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INTRODUCTION

In the early 1960s, the Supreme Court adopted generous standards governing federal habeas petitions by state prisoners.[1] At that time, the Court suggested, rather surprisingly, that its solicitude toward such petitions might be constitutionally mandated by the Suspension Clause,[2] the only provision in the Constitution that explicitly refers to the "Writ of Habeas Corpus."[3] Now, thirty years later, the Court has essentially overruled those expansive rulings,[4] and Congress has con-

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1. *See, e.g.*, Sanders v. United States, 373 U.S. 1 (1963) (formulating standard for addressing "new-claim" successive petitions by either federal or state prisoners); Fay v. Noia, 372 U.S. 391 (1963) (adopting "deliberate bypass" standard to govern habeas court decision regarding enforcement of state procedural default); Townsend v. Sain, 372 U.S. 293 (1963) (outlining circumstances under which state petitioner is entitled to an evidentiary hearing on federal habeas).

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

3. *See, e.g., Sanders*, 373 U.S. at 11-12 ("[I]f construed to derogate from the traditional liberality of the writ of habeas corpus, § 2244 [governing both state and federal prisoners] might raise serious constitutional questions.") (citing the Suspension Clause); *Noia*, 372 U.S. at 406 ("We need not pause to consider whether it was the Framers' understanding that congressional refusal to permit the federal courts to accord the writ its full common-law scope as we have described it might constitute an unconstitutional suspension of the privilege of the writ. There have been some intimations of support for such a proposition in decisions of this Court.") (citations omitted); *Townsend*, 372 U.S. at 311 ("We pointed out there that the historic conception of the writ, anchored in the ancient common law and in our Constitution as an efficacious and imperative remedy for detentions of fundamental illegality, has remained constant to the present day.") (citing *Noia*); Jones v. Cunningham, 371 U.S. 236, 238 (1963) ("The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available.") (citing the Suspension Clause).

4. *See, e.g.*, Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992) (overruling *Townsend*, 372 U.S. at 313, by requiring a showing of cause and prejudice to excuse failure to develop facts underlying claim in state court proceedings); McCleskey v. Zant, 499 U.S. 467 (1991) (petitioner must show "cause and prejudice" to excuse failure to raise new claims in prior petition); Coleman v. Thompson, 111 S. Ct. 2546 (1991) (applying "cause and prejudice" test, rather than "deliberate bypass" standard, to determine whether to enforce state procedural forfeiture); Kuhlmann v. Wilson, 477 U.S. 436 (1986) (plurality opinion) (requiring a "colorable showing of factual innocence" to overcome bar against claims which raise grounds identical to grounds heard and decided on the merits in a previous petition).

sidered, though not yet enacted, further limitations on the availability of the writ.[5] Despite these significant assaults on the habeas forum, the constitutional argument appears to have been entirely abandoned. The liberal minority on the Court has not mentioned the Suspension Clause in over a decade, and legislative as well as academic supporters of habeas have scarcely alluded to the Constitution as a bulwark against the writ's further demise.[6]

The question, then, is whether the constitutional claim that surfaced briefly to support the writ's unparalleled expansion during the 1960s is as much of an embarrassment as its total disappearance would suggest. I will argue that the claim is far from an embarrassment and, indeed, draws support from a variety of familiar forms of constitutional argument, including history, text, doctrine, and structure.[7] Before elaborating the affirmative case, though, I will set forth the "doubts" that most likely account for the absence of any sustained effort to defend a constitutional right to federal habeas for state prisoners.

The first and most obvious response to the claimed "constitutional right" of habeas corpus is that the current writ serves a far broader purpose today than its counterpart at the time of the Founding.[8] By

5. *See, e.g.*, S. 2216, 97th Cong., 2d Sess. § 5 (1982) (advocating "full and fair" standard). This proposal is discussed in Larry W. Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609 (1983).

6. Twenty-five years ago, academics warned Congress that a bill withdrawing federal habeas from state prisoners would violate the Constitution, and Congress's decision to abandon the proposal rested largely on perceived constitutional limitations. *See* Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 606-07 (citing testimony).

7. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11-22 (1991) (discussing modalities of constitutional argument); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194-1209 (1987) (discussing the role of history, text, structure, doctrine, and values in constitutional interpretation).

8. *See, e.g.*, Rex A. Collings, Jr., *Habeas Corpus for Convicts — Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335 (1952) (arguing that the scope of the writ is an issue properly delegated to Congress); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 n.244 (1991) (maintaining that the Suspension Clause "is most plausibly understood as extending only to cases of extrajudicial detention by federal authority, and thus does not guarantee a postconviction remedy for state prisoners"); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 170 (1970) ("It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it, or more pertinently, as the Supreme Court has interpreted what Congress did.") (footnote omitted). Justice Harlan made this objection in his *Sanders* dissent:

> I must also protest the implication in the Court's opinion that every decision of this Court in the field of habeas corpus . . . has become enshrined in the Constitution because of the guarantee in Article I against suspension of the writ. This matter may perhaps be brought back into proper perspective by noting again that at the time of the adoption of the Constitution, and for many years afterward, a claim of the kind . . . asserted here by petitioner [] was not cognizable in habeas corpus at all.

Sanders v. United States, 373 U.S. at 29 (Harlan, J., dissenting) (citations omitted). Along the same lines, see Swain v. Pressley, 430 U.S. 372, 384-85 (1977) (Burger, C.J., concurring) (arguing

1789 and at common law, habeas was primarily used to challenge unauthorized pretrial detentions;[9] today, habeas permits a court to test the legality of a criminal conviction. Indeed, federal habeas currently allows state prisoners to relitigate issues of federal law that state courts have already addressed and decided on their merits.[10] From an originalist perspective, then, to the extent that the Constitution protects any substantive form of the writ, it enshrines at most a limited protection against indefinite confinement without the benefit of formal charges or a speedy trial. On this view, the more encompassing collateral review authorized by the habeas statute is a matter of legislative grace rather than constitutional command.[11]

There are other, equally serious difficulties with asserting a constitutional right to federal habeas relief for state prisoners. As a preliminary matter, the peculiar phrasing of the Suspension Clause raises doubts about whether the Clause affords prisoners even a qualified entitlement to habeas. The provision does not declare that a habeas remedy shall ordinarily be available to federal or state prisoners; in fact, such a proposal was suggested but not adopted at the Constitutional Convention.[12] Instead, the Clause merely specifies the circumstances under which the privilege may be withdrawn. Accordingly, the Clause might simply limit Congress's ability to abolish a judicial remedy that it is not elsewhere required to establish.[13] If, as Chief Justice Marshall stated in his famous dictum in *Ex parte Bollman,*[14] federal habeas jurisdiction exists only to the extent that Congress so provides, the protection of the Suspension Clause would be quite minimal; ab-

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that the Suspension Clause protects only the writ as known at the time of the Framers and therefore imposes no requirement on Congress to provide any collateral review of convictions entered by courts of competent jurisdiction).

9. *See, e.g.,* Dallin H. Oaks, *Habeas Corpus in the States — 1776-1865,* 32 U. CHI. L. REV. 243, 244-45 (1965):

> At common law and under the famous Habeas Corpus Act of 1679 the use of the Great Writ against official restraints was simply to ensure that a person was not held without formal charges and that once charged he was either bailed or brought to trial within a specified time.

10. *See, e.g.,* Brown v. Allen, 344 U.S. 443 (1953) (holding that the habeas statute permits federal courts to revisit substantive federal issues addressed on their merits in state court).

11. *See supra* sources cited in note 8.

12. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 438 (Max Farrand ed., 1911) (reporting that Charles Pinkney of South Carolina "urg[ed] the propriety of securing the benefit of the Habeas corpus in the most ample manner" and proposed that " 'it should not be suspended but on the most urgent occasions, and then only for a limited time not exceeding twelve months' "). This provision undoubtedly was intended for the benefit of federal prisoners alone.

13. *See, e.g.,* William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875,* 13 AM. J. LEGAL HIST. 333, 343 (1969) ("The Constitution did not set the bounds of the federal courts' habeas powers; it dealt only with the reasons for suspending the writ.").

14. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94-95 (1807).

sent congressional action, "the privilege itself would be lost, although no law for its suspension should be enacted."[15]

Moreover, there is some reason to believe that the Framers designed the Suspension Clause principally to promote federalism — to ensure that Congress would not interfere with the power of *state* courts to afford habeas relief to federal prisoners.[16] On this understanding, the claim that state prisoners are constitutionally entitled to a federal forum is not only wrong, but destructive of the Clause's original function; requiring federal review of state criminal convictions weakens rather than strengthens state judicial power within the federal structure.

Finally, even if the Framers initially intended the Clause to safeguard the power of federal courts to issue writs of habeas corpus, they certainly did not understand that power to extend to state prisoners. Indeed, in its first effort to establish federal habeas jurisdiction, the Judiciary Act of 1789, Congress emphatically limited habeas review to prisoners in federal custody.[17] Over forty years later, in the wake of states' resistance to federal taxes, Congress permitted federal courts to issue writs for federal officers held in state custody.[18] But it was not until 1867, more than three-quarters of a century after the Framers adopted the Constitution and the First Congress gave life to the federal judiciary, that Congress chose to extend the writ generally to state prisoners.[19] Given this history, a proponent of broad federal habeas review of state criminal convictions faces seemingly insurmountable obstacles in asserting a constitutional basis for such jurisdiction.

One final objection is worth noting. The federal habeas remedy is significant today because it affords an opportunity for federal review of

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15. 8 U.S. (4 Cranch) at 95.

16. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 155 (1980) (arguing that "the habeas clause was meant to restrict Congress from suspending state habeas for federal prisoners except in certain cases where essential for public safety"). This view of the Suspension Clause was rejected emphatically by the Court in Ableman v. Booth, 62 U.S. (21 How.) 506 (1858), and again in Tarble's Case, 80 U.S. (13 Wall.) 397 (1871). For current criticism of Duker's position, see Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates,* 18 N.Y.U. REV. L. & SOC. CHANGE 451, 465 (1990-1991) (arguing that the word *privilege* in the Clause reveals the Framers' intent to establish a *federal* writ).

17. After specifying that the federal courts shall have the power to issue habeas writs to inquire into the cause of commitment, the First Judiciary Act added the following proviso:

> That writs of *habeas corpus* 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, or are necessary to be brought into court to testify.

First Judiciary Act, ch. 20, § 14, 1 Stat. 73, 81-82 (1789).

18. Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632, 634-35.

19. Judiciary Act, ch. 28, § 1, 14 Stat. 385-86 (1867).

virtually all federal issues arising in state criminal proceedings — an opportunity that is, in the vast majority of cases, unavailable as a practical matter through the Supreme Court's certiorari jurisdiction. Were the lower federal courts not enlisted in the effort, federal habeas would surely cease to exist as an effective remedy for state prisoners. It is widely asserted, though, that the decision whether to divide the federal judicial power between the Supreme Court and the lower federal courts remains wholly within Congress's discretion.[20] Under this view, attributable to Henry Hart,[21] among others, Congress could abolish the lower federal courts altogether. Accordingly, Congress could vest whatever habeas jurisdiction is constitutionally required entirely in the Supreme Court. If this accepted wisdom about the "nonconstitutional" status of the lower federal courts is sound, then any constitutional right to federal habeas for state prisoners would be vastly different from the habeas that exists today.[22]

The "original" Suspension Clause thus seems an unlikely source for constitutionalizing current habeas practice regarding state prisoners. However, given that traditional notions of federalism have been adjusted significantly over the past two hundred years, one may fairly ask whether any constitutional development after the 1789 ratification amplifies the limited protections secured by the Suspension Clause. If the Suspension Clause had been placed within the Bill of Rights, rather than Article I, the obvious source of such amplification would be the Fourteenth Amendment. Over the past several decades, many of the constraints on federal power contained in the Bill of Rights have been "incorporated" through the Due Process Clause to safeguard individual liberty against state intrusion.[23] Should the Fourteenth

20. For a lucid discussion of this issue, see Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 229-30 (1985) (arguing for structural "parity" among the federal courts and embracing Henry Hart's view that Congress "may — but need not" create Article III courts other than the Supreme Court); *see also* Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1031 (1982) (arguing that the Constitution reflects "an agreement that the question whether access to the lower federal courts was necessary to assure the effectiveness of federal law should not be answered as a matter of constitutional principle, but rather, should be left a matter of political and legislative judgment"); Gerald Gunther, *Congressional Power To Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN L. REV. 895, 898 (1984) (maintaining broad congressional power "in terms of sheer legal authority").

21. Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1363-64 (1953).

22. Justice Scalia recently made a similar argument in urging a restrictive reading of the habeas statute. Withrow v. Williams, 113 S. Ct. 1745, 1770 (1993) (Scalia, J., dissenting) (suggesting that the Framers' decision to make the establishment of lower federal courts discretionary undermines the assertion that state courts are not full equals in adjudicating federal issues).

23. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (applying the Sixth Amendment right to a jury trial against the states); Klopfer v. North Carolina, 386 U.S. 213 (1967) (applying the

Amendment likewise be read to "nationalize" a "right" originally conceived as a limitation on federal power notwithstanding its placement in Article I? What would an "incorporated" Suspension Clause look like?

Perhaps because the Suspension Clause has been a virtually empty source of liberty for federal prisoners, the question of its incorporation and application against the states has gone almost entirely unnoticed.[24] Or perhaps our doctrinal blinders have caused us to overlook the liberty-protecting provisions of the "unamended" Constitution in gauging the import of the Fourteenth Amendment.[25] Whatever the reason, the failure to address whether habeas review for state prisoners has been "constitutionalized" by the dramatic events of Reconstruction seems particularly surprising in light of the striking support for such a claim. After all, the "[P]rivileges or [I]mmunities" Clause of Section 1[26] certainly could be read to extend the only "privilege" specified in the Constitution to those detained by state authorities, without the necessity of the more circuitous "incorporation" route. Indeed, the framers of the Fourteenth Amendment frequently mentioned habeas as illustrative of the rights that would be newly safeguarded against state deprivation.[27] The virtually simultaneous con-

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Sixth Amendment right to a speedy and public trial against the states); Malloy v. Hogan, 378 U.S. 1 (1964) (applying the Fifth Amendment right to be free of compelled self-incrimination against the states); Gideon v. Wainwright, 372 U.S. 335 (1963) (applying the Sixth Amendment right to counsel against the states); Mapp v. Ohio, 367 U.S. 643 (1961) (applying the Fourth Amendment exclusionary rule to the states via the Fourteenth Amendment).

24. Writing just before the Court's widespread embrace of incorporation, Judge (then Professor) Pollak acknowledged the possibility of incorporating the protections of the Suspension Clause but dismissed the argument as unlikely to find a receptive audience in the Supreme Court. Louis H. Pollak, *Proposals To Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ,* 66 YALE L.J. 50, 64 (1956) ("Nor is it likely that the Court would presently accept the rather elaborate argument that the Fourteenth Amendment retroactively inflated the scope of the constitutional privilege to include the newly created federal rights to protection against state action.").

A more recent article contends that proposed time limits on habeas filings by state prisoners might run afoul of the Suspension Clause. *See* Mello & Duffy, *supra* note 16, at 470-72 (suggesting that an expansion of the Clause to encompass state prisoners is warranted by the writ's flexible tradition). In a footnote, the authors maintain that such an expansion would be analogous to the Court's incorporation decisions. *Id.* at 471 n.119.

25. *See* Akhil R. Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131, 1131-37 (1991) (arguing that modern approaches to incorporation have caused us to misapprehend the mix of structural and individual liberty protections in both the original Constitution and the Bill of Rights).

26. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.

27. CONG. GLOBE, 39th Cong., 1st Sess. 475, 499, 1117, 1263, 2765 (1866). Virtually all of the references to habeas corpus stem from the repeated invocation of Justice Washington's opinion in Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230), listing some of "those privileges and immunities which are, in their nature, fundamental." For a brief discussion, see Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment,* 101 YALE L.J.

gressional drafting of the Fourteenth Amendment and decision to extend federal habeas review to state prisoners may not, in the end, be merely coincidental.

The fundamental claim in this article is that the Suspension Clause and the Fourteenth Amendment together are best read to mandate federal habeas review of the convictions of state prisoners. The constitutional requirement does not flow from the fact that postconviction review of criminal sentences is a fundamental right or privilege of national citizenship. Indeed, federal prisoners cannot reasonably claim a constitutional right to such review. Rather, the argument rests on the importance of federal review of constitutional questions to the supremacy and enforcement of federal law. Even before the Civil War, the federal writ of habeas corpus had become an essential means of assuring full vindication of federal interests. Later, in the early years of Reconstruction, Congress recognized that writ-of-error review of state criminal convictions by the Supreme Court was inadequate to ensure states' compliance with federal law. Accordingly, Congress radically expanded federal jurisdiction to encompass federal habeas review of all persons detained in violation of the Constitution or laws of the United States. This article will assert that the Fourteenth Amendment constitutionalized this supremacy-ensuring role of the federal courts such that Congress is obligated to make federal review of state criminal convictions practically available through federal habeas corpus.

Of course, the fact that the Reconstruction Congress may have regarded federal habeas as important to assuring states' compliance with federal law does not by itself suggest that the Fourteenth Amendment elevated federal habeas review of state convictions to constitutional status. The affirmative case relies on a variety of evidence: the history of habeas corpus in the United States prior to the ratification of the Fourteenth Amendment, the textual support for constitutionalizing habeas in the Suspension Clause and the Fourteenth Amendment, the Court's doctrinal approach to discerning "nationalized" rights in the Fourteenth Amendment, and overarching considerations of constitutional structure. None of these arguments alone "clinches" the case for recognizing a constitutional right to federal habeas review for state prisoners. Together, though, they provide a convincing basis for the Court's unexamined and hence unsupported intuition thirty years ago that wholesale withdrawal of federal habeas review of state convictions would raise serious constitutional questions.

1193, 1228 n.161 (1992) (discussing references to habeas in the debates surrounding the Fourteenth Amendment).

Part I of the article briefly examines the historiography surrounding the "original" Suspension Clause and then traces the actual history of the writ in this country before the ratification of the Fourteenth Amendment. The early history of habeas corpus illustrates that, even before the Civil War, the federal writ had become an important mechanism for ensuring the supremacy of federal law. The statutory expansions of the writ between 1789 and 1867 were all aimed at specific challenges to federal supremacy. In addition, the history reveals that the scope of the writ during this period was not uniformly limited to review of pretrial detentions or, in the case of actions brought by persons already convicted, to the jurisdiction of the convicting court. Rather, the writ provided a mechanism in certain cases for reviewing postconviction constitutional questions. Overall, the early history of the writ reveals the well-established connection between federal habeas and the supremacy of federal law, and it refutes the long-standing objection that the function of the writ at the time of the "Founding" was importantly different from the function of the writ today.

Part II of the article examines the textual case for recognizing a constitutional right to habeas corpus. At first blush, the case seems strong. The Constitution itself describes the writ of habeas corpus as a "privilege," and the Fourteenth Amendment protects "privileges or immunities" from state abridgment. On this view, the case for expanding and transforming the constitutional protection of habeas in light of the Fourteenth Amendment appears at least as strong as the case for "incorporating" the various liberty-protecting provisions of the Bill of Rights. But the argument so cast does not suggest that the *federal* government must make habeas available; it suggests only that states must make the writ available in their own courts, or perhaps refrain from interfering with the federal exercise of the writ. Hence, the text supports only the limited proposition that the Fourteenth Amendment constitutionalizes some aspect of the habeas right protected by the Suspension Clause. A separate, nontextual argument must make the case for reading the Fourteenth Amendment to require federal action, and not merely to prohibit states' action, with respect to the writ.

Part III examines the Court's doctrinal approach to identifying rights protected by the Fourteenth Amendment. The Court's incorporation methodology focuses on whether a purported right is rooted in a specific textual commitment in the Constitution and whether such a right is fairly regarded as "fundamental" in our traditions. This approach supports the claim that the "right" to habeas corpus embodied in the Suspension Clause should be "incorporated" through the

Fourteenth Amendment. Part III also examines how the incorporated habeas right should be reconstructed. The original Constitution clearly vests the judicial power to review federal questions in the federal courts.[28] The question is whether the Fourteenth Amendment should be read to extend this requirement such that federal review of constitutional questions is not merely *possible,* through discretionary review, but available as a matter of right to state prisoners. This Part concludes that historical considerations, as well as contemporary habeas practices and prevailing constitutional doctrine, suggest that the Fourteenth Amendment habeas right requires Congress to afford some meaningful, nondiscretionary jurisdictional vehicle for federal review of federal constitutional claims raised by state prisoners. In addition, this Part briefly addresses the potential objection that Congress's constitutionally protected discretion to abolish the lower federal courts includes the lesser power to vest habeas jurisdiction entirely within the Supreme Court.

Finally, Part IV examines how the asserted constitutional right would bear on current controversies regarding the scope of habeas corpus for state prisoners. In particular, this Part examines whether the various Court-driven habeas reforms and proposed congressional restrictions on the writ run afoul of a Fourteenth Amendment right to federal habeas corpus.

I. The Constitutional, Statutory, and Common Law History of Habeas Corpus Before the Ratification of the Fourteenth Amendment

When the Thirty-ninth Congress drafted the Fourteenth Amendment, the writ of habeas corpus had a significant history in this country independent of its English origins. By 1868, the Supreme Court had already reached some tentative conclusions regarding the scope of the Suspension Clause.[29] Congress had enacted several provisions conferring habeas powers on the federal courts,[30] and federal and state habeas practice illuminated the range of purposes to which the writ could be put.[31] This history confirms that the American writ oc-

28. *See* Amar, *supra* note 20, at 209 (arguing that, in cases involving federal questions, "federal jurisdiction is mandatory [and] the power to hear all such cases must be vested in the federal judiciary as a whole").

29. *See infra* section I.B.1.

30. *See infra* sections I.B.1 & I.B.3 (discussing statutes).

31. *See infra* sections I.B.2 & I.B.4.

cupied a different position from its English counterpart's.[32] In this country, the federal writ provided an important jurisdictional means of protecting national interests. Moreover, the writ's availability to challenge certain constitutional questions during this period undermines the contention that the framers of the Fourteenth Amendment had a specific or rigid conception of the writ's proper scope. Ultimately, then, the history suggests that, when the framers spoke of habeas as a "privilege or immunity" of citizenship, the privilege to which they referred had substantially different content from the purportedly narrow English writ that had been imported to this country centuries before.

A. *Historiography of the Original Suspension Clause*

The underlying purpose of the Suspension Clause is widely debated. The Clause is located in Section 9 of Article I, which is structurally similar to the Bill of Rights. Like the Bill, Section 9 seeks to safeguard individual liberty both directly, by proscribing certain kinds of offensive lawmaking, and indirectly, by calibrating power between the federal government and the states. Some of the "pure" individual liberty provisions, such as the prohibition of Bills of Attainder and ex post facto laws,[33] also appear in Section 10, which enumerates limitations on states' power.[34] Several other provisions, such as the qualified prohibition of the regulation of the slave trade[35] and the limitation on the taxation of states' exports,[36] withhold powers that might otherwise have been thought to fall within Congress's enumerated powers under Section 8.[37]

The placement of the Suspension Clause within Section 9 makes indisputably clear the Framers' intent to limit *federal* interference with the writ. All of Section 9 is directed toward federal, almost ex-

32. *See infra* section I.C.

33. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

34. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law . . . .").

35. U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.").

36. U.S. CONST. art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State.").

37. Congressional power to regulate the slave trade might otherwise have been thought to be an incident of Congress's commerce power. U.S. CONST. art. I, § 8, cl. 3. The power to tax states' exports might have been located in a combination of the Commerce Clause and the Taxation Clause. U.S. CONST. art. I, § 8, cl. 1 ("Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . .").

clusively congressional,[38] action. The more puzzling questions concern *whose* habeas power — federal or state — the Clause protects and to what extent.

On one view, the Framers sought to protect the power of the federal courts to issue writs of habeas corpus for federal prisoners.[39] A strong version of this position asserts that the Suspension Clause itself obligates Congress to vest habeas powers in some federal court because the prohibition against suspension presumes an existing power.[40] A slightly different version of this position maintains that federal courts, once created, cannot be deprived of habeas jurisdiction over federal prisoners.[41] The general thrust of these positions is that the Suspension Clause requires the federal judiciary to provide a check against potential abuses of federal power.

On an emerging alternative view, the Framers designed the Suspension Clause to protect the power of *state* courts to inquire into the detentions of federal prisoners.[42] Hence, the "existing" power protected by the Suspension Clause lies within state statutory, common law, and constitutional provisions that had already established habeas jurisdiction in the state courts.[43] In rejecting the more established

38. The restriction on drawing unappropriated funds from the treasury, U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."), and the prohibition against granting titles of nobility, U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States . . . ."), seem to run against the Executive as well as against Congress.

Substantial controversy remains concerning whether the limited suspension power belongs to Congress, the Executive, or some combination of the two. Lincoln's suspension of the writ in certain areas during the Civil War was followed over a year later by Congress's blanket authorization to suspend the writ "during the present rebellion . . . whenever, in [the President's] judgment, the public safety may require it . . . ." Habeas Corpus Act, ch. 81, § 1, 12 Stat. 755 (1863) (expiration recognized in 1866). Before the congressional authorization, there were several challenges to the refusal of executive officials to respond to the writ. In the most famous episode, the military commander at Fort McHenry refused to produce John Merryman, who was accused of assisting in the effort to destroy railroad bridges in Baltimore. Chief Justice Taney issued an opinion stating that the military officer had a constitutional obligation to respond to the writ and that the President lacked power to authorize suspension. *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). Justice Taney's order was ignored. All subsequent suspensions of the writ in our history, most notably the suspension of the writ in Hawaii during World War II, *Developments in the Law — Federal Habeas Corpus,* 83 HARV. L. REV. 1038, 1265 (1970) [hereinafter *Developments*], have been at Congress's direction.

39. *See, e.g., Developments, supra* note 38, at 1267 ("The framers' decision to single out habeas corpus for particular protection against congressional 'suspension' suggests that they assumed that habeas jurisdiction would exist in some court for federal prisoners.").

40. This view is often attributed to Chief Justice Marshall on the basis of his opinion in *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807). *See* DUKER, *supra* note 16, at 126; Paschal, *supra* note 6, at 605.

41. *Developments, supra* note 38, at 1272.

42. *See* DUKER, *supra* note 16, at 126-56 (defending the position that Suspension Clause was originally designed to prevent congressional abridgment of state habeas remedies); Akhil R. Amar, *Of Sovereignty and Federalism,* 96 YALE L.J. 1425, 1509 (1987) (agreeing with Duker).

43. DUKER, *supra* note 16, at 140. Four of the 12 states with written constitutions at the

view, advocates of this position emphasize the fact that Article III does not require the creation of lower federal courts;[44] a defender of the "obligation" theory must accept that Congress could place the federal habeas power entirely within the Supreme Court and, accordingly, that Congress could ensure that the Suspension Clause would provide quite limited protection against unlawful detentions. A moderating position that relies extensively on an intricate parsing of the Judiciary Act of 1789 suggests that the Suspension Clause requires *both* state and federal courts to make the writ available to federal prisoners.[45]

Assuming that the Framers intended the Suspension Clause to safeguard some form of the writ, what did they understand habeas review to encompass? The variance in state habeas practices after the adoption of the Constitution[46] suggests that there was no uniform conception of the writ's function. Most judges and academics have insisted that habeas review at the time of the Constitution's ratification was strictly limited to the lawfulness of extrajudicial detentions and, in the case of persons already convicted, to the general jurisdiction of the court of conviction.[47] Of course the rhetoric surrounding the function and scope of habeas corpus has been, and continues to be, much broader.[48] Moreover, the history of the writ in England was quite malleable, leading one prominent scholar to argue that the Framers,

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time of the constitutional convention affirmatively guaranteed the right to habeas corpus. *See* N.C. CONST. of 1776, decl. of rights, § 13; GA. CONST. of 1777, art. LX; MASS. CONST. of 1780, ch. 6, art. VII; N.H. CONST. of 1784, pt. 1, art. XV. Three states, in addition to Georgia and Massachusetts, had enacted statutory provisions modeled on the English Habeas Corpus Act of 1679. *See* Oaks, *supra* note 9, at 251 (citing New York, Pennsylvania, and Virginia provisions). Many of the states afforded some common law version of the writ. *Id.* at 248-49.

44. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

45. Paschal, *supra* note 6, at 607.

46. *See* Oaks, *supra* note 9, at 258-64 (discussing state habeas practices).

47. *See supra* note 8 and accompanying text.

48. Blackstone described habeas as "the most celebrated writ in the English law," and *habeas corpus ad subjiciendum* (the precursor to the present-day writ) as "the great and efficacious writ, in all manner of illegal confinement." 3 WILLIAM BLACKSTONE, COMMENTARIES *129, *131; *see also* Fay v. Noia, 372 U.S. 391, 405 (1963) ("[A]t the time that the Suspension Clause was written into our Federal Constitution and the first Judiciary Act was passed conferring habeas corpus jurisdiction upon the federal judiciary, there was respectable common-law authority for the proposition that habeas was available to remedy any kind of governmental restraint contrary to fundamental law."); Waley v. Johnston, 316 U.S. 101, 105 (1942) (maintaining that the writ "extends . . . to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights") (citations omitted); Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting) ("*[H]abeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell."); Secretary of State for Home Affairs v. O'Brien, 1923 App. Cas. 603, 609 (Earl of Birkenhead)

aware of the writ's past evolution, intended to enshrine a similarly malleable mechanism for vindicating claims of individual liberty.[49]

The competing accounts about the design and expected reach of the Suspension Clause are of obvious interest to anyone who embraces intentionalist arguments about the meaning of the Constitution. But such accounts shed light only on the "original" Suspension Clause. To the extent that intentionalism can shed light on whether and how courts should apply the Suspension Clause against the states through the Fourteenth Amendment, the focus must be on the understanding of the Suspension Clause by the framers and ratifiers of *that* Amendment. By the time of the Fourteenth Amendment's adoption, a significant body of caselaw had addressed the constitutional status of habeas corpus. In addition, practical experience with the writ in federal and state litigation undoubtedly informed the Reconstruction Congress's understanding of the function of habeas corpus. It is against that backdrop that the role of habeas corpus in the reconstructed constitutional order should be evaluated.

B. *Habeas Decisions Between the Founding and the Civil War*

1. Ex Parte Bollman: *The Court's First Word on the Suspension Clause and the Judiciary Act*

Congress first established federal habeas jurisdiction in the Judiciary Act of 1789. Section 14 of the Act mentions writs of habeas corpus in two separate contexts.[50] First, it empowers all federal *courts* — the Supreme Court and the newly created lower federal courts — to issue writs, including habeas corpus.[51] Second, "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

("[H]abeas corpus . . . afford[s] a swift and imperative remedy in all cases of illegal restraint or confinement.").

49. Professor Freund developed this position as an advocate. *See* Brief for Respondent at 30-39, United States v. Hayman, 342 U.S. 205 (1952) (No. 23). The case concerned the adequacy of the federal postconviction remedies in 28 U.S.C. § 2255 (1988) in lieu of habeas corpus proceedings for federal prisoners.

50. Section 14 provides:

> That all the before-mentioned 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 that 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. *Provided,* that writs of *habeas corpus* 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, or are necessary to be brought into court to testify.

Act of Sept. 24, 1789, § 14, 1 Stat. 81-82.

51. Act of Sept. 24, 1789, § 14, 1 Stat. 81-82.

into the cause of commitment."[52]

Less than two decades after the 1789 Act, the litigation surrounding the Burr Conspiracy tested the scope of its habeas provisions. Several of Burr's associates were taken into custody based on their purported involvement in Burr's efforts to assemble an armed force for his Western expedition. Two of the men, Erick Bollman and Samuel Swartwout, were taken into custody by federal military officials, charged with treason, and transported to the District of Columbia. President Jefferson, fearful that Bollman and Swartwout would be released through the writ, encouraged Congress to suspend habeas. The Senate passed a three-month suspension bill, but the House overwhelmingly refused to embrace the measure.[53] The circuit court denied Bollman and Swartwout habeas relief,[54] and they subsequently sought relief in the Supreme Court. When two members of the Court openly questioned whether the Court could lawfully exercise habeas jurisdiction,[55] Chief Justice Marshall directed that "[t]he whole subject w[ould] be taken up *de novo.*"[56]

The Court ultimately issued the writ on the ground that the prosecution failed to allege any treasonous conduct on the part of prisoners that would render them susceptible to trial in the District of Columbia.[57] In the course of the opinion, Chief Justice Marshall addressed some of the vexing questions regarding the scope of federal habeas. Perhaps most importantly, he insisted that the entirety of the federal courts' habeas jurisdiction was a function of statute — that the federal courts possessed no common law authority to issue the writ.[58] Accordingly, to the extent that the Suspension Clause affirmatively guaranteed the federal writ, it did so by commanding Congress to establish such jurisdiction. Following this reasoning, the Chief Justice intimated that the Judiciary Act was undoubtedly the product of

52. Act of Sept. 24, 1789, § 14, 1 Stat. 81-82.

53. The circumstances surrounding the litigation are set forth in Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court,* 1962 SUP. CT. REV. 153, 159-62.

54. United States v. Bollman, 24 F. Cas. 1189 (C.C.D. Col. 1807) (No. 14,622).

55. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 75 n.* (1807) (Justice Chase "doubted the jurisdiction of this court to issue a *habeas corpus* in any case," while Justice Johnson questioned whether Section 14 established independent habeas jurisdiction or simply established "a mere auxiliary power to enable courts to exercise some other jurisdiction given by law.").

56. 8 U.S. (4 Cranch) at 75 n.*.

57. 8 U.S. (4 Cranch) at 135 ("[T]hat no part of this crime was committed in the district of Columbia is apparent. It is therefore the unanimous opinion of the court that they cannot be tried in this district.").

58. 8 U.S. (4 Cranch) at 93 ("Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.").

Congress's perceived "obligation of providing efficient means by which this great constitutional privilege should receive life and activity."[59]

It should be apparent that this "obligation" theory, in addition to denying common law habeas powers to the federal courts, implicitly rejected the view that the Suspension Clause is concerned primarily or exclusively with the habeas powers of *state* courts. If the Suspension Clause were intended to safeguard state judicial power, surely there would be no "obligation" via the Clause to provide for federal habeas review. The Chief Justice's opinion thus gives no hint that the Clause rests on federalism, as opposed to individual liberty and separation-of-powers, concerns.

The other central aspects of the Court's opinion concerned the scope of the Judiciary Act. Although the Court had exercised habeas jurisdiction prior to *Bollman,*[60] substantial doubts remained concerning both the reach of the Act and its constitutionality. First, the statutory provision authorizing "inquiry into the cause of commitment" appeared to apply only to judges in their individual capacity and not to the sitting Court. Justice Marshall dismissed this argument as untenable because he thought Congress surely did not want to give judges greater power in the privacy of their chambers than in open court,[61] a conclusion bolstered by another provision in the Judiciary Act that was apparently premised on the Supreme Court's authority to grant the writ for this purpose.[62]

Second, in the wake of *Marbury v. Madison,*[63] it appeared doubtful that Congress could enlarge the Court's original jurisdiction to encompass habeas actions. Such actions ordinarily would not fall within the limited class of "original" cases that, according to *Marbury,* defined the constitutional maximum of Article III.[64] The Court avoided this difficulty by characterizing habeas jurisdiction as "appellate," relying on the proposition that the writ's purpose is "the revision of a decision

59. 8 U.S. (4 Cranch) at 95.

60. *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806); United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795).

61. 8 U.S. (4 Cranch) at 96 ("It would be strange if the judge, sitting on the bench, should be unable to hear a motion for this writ where it might be openly made, and openly discussed, and might yet retire to his chamber, and in private receive and decide upon the motion.").

62. *See* Act of Sept. 24, 1789, § 33, 1 Stat. 91-92 (granting the Supreme Court — as well as the lower federal courts — discretionary power to set bail in capital cases).

63. 5 U.S. (1 Cranch) 137 (1803).

64. The Court made clear in *Marbury* that the Court's original jurisdiction was limited to those cases specified in the first sentence of Article III, Section 2, Clause 2: "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party . . . ." 5 U.S. (1 Cranch) at 174. The state is not ordinarily thought to be the real party in interest in a typical habeas action.

of an inferior court."[65] By stretching traditional notions of appellate power even further, the Court ultimately entertained habeas actions brought to the Court in the first instance[66] as well as actions, like Bollman's, that sought review of habeas decisions by lower federal courts.[67]

Finally, the Court dismissed the notion that Section 14 did not constitute an independent grant of jurisdiction to the federal courts. On one theory, voiced by Justice Johnson[68] and embraced by a recent academic commentator,[69] Section 14 established habeas jurisdiction merely to facilitate the courts' exercise of jurisdiction independently conferred by other provisions. On this view, the qualifying language of the first part of Section 14 — authorizing courts to issue writs "which may be necessary for the exercise of their respective jurisdictions"[70] — was a global restraint on the courts' power to exercise *any* of the writs mentioned in Section 14, including habeas corpus. Had this reading been accepted, the habeas power of the federal courts in *Bollman* could have stemmed only from the Constitution or from the common law.

Chief Justice Marshall avoided both of these conclusions by limiting the scope of the qualifying language. His central support for this reading was his position, outlined above,[71] that the Suspension Clause obligated Congress to make the writ available. Thus, according to the Chief Justice, prudence counseled in favor of construing Section 14 as an independent jurisdictional grant because a more narrow reading of the Act's jurisdictional scope would raise constitutional difficulties. This integrated approach to the Suspension Clause and the habeas statute harmonized two central commitments of the Chief Justice. By refusing to acknowledge federal common law habeas powers, the Chief Justice reaffirmed his contention that the "writtenness" of the Constitution was significant to its interpretation. The existence of a written Constitution, after all, was crucial to *Marbury*'s defense of judicial review.[72] At the same time, by holding that the Judiciary Act conferred broad habeas powers and that such powers were in some

65. *Ex parte* Bollman, 8 U.S. (4 Cranch) at 101.

66. *See, e.g., Ex parte* Watkins, 32 U.S. (7 Pet.) 568 (1833).

67. *See, e.g., Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1868).

68. *See supra* note 55.

69. *See* Paschal, *supra* note 6, at 632.

70. Act of Sept. 24, 1789, § 14, 1 Stat. 82 (for the full text of section 14, see *supra* note 50).

71. *See supra* text accompanying notes 57-59.

72. 5 U.S. (1 Cranch) at 176 ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").

sense mandated by the Suspension Clause, the Chief Justice augmented federal judicial power.

Thus, by the early nineteenth century, the Court had embraced the view that the Constitution guaranteed some form of the federal writ. At the same time, the Judiciary Act's explicit refusal to extend the writ to prisoners in state custody provided strong evidence that the first Congress did not understand the Constitution's guarantee of a federal habeas corpus to extend to such prisoners. Nor had the Court embraced the view that state (as opposed to federal) habeas enjoyed constitutional protection. Finally, by casting its own habeas jurisdiction as "appellate" because it involved review of decisions by lower courts, the Court paved the way for regarding habeas more generally as a means of addressing "judicial" as well as "extrajudicial" detentions.

2. *Federal Habeas Practice Before the Civil War*

Federal habeas review during the period between the Founding of the Constitution and the Civil War was generally quite limited. Although commentators agree with this basic proposition,[73] considerable disagreement remains about the reasons for its limited scope. Professor Paul Bator's influential study of court opinions led him to conclude that federal habeas "was simply not available at all to one convicted of crime by a court of competent jurisdiction."[74] In this respect, Bator argued, habeas corpus in this country mirrored the quite circumscribed English writ secured by the Habeas Corpus Act of 1679.[75] Bator uses this descriptive history to support a normative conclusion. In Bator's view, federal habeas review should be confined to the adequacy of a state's corrective processes and should not extend to the accuracy of a state court's underlying judgment. Accordingly, Bator argues that the series of post-Civil War decisions, culminating in

73. *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 466 (1963) (arguing that habeas review permitted federal courts only to inquire into the competence of the tribunal); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2062 (1992) (arguing that the writ acted as a substitute for direct Supreme Court review of nationally important questions in situations in which such review was not meaningfully available); Oaks, *supra* note 9, at 246 (arguing that state habeas litigation was far more significant than federal habeas litigation in the period before the Civil War).

74. Bator, *supra* note 73, at 466.

75. *Id.* at 466 n.51 ("The principle that a person convicted by a court of general criminal jurisdiction is not entitled to habeas corpus derives from the Habeas Corpus Act of 1679, 31 Car. 2, c. 2, which expressly excepted 'persons convict[ed] or in Execution by legal process.' "). For a contrary reading of the Habeas Corpus Act, see Brief for Respondent at 31-32, United States v. Hayman, 342 U.S. 205 (1952) (No. 23) (argument of Professor Freund).

Brown v. Allen,[76] that expansively construed federal habeas jurisdiction should be rejected as unwarranted departures from the more traditional scope of the writ.

Bator's description of habeas practice, now thirty years old, was essentially unchallenged until a similarly ambitious study by Professor Gary Peller concluded that habeas review was in fact far broader.[77] Peller argues that the limited scope of the Supreme Court's habeas jurisdiction was exceeded by the habeas powers of the lower federal courts,[78] and that such courts could (and did) look beyond the mere general jurisdiction of the convicting court.[79] Bator's central error, according to Peller, was mistaking the limited scope of pre-*Brown* federal constitutional protections for actual limitations on the scope of the writ.[80] In Peller's account, the scope of federal habeas review of constitutional issues generally mirrored the Court's approach to such questions on direct review. The debate between Bator and Peller remains alive and consequential, as various factions of the current Court continue to debate the proper scope of habeas for state prisoners.[81]

Two scholars have recently deepened and illuminated the Bator-Peller debate. Professor James Liebman has demonstrated in an elaborate study of nineteenth-century and early twentieth-century habeas decisions that, contrary to Bator's position, the Court "did not limit habeas corpus review either to jurisdictional claims or to claims attacking pretrial as opposed to postconviction detention."[82] At the same time, Liebman argues that Peller sought to prove too much because the Court did in fact refuse to address certain constitutional

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76. 344 U.S. 443 (1953).

77. Gary Peller, *In Defense of Federal Habeas Corpus Relitigation,* 16 HARV. C.R.-C.L. L. REV. 579 (1982).

78. *Id.* at 603.

79. *Id.* at 662-63.

80. For example, Peller cites the notorious case of Frank v. Mangum, 237 U.S. 309 (1915), in which Frank alleged that his trial had been dominated by a mob and thus deprived him of his right to due process. Peller, *supra* note 77, at 646. The Court rejected the claim on the ground that Frank had been able to present his allegations to the Georgia Supreme Court. In Peller's account, *Frank* illustrates the Court's narrow understanding of the requirements of the Due Process Clause. Frank lost not because the Court refused to address the merits of his constitutional claim, but because, as a matter of due process, state court review of a mob-domination claim was constitutionally sufficient. Thus, Peller maintains that resolution of Frank's claim on federal habeas was no different than it would have been on direct review. *Id.* at 646.

81. *See, e.g.,* Wright v. West, 112 S. Ct. 2482 (1992) (arguing, via Bator, that the historically limited scope of habeas corpus counsels against de novo review of mixed questions of law and fact); 112 S. Ct. at 2493-98 (O'Connor, J., concurring in judgment) (agreeing with Peller's view that the scope of habeas corpus had been much broader than previously acknowledged).

82. Liebman, *supra* note 73, at 2059.

claims on habeas.[83] What Bator and Peller both missed, on Liebman's account, is the intricate connection between the scope of habeas review and the availability of other forms of federal review of federal claims. The Court continually adjusted the scope of habeas review in both the state and federal prisoner cases based on whether some other federal jurisdictional vehicle was available to address substantial federal claims. In the federal prisoner context, for example, this thesis explains why the scope of federal habeas for federal prisoners diminished after Congress established federal appellate review of criminal convictions in 1891.[84] In the state prisoner context, Liebman's account explains why the scope of habeas corpus increased when federal review as of right through writ of error became largely discretionary.[85] Overall, Liebman's extensive review of the cases persuasively demonstrates that federal habeas review of federal convictions before the adoption of the Fourteenth Amendment extended to virtually all substantial constitutional claims, even in cases challenging criminal *convictions.*[86]

A separate study of nineteenth-century habeas decisions by Professor Ann Woolhandler attempts to locate such cases in the broader context of judicial review of official action.[87] Woolhandler, like Liebman, takes issue with Bator's claim that federal habeas had traditionally been unavailable to review postconviction constitutional claims. Bator, in his own account, conceded that, in a "a few classes of issues (principally the constitutionality of the statute creating the offense)," the Court addressed constitutional claims brought by convicted persons, even though such claims "did not really bear on the competence [i.e., jurisdiction] of the committing court."[88] Woolhandler shows that this seemingly minor concession actually is quite significant.

During most of the nineteenth century, the Court and members of the broader legal culture did not typically characterize officers engaged in unauthorized illegal acts as acting "unconstitutionally."[89] Such "ad hoc or random official illegality" was more commonly

83. *Id.* at 2093.

84. *Id.* at 2092-93.

85. *Id.* at 2092.

86. *See id.* at 2059 n.354 (citing cases in which the Court granted relief on, or addressed, nonjurisdictional claims); *id.* at 2059-60 & n.355 (citing *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866), and *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806), as cases in which the Court "overturned what amounted to criminal *convictions*").

87. Ann Woolhandler, *Demodeling Habeas,* 45 STAN. L. REV. 575 (1993).

88. Bator, *supra* note 73, at 483-84.

89. Woolhandler, *supra* note 87, at 605-06.

thought to give rise to liability under the common law.[90] In both criminal and civil contexts, parties thus couched virtually all constitutional, as opposed to common law, claims as actions challenging the constitutionality of statutes.[91] Hence, the Court's willingness throughout the nineteenth century to entertain constitutional challenges to statutes in federal habeas actions was equivalent, as a practical matter, to a willingness to entertain the full range of cognizable constitutional claims. Ultimately, what Bator regards as a radical expansion of federal habeas can be traced, in Woolhandler's terms, to an increased willingness on the part of the Court to view ad hoc illegality as actionable under the Constitution.[92]

As this recent work illustrates, it is simply wrong to assert that the writ known to the framers of the Fourteenth Amendment was the same narrowly circumscribed writ known at English law, or perhaps even known to the Framers of the Suspension Clause. Although it is true that federal habeas review has more bite today than it did in 1867, the expansion is more fairly attributable to other factors — the growth of constitutional claims available to state prisoners via the Due Process Clause, the increased willingness to view official illegality as "unconstitutional" conduct, and the diminished opportunities for direct review as of right — than it is to a radical redefinition of "habeas" itself. Accordingly, if courts should "incorporate" the privilege of habeas corpus via the Due Process Clause, they need not limit the newly defined right, as Justice Harlan and Chief Justice Burger suggested, to review of the legality of a detention or of the jurisdiction of the convicting court.[93]

3. *Statutory Expansions of the Federal Writ*

Given that fears of intrusive federal power appear to have contributed significantly to the Framing of the Suspension Clause,[94] one of the striking features of federal habeas practice in the early and mid-nineteenth century was the writ's role in assuring the supremacy of federal law. As mentioned above,[95] the Judiciary Act of 1789 explicitly withheld federal habeas review of detentions by state authorities.

90. *Id.*

91. This distinction between "unconstitutional" laws and merely tortious conduct by state officials is reflected in the Fourteenth Amendment itself, which forbids states from "mak[ing] or enforc[ing] any *law* which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1 (emphasis added).

92. Woolhandler, *supra* note 87, at 621.

93. *See supra* note 8 (citing cases).

94. *See supra* text accompanying note 38.

95. *See supra* note 50.

Nonetheless, Congress gradually extended federal habeas jurisdiction to meet specific challenges to federal authority posed by state law prosecutions.

When South Carolinians declared federal tariffs unconstitutional at the climax of the nullification controversy, President Jackson feared that federal officers seeking to enforce the tariffs would be subject to state interference.[96] Upon Jackson's initiative, Congress authorized federal judges to exercise habeas jurisdiction in cases involving prisoners, federal or state, confined for acts committed "in pursuance of a law of the United States."[97] The crisis subsided soon after the statute became law, but Congress's use of federal habeas as a means of vindicating particular federal interests rather than protecting state sovereignty or individual liberty marked a significant transformation of the writ.

Faced with another conflict between national and state power less than a decade later, Congress again expanded federal habeas jurisdiction, this time to permit federal review of cases involving federal or state prisoners who are "subjects or citizens of a foreign State, and domiciled therein . . . ."[98] This expansion was prompted by the diplomatic crisis that ensued when New York tried a British citizen who had attempted to prevent American assistance to Canadian rebels during the winter revolt of 1837-1838.[99] The United States denied a British request to release the prisoner on the ground that New York properly retained jurisdiction over persons suspected of committing crimes within its boundaries. The case ended in an acquittal, but Congress, fearful that national foreign policy might again be subject to the vagaries of independent state criminal processes, ensured that federal courts would have the final word regarding the validity of detentions of foreign citizens.

The writ's role in enforcing national policy increased as the sectional conflict over slavery intensified. It is somewhat ironic that the "Great Writ" became an important tool in overcoming Northern resistance to the Fugitive Slave Act.[100] Thus, despite recent histori-

96. *See* DUKER, *supra* note 16, at 187; WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA 1816-1836, at 283 (1966).

97. Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632, 634-35.

98. Act of Aug. 29, 1842, ch. 257, 5 Stat. 539.

99. The McLeod affair is discussed in PAUL BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1466 (3d ed. 1988) [hereinafter HART & WECHSLER]; DUKER, *supra* note 16, at 188-89; CHARLES G. HAINES & FOSTER H. SHERWOOD, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1835-1864, at 206-17 (1957).

100. *See, e.g., Ex parte* Sifford, 22 F. Cas. 105 (D.C.S.D. Ohio 1857) (No. 12,848); *Ex parte* Jenkins, 13 F. Cas. 445 (C.C.E.D. Pa. 1853) (No. 7259). At the same time, abolitionists

ans' insistence that the Framers designed the Suspension Clause to protect state sovereignty and individual liberty from a potentially unresponsive and vast national government,[101] the early interpretations of the Clause and subsequent federal practice suggested otherwise. By the time of the Civil War, the federal writ in its actual implementation could claim a greater affinity with the Supremacy Clause than with the various provisions of the Bill of Rights.

Of course, the most significant statutory expansion of the writ occurred in the Judiciary Act of 1867.[102] The Act extends the writ to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[103] More than a century later, the 1867 Act, with some important modifications, still provides the basic framework for the current regime of federal habeas review of state convictions.[104] This regime permits, with some recent exceptions,[105] state prisoners to relitigate properly preserved federal issues in federal court after such issues are fully exhausted in the state system.

The plain meaning of the language in the 1867 Act would suggest that the Reconstruction Congress sought, consistent with the writ's prior expansions, to increase substantially federal judicial supervision over the enforcement of federal law. Indeed, Justice Brennan, in justifying a lenient policy toward state prisoners who forfeited their claims in state court, insisted that the 1867 Act reflected a "clear congressional policy of affording a federal forum for the determination of the federal claims of state criminal defendants."[106] In Justice Brennan's view, the Act was part of a more general effort to ensure the vindication of rights that were soon to be secured by the Fourteenth Amendment.[107] Justice Brennan's account is buttressed by the famous

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attempted to use state habeas to prevent slave owners from returning to the South with fugitive slaves. *See, e.g.*, Commonwealth v. Aves, 35 Mass. (18 Pick.) 193 (1836).

101. *See supra* note 42.

102. Judiciary Act, ch. 28, § 1, 14 Stat. 385 (1867).

103. Judiciary Act, ch. 28, § 1, 14 Stat. 385, 385 (1867).

104. Federal habeas for federal prisoners has been largely supplanted by a separate postconviction framework. *See* 28 U.S.C. § 2255 (1988).

105. *See, e.g.*, Teague v. Lane, 489 U.S. 288 (1989) (generally precluding federal habeas review of "new" law claims); Stone v. Powell, 428 U.S. 465 (1976) (precluding federal habeas litigation of Fourth Amendment exclusionary rule claims when the state courts have provided a "full and fair" opportunity to present such claims in state court); *cf.* Brecht v. Abrahamson, 113 S. Ct. 1710 (1993) (establishing more deferential "harmless error" standard than is applied to constitutional claims on direct review).

106. Fay v. Noia, 372 U.S. 391, 418 (1963).

107. In 1867, Congress was anticipating resistance to its Reconstruction measures and planning the implementation of the post-war constitutional Amendments. . . . [T]he measure that became the Act of 1867 seems plainly to have been designed to furnish a

declaration of Representative Lawrence that "[i]t is a bill of the largest liberty."[108] Lawrence, who introduced the habeas measure in the House, explained that the Act's purpose was "to make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them."[109] Senator Trumbull, chairman of the Judiciary Committee, made similar comments in introducing the bill to the Senate.[110]

Although both supporters and opponents of broad federal habeas review have embraced Justice Brennan's understanding of the central purposes of the 1867 Act,[111] an exhaustive study of the meager legislative history led one scholar to conclude that such claims about the Act's purported purposes were wildly inflated.[112] Professor Lewis Mayers maintained that the best evidence available suggests that the Act was intended to provide a federal judicial remedy against "oppressive apprenticeship and labor contract laws."[113] In Mayers's view, a careful analysis of the history surrounding its passage reveals that the framers of the Act did not intend to authorize substantial federal oversight over state criminal processes.[114] Representative Lawrence's comments, according to Mayers, have been taken out of context, and Senator Trumbull's words reflected his "apparent ignorance of the purpose of the House bill."[115]

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method additional to and independent of direct Supreme Court review of state court decisions for the vindication of the new constitutional guarantees.

372 U.S. at 415-16.

108. CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866).

109. *Id.*

110. Trumbull stated:

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

CONG. GLOBE, 39th Cong., 1st Sess. 4229 (1866).

111. Bator, *supra* note 73, at 475 n.80 ("There is no clear indication what moved the Congress . . . (though surely the underlying concern was the enforcement of the reconstruction legislation)."); Collings, *supra* note 8, at 351 (maintaining that the Act sought "to facilitate enforcement of the Reconstruction Acts"); Pollak, *supra* note 24, at 52 n.9 ("The act was plainly intended to help safeguard the new . . . constitutional rights created after the Civil War."); Note, *Federal Habeas Corpus Review of State Convictions: An Interplay of Appellate Ambiguity and District Court Discretion,* 68 YALE L.J. 98, 98 (1958).

112. Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian,* 33 U. CHI. L. REV. 31, 55-56 (1965) ("[T]here is no foundation for the Court's assertions that the 1867 act was intended to afford a new remedy for state prisoners, that it was enacted in contemplation of anticipated southern resistance to Reconstruction, and that it was aimed at implementing the fourteenth amendment.").

113. *Id.* at 49.

114. *Id.* at 58.

115. *Id.* at 38-39.

Mayers's position encounters several problems, not the least of which is explaining why Congress chose to express its purportedly narrow purpose in such expansive language. In this respect, Mayers's argument reproduces the same debate about the framers' intentions in creating the Fourteenth Amendment: if, as some argue, the framers of the Fourteenth Amendment were solely concerned with securing the rights of the newly freed slaves, why did they not simply say so?[116] Moreover, Mayers's extensive effort to disprove the availability of any meaningful legislative history[117] undercuts his confident assertion that the Reconstruction Congress was *not* concerned with possible state hostility to newly recognized federal rights of state prisoners.[118] If anything, Mayers reveals the inadequacy of his strict intentionalist approach in attempting to gauge the "true" meaning of this Reconstruction statute.[119]

Finally, given his deep commitment to context as a means of illuminating the intentions of the drafters, it is surprising that Mayers regards as "totally unrelated" Congress's decision to adjust writ-of-error review of state judgments at the same time that it chose to expand federal habeas.[120] Indeed, the striking feature of the 1867 Act is that it is fairly regarded as part of a more general effort to expand federal review of state decisions.[121] In addition to extending habeas review to "any person" detained in violation of federal law, Congress had recently provided for wider removal of federal issues from state to federal court.[122] The removal statute permitted removal both before

116. Mayers responds to this criticism, noting that "[q]uite possibly it was thought that one seeking relief through habeas corpus from detention under such vagrancy or contract labor statutes would find the broader phrase, 'restrained of his liberty in violation of the constitution,' more serviceable than the narrower 'held in slavery or involuntary servitude.'" *Id.* at 44.

117. According to Mayers:

> Such then is the congressional history of the measure—presentation without written report on the floors of both houses and enactment without discussion of its purposes in either house other than the explanation offered by the member reporting it, with its proponent in the Senate ignorant of both its genesis and of the explanation offered by its draftsman on the floor of the House. Although the Supreme Court has been able to find in this legislative history a clear congressional intention to create a novel form of federal review of state convictions, it is impossible to speak confidently of the intent of even the two or three members of Congress most intimately concerned with enactment of the measure.

Id. at 42 (footnotes omitted).

118. *Id.* at 54-55. For further criticism of Mayers's article, see Larry W. Yackle, *Form and Function in the Administration of Justice: The Bill of Rights and Habeas Corpus*, 23 U. MICH. J.L. REF. 685, 695-702 (1990).

119. Mayers's intentionalism raises particular problems in his focus on the purported intentions of Representative Lawrence, the presumed drafter of the measure in the House, rather than on the understanding of the Bill by all of the members of Congress that passed the measure. *See* Yackle, *supra* note 118, at 696.

120. Mayers, *supra* note 112, at 35.

121. *See* Liebman, *supra* note 73, at 2064.

122. Habeas Corpus Act, ch. 81, § 5, 12 Stat. 755, 756-57 (1863).

and *after* judgment in the state court;[123] moreover, in authorizing removal of certain claims arising under "the Constitution, laws or treaties of the United States," the removal provision employed the same expansive language as the habeas provision.[124] The expansion of writ-of-error jurisdiction, which Mayers regards as coincidental, eliminated the then-existing statutory requirement that review of federal questions adjudicated in state court be confined to errors appearing "on the face of the record."[125] A "contextual" reading of the habeas statute does not suggest a series of isolated jurisdictional developments. Rather, these statutes reveal Congress's overall effort — through removal, writ-of-error, and habeas jurisdiction — to enhance opportunities to adjudicate federal questions in the federal courts.

The statutory approach to federal habeas prior to the Fourteenth Amendment, then, like the federal cases, suggests that the writ had become an important, although not exclusive, jurisdictional vehicle for assuring federal enforcement of federal rights. The writ known to the framers of the Fourteenth Amendment was not simply a writ of the "largest liberty," but also a writ essential to federal supremacy.

4. *State Habeas Before the Civil War*

After the ratification of the Constitution, many states adopted their own constitutional guarantees concerning habeas corpus using the Suspension Clause as a model.[126] For the most part, though, the scope of state habeas was a function of state statutes and the common law. State statutory provisions closely tracked the English Habeas Corpus Act of 1679,[127] which prescribed specific remedies and civil penalties against legal authorities who did not answer the writ. Like the English version, the state habeas statutes focused on the rights of persons detained before trial, especially on defendants' rights against

123. *See* HART & WECHSLER, *supra* note 99, at 483-84 (discussing removal under the 1863 Act).

124. Liebman, *supra* note 73, at 2049.

125. *See id.* at 2063.

126. Four states already had constitutional guarantees by 1789. N.C. CONST. of 1776, decl. of rights, § 13; GA. CONST. of 1777, art. LX; MASS. CONST. of 1780, ch. 6, art. VII; N.H. CONST. of 1784, pt.1, art. XV. Several of the 13 original states included habeas provisions soon after the Constitution was ratified, *see, e.g.,* PA. CONST. of 1790, art. IX, § 14, and all 21 of the states admitted between 1787 and 1860 likewise included some constitutional provision concerning the suspension of the writ. *See, e.g.,* MICH. CONST. of 1835, art. I, § 12. Virtually all of the constitutional provisions adopted after the ratification of the federal Constitution used language identical to the federal provision. *See* Oaks, *supra* note 9, at 247-51 (discussing state constitutional provisions).

127. 31 Car. 2, c.2 (1679); *see* Oaks, *supra* note 9, at 253 (maintaining that states "slavishly" followed the English Act).

warrantless detentions and denials of bail.[128] Following the perceived limited scope of the English Act,[129] many states adhered in form to the proposition that habeas generally would be unavailable to petitioners imprisoned pursuant to a conviction by a court of competent jurisdiction.[130] Nonetheless, state courts exercising their common law jurisdiction in some cases entertained postconviction challenges to the constitutionality of the statute creating the offense[131] or to the legality of the sentence.[132] As in the federal context, these "exceptions" tended in practice to swallow the rule.[133]

State courts also exercised habeas jurisdiction to review the legality of certain federal detentions during a substantial portion of the pre-Civil War period. Such cases generally involved efforts to release federal soldiers from enlistment contracts.[134] When the Wisconsin Supreme Court put the writ to a broader purpose — to secure the release of an abolitionist who had been convicted in a federal proceeding of aiding and abetting a fugitive slave — the U.S. Supreme Court ruled that state courts altogether lacked power to interfere with persons imprisoned under the authority of the federal government.[135] Chief Justice Taney's opinion emphatically rejected the proposition that states occupy an important role in safeguarding the liberty of federal prisoners. Perhaps overstating the case against concurrent habeas jurisdiction, the Chief Justice maintained that the Union could not "have lasted a single year" had states been empowered to review the federal convictions of persons held within their borders.[136] Thus, as in *Marbury,* the Court eschewed any notion that the Suspension Clause of the Constitution preserves the power of state courts to review federal detentions.

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128. *Id.* at 258.

129. *See* Brief for Respondent at 31, United States v. Hayman, 342 U.S. 205 (1952) (No. 23) (contesting the conventional reading of the English Act).

130. Oaks, *supra* note 9, at 261-62.

131. The most famous instance occurred in a state court's review of a federal convict's sentence. In *Ex parte* Booth, 3 Wis. 157 (1854), the Wisconsin Supreme Court ordered the release of Sherman Booth, who had been convicted of aiding and abetting the escape of a slave in violation of the Fugitive Slave Act of 1850. Ableman v. Booth, 62 U.S. (21 How.) 506 (1858).

132. ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS 164-202, 330-35 (1st ed. 1858).

133. *See supra* text accompanying notes 89-92.

134. *See, e.g.,* Sims Case, 61 Mass. 285, 309 (1851); Commonwealth v. Cushing, 11 Mass. 67 (1814); State v. Dimick, 12 N.H. 194 (1841). The military cases are discussed at length in an 1858 treatise on habeas corpus practice. HURD, *supra* note 132, at 164-202 (citing cases); *see also* Oaks, *supra* note 9, at 274-76 (discussing the use of the writ by minor-enlistees).

135. Ableman v. Booth, 62 U.S. (21 How.) 506 (1858).

136. *Ableman,* 62 U.S. (21 How.) at 515.

C. *Summary*

By the eve of the Civil War, a distinctive view of the Suspension Clause and the purposes of the writ had emerged in American politics. First, following Chief Justice Marshall's exegesis of the Clause in *Bollman,* the Court cast habeas as an affirmative individual right of constitutional dimension. Second, contrary to some current accounts of the "original" understanding of the Suspension Clause, the writ had become an important means of securing the states' compliance with federal law. Each statutory expansion of the writ responded to a specific threat to the supremacy of federal law. At the same time, the authority of state courts to intervene on behalf of federal prisoners was rejected as constitutionally impermissible, a far cry from the argument that such power was constitutionally protected.

This history is important to this article's constitutional argument in several respects. To a modest extent, the federal judicial and legislative approaches to the writ prior to the ratification of the Fourteenth Amendment represent a partial repudiation of two long-standing principles espoused by those who oppose broad federal habeas for state prisoners. First, they challenge the basic theory of parity — that federal and state courts provide equal and interchangeable vehicles for enforcing federal rights. Second, they suggest that the Supreme Court's role in direct review of state judgments may not provide sufficient protection of the federal interest in federal adjudication of federal rights.

More importantly, though, the history provides a rejoinder to those who would assert that any constitutional right to habeas must be severely limited. Diverting one's focus from the Framers of the "original" Constitution to the framers of the Fourteenth Amendment significantly alters the understanding of the writ. If the "right" to habeas corpus is properly located in the Fourteenth Amendment, the contours of that right must be discussed in light of the writ's transformation between 1789 and 1868. That transformation, in turn, strongly supports the writ's role in protecting national rights in a national forum. History alone, though, does not absolutely confirm that a federal right to habeas corpus for state prisoners is fairly found in the Fourteenth Amendment. That position must draw support from other forms of constitutional argument.

II. The Textual Case for Recognizing a National Right to Federal Habeas Corpus

The second line of the Fourteenth Amendment declares that "[n]o

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[137] From a textual standpoint, this declaration should have been, but of course is not, the most comprehensive constitutional source of individual liberty against state power. Notwithstanding the Court's decisions construing this provision — most infamously the *Slaughter-House Cases*[138] — this language provides strong support for the conclusion that the Fourteenth Amendment amplifies the "Privilege of the Writ of Habeas Corpus" protected in Article I.

A. *Habeas as a "Privilege or Immunity" Safeguarded Against State Abridgment*

As I have argued above,[139] by the time of the Fourteenth Amendment's ratification, the Court had already made clear that the habeas right secured in Article I did not extend to state prisoners. The Court likewise made clear in *Barron v. Mayor of Baltimore*[140] that all of the restraints on power enumerated in Section 9 of Article I, including the Suspension Clause, were not directed at state power.[141] The *Barron* Court defended this conclusion by contrasting the introductory language of each restriction in Section 10 ("No state shall . . .") with the introductory language of Section 9, which makes no reference to the states. The Court ultimately used this contrast between the language of Section 10 and the other "rights-securing" provisions of the Constitution to support its more familiar holding in *Barron* that the Fifth Amendment's Due Process Clause, like the other provisions in the Bill, did not apply against the states.[142]

1. *The Connection Between Article IV and the Fourteenth Amendment*

The Fourteenth Amendment thus employs precisely the language that would avoid *Barron*'s conclusion that the rights or privileges in the "original" Constitution and Bill of Rights did not run against the states.[143] The question, then, is whether habeas is properly regarded as a "privilege or immunity" of national citizenship. Of course, the

137. U.S. CONST. amend. XIV, § 1.

138. 83 U.S. (16 Wall.) 36 (1873).

139. *See supra* text accompanying note 72.

140. 32 U.S. (7 Pet.) 243 (1833).

141. 32 U.S. (7 Pet.) at 248. A contrary view is set forth in a constitutional commentary that predates *Barron*. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 113 (1825) (arguing that the Suspension Clause applied against states).

142. 32 U.S. (7 Pet.) at 248-49.

143. *See* Amar, *supra* note 27, at 1228-29.

Suspension Clause itself describes the writ of habeas corpus as a "privilege." So, too, had several framers of the Fourteenth Amendment during debates about Section 1.[144] The references to habeas as a fundamental privilege, both in these debates and in subsequent debates concerning measures enacted pursuant to Section 5,[145] are ultimately traceable to Justice Washington's discussion of "privileges or immunities" in *Corfield v. Coryell.*[146]

The suit in *Corfield* involved an oysterman who was fined under a New Jersey statute denying nonresidents the right to gather oysters in New Jersey waters. The plaintiff maintained that the New Jersey law violated Article IV's guarantee that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[147] Justice Washington, writing for the Federal Circuit Court, rejected the claim on the ground that the oysters in New Jersey waters belonged to the people of New Jersey as "tenants in common."[148] Nonetheless, Justice Washington offered an expansive description of the "privileges and immunities" protected by Article IV, including, in his extensive enumeration, the writ of habeas corpus:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments .... What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: ... the benefit of the writ of habeas corpus ....[149]

2. *The* Slaughterhouse *Reading*

Should Justice Washington's language control the interpretation of the Privileges and Immunities Clause of the Fourteenth Amendment? As a textual matter, the only plausible justification for construing the "privileges and immunities" language of Article IV differently from the "privileges or immunities" language of the Fourteenth Amendment rests on the modifying language of the two provisions. Article IV concerns the "privileges and immunities" of state citizenship ("of Citizens in the several States") whereas the Fourteenth

144. CONG. GLOBE, 39th Cong., 1st Sess. 475, 499, 1117, 1263, 2765 (1866) (statements of Sens. Trumbull, Cowan, and Howard, and Reps. Wilson and Broomall).

145. *See, e.g.*, 2 CONG. REC. H420 (1874) (statement of Rep. Herndon during debates over Civil Rights Bill of 1874).

146. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

147. U.S. CONST. art. IV, § 2, cl. 1.

148. 6 F. Cas. at 552.

149. 6 F. Cas. at 551-52.

Amendment concerns the "privileges or immunities" of national citizenship ("of citizens of the United States"). Or, put another way, the drafters' use of the same "privileges and immunities" language is not dispositive if the framers understood state and national citizenship to confer differing sets of rights.

This argument, of course, is not merely hypothetical. It is precisely the one offered by Justice Miller in defense of his holding in *Slaughterhouse* that the Fourteenth Amendment does not protect the same rights against absolute state deprivation that Article IV protects against state discrimination.[150] The argument, though, remains unpersuasive.

To begin, it seems unlikely that the Reconstruction Congress would place a term of art in the Fourteenth Amendment, carrying the baggage of prior interpretation, and expect that the phrase would take on an entirely different meaning. Moreover, such an expectation is belied by the repeated invocation of *Corfield* in the debates;[151] at least some of the framers understood "privileges or immunities" to be defined aptly by Justice Washington. Justice Miller's quite limited list of the rights of "national citizenship," on the other hand, has no strong support other than Justice Miller's own conception of the proper allocation of state and federal power.

Perhaps more importantly, there is little doubt that the Fourteenth Amendment was intended, at a minimum, to ratify Congress's ability to protect the economic rights of the newly freed slaves. The Civil Rights Act of 1866 granted freed slaves the right, among others, to enter into contracts, to purchase and convey property, and to sue.[152] The frequent appearance of Justice Washington's list in the debates is attributable in part to his explicit enumeration of exactly these rights in *Corfield.*[153] Yet, in *Slaughterhouse,* the Court denies that the Reconstruction Congress intended to transfer the enforcement of even

150. 83 U.S. (16 Wall.) 36, 74 (1873). Justice Miller argued as follows: "It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual." 83 U.S. (16 Wall.) at 74. Justice Miller buttressed this argument with the observation that the first line of Section 1 confers both national and state citizenship on persons born in the United States whereas the second line protects only the privileges and immunities of national citizenship:

> It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it.

83 U.S. (16 Wall.) at 74.

151. *See supra* note 144.

152. *See* Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. § 1982 (1988)); Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144 (codified at 42 U.S.C. § 1981 (1988)).

153. 6 F. Cas. at 551-52 (listing, as fundamental privileges and immunities, "the right to

these civil rights — "the rights of person and of property" — to the federal government.[154] Hence, the textual argument proves far too much. It suggests that the Reconstruction Congress, in deciding whether to adopt the Fourteenth Amendment just weeks after the passage of the Civil Rights of 1866, was content to leave constitutional doubts surrounding its centerpiece legislation.

Finally, the notion that "privileges or immunities" carries different meanings, which depend on the sovereign against whom the rights are asserted, fails to account for the perceived natural law foundation of such rights. Many of the drafters of the "original" Constitution and the Fourteenth Amendment believed that "privileges or immunities" of citizenship were not simply a function of positive law, but the rights belonging to all free persons.[155] Precisely for this reason, many of the framers of the Fourteenth Amendment apparently were surprised to learn, as they did during the debates, that states were not already constitutionally obligated to afford the various "privileges or immunities" contained in the Bill of Rights.[156] This natural law foundation is also evident in Justice Washington's own description of the "privileges and immunities" of state citizenship as rights "which belong . . . to the citizens of all free governments."[157] Hence, *Slaughterhouse*'s textual argument rejecting a parallel reading of Article IV and the Fourteenth Amendment reflects neither a good reading of the text nor an adequate understanding of the context from which the Fourteenth Amendment emerged.

Even as it rejected the Article IV parallel, though, the Court in *Slaughterhouse* nonetheless included the writ of habeas corpus in its short list of "national" rights.[158] In what manner, on the Court's view, did the Fourteenth Amendment thereby protect the writ? Looking at the other national rights with which habeas is grouped, the Fourteenth Amendment does little. In addition to the privilege of the writ of habeas corpus, the other "privileges or immunities of citizens of the United States" include federal protection on the high seas, the

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acquire and possess property of every kind, . . . [and] to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal").

154. 83 U.S. (16 Wall.) at 82.

155. *See* Amar, *supra* note 27, at 1205-12 (discussing "declaratory theory" of the Bill of Rights).

156. *Id.* at 1208-10 (discussing *Barron* "contrarians" who did not believe that states could infringe on the rights contained in the Bill); *id.* at 1235-36 (arguing that many of the framers of the Fourteenth Amendment initially believed that the Bill of Rights applied to the states, though they later were informed of *Barron*'s holding by Representative Bingham).

157. 6 F. Cas. at 551.

158. 83 U.S. (16 Wall.) at 79 (stating that "the writ of *habeas corpus*" is a "right[ ] of the citizen guaranteed by the Federal Constitution").

right to petition the federal government, and the right to use navigable waters of the United States.[159] Given that this grouping focuses on preexisting obligations of the federal government, the privilege of the writ to which *Slaughterhouse* seemingly refers is the writ that Chief Justice Marshall found that the Suspension Clause guarantees.[160] That writ, as we have seen, is a federal writ for federal prisoners.[161]

If the federal writ for federal prisoners is a "privilege or immunity" now protected against state abridgment, then presumably states may not "make or enforce" any laws that interfere with this federal right. But, as Justice Field observed in dissent, the Constitution, and more particularly the Supremacy Clause, already forbade states from interfering with the exercise of federal rights: "The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character. But if the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence."[162] Hence, by *Slaughterhouse*'s reading, the Fourteenth Amendment did not "expand" the constitutional right to habeas corpus located in the Supremacy Clause. Instead, the Court had rendered the Amendment, in Justice Field's words, "a vain and idle enactment."[163]

B. *A Right to Federal Habeas for State Prisoners?*

If *Slaughterhouse* had been decided differently, and the Court had imported Justice Washington's gloss on Article IV "privileges and immunities" into the Fourteenth Amendment, what would the "new" habeas right encompass? The most obvious possibility suggested by the text would be that it would obligate the states, like the federal government, to make the writ available.[164] Just as the Fourteenth Amendment would eventually require states to safeguard many of the "privileges" contained in the Bill of Rights — such as the right to a jury trial in criminal cases and the right to free speech — so, on this reading, would the Fourteenth Amendment require states to provide

159. 83 U.S. (16 Wall.) at 79.

160. *See supra* text accompanying notes 58-59.

161. *See supra* text accompanying notes 135-36. *Slaughterhouse*'s reference to habeas is most commonly read in just this fashion. Amar, *supra* note 27, at 1258 (citing 2 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1128-30 (1953)).

162. 83 U.S. (16 Wall.) at 96 (Field, J., dissenting).

163. 83 U.S. (16 Wall.) at 96 (Field, J., dissenting).

164. If the privilege applied against the states were to mirror the federal protection, perhaps a narrow range of extraordinary circumstances comparable to "[r]ebellion or [i]nvasion," U.S. CONST. art. I, § 9, cl. 2, might justify suspension.

some form of the writ in appropriate circumstances. Forbidding states from "mak[ing] or enforc[ing] any law which shall abridge the privileges or immunities of citizens of the United States"[165] would become a requirement to make habeas routinely available.

The difficulty in reconstructing the privilege of habeas corpus in this way is that it runs contrary to the Reconstruction Congress's apparent belief that recourse to the state courts would not adequately ensure enforcement of the newly established rights.[166] It is true that one concrete problem before the Civil War was the failure of judges in slaveholding states to make the writ available in cases of unauthorized detentions involving persons of color alleged to be fugitive slaves.[167] But the Reconstruction Congress was acutely aware that the solution to this problem was not simply to require state courts to exercise their traditional habeas powers. As noted above,[168] the various expansions of federal jurisdiction over federal issues in the years immediately preceding the ratification of the Fourteenth Amendment reflected an emerging sense that federal review was essential to federal supremacy. Hence, the Reconstruction Congress was committed to making federal review of substantial federal issues practically available in the lower federal courts.[169] To construe the Fourteenth Amendment as making certain forms of state court jurisdiction, such as habeas review, mandatory thus seems somewhat anomalous given the Reconstruction Congress's willingness, just a year before, to give federal courts full authority to review unlawful detentions regardless of the availability of state processes.

1. *The Relationship Between Structure and Rights in the Original Constitution*

The anomaly arises in part because of the important difference between the "privilege" of habeas corpus and the various "privileges" enumerated in the Bill of Rights. As Professor Akhil Amar's important work illustrates, the "original" Bill, like the unamended Constitution, rests on a mixture of structural and individual liberty concerns.[170] The Bill of Rights was not at its inception entirely or

165. U.S. CONST. amend. XIV, § 1.

166. *See supra* text accompanying notes 103-11.

167. *See, e.g.*, HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT (1982); *cf.* Mayers, *supra* note 112, at 43 (arguing that unlawful detentions of laborers continued to be a concern after the Civil War).

168. *See supra* text accompanying notes 82-86.

169. *See* Liebman, *supra* note 73, at 2055-57; *see also supra* text accompanying notes 82-86 (discussing Liebman's argument).

170. Amar, *supra* note 25, at 1132-33, 1205.

even predominantly focused on safeguarding individuals from majoritarian constraint.[171] Rather, several provisions of the Bill address the possibility that *representatives* of the majority might act contrary to the majority's will and thus frustrate the goal of popular self-government.[172] Moreover, several provisions of the Bill sought to promote the values of federalism[173] that are also traditionally associated with the unamended Constitution alone, or with the Tenth Amendment. Of course, the distinction between "structure" and "rights" is a difficult one to maintain. Certainly the Framers believed that the protection of individual rights was inextricably tied to questions of structure; in virtually all of the *Federalist Papers,* the authors took care to link structural innovations to the cause of individual liberty.[174] Nonetheless, as Amar argues, there is often an unreflective instinct to regard the Bill as entirely about "individual liberty," an instinct that has had important adverse consequences for Fourteenth Amendment interpretation.

More particularly, viewing the Bill of Rights as the sole locus of "liberty" in the Constitution leads to the "total incorporation" approach of Justice Black.[175] On this view, since the Bill provides the best textual basis for uncovering the fundamental rights in our traditions, the Fourteenth Amendment should be read to "incorporate," and to incorporate *only,* the liberty-protection provisions of the Bill.[176] This approach does have the virtue of recognizing, as *Slaughterhouse* did not,[177] that the framers of the Fourteenth Amendment intended to expand dramatically the constitutional protection of individual liberty. But, as Amar argues, this "mechanical" approach, by failing to recognize the mix of structure and liberty in both the unamended Constitution and the Bill of Rights, "incorporates" too much and too little.[178] Some provisions concerned with individual liberty, such as the Suspension Clause, are inappropriately excluded from Fourteenth Amendment consideration. At the same time, contrary to Justice

171. *Id.* at 1205-06.

172. *See id.* at 1146-62 (discussing majoritarian aspects of First Amendment); *id.* at 1175-81 (discussing majoritarian aspects of Fourth Amendment); *id.* at 1182-99 (discussing majoritarian aspects of various jury-protecting clauses in the Fifth, Sixth, and Seventh Amendments).

173. *Id.* at 1165-73 (uncovering the federalism concerns animating the Second Amendment); *id.* at 1157-60 (discussing federalism and the religion clauses).

174. *See, e.g.,* THE FEDERALIST NOS. 23, 28 (Alexander Hamilton), NOS. 10, 51, 58, 63 (James Madison).

175. *See, e.g.,* Adamson v. California, 332 U.S. 46, 70-123 (1947) (Black, J., dissenting); Betts v. Brady, 316 U.S. 455, 474-75 (1942) (Black, J., dissenting).

176. *Adamson,* 332 U.S. at 74-75 (Black, J., dissenting).

177. *See supra* section II.A.2.

178. Amar, *supra* note 27, at 1227.

Black's approach, some rights contained in the Bill, such as the Establishment Clause, must be "incorporated," if at all, with special attention to their role in protecting states' rights or the rights of the public at large.[179]

Amar's solution of "refined incorporation" would bring within the Fourteenth Amendment those provisions in either the unamended Constitution or the Bill of Rights that can be regarded fairly as "personal privileges."[180] For those provisions that combine personal privilege and the interests of states or the public at large, Amar would "reconstruct" the provision to preserve the individual liberty aspect while discarding the "structural" aspect.[181]

Amar's nuanced approach to discerning the appropriate relation between the original Constitution and the Bill of Rights, on the one hand, and the Fourteenth Amendment, on the other, has enormous appeal because the Civil War fundamentally altered our understanding of what types of constitutional structures are most conducive to individual liberty. In the original Constitution and Bill of Rights, the Framers' ideas of structure and liberty could peacefully coexist: limited national government and the preservation of state autonomy were likely to diminish the threat to individual liberty. Since the Fourteenth Amendment identifies states as the central threat to individual liberty, however, it makes little sense to import structural principles premised on state autonomy into the Fourteenth Amendment.

The privilege of habeas corpus presents some difficulties for this approach. Like some of the provisions in the Bill, the Suspension Clause seems, as an original matter, to combine structural and individual liberty concerns. The liberty dimension of habeas corpus is apparent: the writ provides a remedy for unlawful and otherwise unaccountable restraints on personal freedom. As for the structural dimension, in light of the work of some recent scholars,[182] including Amar,[183] it is likely that the Clause was intended to protect the ability of state courts to inquire into the legality of federal detentions. Hence, following Amar's approach, courts would incorporate the "personal privilege" aspect of habeas corpus while setting aside the federalism aspect. Accordingly, courts would read the Fourteenth Amendment,

179. *Id.* at 1271-72.

180. *Id.* at 1262, 1264.

181. *Id.* at 1264-66.

182. *See* DUKER, *supra* note 16, at 126 (arguing that "the framers intended the clause only to restrict Congressional power to suspend state habeas for federal prisoners").

183. Amar, *supra* note 42, at 1509.

as the text suggests, to require states to make habeas corpus available to persons within their own jurisdiction.

This approach, however, ignores the new structural dimensions that habeas assumed between 1789 and 1868. Whatever its "original" structural purpose,[184] the writ of 1868 had become chiefly significant for its role in assuring the enforcement and supremacy of federal law.[185] Through *Bollman*[186] and *Ableman,*[187] the Court had already stripped the Suspension Clause of all of its states' rights wrapping. Both court decisions and congressional legislation established a role for the writ much more suited to the federalist vision of Hamilton than to views of Framers such as Luther Martin[188] and John Rutledge,[189] who had envisioned the writ as a check against abusive federal power. Indeed, the individual liberty aspect of the writ had to some extent become less significant than its nationalist and unifying function; the Sixth Amendment's guarantee of a "speedy and public trial"[190] and the Eighth Amendment's prohibition against "[e]xcessive bail"[191] covered much of the ground of the English common law writ.

Thus, the "privilege" of habeas corpus was as much structural as it was personal by 1868. More importantly, the structural component was fully consistent with the understanding of federal and state power embraced by the framers of the Fourteenth Amendment. Unlike the privileges contained in the original Bill, then, the privilege of habeas corpus need not and should not shed its gradually developed nationalist core as it is absorbed into the Fourteenth Amendment. A truly "refined" theory of incorporation would instead reconstruct the "original" writ for federal prisoners as a federal writ for all prisoners, whether detained by federal or state authorities. Such an approach has the virtue of carrying forward in constitutional terms what the Reconstruction Congress plainly sought to accomplish through legislation.

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184. *See supra* section I.A.

185. *See supra* section I.B.3.

186. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807); *see supra* section I.B.1 (discussing *Bollman*).

187. Ableman v. Booth, 62 U.S. (21 How.) 506 (1858); *see supra* section I.B.4 (discussing *Ableman*).

188. *See* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 12, at 213 (arguing to the Maryland convention that the Suspension Clause afforded too much power to the federal government in overriding state habeas powers).

189. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 12, at 438 (reporting that Rutledge "was for declaring the Habeas Corpus inviolable — He did [not] conceive that a suspension could ever be necessary at the same time through all the States").

190. U.S. CONST. amend. VI, cl. 1.

191. U.S. CONST. amend. VIII.

2. *The Text Revisited*

This approach creates textual difficulties of its own. The language of the Fourteenth Amendment imposes obligations on states, not on the federal government. How, then, could the Fourteenth Amendment be read to *require* Congress to vest expansive habeas powers in the lower federal courts to facilitate review of state detentions? One possibility would be to construe Section 5, which states that "Congress shall have power to enforce"[192] the provisions of the Fourteenth Amendment, as imposing remedial obligations on the federal government. The language of Section 5, though, seems to weaken rather than to strengthen this argument. Section 5 tracks the language of Article I, Section 8 ("Congress shall have Power . . ."), and it would be difficult to assert that Congress *must* exercise each of those enumerated grants of power.[193] Hence, from a purely textual standpoint, it is better to read Section 5 to permit — not to require — congressional enforcement of the Amendment. Nonetheless, the case for reading Section 5 as creating an individual right in federal habeas corpus is modestly supported by one Framer's suggestion that Section 2 of the Thirteenth Amendment should be so construed.[194]

Section 5 also has little bearing on Congress's *power,* as opposed to obligation, to extend habeas corpus to state prisoners. Even before the Fourteenth Amendment, Congress clearly had the power, via Article III, to extend habeas jurisdiction over persons detained by state authority.[195] Indeed, prior to 1868, no serious constitutional argument was ever raised challenging the statutory expansions of the writ that brought particular state detentions — and, in 1867, *all* state detentions — within the habeas jurisdiction of the federal courts. Nonetheless, courts have perceived a strong connection between federal habeas review of state convictions and the Fourteenth Amendment. For example, when Pennsylvania, joined by forty other states, challenged the

192. U.S. CONST. amend. XIV, § 5.

193. For example, one of the enumerated powers in Article I, Section 8, is the power to "constitute Tribunals inferior to the supreme Court," U.S. CONST. art. I, § 8, cl. 8, a power which is widely regarded as discretionary. *See supra* text accompanying notes 20-22; *infra* section III.C.

194. CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866) (statement of Sen. Cowan) (arguing that the purpose of Section 2 of the Thirteenth Amendment was "to give to the negro the privilege of the *habeas corpus;* that is, if anybody persisted in the face of the constitutional amendment in holding him as a slave, that he should have an appropriate remedy to be delivered").

195. U.S. CONST. art. III, § 2 ("[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress may by Law have directed.").

constitutionality of section 2254,[196] which is the current embodiment of the Habeas Act of 1867, the Third Circuit relied on the Fourteenth Amendment, not Article III, as the source of Congress's authority to establish such review.[197]

Ultimately, then, the text of the Fourteenth Amendment offers only limited support for a constitutional right to habeas corpus for state prisoners. On the one hand, the text provides a strong basis for protecting the "privilege" of the writ from state abridgment. Indeed, given the correspondence in language between the Suspension Clause and the Fourteenth Amendment, it is surprising that parties have not urged constitutional claims to the writ more frequently. On the other hand, though, the text does not support, and in fact undermines, the claim that the Fourteenth Amendment establishes a right to *federal* habeas corpus. Accordingly, the case for constitutionalizing such federal review must be based on other considerations.

III. Reconstructing Habeas in Light of the Fourteenth Amendment: Incorporation via the Due Process Clause

This Part examines prevailing constitutional doctrine concerning Fourteenth Amendment interpretation. In light of the Court's "incorporation" decisions, the courts should recognize the privilege of habeas corpus protected by the Suspension Clause as a Fourteenth Amendment due process right. Given the Court's focus on Anglo-American tradition and specific textual commitments in the Constitution, the location of the privilege in Article I rather than the Bill of Rights should not affect this determination.

Once the privilege is brought within the Fourteenth Amendment, historical, structural, doctrinal, and prudential considerations should dictate the manner in which courts apply the privilege against the states. These considerations suggest that the reconstructed habeas right should assure a meaningful, nondiscretionary opportunity for federal review of federal claims. Such an interpretation accords with the role that habeas occupied before 1868, the framers' understanding of the importance of federal review to the enforcement of federal law,

196. 28 U.S.C. § 2254 (1988).

197. The battle against federal interference with some of these state processes was lost when the Fourteenth Amendment was adopted. The Amendment, as every high school boy knows, forbids states to deprive a person of life, liberty or property without due process of law. That necessarily confers federal power to prevent states from doing the forbidden thing.

United States *ex rel.* Elliot v. Hendricks, 213 F.2d 922, 928 (3rd Cir. 1954), *cert. denied*, 348 U.S. 851 (1954).

prevailing constitutional doctrine, and entrenched expectations about the function of habeas in our current constitutional scheme.

Cast in this way, a constitutional right to federal habeas review for state prisoners assumes the existence of the lower federal courts. This assumption, though it appears to be in some tension with Congress's discretion to establish lower federal courts conferred by Article III, is a defensible one given the context in which the Fourteenth Amendment was adopted. Accordingly, the Suspension Clause and the Fourteenth Amendment are rightly read to constitutionalize federal habeas for state prisoners.

A. *The Court's Incorporation Methodology*

The quite narrow reading of the Privileges or Immunities Clause in *Slaughterhouse* was of course not the final word regarding the scope of the Fourteenth Amendment. The Court gradually shifted its focus to the adjacent Due Process Clause. After initially recognizing economic rights in the "property" guarantee of the Due Process Clause,[198] the Court looked to the Clause as the source of individual liberty more generally. Indeed, just as the Court dealt its death blow to the "economic due process" doctrine in the wake of the New Deal, the Court hinted that the Fourteenth Amendment's Due Process Clause might protect individuals against state laws that abridge any of the rights-protecting provisions of the original Constitution and the Bill of Rights.[199]

1. *Text and Tradition*

Nonetheless, the process of "incorporating" particular provisions was a slow and haphazard one. By 1937, the Court had already held that the Due Process Clause of the Fourteenth Amendment prohibited states from abridging the First Amendment's protection for speech,[200]

198. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (invalidating state statute restricting hours of bakers); Allegeyer v. Louisiana, 165 U.S. 578 (1897) (invalidating state insurance regulation via Due Process Clause); Chicago, Milwaukee & St. Paul Ry. v. Minnesota, 134 U.S. 418 (1890) (invalidating state rate-setting procedure via Due Process Clause); Railroad Commn. Cases, 116 U.S. 307 (1886) (sustaining regulation of railroad rates but suggesting that Fifth Amendment Takings Clause might apply to states); Munn v. Illinois, 94 U.S. 113 (1877) (finding no due process violation but noting that some state regulation might deprive private property owners of constitutionally protected economic rights).

199. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth").

200. *See, e.g.*, Fiske v. Kansas, 274 U.S. 380 (1927).

press,[201] and assembly,[202] as well as the Sixth Amendment's right to counsel in capital cases.[203] The Court, though, refused to hold that the Fourteenth Amendment is appropriately read to protect every "right" in the Bill from state interference. Instead, the Court suggested that the test for recognizing a particular right in the Due Process Clause is, in Justice Cardozo's famous phrase, whether the right is essential to "ordered liberty" and connected to a " 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[204] Vying against this open-ended approach, at the other extreme, was Justice Black's insistence that "total incorporation" of the Bill of Rights held the only hope for a principled, nondiscretionary interpretation of the Fourteenth Amendment.[205]

In the Court's subsequent decisions, neither Justice Black's total incorporation approach nor Justice Cardozo's natural law formulation emerged as the sole guiding principle. Instead, the Court has adopted an amalgam of their approaches, selectively incorporating several provisions of the Bill of Rights and refusing to import many "extratextual" rights through the Due Process Clause.[206] In choosing which of the provisions to incorporate, the Court, following Justice Cardozo, has placed great emphasis on "tradition" with special attention to whether a claimed right "is necessary to an Anglo-American regime of

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201. *See, e.g.*, Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

202. *See, e.g.*, DeJonge v. Oregon, 299 U.S. 353 (1937).

203. Powell v. Alabama, 287 U.S. 45 (1932).

204. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

205. *See, e.g.*, Adamson v. California, 332 U.S. 46, 89 (1947) (Black, J., dissenting) ("To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution."); *see also supra* text accompanying notes 164-68.

206. For example, although the Court has recognized some due process rights in the area of criminal procedure that are not tied to textual guarantees in the Bill of Rights, *see, e.g., In re* Winship, 397 U.S. 358 (1970) (recognizing the requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt); Brady v. Maryland, 373 U.S. 83 (1963) (protecting defendant's right to discovery of exculpatory evidence), the Court has also recently made clear that it will no longer engage in general balancing to determine whether a challenged state criminal procedure satisfies the Due Process Clause. *See* Medina v. California, 112 S. Ct. 2572 (1992) (refusing to apply three-part test of Mathews v. Eldridge, 424 U.S. 319 (1976), in determining whether states may allocate the burden of proof in competency proceedings to the defendant). The Court's use of both the positions of Justice Cardozo and Justice Black is evident. On the one hand, the new standard for evaluating challenged state criminal procedures is Justice Cardozo's "fundamental traditions" test. *See* 112 S. Ct. at 2577. On the other hand, the Court justified its adoption of this test on the ground that:

> The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order.

112 S.Ct. at 2576.

ordered liberty."[207] At the same time, Justice Black's position has undoubtedly been influential in ensuring that the Court has found virtually all of the provisions in the Bill of Rights to be sufficiently rooted in our traditions to command application against the states.[208]

2. *Looking Beyond the Bill of Rights*

From a purely doctrinal standpoint, the right to habeas falls squarely within the Court's dual approach. The Suspension Clause expresses a textual commitment to the writ, a conclusion buttressed by Chief Justice Marshall's suggestion in *Bollman* that the Clause obligates Congress to make the writ generally available to federal prisoners.[209] As for our Nation's traditions and conscience, judicial exaltation of the writ by both supporters[210] and opponents[211] of broad habeas review confirms the writ's status as a bedrock element of "ordered liberty."[212] Of course, judges have disagreed as to the *scope* of habeas review essential to preserve such liberty. But the Court's due process decisions applying the fundamental liberty test reveal a distinction between the question *whether* to incorporate a particular right and questions about the *manner* in which a particular right should be incorporated.[213] Following this approach, nine members of the Court need not agree as to the precise formulation of a Fourteenth

207. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 150 n.14 (1968).

208. The incorporated provisions include the Fourth Amendment's protection against unreasonable searches, Wolf v. Colorado, 338 U.S. 25 (1949), and its accompanying judicially crafted exclusionary rule, Mapp v. Ohio, 367 U.S. 643 (1961); the Fifth Amendment's protections against self-incrimination, Malloy v. Hogan, 378 U.S. 1 (1964), and double jeopardy, Benton v. Maryland, 395 U.S. 784 (1969); the Sixth Amendment's guarantee of a public and speedy jury trial, *see* Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to speedy trial); *In re* Oliver, 333 U.S. 257 (1948) (right to public trial), with the benefit of counsel, Gideon v. Wainwright, 372 U.S. 335 (1963), and the opportunity to confront witnesses, Pointer v. Texas, 380 U.S. 400 (1965); and the Eighth Amendment's proscription against the imposition of cruel and unusual punishments. Robinson v. California, 370 U.S. 660 (1962).

209. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807).

210. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 401 (1963) (Brennan, J.) ("Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty.").

211. *See, e.g.*, Smith v. Bennett, 365 U.S. 708, 714 (1961) (Clark, J.) ("Throughout the centuries the Great Writ has been the shield of personal freedom insuring liberty to persons illegally detained."). Justice Clark dissented in Fay v. Noia, 372 U.S. 391, 445 (1963), as well as in Sanders v. United States, 373 U.S. 1, 23 (1963) (Harlan, J., dissenting, joined by Clark, J.), and Townsend v. Sain, 372 U.S. 293, 325 (1963) (Stewart, J., dissenting, joined by Clark, J.).

212. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.).

213. In Mapp v. Ohio, 367 U.S. 643 (1961), for example, the Court unanimously embraced its prior holding in Wolf v. Colorado, 338 U.S. 25 (1949), that the Fourth Amendment protection against unreasonable searches and seizures applies against the states, but it disagreed sharply over whether the "incorporated" right encompasses the exclusionary rule applicable in federal proceedings. *Compare* 367 U.S. at 643 (majority opinion) *with* 367 U.S. at 672 (Harlan, J., dissenting).

Amendment habeas right in order for them to all agree that the writ, by virtue of its special status in our history, should receive *some* protection via the Due Process Clause.

It might be argued, though, that Justice Black's textual approach was properly limited to provisions in the Bill of Rights and should not extend to provisions of the unamended Constitution. This objection carries little weight. The Framers of the Constitution did not embrace a rigid dichotomy between structure and rights that such an objection presupposes.[214] Indeed, the protection of the writ in Article I, Section 9 may actually reflect the Framers' belief that such protection was *more* fundamental than the protections embodied in the Bill because it was included in the Constitution even before those fearful of federal governmental tyranny insisted on additional safeguards.

Perhaps more importantly, Justice Black's underlying justification for locating Fourteenth Amendment rights in the Bill of Rights applies with equal force to Article I, Section 9. In Justice Black's view, courts should embrace "total incorporation" primarily because it grounds judicial interpretation in authority and thereby preserves the rule of law.[215] The existence of a text prevents judges from "roam[ing] at large in the broad expanses of policy and morals and . . . trespass[ing], all too freely, on the legislative domain of the States as well as the Federal Government."[216] Justice Black recognized that interpretive disagreement, and therefore judicial discretion, is an inevitable aspect of constitutional interpretation. Nonetheless, he regarded interpretation that begins with textual authority as different in kind from interpretation grounded in abstract philosophical commitments. In Justice Black's words, "to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and *other parts* of the Constitution is one thing; to invalidate statutes because of application of 'natural law' deemed to be above and undefined by the Constitution is another."[217] Accordingly, if the Fourteenth Amendment embraces and extends the Bill of Rights because text is important, so too should the Fourteenth Amendment embrace the "right" to habeas corpus enumerated in Article I, Section 9.

214. *See* Amar, *supra* note 27, at 1200 (arguing that the placement of rights-protecting provisions in a "Bill of Rights" rather than Article I, Section 9, was nothing more than "aesthetic"); *supra* section II.B.2 (discussing Amar's "refined" incorporation approach).

215. Justice Black also maintained that the "total incorporation" approach found support in the historical record. *See* Adamson v. California, 332 U.S. 46, 74-75 (1947) (Black, J., dissenting).

216. *Adamson*, 332 U.S. at 90 (Black, J., dissenting).

217. 332 U.S. at 91 (Black, J., dissenting) (emphasis added) (footnotes omitted).

B. *Reconstructing the Writ*

So far, I have argued that several familiar forms of constitutional argument support recognition of a habeas right in the Fourteenth Amendment. From an intentionalist perspective, the framers of the Amendment frequently cited the writ as illustrative of the fundamental privileges worthy of national protection.[218] As a matter of history and structure, the role of habeas corpus in the nation's early development generally, and in the Reconstruction effort more particularly, highlighted the writ's importance to the enforcement of federal law, a central concern of the Fourteenth Amendment.[219] From a textual standpoint, the Privileges or Immunities Clause of the Fourteenth Amendment is appropriately read to safeguard the "privilege" of the writ from state interference.[220] Finally, as a doctrinal matter, the Court's Fourteenth Amendment methodology makes the writ a strong candidate for "incorporation" through the Due Process Clause.[221]

At the same time, I have alluded to, though not yet fully defended, the proposition that the writ protected by the Fourteenth Amendment is best understood to be the federal writ for state prisoners. This argument draws from the same considerations that justify the recognition of a Fourteenth Amendment habeas right in the first place: history, structure, intent, text, and doctrine. But the case for construing the habeas right in this particular manner requires more interpretive work. The forms of argument do not converge as neatly and unambiguously as they do in supporting a more general Fourteenth Amendment habeas right. Historical, structural, and prudential considerations, for example, provide a more persuasive basis than the text for reading the Fourteenth Amendment to require congressional action. Accordingly, some balancing or prioritizing of these various considerations is necessary in light of the "commensurability problem"[222] that often accompanies recourse to more than one interpretive mode in constitutional interpretation.

1. *Federal or State Writ?*

All of the incorporated provisions of the Bill of Rights, when applied through the Fourteenth Amendment, directly constrain state lawmakers and officials. By virtue of the Fourteenth Amendment,

218. *See supra* text accompanying notes 144-49.

219. *See supra* sections I.B.2 & I.B.3.

220. *See supra* section II.A.

221. *See supra* section III.A.

222. *See* Fallon, *supra* note 7, at 1189.

states must afford criminal defendants a speedy and public jury trial, issue warrants only on a showing of probable cause, and refrain from imposing cruel and unusual punishments. If the Suspension Clause is incorporated in a like manner, is it not also properly understood to prevent *states* from suspending or withholding the writ from their own prisoners?

As I have argued above,[223] reconstructing the writ in this fashion makes little sense given the circumstances surrounding the adoption of the Fourteenth Amendment. By 1868, virtually every state had adopted some state constitutional provision concerning habeas corpus.[224] Notwithstanding these state guarantees, the Reconstruction Congress extended federal jurisdiction over all state detentions.[225] It is highly unlikely that the framers of the Fourteenth Amendment were concerned with constitutionalizing state habeas review just after they had empowered the federal courts to assess independently whether state detentions violate federal law. Given the framers' manifest distrust of state court adjudication of federal claims, the national interest would have been little served by mandating the availability of state court review.

Along these same lines, by the time of the Fourteenth Amendment, the writ had already become primarily a means of challenging *judicial* detentions rather than unauthorized detentions by public officials or private parties. Thus, the writ's central function was to permit one court to review the actions of another. Once the writ is cast as a judicial check against improper judicial action, the writ is most sensibly vested in a reviewing court that is independent of the detaining court. Wholly apart from assertions about the purported superiority of federal judges,[226] common sense suggests that the meaningfulness of judicial review is greatly enhanced if the reviewing court owes no special allegiance to the court whose judgment is subject to review.[227] For precisely this reason, the best account of the intent un-

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223. *See supra* section II.B.1.

224. *See* Oaks, *supra* note 9, at 249.

225. Judiciary Act, ch. 28, § 1, 14 Stat. 385 (1867).

226. *See, e.g.*, Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 333-34 (1988) (suggesting that federal courts are more focused on, and therefore better equipped to resolve, federal constitutional questions); Michael Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 282, 300-01 & n.84 (1988) (arguing that "federal judges may be more sympathetic to the countermajoritarian claims asserted in . . . constitutional litigation"); Woolhandler, *supra* note 87, at 634 (suggesting that the centralization of the federal system, the selection and retention processes for federal judges, and the institutional settings of state and federal courts support the proposition that federal courts are more effective in enforcing federal rights).

227. Indeed, some states vest postconviction review in the court of conviction, effectively asking the trial judge to determine whether his own initial legal rulings were justified. *See, e.g.*,

derlying the "original" Suspension Clause is that the Clause was designed to preserve state power to review federal detentions.[228] Indeed, Chief Justice Marshall's alternative reading — protecting a federal writ for federal prisoners — was plausible only because the separation-of-powers rationale carried somewhat more weight at a time when habeas corpus was still frequently invoked to challenge extrajudicial detentions. Hence, changes in the nature of the writ prior to the adoption of the Fourteenth Amendment strengthen the case for incorporating a right to federal habeas review.

Of course, to argue that the framers were more interested in protecting federal, rather than state, habeas review of state detentions in the aftermath of the Civil War is not to assert that they specifically intended to constitutionalize federal habeas for state prisoners in the Fourteenth Amendment. This assertion not only would be difficult to prove, it would probably also be wrong. "Habeas corpus" is not now, nor has it ever been, a fully fixed and determinate concept. Many of the framers of the Fourteenth Amendment, particularly those who invoked *Corfield,*[229] likely believed that the historic writ should gain additional protection via the Privileges or Immunities Clause. But they also probably entertained varying ideas about the nature of the writ, both in terms of who should issue it (federal or state courts) and under what circumstances (pretrial review only or full collateral review). The most we can do from an intentionalist and historical perspective is to weave congressional legislation, habeas practice, and the basic goals of the Fourteenth Amendment into a coherent whole. We cannot, and, indeed, the framers most likely could not, provide an authoritative answer about their specific intentions concerning the constitutional status of habeas corpus in light of the Fourteenth Amendment.[230]

Our inability to find determinate "intent" regarding the framers' understanding of habeas corpus should not lead us to dismiss incorporation of the Suspension Clause altogether. Text and doctrine, as a threshold matter, bring habeas within the scope of the Fourteenth Amendment. They provide strong grounds for undertaking the effort of reconstructing the writ and applying it in some way against the states. In this respect, the Fourteenth Amendment's protection of the

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TEX. CODE CRIM. PROC. ANN. art. 11.07, § 2(b) (West Supp. 1993) (directing state habeas petitions to be filed in the court of conviction).

228. *See supra* text accompanying notes 42-45.

229. *See supra* text accompanying notes 144-46.

230. *Cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134-37 (1978) (contrasting Framers' "concepts" that they embedded in the Constitution at a general level and the particular "conceptions" or instantiations of those concepts in their practice).

writ of habeas corpus is much like its guarantee of "due process of law." Both concepts are "essentially contestable"[231] and must be given meaning by looking to political and moral practices outside of the text; yet the text itself commands that governmental actors obey, and judicial systems enforce, these lofty concepts in concrete cases.

Apart from historical, structural, and intentionalist arguments, prudential considerations should also play a role in defining the Fourteenth Amendment habeas right. A persuasive interpretation of the Fourteenth Amendment must accommodate, or at least account for, entrenched practices and doctrine. Thus, habeas practice and doctrinal developments *after* the adoption of the Fourteenth Amendment are relevant to discerning the contours of the constitutional claim. Such developments likewise support construing the Fourteenth Amendment to extend the federal writ to state prisoners.

By the early part of this century, federal habeas had become an important vehicle for vindicating the federal rights of state prisoners. Soon after the Court's infamous denial of habeas relief to Leo Frank in 1915,[232] the Court made the writ available to five African Americans who had been convicted of murder and sentenced to death after a race riot in Arkansas.[233] As the Court extended various substantive guarantees of the Bill of Rights via the Due Process Clause, state prisoners filed federal habeas petitions with increasing frequency and success.[234] In the landmark decision of *Brown v. Allen,*[235] the Court emphatically asserted that the federal habeas statute, a codified version of the 1867 Act, authorized de novo review of all constitutional issues already addressed on their merits in state court.[236] To this day, federal habeas affords state prisoners their sole meaningful opportunity for federal review given the extraordinarily rare exercise of the Court's certiorari jurisdiction over state criminal convictions.

At the same time, state habeas for state prisoners is generally of far less significance to the preservation of federal rights. Although many states permit prisoners to raise the full range of federal claims in

231. Fallon, *supra* note 7, at 1205 (citing W.B. Gallie, *Essentially Contested Concepts,* 56 PROC. OF THE ARISTOTELIAN SOCY. 167 (1956); Alasdair MacIntyre, *The Essential Contestability of Some Social Concepts,* 84 ETHICS 1 (1973)).

232. Frank v. Mangum, 237 U.S. 309 (1915) (rejecting habeas claim based on allegation that state murder trial was dominated by a mob and thereby denied petitioner due process of law).

233. Moore v. Dempsey, 261 U.S. 86 (1923).

234. *See generally* Peller, *supra* note 77, at 643-63 (connecting the increase in habeas litigation with more expansive reading of Fourteenth Amendment Due Process Clause).

235. 344 U.S. 443 (1953).

236. 344 U.S. at 458 (state adjudication of federal constitutional claims does not bind a federal habeas court through ordinary principles of res judicata).

habeas, or postconviction,[237] proceedings,[238] others limit such proceedings to claims outside of the trial record that could not have been pursued on direct appeal.[239] Some states make no provision for counsel in postconviction proceedings,[240] even in capital cases.[241] Indeed, state postconviction proceedings often are viewed as a necessary prelude to federal habeas litigation — to satisfy the statutory exhaustion requirement[242] — rather than as an independently viable means of vindicating federal rights.

Perhaps more importantly, the Supreme Court already has plainly indicated in a series of decisions that states have no constitutional obligation to afford postconviction review.[243] In fact, the Court has never called into question its decision from the late nineteenth century asserting that state criminal defendants have no constitutional right even to *appeal* their convictions in state court.[244] In contrast, the Court has suggested on several occasions that federal habeas for state prisoners might find some constitutional protection via the Suspension Clause,[245] although the Court has never squarely addressed the issue. Together these decisions suggest that the Court regards federal review of federal issues as less intrusive than federally mandated structuring

237. The terms *habeas* and *postconviction* have become virtually synonymous in some state schemes precisely because the writ has become primarily a means for challenging the lawfulness of a conviction, rather than the lawfulness of a pretrial detention.

238. *See* LARRY W. YACKLE, POSTCONVICTION REMEDIES § 1, at 3 (1981). The relatively recent decision of many states to address the full panoply of federal claims is more fairly attributable to states' desire to avoid intrusive *federal* habeas review than to states' desire to ensure the full vindication of defendants' federal rights. *See id.*

239. *Id.* § 6, at 21. At the extreme, Arkansas has recently abolished state collateral review of most federal claims. *See* Whitmore v. Arkansas, 771 S.W.2d 266, 267 n.1 (Ark. 1989) (limiting collateral review of state convictions to questions of whether the commitment is valid on its face or whether the convicting court had proper jurisdiction).

240. *See* Murray v. Giarratano, 492 U.S. 1, 31 n.28 (1989) (Stevens, J., dissenting) (citing states with no provision for postconviction counsel).

241. *Murray*, 492 U.S. at 10 n.5 (noting that, at the time of the decision, virtually half of the states with the death penalty did not require automatic appointment of counsel in postconviction proceedings).

242. 28 U.S.C. § 2254(b)-(c) (1988).

243. *See, e.g., Murray*, 492 U.S. at 10 ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings."); Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) (holding that, because states have no obligation to provide a mechanism for postconviction review, they are not required to supply counsel if they choose to adopt such discretionary proceedings).

244. McKane v. Durston, 153 U.S. 684, 687 (1894).

245. *See, e.g.*, Sanders v. United States, 373 U.S. 1, 11-12 (1963) (suggesting that constitutional issues might be implicated if the federal habeas statute were "construed to derogate from the traditional liberality of the writ of habeas corpus"); Fay v. Noia, 372 U.S. 391, 406 (1963) (suggesting that there are "some intimations of support for such a proposition in decisions of this Court") (citing cases); Townsend v. Sain, 372 U.S. 293, 311 (1963) (stating that the writ for state prisoners is "anchored in the ancient common law and in our Constitution as an efficacious and imperative remedy for detentions of fundamental illegality").

of state criminal justice systems. Accordingly, reconstructing the Fourteenth Amendment habeas privilege as a right to federal rather than state habeas fits more comfortably with both existing habeas practice and constitutional doctrine.

2. *The Fourteenth Amendment's Protection Against "Suspension"*

If state prisoners are constitutionally entitled to federal habeas, what is the scope of their entitlement? Recall Justice Harlan's suggestion that the constitutional protection for the writ must be understood in light of the writ as it existed at the time of the Founding.[246] Following this approach, Justice Harlan, and later Chief Justice Burger,[247] seemed to regard the Suspension Clause as establishing at most a right to challenge the lawfulness of pretrial detentions. According to the Chief Justice:

> The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted. . . . The writ in 1789 was not considered "a means by which one court of general jurisdiction exercises post-conviction review over the judgment of another court of like authority."[248]

The problem with this approach is that it looks to the wrong founding and to the wrong framers. The Suspension Clause alone cannot be read to afford state prisoners any federal habeas review. Such a right is established only by reconstructing the Clause in light of the Fourteenth Amendment. By the time of the Fourteenth Amendment, the writ had already changed from a limited pretrial entitlement to a more flexible remedy.[249] Indeed, the Supreme Court had already granted relief on, or addressed, postconviction constitutional claims in the exercise of its habeas jurisdiction.[250] Accordingly, a purely historical approach cannot assign so limited a scope to the Fourteenth Amendment's protection of the writ.

On the other hand, historical and intentionalist arguments cer-

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246. I must also protest the implication in the Court's opinion that every decision of this Court in the field of habeas corpus . . . has become enshrined in the Constitution because of the guarantee in Article I against suspension of the writ. This matter may perhaps be brought back into proper perspective by noting again that at the time of the adoption of the Constitution, and for many years afterward, a claim of the kind . . . asserted here by petitioner, was not cognizable in habeas corpus at all.

Sanders v. United States, 373 U.S. 1, 29 (1963) (Harlan, J., dissenting); *see also supra* note 8.

247. Swain v. Pressley, 430 U.S. 372, 384 (1977) (Burger, C.J., concurring).

248. 430 U.S. at 384-85 (quoting Dallin H. Oaks, *Legal History in the High Court — Habeas Corpus*, 64 MICH. L. REV. 451, 451 (1966)).

249. *See supra* section I.B.2.

250. *See, e.g., Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (overturning criminal conviction based on Sixth Amendment violation); *supra* section I.B.2.

tainly do not establish the opposite — that the framers of the Fourteenth Amendment equated habeas corpus with full postconviction review. That role for the writ was not firmly established until well into this century. In the end, historical arguments must acknowledge that the role of the writ by the time of Reconstruction was in a state of transition. It had already shed much of its English common law heritage and yet had not fully assumed its current role of facilitating plenary postconviction review.

Nonetheless, one can make a strong case for interpreting the Fourteenth Amendment habeas right as a right to full postconviction review of federal questions. From an intentionalist perspective, the framers of the Fourteenth Amendment likely regarded federal habeas as an important part of a more comprehensive effort to ensure the states' compliance with federal law.[251] The expansion of federal habeas jurisdiction over state prisoners — first piecemeal in the Acts of 1833 and 1842, and then wholesale in the Act of 1867 — was rooted in the belief that the postconviction writ-of-error review would be insufficient to protect federal interests.[252] At a general level, then, federal habeas afforded a practical opportunity for federal review when other avenues of review were unavailing.

Federal habeas for state prisoners in the post-Reconstruction years confirmed the writ's role as an alternative means of securing federal review. When state prisoners were able to challenge their convictions through writ-of-error review in the Supreme Court, the federal courts were generally unwilling to address postconviction errors on habeas.[253] When writ-of-error review as of right was no longer available to state prisoners, federal habeas became the substitute mechanism for postconviction review of federal questions.[254] Thus, although the scope of the writ has changed from predominantly pretrial to predominantly post-trial review, it has done so to achieve the same overriding purpose: to afford state prisoners a meaningful opportunity to a federal forum for review of their federal claims.

Apart from intentionalism, casting the Fourteenth Amendment

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251. *See supra* text accompanying notes 82-86; *cf.* Liebman, *supra* note 73, at 2055-57.

252. *See supra* section I.B.3.

253. *See* Liebman, *supra* note 73, at 2070-71. Liebman persuasively demonstrates that "the commensurability and substitutability of writ of error and habeas corpus review" is reflected by the categories of cases in which the Court was willing to entertain federal habeas petitions of state prisoners. According to Liebman, the Court regularly afforded habeas review if writ-of-error remedies were unavailable, if adherence to the exhaustion requirement would unduly delay federal review, or if the state prisoner had become eligible for writ-of-error review while the habeas petition was pending and administrative convenience justified addressing the habeas petition in lieu of refiling. *Id.* at 2071 (collecting cases).

254. *Id.* at 2081-84.

habeas privilege as a right to postconviction review accords with the Court's interpretation of the 1867 Habeas Act and current practice. At least since 1953, the Court has understood the federal habeas statute to encompass de novo postconviction review of federal claims brought by state prisoners.[255] Accordingly, the federal courts have continued to exercise habeas jurisdiction to provide state prisoners with their one "appeal" as of right in the federal courts.[256] Just as the right to trial by an "impartial jury" and the right to be free of "unreasonable searches and seizures" must take their meaning in light of contemporary understandings of those phrases, so should "habeas corpus" be defined in light of the role it currently occupies in our federal structure. That firmly established role involves plenary postconviction review of certain federal issues, a role that mirrors in purpose, although perhaps not in detail, the role that habeas occupied at the time the Fourteenth Amendment was adopted.

Which federal issues should such postconviction review entertain? The most obvious answer is that the Fourteenth Amendment's habeas right should be read to vindicate the other substantive rights protected by that Amendment. Hence, the "incorporated" provisions of the Bill of Rights, as well as any rights otherwise secured by the due process or equal protection guarantees, should be enforceable against the states through the federal writ. This construction carries forward the scope of the 1867 Act, which authorized federal habeas review of any person detained in violation of the Constitution.[257] It also comports with the writ's long-standing role as a substitute for discretionary review by the Supreme Court. Any theory that posits less than full review of all constitutional issues must offer some basis for establishing a "hierarchy" of constitutional rights.[258] Moreover, such a theory must explain why the hierarchy implicit in the Court's incorporation decisions — applying some, but not all, of the privileges in the Bill of Rights against the states — should be modified on federal habeas.

In sum, the Suspension Clause, viewed through the lens of the Fourteenth Amendment, affords state prisoners a constitutional right to federal review of constitutional claims in the lower federal courts. Such a reading comports with the history surrounding the Amendment's passage, gives life both to Article I's textual commit-

255. *See* Brown v. Allen, 344 U.S 443 (1953); *supra* notes 231-36 and accompanying text.

256. *See* Liebman, *supra* note 73, at 2009 (describing federal habeas as a form of appellate review limited to federal claims).

257. *See supra* text accompanying notes 104-10.

258. *See infra* Part IV (discussing applications of the Fourteenth Amendment habeas right to current limitations on federal habeas review).

ment to the "privilege of the writ" and to the Fourteenth Amendment's protection of "privileges or immunities" of national citizenship, and accommodates current habeas practice and doctrine. Before turning to the consequences that this asserted constitutional right holds for currently enforced and proposed restrictions on the availability of the federal writ, I will briefly address whether Congress's apparent discretion to abolish the lower federal courts undermines recognition of a Fourteenth Amendment right to federal habeas.

C. *The Article III Objection*

One important obstacle to recognizing a constitutional right to federal habeas review is the familiar proposition that lower federal court jurisdiction is entirely discretionary. Article III vests the judicial power of the United States "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[259] This text, together with the records of the Constitutional Convention,[260] provide overwhelming support for the widely embraced view that Article III does not require the creation of lower federal courts.[261] If Congress were not obligated to create lower federal courts, a constitutional right to federal habeas, presumably in the Supreme Court alone, would be of virtually no value; federal habeas review is important precisely because the Supreme Court is unable, as a practical matter, to grant certiorari in the thousands of state criminal cases raising federal questions on direct review.[262] Indeed, Justice Scalia has recently urged a narrow reading of the habeas statute on this very premise: "It would be a strange constitution that regards state courts as second-rate instruments for the vindication of federal rights and yet makes no mandatory provision for lower federal courts (as our Constitution does not)."[263]

I do not dispute the conventional reading of Article III. Nonetheless, it is important to acknowledge that the Fourteenth Amendment was not passed contemporaneously with Article III. By 1868, the lower federal courts had been in place for over seventy-five years, since the beginning of the nation. Their jurisdiction had been substantially

259. U.S. CONST. art. III, § 1.

260. *See* HART & WECHSLER, *supra* note 99, at 11 ("[I]t seems to be a necessary inference . . . that the creation of inferior federal courts was to rest in the discretion of Congress [and] that the scope of their jurisdiction, once created, was also to be discretionary.").

261. *See supra* note 20 and accompanying text.

262. *See supra* notes 82-86 and accompanying text (arguing that the Habeas Act of 1867 was enacted in part to make federal review of federal questions practically available).

263. Withrow v. Williams, 113 S. Ct. 1745, 1770 (1993) (Scalia, J., dissenting in part).

enlarged through removal statutes and the Habeas Act of 1867.[264] For the framers of the Fourteenth Amendment, the discretionary character of the lower federal courts was of mere hypothetical interest because a federal judiciary consisting solely of the Supreme Court was already unimaginable.

Hence, if the framers of the Fourteenth Amendment sought to guarantee meaningful federal review of federal claims through habeas corpus in the lower courts, they would not have paused to consider whether such a right could be woven comfortably into a federal judicial regime that had no lower courts. Of course, I have asserted that such a specific intention cannot be attributed to the framers.[265] If, though, conventional forms of constitutional argument suggest this same result — that the Fourteenth Amendment is best read to afford state prisoners federal habeas in the lower federal courts — we should not resist this otherwise sensible or plausible reading of the Amendment based on concerns that the framers would have rejected out of hand.

In any case, we should not forget that the Fourteenth Amendment *amends* the Constitution. If the Fourteenth Amendment cannot be effectuated without the aid of the lower federal courts, we should resolve the apparent conflict between Article III and the Fourteenth Amendment in favor of the subsequent enactment. We should certainly be cautious before we conclude that a constitutional amendment implicitly overrides a textually demonstrable commitment in the original Constitution. We should not assume, though, that the framers of constitutional amendments have the controversies of an earlier day as clearly in mind as their more pressing concerns, especially if such controversies appear to be fully settled by practice if not by decision.

IV. Applying the Fourteenth Amendment to Current Controversies: What Constitutes a Suspension of the Writ?

If the Court were to recognize the Fourteenth Amendment habeas right described in this article, how would such a right affect current disputes about the appropriate scope of the writ? This Part evaluates the Court's various procedural and substantive habeas doctrines, as

264. *Supra* section I.B.3; *see* Habeas Corpus Act, ch. 81, § 5, 12 Stat. 755, 756-57 (1863) (providing for removal to the lower federal courts under specified circumstances); Judiciary Act, ch. 28, § 1, 14 Stat. 385, 385-86 (1867) (authorizing broad federal habeas review by the lower federal courts).

265. *See supra* text accompanying notes 229-30.

well as congressional proposals for reform, from a constitutional perspective.

Ironically, none of the stringent procedural doctrines that initially prompted the Warren Court to invoke the Suspension Clause[266] raises any serious constitutional difficulties. The "cause and prejudice" standard governing habeas treatment of claims forfeited in state court, new-claim successive petitions,[267] and same-claim successive petitions[268] affords state prisoners a constitutionally adequate opportunity for federal review of federal claims. On the other hand, several of the Court's recent doctrines — including the withdrawal of habeas review of Fourth Amendment exclusionary rule claims,[269] the requirement that habeas petitioners show greater harm stemming from constitutional violations than defendants challenging their convictions on direct review,[270] and the general bar to retroactive application of "new" law on habeas[271] — present closer cases. The often-floated proposal to confine federal habeas review to the adequacy of the state corrective processes[272] likewise triggers serious constitutional scrutiny.

A. *Procedural Obstacles to Federal Habeas Relief*

1. *Federal Habeas Treatment of State Forfeitures*

One of the most contested issues in federal habeas law concerns the treatment of federal claims that are procedurally defaulted in state court. If the state procedural default is "independent and adequate," Article III of the Constitution bars consideration of the federal claim

266. *See, e.g.*, Sanders v. United States, 373 U.S. 1, 11-12 (1963) (suggesting that stringent treatment of same-claim or new-claim successive petitions might violate the Suspension Clause); Fay v. Noia, 372 U.S. 391, 426 (1963) (raising, but not addressing, the possibility that the Constitution might require liberal treatment of federal claims procedurally forfeited in state court).

267. *See, e.g.*, Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991) (holding that "cause and prejudice" standard rather than "deliberate bypass" standard governs habeas treatment of claims procedurally defaulted in state court).

268. *See* Sawyer v. Whitley, 112 S. Ct. 2514, 2518 (1992) (suggesting that the "cause and prejudice" standard of Wainwright v. Sykes, 433 U.S. 72 (1977), governs habeas treatment of same-claim successive petitions).

269. Stone v. Powell, 428 U.S. 465 (1976) (holding that state prisoners may not ordinarily seek habeas relief on the ground that unconstitutionally seized evidence was erroneously introduced at trial).

270. Brecht v. Abrahamson, 113 S. Ct. 1710 (1993).

271. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 305-10 (1989) (plurality opinion) (narrowing retroactive application of new constitutional decisions on federal habeas).

272. *See, e.g.*, S. 1241, 102d Cong., 1st Sess. § 1105 (1991) (proposing to eliminate habeas review of issues where claimant had a full and fair opportunity to litigate such claims in state court); S. 2216, 97th Cong., 2d Sess. § 5 (1982) (likewise advocating "full and fair" standard); *see also* Bator, *supra* note 73, at 527-28 (suggesting that federal habeas review should be modified to afford federal judges discretion to deny relief where the constitutional issue "has been fully canvassed by fair state process").

on direct review.[273] The Article III bar rests on the generally applicable principle that federal review of cases involving nondiverse parties is confined to issues arising under federal law.[274] Nonetheless, in *Fay v. Noia,*[275] the Court held that a discretionary, nonjurisdictional standard — "deliberate bypass" — controlled the effect of state forfeitures on federal habeas.[276] Indeed, in *Noia,* the Court suggested that the Suspension Clause may compel its nonjurisdictional treatment of state procedural defaults.[277]

In a series of decisions over the past sixteen years, the Court has overruled *Noia* and replaced the "deliberate bypass" test with a "cause and prejudice" standard.[278] Instead of focusing on whether the defendant intentionally relinquished his right to raise a constitutional claim,[279] the latter test asks whether some unusual or extraordinary external impediment prevented the defendant from adhering to state procedural rules.[280] As a result, federal habeas treatment of state forfeitures has become virtually equivalent to the Court's treatment of such forfeitures on direct review,[281] although it still remains somewhat more generous given the flat jurisdictional bar imposed by Article III.

The Court's overruling of *Noia* does not plausibly deny state prisoners the Fourteenth Amendment habeas right identified above. The various arguments supporting a constitutional right to federal habeas review emphasize that such review affords state prisoners meaningful access to a federal forum in lieu of the Supreme Court's wholly discretionary certiorari jurisdiction.[282] The purpose underlying such a right

273. *See, e.g.,* Parker v. North Carolina, 397 U.S. 790 (1970) (defendant's failure to object to grand jury composition prior to entry of guilty plea, as required by state rule, bars Supreme Court review of federal claim); Johnson v. New Jersey, 384 U.S. 719 (1966) (state rule precluding reconsideration of federal issue adjudicated in prior litigation bars Supreme Court review).

274. *See, e.g.,* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875) (developing independent and adequate state grounds doctrine).

275. 372 U.S. 391 (1963).

276. 372 U.S. at 433-34.

277. 372 U.S. at 405-06.

278. *See* Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991) (finding no "cause" for default based on attorney's failure to file an appeal and explicitly overruling *Noia*); Murray v. Carrier, 477 U.S. 478 (1986) (finding no "cause" for default based on attorney's failure to preserve a claim on appeal); Engle v. Isaac, 456 U.S. 107 (1982) (finding no "cause" for default based on attorney's failure to recognize the basis for petitioner's constitutional claim); Wainwright v. Sykes, 433 U.S. 72 (1977) (applying "cause and prejudice" standard to trial default); Francis v. Henderson, 425 U.S. 536 (refusing to address grand jury exclusion claim absent a showing of cause and prejudice), *vacated,* 425 U.S. 967 (1976).

279. *Noia,* 372 U.S. at 439 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

280. Coleman v. Thompson, 111 S. Ct. 2546, 2566 (1991).

281. *See* Jordan M. Steiker, *Innocence and Federal Habeas,* 41 UCLA L. REV. 303, 322-37 (1993) (tracing the Court's procedural default doctrine and evaluating its impact).

282. *See supra* section III.B (exploring contours of Fourteenth Amendment habeas right).

is to guarantee a federal forum for federal claims, not to override legitimate applications of state law. Conceived in this way, the review afforded on federal habeas need not be *more* generous than the Court's direct review.[283] Indeed, Justice Brennan's opinion in *Noia* did not persuasively explain why the Article III bar did not apply with equal force to federal habeas proceedings.[284] If a state decision truly rests on independent and adequate state grounds, and such grounds are not invoked merely to frustrate the enforcement of federal law, there is little in the Fourteenth Amendment that would require overriding the state basis of decision. Thus, if anything, the constitutional argument *against* adoption of a nonjurisdictional procedural default standard is stronger than the claim that such a solicitous standard is constitutionally mandated.

2. *Federal Habeas Treatment of Successive Petitions*

At the same time that the Court adopted a generous procedural default standard, it construed the habeas statute to permit petitioners to file successive habeas petitions except in narrow circumstances.[285] Congress subsequently amended the statute,[286] apparently to codify the Court's standard.[287] Nonetheless, the Court ultimately held that lower federal courts may not entertain same-claim[288] or new-claim[289] successive petitions unless the petitioner demonstrates "cause and prejudice" or makes a colorable showing of actual innocence.[290] This

283. *See* Herbert Wechsler, *Habeas Corpus and the Supreme Court: Reconsidering the Reach of the Great Writ*, 59 U. COLO. L. REV. 167, 179 (1988) (arguing that "it surely is astounding that in the course of only forty years the reach of *habeas* in the review of state criminal convictions should have been expanded to the point where, in cases involving a procedural default, it became broader than federal direct review").

284. *See* Steiker, *supra* note 281, at 324-25.

285. Sanders v. United States, 373 U.S. 1, 18 (1963) (holding that a petitioner abuses the writ if he deliberately withholds a claim at the time of his first application or if the purpose of the subsequent filing is to vex, harass, or delay).

286. [A] subsequent application for a writ of habeas corpus . . . need not be entertained . . . unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court . . . is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

28 U.S.C. § 2244(b) (1988).

287. *See* Steiker, *supra* note 281, at 348 n. 213 (" 'The statute has been correctly understood as an enactment into law of the principles announced in *Sanders*.' " (quoting 17A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4267, at 478 (2d ed. 1988))).

288. Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion) (suggesting that petitioner must make a colorable showing of actual innocence to overcome bar to same-claim successive petitions).

289. McCleskey v. Zant, 111 S. Ct. 1454 (1991) (holding that new-claim successive petitions are subject to cause and prejudice standard).

290. Sawyer v. Whitley, 112 S. Ct. 2514, 2518 (1992) (outlining Court's doctrinal approach to same-claim and new-claim successive petitions).

approach to successive petitions, like the Court's approach to procedural default, has substantially decreased the likelihood that federal habeas courts will address the merits of state prisoners' federal claims.

Do the newly adopted limitations on successive filings run afoul of the Fourteenth Amendment habeas right? The case for such a constitutional claim is quite thin. Perpetual federal review of federal claims is not essential to the enforcement of federal law. *Brown v. Allen*[291] notwithstanding, the Fourteenth Amendment should not be read to override principles of res judicata when a *federal* court has already addressed the merits of a federal claim. Nor should the Fourteenth Amendment's concern for the vindication of federal rights preclude Congress from requiring that all federal claims be presented at the same time as a means of protecting both the states' interest in finality of judgments and the federal interest in conserving judicial resources.

The absence of a viable constitutional claim, though, does not suggest that a more generous successive petition policy is unwise as a matter of policy. Federal habeas petitions are often filed without the benefit of adequate legal counsel. Moreover, the facts underlying some constitutional claims are often concealed by the very state actors whose conduct those claims challenge.[292] These considerations could lead Congress to adopt a more flexible standard than the Court's current approach to same-claim and new-claim successive petitions. Indeed, there is a strong case that Congress has already done so and that the Court's decisions reflect a poor interpretation of the habeas statute.[293] But neither the policy considerations supporting broad successive habeas review nor the purportedly unfaithful interpretation by the Court transforms the concern for successive federal litigation into a constitutional entitlement.

That the Court raised the specter of the Suspension Clause in both the procedural default and successive petition contexts[294] reflects the same misunderstanding of the constitutional source of federal habeas for state prisoners that accounts for the abandonment of the constitutional argument altogether. Justice Brennan, like Justice Harlan and Chief Justice Burger,[295] located the right to federal habeas for state prisoners in the Suspension Clause alone. Accordingly, he sought to

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291. 344 U.S. 443 (1953).

292. *See, e.g.*, McCleskey v. Zant, 111 S. Ct. 1454, 1487 (1991) (Marshall, J., dissenting) (arguing that state officials affirmatively misled petitioner's counsel about the facts underlying the claim presented in petitioner's new-claim successive petition).

293. *See supra* note 287.

294. *See supra* note 266.

295. *See supra* note 8.

assign the same meaning to "suspension" that the term had at the Founding of the original Constitution. At that time, as Justice Harlan was quick to note in his *Sanders* dissent,[296] nonsuspension was essentially a command that the courts keep their doors open to review claims of unlawful extrajudicial and pretrial detentions. Justice Brennan invoked the same image in a radically different context: federal courts must never shut their doors to constitutional claims brought by state prisoners, even if they have already been convicted and, indeed, even after they have already litigated their claims in federal court.

The difficulty with Justice Brennan's approach is that it does not attempt to analyze the scope of the habeas right in light of the Fourteenth Amendment. Once the habeas right is conceived as a means of postconviction challenge, the notion that it should be perpetual must be abandoned. As I have argued above,[297] a more sensible understanding of the guarantee against "suspension" is that it obligates Congress to provide one meaningful, nondiscretionary opportunity to secure federal review of federal claims. Such a reading more faithfully accords with the function of habeas both at the time of the "true" founding — 1868 — and throughout this century.

B. *Substantive Restrictions on the Writ*

1. *Constitutional Hierarchy? Federal Habeas Treatment of Fourth Amendment Exclusionary Rule Claims*

By the late 1960s, as a result of the Court's solicitous habeas standards and dramatic incorporation decisions, federal habeas for state prisoners had become an increasingly important means of enforcing federal rights. Federal habeas had also become a source of heightened tension in federal-state relations, as federal courts more regularly reversed the convictions of state prisoners on what were often perceived to be "technical" grounds. Several Justices, following the advice of Judge Friendly,[298] argued that federal habeas should serve a more limited function than direct review and, more particularly, that factual innocence should be an important consideration in deciding whether to afford habeas relief.[299]

296. 373 U.S. at 29 (Harlan, J., dissenting).

297. *See supra* section III.B.2.

298. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

299. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring) (arguing that collateral review of search-and-seizure claims should be confined "solely to the question of whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in state courts").

The Court ultimately embraced one substantive limitation on the writ on the basis of these concerns. In *Stone v. Powell,*[300] the Court held that state prisoners may not ordinarily seek habeas relief on the ground that unconstitutionally seized evidence was erroneously introduced at trial.[301] According to the Court, the benefits of collateral enforcement of the exclusionary rule do not justify the costs in terms of loss of finality, intrusion on state criminal processes, and depletion of judicial resources. Thus, while the Court continued to adhere to its decision to apply the exclusionary rule on direct review of state criminal convictions,[302] it held that state prisoners could not raise such claims on federal habeas unless they were denied a fair opportunity to litigate their claims in state court.

In the Court's view, its decision to withhold habeas review of Fourth Amendment claims reflected a refinement of the exclusionary rule rather than a rejection of the principle and statutory command that all constitutional claims should be cognizable on federal habeas.[303] Nonetheless, *Powell* is better read as a limitation on habeas than as a gloss on the exclusionary rule.[304] *Powell* does not retreat from the Court's position that the exclusionary rule must be applied in state proceedings. Accordingly, a defendant convicted and imprisoned on the basis of illegally seized evidence is detained in violation of the Constitution; the state, by refusing to exclude the evidence, misapplied federal constitutional law.

Whether a federal court will review such an unconstitutional detention is a separate matter. According to *Powell,* state law enforcement officers who might otherwise flout the Fourth Amendment will be deterred adequately by the possibility that the state courts will exclude the illegally seized evidence, together with the remote possibility of review by the Supreme Court. This conception of constitutional norm enforcement violates the Fourteenth Amendment habeas right. *Powell* assumes that state courts will be sufficiently receptive to constitutional claims so that federal review will not be necessary to secure compliance with federal law. Even if this assumption was currently warranted as an empirical matter, it is inconsistent with the fundamental structural principles animating the 1867 Habeas Act and the Fourteenth Amendment.

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300. 428 U.S. 465 (1976).

301. 428 U.S. at 481-82.

302. Mapp v. Ohio, 367 U.S. 643 (1961).

303. 428 U.S. at 494-95 n.37 (insisting that its decision was "*not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally").

304. I defend this argument more fully in Steiker, *supra* note 281, at 362-63.

As I have argued above,[305] textual and doctrinal considerations require the Fourteenth Amendment habeas right to be defined in some manner. Given the circumstances surrounding the adoption of the Fourteenth Amendment and the historical role of the writ in this country, the most plausible construction connects the Fourteenth Amendment habeas right to the goal of federal supremacy. However, if *Powell* is accepted on its terms such that federal and state courts are regarded as interchangeable vehicles for the enforcement of federal law, this aspect of the writ is lost. *Powell*'s central assumption of parity thereby frustrates the effort to define the habeas right located in the Fourteenth Amendment.

Powell, however, might be cast more narrowly. Rather than disclaiming the importance of federal review generally, we might regard *Powell* as defining which rights are sufficiently important to warrant federal protection. On this view, the exclusionary rule is not designed to vindicate claims of individual liberty so much as to encourage compliance with the Fourth Amendment for the benefit of society as a whole. As the Court reiterated in *Powell,* "the rule is a judicially created remedy"[306] rather than "a personal constitutional right."[307] Hence, federal courts need not be enlisted in the effort to police Fourth Amendment violations.

This approach, too, runs counter to the Fourteenth Amendment. If a provision of the Bill of Rights is sufficiently rooted in our traditions and constitutional text to command application against the states via the Due Process Clause, there is little basis for concluding that it is not sufficiently important to justify federal enforcement. Nor is there a textual basis in the 1867 Habeas Act or in the Fourteenth Amendment for establishing a hierarchy of constitutional rights. Ultimately, the selective withdrawal of issues from federal habeas review based on the Court's own policy assessment of the values associated with particular constitutional provisions cannot be defended. In any event, the Court has chosen to confine *Powell* to the Fourth Amendment context and has refused to bar habeas relitigation of grand jury discrimination claims[308] or claims alleging *Miranda* violations.[309]

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305. *See supra* Parts II, III.

306. 428 U.S. at 486 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

307. 428 U.S. at 486.

308. Rose v. Mitchell, 443 U.S. 545 (1979).

309. Withrow v. Williams, 113 S. Ct. 1745 (1993) (sustaining habeas review of claims alleging noncompliance with Miranda v. Arizona, 384 U.S. 436 (1966)).

2. *The Nonretroactivity Principle*

The most noted recent change in habeas law concerns the retroactivity of constitutional decisions. During the same Term in which the Court decided *Noia* and *Sanders,* the Court suggested for the first time in *Linkletter v. Walker*[310] that criminal defendants need not invariably receive the retroactive benefit of new constitutional rules. Instead, the Court held that the retroactivity of new decisions should be determined in light of the purposes of the new rule, the reliance interests surrounding the old rule, and the administrative effects of retroactive application.[311] Applying this test, the Court held that the petitioner could not receive the retroactive benefit of the Court's then-recent decision to apply the exclusionary rule against the states.[312]

In its early applications of the nonretroactivity doctrine, the Court did not distinguish between claims raised on direct review and those raised on federal habeas.[313] But, in response to a series of separate opinions by Justice Harlan,[314] the Court subsequently held that criminal defendants must receive the full retroactive benefit of new constitutional decisions on direct review.[315] More recently, and more controversially, the Court adopted the corollary of Justice Harlan's approach,[316] ruling that federal habeas petitioners cannot ordinarily receive the retroactive benefit of new constitutional decisions.[317] Under the Court's new approach, retroactive application of new law on habeas is limited to rules that prohibit the criminalization of certain

310. 381 U.S. 618 (1965).

311. 381 U.S. at 636.

312. Mapp v. Ohio, 367 U.S. 643 (1961).

313. *See, e.g.,* Stovall v. Denno, 388 U.S. 293, 300-01 (1967) (rejecting as "unsupportable" any distinction between direct and collateral review in deciding the scope of its decisions regarding the admissibility of pretrial identifications made in the absence of counsel).

314. Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part); Desist v. United States, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting). In Justice Harlan's view, full retroactive application of new constitutional rules was a necessary aspect of the Court's judicial power to exercise direct review over the decisions of lower federal and state courts: "If we do not resolve all cases before us on direct review in light of our best understanding of governing principles, it is difficult to see why we should adjudicate any case at all." *Mackey,* 401 U.S. at 679. At the same time, Justice Harlan suggested that retroactive application of new law on federal habeas should be quite narrow. *See, e.g., Desist,* 394 U.S. at 262 (arguing that retroactive application of new decisions on habeas should be confined to "those rules which substantially affect the fact-finding apparatus of the original trial"); *Mackey,* 401 U.S. at 692-93 (refining his position in *Desist* such that retroactive application of new decisions on federal habeas should encompass rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or rules that mandate protections " 'implicit in the concept of ordered liberty' " (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937))).

315. Griffith v. Kentucky, 479 U.S. 314 (1987).

316. *See supra* note 314.

317. Teague v. Lane, 489 U.S. 288 (1989).

kinds of conduct and "watershed" rules that diminish the likelihood that the innocent will be convicted.[318]

Given that the Fourteenth Amendment habeas right is properly regarded as a substitute for the Court's discretionary certiorari review of federal claims, a general principle of nonretroactivity on federal habeas is unobjectionable from a constitutional perspective. By authorizing the lower federal courts to resolve a petitioner's claims in light of the law prevailing at the time the conviction became final, the nonretroactivity principle places the petitioner in precisely the same position he would have occupied had the Supreme Court chosen to grant certiorari review.[319]

Nonetheless, the Court's applications of its nonretroactivity principle suggest that it has done more than simply restore parity between direct and habeas review. Indeed, the Court's expansive conception of "new" law has threatened to undermine lower federal courts' ability to apply established principles to novel fact patterns.[320] Moreover, the rhetoric surrounding the Court's retroactivity decisions has not highlighted the case for parity between habeas and direct review so much as it has emphasized the respect and deference owed state judges.[321] Thus, if the Court genuinely employs its nonretroactivity doctrine to harmonize direct and habeas review, it will secure precisely the role for the writ required as a minimum by the Fourteenth Amendment and the Suspension Clause. If, on the other hand, the retroactivity doctrine becomes a vehicle for stifling routine habeas application of law to facts, the doctrine may ultimately undermine — and at some point unconstitutionally "suspend" — state prisoners' access to meaningful federal review.

C. *Confining Habeas Review to the Adequacy of State Procedures*

Over the past thirty years, Professor Paul Bator's "full and fair" or

318. 489 U.S. at 307, 311.

319. *See* Liebman, *supra* note 73, at 2007 (arguing that "the nonretroactivity bar actually *preserves* parity between direct and habeas corpus review").

320. *See, e.g.*, Sawyer v. Smith, 497 U.S. 227 (1990) (holding that the decision in Caldwell v. Mississippi, 472 U.S. 320 (1985), condemning prosecutorial argument that sought to diminish the jury's sense of responsibility for its verdict was novel, despite the fact that such comments had been condemned in prior cases as potentially violative of the Due Process Clause, *see* Donnelly v. DeChristoforo, 416 U.S. 637 (1974)); Butler v. McKellar, 494 U.S. 407 (1990) (holding that the rule prohibiting police-initiated interrogation concerning a separate offense in the absence of counsel, *see* Arizona v. Roberson, 486 U.S. 675 (1988), was novel notwithstanding an earlier decision that had addressed a virtually identical Fifth Amendment violation. *See* Edwards v. Arizona, 451 U.S. 477 (1981)).

321. *See, e.g.*, Saffle v. Parks, 494 U.S. 484, 488 (1990) (" 'The 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.' " (quoting *Butler*, 494 U.S. at 414)).

"process" model of habeas review[322] has been the primary foil to the full relitigation model embraced by *Brown v. Allen.*[323] Bator maintained that federal habeas review should be confined to the adequacy of the state procedures for correcting federal error. Such a model, in Bator's view, avoids the high costs of revisiting issues already addressed in a judicial forum and recognizes the futility of seeking unassailably "correct" outcomes to legal disputes.[324] Bator's approach accounts in part for the Court's current bar to Fourth Amendment exclusionary rule claims.[325] It also has provided the framework for congressional proposals that generally would foreclose relitigation of federal issues on federal habeas.[326]

Bator's approach cannot be squared with the Fourteenth Amendment habeas right outlined in this Part. If Bator's proposal were implemented, courts would generally deny state prisoners access to federal review of federal claims. Although the Fourteenth Amendment does not command "correct" legal outcomes, it does command that federal courts have the last say regarding the content of federal rights. In this regard, it is important to note that Bator's argument rested primarily on general institutional considerations and policy considerations.[327] Relying on the familiar proposition that the existence of the lower federal courts is entirely a matter of congressional discretion, he did not take seriously the possibility that the Constitution speaks at all to the scope of the federal habeas right.[328] Once the constitutional argument is uncovered, though, the underlying assumption of parity between federal and state courts on which Bator's theory rests must be critically reexamined.[329]

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322. *See* Bator, *supra* note 73, at 456.

323. 344 U.S. 443 (1953).

324. Bator, *supra* note 73, at 446-47.

325. *See supra* section IV.B.1. In Stone v. Powell, 428 U.S. 465 (1976), the Court held that:

> [W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

428 U.S. at 481-82 (footnote omitted).

326. *See supra* note 272 (citing statutes).

327. Bator, *supra* note 73, at 446 (beginning his discussion with an open-ended consideration of "the problem of finality as it bears on the great task of creating rational institutional schemes for the administration of the criminal law").

328. Surely it is plain that there exists no *constitutional* right to have the merits of a federal question determined by a federal constitutional court; this would seem to be implicit in the power of the Congress over the appellate jurisdiction of the Supreme Court and over the very existence of lower federal courts.

Id. at 507 (footnote omitted).

329. *Id.* at 511-12 (rejecting institutional arguments regarding state hostility to federal rights and the purported superiority of the federal courts).

CONCLUSION

Over the past thirty years, legislators, judges, academics, and the general community have engaged in a robust debate about the proper scope of federal habeas review for state prisoners. During virtually every session Congress considers proposals for habeas reform, and every term the Supreme Court adds to its "common law" rules governing the availability of the writ. As might be expected, these legislative and judicial developments inspire an extraordinary amount of legal scholarship.

Strikingly absent from these deliberations is any mention of the Constitution. At a time when debates about "incorporation" are becoming increasingly anachronistic, it is time to revisit the Fourteenth Amendment's effect on the "original" Constitution and Bill of Rights with an eye toward habeas corpus. After all, the various substantive rights that already have been incorporated are only as valuable as the remedial structures available for their enforcement. Moreover, the Suspension Clause stands as a conspicuous exception to the general observation that the Constitution makes no references to remedies.[330]

Once we examine the Suspension Clause through the lens of the Fourteenth Amendment, the right to habeas corpus embodied in the Clause assumes quite different dimensions. We can no longer assume that the scope of the constitutional protection corresponds to the scope of the writ in 1789. Nor can we assume that the writ protected is the federal writ for federal prisoners. Ultimately, we must reconstruct the constitutional right against "suspension" in light of the unique role that habeas occupied prior to the adoption of the Fourteenth Amendment and in accordance with contemporary practice and doctrine.

I have defined this reconstructed writ as a right of state prisoners to federal review of federal claims. This interpretation is faithful to the general understanding of the writ's role by 1868 and carries forward to a contemporary setting the structural concerns embedded in the Habeas Act of 1867. Whether or not we embrace this particular reconstruction, it is important to reintroduce constitutional argument to the debates surrounding habeas corpus. The "Great Writ" deserves its appellation not merely because of its remarkable role in English history and our own. Its greatness also stems from its enshrinement in our Constitution.

330. Fallon & Meltzer, *supra* note 8, at 1779 (citing the Takings Clause as the other exception).