a relationship that has always been intuitively perceived if not fully articulated. In light of that relationship, the challenge is to arrive at the best interpretation of the Suspension Clause, and the particular remedy it allows Congress to withdraw, from the standpoint of the purpose of the Framers, the needs of the government in times of crisis, and the process of law that is due the individual in such times. In other words, to what extent does the valid suspension of what is, and for centuries has been, the principal remedy for a particular abuse of power affect the very definition of what constitutes abuse?

C. Detention Within the Scope of a Valid Suspension Is Not Unlawful

As already noted, the case for an implicit constitutional guarantee of the availability of the habeas remedy is a strong one, and one accepted by most commentators as well as by the Supreme Court itself in powerful dictum in *St. Cyr*.¹¹⁶ Is there also a strong case for an implicit withdrawal of any objection, under the Constitution or any other provision of our law, to the lawfulness of a detention pursuant to a valid suspension of the habeas remedy?

I believe that there is, and that the case is a convincing one. Its principal support lies in the natural understanding of those who framed the Suspension Clause and of the kinds of conditions likely to exist when its use is warranted.

On the first of these grounds, the contemporary view of the writ was not only as the first line of defense against unlawful detention,

113 Morrison, *supra* note 5, at 438–39 (citing Calabresi & Melamed, *supra* note 101).

114 Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

115 *Id.* at 887.

116 *INS v. St. Cyr*, 533 U.S. 289, 300–01 (2001); *see supra* text accompanying notes 41–43.

but, I believe, more substantively, as the means by which individual freedom from arbitrary detention was to be guaranteed. Blackstone's emphasis on the link between the substantive commitments of compliance with law in the Magna Carta and the remedy supplied by the Great Writ¹¹⁷ is hard to exaggerate.¹¹⁸ As he said in the introduction to an extended discussion, the function of "the most celebrated writ in the English law"¹¹⁹ is to require that a reason be given for every commitment, so that "the court upon a *habeas corpus* may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand" the prisoner.¹²⁰ Moreover, he noted, on those occasions when evasion of the writ threatened its critical role, the legislature had acted to restore the balance.¹²¹

Thus it seems more than likely that contemporary thinking tended to equate the right to be free from unlawful detention with the role of habeas corpus in guaranteeing that right. And this belief is buttressed by the nature of the debate over the appropriate language to use in the Constitution—a debate that focused primarily on whether or not any exceptions to the availability of the writ should be recognized.¹²² The intensity of this debate makes far less sense if the availability of the writ and the lawfulness of the detention were not regarded as two sides of the same coin.

The history of suspension by federal legislative act supports this understanding. Such legislation has been rare and has been essentially confined to those circumstances in which the dangers of chaos and lawlessness were so great as to warrant emergency measures tantamount to martial law.¹²³ The notions that detentions under such cir-

117 BLACKSTONE, *supra* note 11, at *133–34.

118 See *supra* note 18 and accompanying text.

119 BLACKSTONE, *supra* note 11, at *129.

120 *Id.* at *134 (emphasis omitted). To be sure, Blackstone also referred quite briefly to several alternatives as remedies for "false imprisonment." See *id.* at *128, *138. But each of the three rather archaic writs referred to (writs of "mainprize," "*odio et atia*," and "*de homine replegiando*") was of extremely limited value. See *id.* at *128–29. And in his one paragraph (one sentence) discussion of an action in trespass for damages resulting from false imprisonment, *id.* at *138, he makes no reference to detention pursuant to the order of a government official, or to the question of when such detention may lead to liability in damages.

121 *Id.* at *134–38.

122 See DUKER, *supra* note 2, at 128–31 (noting that one point of concern expressed at the Convention with respect to the Suspension Clause—perhaps the principal point—was that since the power to suspend already existed in the states (or most of them), it was unnecessary and dangerous to give that power to Congress as well).

123 Congress has authorized suspension infrequently—during the Civil War (after the President's unilateral suspension of the writ); during Reconstruction; in the Philippines in the early twentieth century in the event of "rebellion, insurrection, or inva-

cumstances might be subject to other remedies, either contemporaneous or ex post, and that (as Morrison argues) the executive might be restrained from ordering a detention he deems necessary to preserve or restore order by the threat of such sanctions—or even by the moral force of his oath to support the Constitution and laws¹²⁴—simply cannot be reconciled with the underlying premise of the legislative decision. In this very practical sense then, remedy and right become not just interdependent but inseparable.

Interestingly, Morrison appears to recognize this point in a footnote discussing the possibility of obtaining an injunctive decree ordering release during a period of valid suspension.¹²⁵ In rejecting this possibility, he simply notes that under existing doctrine, an injunction may not be an available remedy for state prisoners, that it is in any event a remedy that may be denied in the “sound discretion” of the trial judge, and that Congress could seal any loophole by prohibiting its use as an alternative to the writ in instances in which the writ has been suspended.¹²⁶ Nowhere does he consider the question whether—accepting his assumption that the detention may be unconstitutional even though the writ has been suspended—the Constitution itself may require that some meaningful remedy be available.¹²⁷

Moreover, Morrison’s first reason for questioning the availability of injunctive relief cuts deeper than he appears to recognize. In a line of cases beginning with *Preiser v. Rodriguez*,¹²⁸ the Court has held that the existence of the habeas corpus remedy for one in custody pursuant to a state conviction bars resort not only to the alternative of in-

sion” (a power exercised by the governor in 1905 with respect to a particular province, during a period of insurrection in that province); and in Hawaii under the Organic Act of 1900, when required by the “public safety” (a power exercised by the governor after the attack on Pearl Harbor in 1941). See Ekeland, *supra* note 48, at 1487 & nn.83–87.

For a full discussion of one compelling example of the need for such authorization and the use of delegated authority, see Lou Falkner Williams, *The Constitution and the Ku Klux Klan on Trial: Federal Enforcement and Local Resistance in South Carolina, 1871–1872*, 2 GA. J. S. LEGAL HIST. 41 (1993), describing the virtual overrunning of South Carolina by the Ku Klux Klan after the Civil War and the resulting mass arrests and detentions by government forces, acting pursuant to legislatively authorized suspension of the writ under the Ku Klux Klan Act, ch. 22, § 4, 17 Stat. 13, 14.

124 Morrison, *supra* note 5, at 435–36.

125 *Id.* at 433 n.134.

126 *Id.*

127 For discussion of the complex issues presented by the questions of whether, when, and to what extent the Constitution itself may mandate the availability of at least one meaningful remedy for invasion, or threatened invasion, of a constitutional right, see HART & WECHSLER, *supra* note 10, at 795–804, 823–25.

128 411 U.S. 475 (1973).

injunctive relief in a civil rights action but also to a civil rights action for damages where the judgment in either case would in effect require invalidation of the conviction on which the commitment rests.¹²⁹ By implication, if the rigorous hurdles that a habeas applicant must surmount operate to bar that habeas remedy for the state prisoner, those hurdles cannot be circumvented by resort to these other avenues of relief.¹³⁰ To be sure, this line of cases is not directly on point in a situation in which the prisoner is complaining not of state detention pursuant to a state judgment but rather of federal executive detention. But the cases are surely relevant by analogy. If Congress has made a valid decision that extreme circumstances warrant denial of the classic remedy for one officially detained, should the detainee be able to circumvent that decision by resorting to another remedy that Congress has inadvertently failed to withdraw? (Or if some meaningful remedy must be available for violations of individual rights, one that Congress could not withdraw?) Or is the sounder conclusion that the legislature's decision to make this classic remedy unavailable—by exercising its power under the Suspension Clause—frees the Executive from the legal restraints on detention that would otherwise apply?¹³¹

129 *Id.* at 489–91. The most significant of the later cases is *Heck v. Humphrey*, 512 U.S. 477 (1994).

130 Among the most important hurdles that a habeas petitioner must surmount are the requirement of exhaustion of state remedies, *see* 28 U.S.C. § 2254(b)(1)(A) (2000), and a one-year statute of limitations, *see id.* § 2244(d)(1). The Court has yet to determine whether the *Preiser* line of cases bars remedies other than habeas for one who was convicted but not imprisoned (and thus was never eligible for habeas relief), or who was imprisoned but who since has been unconditionally released (and thus is no longer eligible for habeas relief). *See Muhammad v. Close*, 540 U.S. 749, 752 n.2 (2004). (In neither case, of course, is the habeas remedy unavailable because of a valid suspension of the writ.)

131 I believe that Pfander asks a different question—whether the unavailability of the writ for reasons not involving a valid suspension precludes the use of other remedies, and concludes that it does not. Pfander, *supra* note 5, at 525–26. (He gives as an example a case in which the writ is unavailable because the relevant statute does not confer territorial jurisdiction on American courts to grant habeas relief to a petitioner detained beyond our borders. *See id.* at 525.) To the extent that such a withdrawal of jurisdiction is not based on premises that warrant, and render constitutionally valid, the denial of any judicial remedy to a petitioner, I agree with this conclusion. But I view the exercise of the power to suspend as significantly different. (Indeed the sensible rule, articulated by the Court in *United States v. Hayman*, 342 U.S. 205, 205 (1952), that an adequate alternative defeats a Suspension Clause claim itself suggests that a valid suspension defeats the argument for an alternative remedy.)

Similarly, the thesis advanced by Kontorovich—that in the context of a mass detention, the federal courts may find it appropriate to allow an ex post (damages) remedy but not an injunctive one—assumes that there has not been a legislative sus-

Consider again for a moment the practical consequences of the opposite view. Congress has determined that emergency conditions justify extraordinary action, in particular, permitting detentions that would otherwise be subject to challenge in habeas corpus proceedings. Nevertheless, the executive, or those exercising delegated authority under him, might well be deterred from engaging in the very activity needed, and contemplated, to deal with the crisis by threats of financial liability or by an understandable reluctance to violate their oaths to support the Constitution and laws. Wouldn't the very purpose of the suspension be undermined, if not nullified?

Another consequence of the opposite view is brought home by Justice Thomas's dissent in the *Hamdi* case.¹³² Acceptance of that view led him to the conclusion that suspension of a mere remedy was not sufficient to meet the needs created by a crisis because it did not in itself validate a decision to detain.¹³³ Thus, he argued, regardless of whether or not Congress exercised its power under the Suspension Clause, the Executive had unreviewable authority to determine that a person (whether or not a citizen) was an enemy combatant and to detain the person on that basis without further process.¹³⁴

D. *The Sky Will Not Fall*

The skeptical reader may well object that this understanding of the Suspension Clause thwarts its function by taking away from individuals more than it gives—that a provision whose purpose is to guarantee a meaningful remedy for those unlawfully detained is being read to undercut other constitutional and statutory guarantees. In at least partial response to this concern, I will try to explain the limited (but still important) scope of the argument presented here.

First, the result advocated here does give significance to the disagreement at the time of drafting and ratification between those who would allow no suspension and those who would allow it during times of crisis, and only during such times. If the debate were only about the availability of one remedy among several, its intensity is harder to

pension of the writ. Kontorovich, *Liability Rules*, *supra* note 5, at 759. Indeed, Kontorovich expressly states that his proposal "would not require a suspension of habeas corpus." *Id.* at 792 n.119. This footnote may imply that a damages remedy would still be available if the writ were suspended, but the issue is not discussed.

132 *Hamdi v. Rumsfeld*, 542 U.S. 507, 579 (2004) (Thomas, J., dissenting); *see supra* note 112.

133 Pfander, *supra* note 5, at 594.

134 *Hamdi*, 542 U.S. at 579 (Thomas, J., dissenting). Nor was this authority limited, in his view, to the need to take emergency action until Congress had an opportunity to legislate. *Id.* at 583–84.

grasp. But if the debate is understood as involving the ability to detain free from any judicial oversight during times of crisis, its importance is more readily understood.

Second, the judicial role in overseeing acts of suspension has already been recognized in several cases, most notably *Ex parte Milligan*,¹³⁵ where the Court concluded that Milligan himself was not within the scope of the legislative provision for suspension of the writ.¹³⁶ Moreover, as advocated here and more forcefully by others, the very validity of a suspension—with respect to both the predicate conditions and the duration and other terms of the suspension—should be subject to judicial review, though the standard of review is far from certain.¹³⁷ These aspects of judicial supervision serve to limit the impact on individual liberty of a valid suspension and help to ensure that conditions really do warrant the authority that a suspension vests in the executive branch.

Finally, and perhaps most important, acceptance of the argument made here should not be understood to mean more than this: if the detaining authority is acting pursuant to a valid legislative suspension of the writ, only the detention itself—and actions (such as seizure of the person) that are strictly necessary to effectuate it—are immunized from the restraints that would otherwise apply under the governing law. Thus the invocation of remedies other than habeas corpus would be available, for example, in connection with a claim for maltreatment in violation of law, treaty, or the Constitution,¹³⁸ as a means of preventing trial by a tribunal not duly authorized by law to adjudicate

135 71 U.S. (4 Wall.) 2 (1866).

136 *Id.* at 130–31.

137 *See supra* Part I.E.

138 Claims of improper treatment during detention might range from allegations of physical abuse to denial of access to counsel, and the validity of any such claims would depend on factors independent of the authority conferred by legislation pursuant to the Suspension Clause. For example, a prisoner might complain (if in state detention, under 42 U.S.C. § 1983, or if in federal detention, under *Ex parte Young*, 209 U.S. 123 (1908), and/or *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)) of treatment allegedly in violation of the Eighth Amendment. If successful, he might be entitled to injunctive or declaratory relief with respect to the treatment, or to damages for the harm caused by it, but not to release from detention.

Moreover, in circumstances akin to those described by Kontorovich, where courts were inundated with complaints of maltreatment in connection with mass detentions resulting from a national emergency, the courts, with or without legislative authorization, and quite apart from the suspension of the habeas writ, might properly choose to restrict the remedies available to ex post relief (e.g., a *Bivens* damages remedy). Kontorovich, *Liability Rules*, *supra* note 5, at 781–82.

the offense charged;¹³⁹ or in order to obtain review of a conviction.¹⁴⁰ Success on any such claim would entail relief from the official conduct in question, including invalidation of a conviction, but would not require or permit the cessation of continued detention as authorized by a valid suspension of the writ.

My reasoning here centers on the classic function of the writ as it was understood when the Suspension Clause was adopted. Although the scope of the writ has expanded to allow its use to raise such claims as the lawfulness of treatment and to assert the unlawfulness of limitations on freedom of movement that fall well short of true detention, and the writ has long been available to question the authority of a tribunal seeking to exercise adjudicatory authority, the focus of the writ has traditionally been on the fact of detention.¹⁴¹ Thus, I believe, there is no inconsistency between the unavailability of a remedy for

139 For example, such relief could be sought by a petition for a writ of mandamus or prohibition, or as suggested *supra* note 94, might in some circumstances be limited to ex post relief of the type recognized in *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806). See generally Pfander, *supra* note 5, at 525–37 (discussing “nonstatutory” review).

140 Remedies for unlawful conviction other than habeas corpus include direct review (on appeal) and the writ of *coram nobis*. The Supreme Court has several times indicated that there is no constitutional right to direct appeal—see, for example, *McKane v. Durston*, 153 U.S. 684, 688–89 (1894). But—as noted in CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* § 29.01, at 810–11 (4th ed. 2000)—the constitutional status of denial of all review of a criminal conviction has never been squarely addressed, and in view of the general availability of appeal as of right, probably never will be. With respect to the use of the writ of *coram nobis* to challenge the lawfulness of a conviction, see, for example, *United States v. Morgan*, 346 U.S. 502, 505–06 (1954); *Hirabayashi v. United States*, 828 F.2d 591, 594 (9th Cir. 1987).

141 An important decision bearing on this argument is *Wilkinson v. Dotson*, 544 U.S. 74 (2005). In that case, prisoners, in actions brought under 42 U.S.C. § 1983, challenged the validity of parole proceedings on grounds that, if successful, would result not in release but only in new parole hearings. *Id.* at 76–77. The Court held the *Preiser* line of cases, see *supra* note 128 and accompanying text, inapplicable to preclude action under § 1983 because the proceedings at bar (even if they could be brought as petitions for habeas corpus) did not go the “core” of the habeas remedy: the relief sought did not include a request for immediate or speedier release, nor would success “necessarily imply” the invalidity of the convictions on which the detentions were based. *Wilkinson*, 544 U.S. at 81. The case is relevant here because it underscores the fact that the modern habeas remedy has expanded well beyond the “core” to which I believe the Suspension Clause refers. As for the Court’s reference to the use of a habeas proceeding to establish the invalidity of a conviction, I believe that this use only goes to the core of the remedy when the detention itself cannot be legally defended on any other ground. And if a valid legislative suspension of the writ authorizes any detention within its scope, whether or not the detainee has been tried and convicted, that condition is not met. (Nor would it be met in such circumstances

detention and a challenge to maltreatment that, if successful, does not result in discharge of the prisoner. Nor, in my view, is there any conflict between the writ's unavailability and an action to prevent a trial, or to attack a conviction—so long as the success of the action does not require termination of the detention. (Of course, success of the action may persuade the authorities to terminate the detention, but if they conclude that detention is still warranted pursuant to a valid suspension of the writ, no present or ex post remedy would be available, and indeed, no law would be violated.)

The remedial-substantive link, in sum, does not mean that the function of the writ is to protect all elements of the due process guarantee, either as that guarantee was originally envisioned or as it has evolved over the centuries. Rather, in both its inception and its development (though recent years have seen some significant expansion), the writ was understood as the method of challenging the lawfulness of *detention*.¹⁴² Thus, in my view, it was that particular aspect, and only that aspect, of due process that the Founders were willing to allow Congress to abridge during times of crisis.

True, the possibility remains that Congress, in an effort to cut off judicial consideration of other claims of unlawful conduct, might also enact legislation—perhaps in the form of jurisdiction-stripping—seeking to bar such claims from being brought to any court in any form. But any such legislation would raise difficult questions alluded to earlier¹⁴³ and would receive little or no support from the authority of Congress to suspend the writ.

Three testing cases may help to illustrate both the core and the limitations of my argument. First, the decision to intern Japanese-Americans during World War II—perhaps one of the most criticized

by a challenge to the jurisdiction of a tribunal set up to adjudicate a criminal charge against the detainee.)

142 The significance of detention (or imprisonment or custody) as both the basis of jurisdiction and the question at issue on a petition for habeas corpus has been stressed throughout this Article. It is evident not only in the jurisdictional requirement that the petitioner be in custody but in the analysis of the writ in the writings of Blackstone, see *supra* note 120, and other jurists and commentators, see, for example, Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Corpus Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1087 (1995) (describing the writ as requiring a showing of “sufficient legal cause for detaining or jailing”), as well as in many judicial opinions, see, for example, *Fay v. Noia*, 372 U.S. 391, 430 (1963) (referring to the jurisdictional prerequisite for habeas as “detention *simpliciter*”); *In re Medley*, 134 U.S. 160, 173 (1890) (noting that traditionally, habeas corpus is a remedy only for wrongful commitment and that the traditional form of relief has therefore been discharge from prison).

143 See *supra* note 127 and accompanying text.

events in our history—would almost certainly gain no support from my argument.¹⁴⁴ Not only was there no legislation that could be read as suspending the writ in that context,¹⁴⁵ but had there been, it might well have been vulnerable to challenge on the ground that, although we were at war, there was no “rebellion” or “invasion” warranting suspension of the writ on our own West Coast. (Even if the attack on, and occupation of, American soil thousands of miles from California constituted an “invasion,” the distance from California and the enormous sweep of the dragnet, based solely on ethnicity, might well have been regarded as an abuse of the discretion conferred by the “public safety” provision of the Suspension Clause.) The “relocation,” in other words, highlights the kind of emergency that must be present to warrant invocation of this emergency power.

Milligan’s case is a second example. Though Indiana itself was not part of the Confederacy, there clearly was a “rebellion,” and the rebelling states were not far away.¹⁴⁶ Thus it is distinctly possible that had Congress suspended the writ in terms applicable to Milligan, the suspension would have withstood judicial review. But, as suggested above, that would not have barred Milligan from bringing an appropriate action (for a writ of prohibition or mandamus) to prevent his trial by a military commission.¹⁴⁷ Had Milligan succeeded, no trial could have occurred, but the Executive would still have had authority to detain him, so long as the detention continued to fall within the terms of a valid Act suspending the writ.

Finally, take a case like Hamdi’s.¹⁴⁸ If we assume that the present crisis warrants a legislative decision to suspend the writ,¹⁴⁹ and that

144 Of the three significant Japanese-American internment cases in the Supreme Court, two (*Korematsu v. United States*, 323 U.S. 214 (1945), and *Hirabayashi v. United States*, 320 U.S. 81 (1943)) arose on direct review, and affirmed the petitioners’ criminal convictions. Only the third, *Ex parte Endo*, 323 U.S. 283 (1944), discussed *infra* note 145, involved a habeas corpus petition.

There have been many studies of the internment of Japanese-Americans during World War II. For one of particular contemporary interest, because of its effort to relate that experience to the current internment of persons deemed to be enemy combatants, see Jerry Kang, *Watching the Watchers: Enemy Combatants in the Internment’s Shadow*, LAW & CONTEMP. PROBS., Spring 2005, at 255, at 264–78.

145 In *Ex parte Endo*, the Supreme Court held that a writ of habeas corpus should be granted to the petitioner, a loyal citizen of Japanese descent who was being held in a relocation center. *Endo*, 323 U.S. at 305–06. No argument was made by the Government in this case that there was any applicable Act of Congress suspending the writ.

146 *Ex parte Milligan*, 71 U.S. (4 Wall) 2, 140 (1866).

147 See *supra* notes 138–41 and accompanying text.

148 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); see *supra* note 102.

149 As advocated in Ekeland, *supra* note 48, at 1517–19.

Congress were to enact such legislation, the question whether Hamdi's detention came within the terms of the legislation would still be open to judicial challenge (for example, the Act might well be limited to "enemy combatants"), as would such questions as the nature of his treatment and the authority of a particular tribunal to adjudicate any charges against him.¹⁵⁰

CONCLUSION

Accommodation between the demands of national security and those of the individual to be free from abusive interference, especially with his physical liberty, is never easy. And for one who is loath to sacrifice the latter under any circumstances, the task is particularly agonizing. But the resolution suggested here is, I believe, the most consistent with the text, purpose, and understanding of the Suspension Clause; with the emergencies that warrant its use; and with the individual interests that require protection, even in the midst of a national crisis.

150 If, as is likely, any Act suspending the writ would be limited to enemy combatants, or persons meeting a similar description, a court on a habeas petition would be entitled to consider the question of the detainee's status in order to determine whether the Act applied under its own terms. This approximates the actual result in the case.

