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# The Suspension Clause as a Structural Right

STEPHEN I. VLADECK\*

## I. INTRODUCTION

The central point of disagreement between the majority and dissenting opinions in the D.C. Circuit in *Boumediene v. Bush*,<sup>1</sup> the latest in a series of challenges to the detention of noncitizen “enemy combatants” at Guantánamo Bay, Cuba, is the question whether the Constitution’s Suspension Clause<sup>2</sup> applies in Guantánamo. Following the logic of Judge Robertson’s opinion for the D.C. District Court in *Hamdan v. Rumsfeld*,<sup>3</sup> the majority in *Boumediene* concluded that the Suspension Clause does not protect noncitizens outside the territorial United States.<sup>4</sup> As such, the court of appeals held that the Clause does not apply to the Guantánamo detainees, and that the Military Commissions Act of 2006 (“MCA”),<sup>5</sup> section 7 of which purports to divest the federal courts of jurisdiction over the detainees’ habeas petitions,<sup>6</sup> is therefore constitutional (or “not unconstitutional,” to use the more logical but less grammatically correct description).<sup>7</sup>

In a stringent dissent, Judge Rogers argued to the contrary that it is illogical to read the Suspension Clause as anything other than a global limitation on Congress’s power in all cases, citizen or not, extraterrito-

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By way of disclosure, I am coauthor of an amicus brief in support of the Petitioners in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), cert. granted, 127 S. Ct. 3078 (2007), and *Al Odah v. United States*, 476 F.3d 981, cert. granted, 127 S. Ct. 3067 (2007), currently pending before the Supreme Court. See Brief of Federal Courts and International Law Professors as Amici Curiae in Support of Petitioners, *Boumediene v. Bush*, No. 06-1195 (U.S. Aug. 24, 2007), 2007 WL 2441588.

1. 476 F.3d 981 (D.C. Cir.), cert. granted, 127 S. Ct. 3078 (2007).

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

3. 464 F. Supp. 2d 9 (D.D.C. 2006).

4. See *Boumediene*, 476 F.3d at 988–92.

5. Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28 & 42 U.S.C.).

6. *Id.* § 7(a), 120 Stat. at 2635–36 (“No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”).

7. See *Boumediene*, 476 F.3d at 988–94.

rial or not.<sup>8</sup> In particular, Judge Rogers seized upon the placement of the Clause in Article I, Section 9 of the Constitution—alongside other structural limitations on Congress’s power, including the Ex Post Facto and Bill of Attainder Clauses.<sup>9</sup> Because we would never think of defining those provisions by either their territorial application or the citizenship of those subjected to laws enacted in violation thereof, the argument goes, we should similarly not embrace such a stilted view of the Suspension Clause. Thus, from Judge Rogers’s perspective, the relevant question is not whether the Suspension Clause applies, but whether section 7 of the MCA runs afoul of that constitutional provision.<sup>10</sup> And so, the point of departure in the D.C. Circuit—and one key facet of the cases now pending before the Supreme Court—is whether the “right” enmeshed within the Suspension Clause is “structural” or “individual.”<sup>11</sup>

As currently framed, this debate simply cannot have a definitive answer. Some provisions of the Constitution are clearly “structural”; others are clearly “individual.”<sup>12</sup> The line dividing the two is elusive at best, if not downright illusory, and supporters of both views of the Suspension Clause can marshal support for the notion that the Clause falls on either side. But regardless of the category into which one places the Suspension Clause, it seems completely uncontroversial to conclude that the contemporary debate has been framed entirely in these terms.

And therein lies the rub.

Regardless of ideology, the Founders would have been surprised at the strange doctrinal path that the Suspension Clause has taken. At the

8. *See id.* at 994–98, 987 n.3.

9. U.S. CONST. art. I, § 9, cl. 3.

10. *See, e.g., Boumediene*, 476 F.3d at 996–98.

11. A separate argument in the Guantánamo cases, and one that may curry particular favor with Justice Kennedy, is that Guantánamo is “different”—that owing to the nature of the United States’ control over the base, it is not quite as “extraterritorial” as other installations elsewhere in the world. *See, e.g., Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring in the judgment) (“Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. . . . What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the ‘implied protection’ of the United States to it.”) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 777–78 (1950)). *See generally* Ghorebi v. Bush, 352 F.3d 1278 (9th Cir. 2003) (making a variation of this argument).

Since there is little question that the Suspension Clause *does* protect noncitizens within the territory of the United States, *see, e.g., INS v. St. Cyr*, 533 U.S. 289, 293, 305 (2001), the Supreme Court could conceivably sidestep deeper questions about the extraterritorial applicability of the Suspension Clause simply by holding that Guantánamo is not “really” extraterritorial. Of course, such a holding does nothing to solve the applicability of the Clause to noncitizens detained elsewhere, including in Iraq and Afghanistan.

12. For a discussion of this issue solely in the context of Article III of the Constitution, see Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 GEO. L.J. 1497, 1541–45 & n.226 (2007).

1787 Constitutional Convention in Philadelphia and during the ratification debates that followed, the Clause was understood by both the Constitution's supporters and detractors as a grant of authority to the federal government—to do away with the “privilege of the writ of Habeas Corpus” in certain emergency situations when “the public Safety may require it.”<sup>13</sup> Thus, the name of the provision—the “Suspension” Clause. The idea that Congress could do away with habeas was one of the catalyzing agents behind what would become the Bill of Rights, and the conclusion that the Clause affirmatively granted authority to the federal government was a keystone of the Federalists’ defense of the Constitution as written.<sup>14</sup>

And so, the “original understanding” of the Suspension Clause was as the exception to the rule—as delineating those narrow and express cases where the privilege of the writ of habeas corpus could be infringed upon.<sup>15</sup> Simply put, the Suspension Clause did not create a “structural right”; it provided structural constitutional underpinnings for the common-law right that already existed, and specified the *only* instances in which that right could be abridged.<sup>16</sup>

On this view, both readings of the Suspension Clause in the D.C. Circuit’s *Boumediene* decision are incorrect because both presuppose that the relevant question is how the Clause limits Congress. Entirely to the contrary, the Clause specifies the circumstances wherein Congress can *act* to preclude access to the courts, and recognizes that habeas, at least “as it existed in 1789,”<sup>17</sup> is otherwise available to those detained in violation of federal law; it expressly “protects” no one.<sup>18</sup> Thus, the cen-

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13. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 128 (1980) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 438 (Max Farrand, ed. 1966)). For a succinct contemporary reconstruction, see ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 12–19 (2001). See generally Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509 (1998) (reviewing the common-law origins of habeas corpus).

14. See, e.g., FREEDMAN, *supra* note 13, at 17–19.

15. As one scholar has argued, the real purpose of the Clause was to limit Congress’s power to take away habeas in state courts. See DUKER, *supra* note 13, at 126–35.

16. See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1510 (1987) (“The common law would furnish the cause of action that assured judicial review; the Constitution would furnish the test on the legal merits of confinement.”).

17. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 300–01 (2001) (“[R]egardless of whether the protection of the Suspension Clause encompasses all cases covered by the 1867 Amendment extending the protection of the writ to state prisoners, or by subsequent legal developments, at the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’”) (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996)) (citations and footnote omitted).

18. Thus, as one recent article suggests, courts entertaining habeas petitions need only resolve whether the government has the legal authority to hold the detainee, without reaching any deeper questions about the detainee’s substantive individual rights. See Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. (forthcoming).

tral thesis of this essay is that the view of the Suspension Clause “as a structural right” is, in fact, another version of the long-recognized (if currently underappreciated) view of the Suspension Clause as creating no rights whatsoever, but merely empowering Congress to do away with the writ of habeas corpus only when exigency demands.

This argument, of course, is not without its own difficulties. After summarizing the original understanding, Part II considers its first potential shortcoming—that no less a figure than Chief Justice Marshall wrote in 1807 that federal jurisdiction over habeas is entirely a creature of statute.<sup>19</sup> Marshall’s dicta in *Ex parte Bollman* implied (and has subsequently been read as suggesting<sup>20</sup>) that the writ would not have existed without section 14 of the Judiciary Act of 1789,<sup>21</sup> a conclusion strongly at odds with the notion that the Suspension Clause recognizes (and constitutionalizes) the preexisting availability of common-law habeas.

As Part II notes, the critical point missing from our contemporary understanding of *Bollman* is that federal habeas was generally available in *state* courts from the Founding to—and even through—the Civil War.<sup>22</sup> Thus, even if Marshall meant what he said in *Bollman*, he was speaking only to the question of federal court habeas on top of what would have been available in state court. That is to say, Marshall’s dictum did not suggest that there would have been *no* habeas for federal prisoners without section 14 of the Judiciary Act; it suggested that there would have been no habeas in the lower federal courts, a result that, given the availability of state-court review, would not have raised substantial Suspension Clause concerns.<sup>23</sup>

19. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94–95 (1807).

20. See *infra* note 83 and accompanying text (discussing Justice Scalia’s reading of *Bollman*).

21. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82.

22. See, e.g., FREEDMAN, *supra* note 13, at 18 (“However odd the notion may appear to modern lawyers, contemporaries all assumed that the state courts would be able to issue writs of habeas corpus to release those in federal custody.”); see also *id.* at 159 n.21. See generally Todd E. Pettys, *State Habeas Relief for Federal Extrajudicial Detainees*, 92 MINN. L. REV. 265, 270–81 (2007) (summarizing state courts’ antebellum experience with federal habeas petitions). For some of Pettys’s examples of state-court cases considering federal habeas claims, see *Commonwealth v. Downes*, 41 Mass. (24 Pick.) 227 (1836); *State v. Dimick*, 12 N.H. 194 (1841); *United States v. Wyngall*, 5 Hill 16 (N.Y. Sup. Ct. 1843); and *Commonwealth ex rel. Webster v. Fox*, 7 Pa. 336 (1847).

23. For example, in *Felker*, the Supreme Court upheld the “gatekeeper” provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 15, 18, 21, 22, 28, 40, 42, 49 & 50 U.S.C.), even though the provisions took away appellate jurisdiction over second and successive habeas petitions where the petitioner did not receive permission to appeal. See *Felker v. Turpin*, 518 U.S. 651, 654 (1996). The crux of Chief Justice Rehnquist’s reasoning for the majority was that the gatekeeper provisions raised no Suspension Clause issue because they left intact the Court’s jurisdiction over “original” habeas petitions. See *id.* at 663–64. Thus, the preclusion of federal jurisdiction over some aspect of a habeas petition does not implicate the Suspension

Moreover, by 1872, when the Supreme Court finally repudiated habeas for federal prisoners in the state courts in *Tarble's Case*,<sup>24</sup> Congress had enacted the Habeas Corpus Act of 1867,<sup>25</sup> which effectively provided for federal court jurisdiction over any habeas petition alleging detention in violation of federal statutes, federal treaties, or the federal Constitution.<sup>26</sup> Thus, by a twist of fate, the constitutional problem that *Tarble* would otherwise have caused (this one,<sup>27</sup> anyway) had already been solved. And whatever one might say about *Tarble's* logic or rationale, it could not have been lost on the Justices that the lower federal courts on whom they were foisting *all* subsequent federal habeas petitions had statutory jurisdiction to issue the writ, the scope of which likely matched (if not exceeded) the common-law authority to issue the writ that the state courts had previously possessed. Thus, as Part II concludes, Marshall's dictum was anachronistic, written during a time when the absence of federal jurisdiction would not have meaningfully implicated the availability of habeas corpus in *some* forum.

The harder challenge to this essay's thesis,<sup>28</sup> to which I turn in Part III, is what to make of the Supreme Court's case law with respect to the extraterritorial availability of habeas corpus, particularly its 1950 decision in *Johnson v. Eisentrager*<sup>29</sup> (which precluded access to the writ for enemy aliens overseas),<sup>30</sup> and subsequent decisions taking no issue with extraterritorial invocations of the writ by U.S. citizens.<sup>31</sup> Some scholars have seized upon *Eisentrager* and its progeny, in conjunction with the

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Clause unless it precludes access to the courts altogether. See *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (“[T]he substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus.”).

24. See 80 U.S. (13 Wall.) 397, 407–08, 412 (1872).

25. Act of Feb. 5, 1967, ch. 27, 14 Stat. 385.

26. See *id.* § 1, 14 Stat. at 385.

27. For two slightly different views on *Tarble*, compare Daniel A. Farber, *The Trouble With Tarble's: An Excerpt from an Alternative Casebook*, 16 CONST. COMMENT. 517 (1999) (suggesting that an alternative result in *Tarble's Case* would have had disastrous consequences), with Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 258–60 (2005) (arguing that “one might expect that the state courts” were available to issue writs of habeas corpus when “neither the Supreme Court nor inferior federal courts were”).

28. For reasons having more to do with economy of space than principle, I do not consider in this essay whether such a reading of the Suspension Clause should also provoke a thorough reevaluation of the availability of federal habeas for *state* prisoners, and the potential constitutional limits on Congress's authority to constrain such a remedy. For one such argument based on an even more forceful critique of *Bollman* than that offered herein, see FREEDMAN, *supra* note 13, at 20–42. For a summary of the larger problem, especially in light of AEDPA, see *Irons v. Carey*, 479 F.3d 658, 665–70 (9th Cir. 2007) (Noonan, J., concurring).

29. 339 U.S. 763 (1950).

30. See *id.* at 776.

31. See, e.g., *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955); *Burns v. Wilson*, 346 U.S. 137, 139 (1953) (plurality opinion).

so-called “*Insular Cases*,”<sup>32</sup> to argue that the Constitution in general—and the Suspension Clause in particular—should not generally apply to noncitizens overseas.<sup>33</sup>

But, as Part III concludes, the Court in these cases viewed the Suspension Clause issue as coextensive with the merits. Thus, in *Eisentrager*, the Court held that the Suspension Clause could not be “invoked” by enemy aliens convicted by a U.S. military tribunal in China, concluding that such detainees had no rights whatsoever, including no “right” to habeas corpus.<sup>34</sup> Indeed, *Eisentrager* must be understood for what it was—as a sweeping repudiation of Judge Prettyman’s even more sweeping opinion for the D.C. Circuit, which had suggested that all individuals everywhere had a virtually immutable right to habeas corpus.<sup>35</sup> Such a right was ultimately meaningless if, as Justice Jackson concluded in *Eisentrager*, the petitioners’ claims were meritless.<sup>36</sup>

Because these cases were decided decades before the Court’s modern obsession with threshold jurisdictional questions,<sup>37</sup> we might better understand *Eisentrager* and its progeny as suggesting that Congress was not required to provide for habeas corpus when there were no substantive rights capable of enforcement upon the merits.<sup>38</sup> Indeed, after dispensing with the petitioners’ right to the writ of habeas corpus, *Eisentrager*, a case with “an awful lot of alternative holdings,”<sup>39</sup> devoted

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32. The term “*Insular Cases*” actually refers to several *dozen* decisions handed down by the Supreme Court during the first quarter of the twentieth century involving the applicability of the Bill of Rights to the United States’ new overseas territories, including Cuba, Panama, Puerto Rico, and the Philippines. For a wonderful and thorough modern treatment of the cases and their background, see BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* (2006).

33. For the most thorough contemporary version of this argument, see generally J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 521–24 (2007) (arguing that, as a constitutional matter, the privilege of the writ of habeas corpus should only be available within the territorial United States).

34. See *Eisentrager*, 339 U.S. at 777–81.

35. See *Eisentrager v. Forrestal*, 174 F.2d 961, 965 (D.C. Cir. 1949), *rev’d*, 339 U.S. 763.

36. See *Eisentrager*, 339 U.S. at 776–85.

37. See, e.g., *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 127 S. Ct. 1184, 1191–92 (2007); *Steel Co. v. Citizens for a Better Env’t.*, 523 U.S. 83 (1998); see also Vladeck, *supra* note 12, at 1525 n.143 (discussing *Steel Co.*).

38. Cf. *Christopher v. Harbury*, 536 U.S. 403, 414–15 (2002) (“[T]he very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong. However unsettled the basis of the constitutional right of access to courts, our cases rest on the recognition that the right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court.”) (footnote omitted); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 339 (1993) (“When there is no right to a constitutional remedy, it would seem to follow that there can be no right to judicial review.”).

39. Transcript of Oral Argument at 72, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184) (statement of Solicitor General Clement), [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/05-184.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-184.pdf) [hereinafter Transcript of Oral Argument].

another ten full pages to the question whether the petitioners had any substantive constitutional or treaty-based rights to enforce in their habeas petitions.<sup>40</sup> Such analysis simply should not have mattered if the petitioners were not entitled to invoke the writ in the first place. Instead, as Part III concludes, the real violence to precedent worked by *Eisen-trager* is its conflation of the merits with the availability of habeas. Properly read, *Eisen-trager* is not inconsistent with the idea that, so long as habeas has not been validly suspended, the Constitution protects access to some form of the writ for *anyone* with meritorious claims of unlawful detention.

On that view, the harder questions in the current cases concern the merits. Have the detainees in fact alleged detention in violation of the “Constitution or laws or treaties of the United States”?<sup>41</sup> Is the statutory remedy provided by the MCA and the Detainee Treatment Act of 2005 (“DTA”)<sup>42</sup> an “adequate” and “effective” substitute for the remedy that would be available via habeas?<sup>43</sup> Is the process provided by the Combatant Status Review Tribunals (and the D.C. Circuit, on appeal) constitutionally sufficient?<sup>44</sup>

The purpose of this essay is not to suggest answers to these incredibly difficult questions. Rather, my goal is to suggest that the answer cannot simply be, as the D.C. Circuit held in *Boumediene*, that the Suspension Clause does not “apply.”<sup>45</sup> It may be that the MCA is ultimately constitutional because it does not effect a deprivation of a remedy that would otherwise have been available (a result I find unlikely, but not impossible), but it just cannot be the case that the MCA exists entirely outside the scope of the Suspension Clause.

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40. See *Eisen-trager*, 339 U.S. at 781–90.

41. See *Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004) (“Petitioners’ allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’”) (quoting 28 U.S.C. § 2241(c)(3) (2000)).

42. Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (to be codified in scattered sections of 10, 28, & 42 U.S.C.).

43. See *Swain v. Pressley*, 430 U.S. 372, 381–83 (1977) (holding that the Suspension Clause is not implicated when habeas is unavailable unless there is no “adequate” or “effective” substitute).

44. Cf. *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir.) (considering the scope of the remedy provided by the MCA and the DTA), as amended on denial of reh’g, 503 F.3d 137 (D.C. Cir. 2007).

45. See *Boumediene v. Bush*, 476 F.3d 981, 988–94 (D.C. Cir. 2007), cert. granted, 127 S. Ct. 3078 (2007).



## II. THE SUSPENSION CLAUSE: ORIGINS AND EARLY APPLICATION

The common-law origins of (and English and colonial experiences with) the writ of habeas corpus have been extensively documented elsewhere,<sup>46</sup> and, with limited exceptions, are not the subject of significant contemporary dispute. As one author has summarized,

The origin of the writ is obscure. Traces are found in the Year Books as early as 48 Edward III [1374]. For several centuries the writ was used by the King's courts as a weapon in their battle to control the lower courts. It was probably not used against the crown until the reign of Henry VII. . . . Whatever its origin, by the time of Charles I (1625–1649) the writ was fully established as the appropriate process for checking illegal imprisonment by public officials or inferior courts. However, it acquired its full and present importance by legislation.<sup>47</sup>

Thus, in a host of statutes—including the Habeas Corpus Act of 1679—Parliament codified various applications of the writ to challenge criminal confinement, but also left intact the availability of the common-law writ in challenges to noncriminal detention.<sup>48</sup> The prevailing colonial practice mirrored the English experience, with at least six of the colonies formally adopting the English Habeas Corpus Act,<sup>49</sup> and the other seven recognizing the availability of the common-law writ.<sup>50</sup> I am oversimplifying vast swaths of English and colonial legal history,<sup>51</sup> but the upside is that, at the time of the Founding, it was well understood throughout the colonies that noncriminal habeas was a creature primarily of the common law, and was an important stopgap against arbitrary executive action—something hardly unknown to revolutionary-era America.

### A. *The Suspension Clause at Philadelphia and After*

“[T]he history of the [Suspension] Clause at the [1787 Constitu-

46. See, e.g., Hafetz, *supra* note 13, at 2520–36. See generally DUKER, *supra* note 13, at 12–125 (surveying the British and colonial experiences with the writ).

47. Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 336 (1952).

48. See *id.* at 336–38; see also DUKER, *supra* note 13, at 12–94 (summarizing the evolution of the writ in England).

49. See Collings, *supra* note 47, at 338–39.

50. See DUKER, *supra* note 13, at 115 (“[O]ne finds that the common-law writ of habeas corpus was in operation in all thirteen of the British colonies that rebelled in 1776.”).

51. For a thorough and thoughtful modern recounting of this history, see Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. (forthcoming May 2008), available at <http://ssrn.com/abstract=1008252>.

tional] Convention is sparse but clear.”<sup>52</sup> On August 20, Charles Pinckney of South Carolina introduced a proposal that the Constitution provide that “[t]he privileges and benefit of the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner: and shall not be suspended by the legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding — months.”<sup>53</sup> Without debate, Pinckney’s proposal was referred to the Committee on Detail. When it was reported back to the Convention on August 28, the debate focused entirely on whether it was necessary to ever allow for suspension.<sup>54</sup> There was simply no question that the Framers otherwise viewed habeas as inviolable.

Moreover, as Professor Paschal has argued, by the time the Framers settled on what would become the Suspension Clause, they had already decided to leave to Congress the power to decide whether to create lower federal courts.<sup>55</sup> Thus, “the Convention dealt with the possibility of no lower federal courts by directly commanding the courts, federal and state alike, to make the privilege of the writ routinely available.”<sup>56</sup>

The scope of the Suspension Clause was not an important part of the ratification debates that followed.<sup>57</sup> Rather, the Anti-Federalists used the Clause as support for their call for a Bill of Rights, suggesting that similar protections should have been given to the other rights conferred by the Constitution.<sup>58</sup> At the heart of these arguments was the assertion that the Clause undermined the Federalists’ defense of the Constitution as limiting the federal government’s powers to those for which the text expressly provided. If the Clause specified that the “privilege of the writ of Habeas Corpus shall not be suspended” except in certain cases, the negative implication, according to the Anti-Federalists, was that habeas *could* have been suspended by the federal government absent the Suspension Clause.<sup>59</sup>

Critically, the Federalists’ response was that the Clause delineated the only circumstances where the federal government *could* act to preclude habeas—“cases of Rebellion or Invasion [when] the public Safety

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52. FREEDMAN, *supra* note 13, at 12.

53. *Id.* (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 13, at 334, 340–42).

54. See generally Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 608–17 (summarizing the debates).

55. See *id.* at 615.

56. *Id.* at 616.

57. See, e.g., FREEDMAN, *supra* note 13, at 16.

58. See, e.g., *id.* at 15–16.

59. DUKER, *supra* note 13, at 128 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 13, at 438).

may require it.”<sup>60</sup> As Professor Freedman argues, the Federalists appeared to carry the day on this point, given the absence of virtually any discussion of habeas in the subsequent debates over—and enactment of—the Bill of Rights.<sup>61</sup> For present purposes, that this was the crux of the debate is immensely significant; the Anti-Federalists’ concerns over the Suspension Clause were assuaged by the assertion that the Clause delineated the only circumstances where habeas could be abridged by the federal government.<sup>62</sup> Habeas, it was presumed, would otherwise be available to all prisoners in *some* forum. Had there been any serious concern that there would be cases where the federal government could preclude access to habeas corpus without satisfying the Suspension Clause, the Anti-Federalists surely would have voiced them.

### B. *The Bollman Problem*

As the conventional wisdom goes, Chief Justice Marshall’s legendary opinion in *Marbury v. Madison*<sup>63</sup> created something of a predicament for the Supreme Court when it came to habeas corpus.<sup>64</sup> *Marbury*, of course, denied to Congress the power to enlarge the Supreme Court’s constitutional original jurisdiction past the rigid confines of Article III, Section 2.<sup>65</sup> In invalidating section 13 of the Judiciary Act of 1789,<sup>66</sup> however dubiously,<sup>67</sup> *Marbury* thus called into question similar language in section 14, which appeared to empower the Supreme Court to issue “original” writs of habeas corpus.<sup>68</sup> Although the exercise of that power in cases involving ambassadors would arguably fall within the

60. *Id.*

61. See FREEDMAN, *supra* note 13, at 17–18. As Freedman notes, there was one minor exception—a proposal by New York for an amendment interposing more express temporal limits on the federal government’s power to suspend habeas. See *id.* at 159 n.22.

62. See *id.* at 18 (“A fair conclusion is that the ratification debates had convinced all parties that the Clause as written would meet the aims they agreed that they shared: to safeguard a critical mechanism for protecting the liberties of those who might fall afoul of the organs of power.”).

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

64. See, e.g., Hartnett, *supra* note 27, at 256–58.

65. See *Marbury*, 5 U.S. (1 Cranch) at 173–77.

66. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80–81.

67. See generally Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989) (summarizing the various shortcomings of Marshall’s analysis of section 13).

68. The original version of section 14 (the modern ancestor of which appears at 28 U.S.C. § 2241(a) (2000)) provided:

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.

Judiciary Act of 1789 § 14, 1 Stat. at 81–82.

scope of the textual grant of original jurisdiction,<sup>69</sup> all other cases would not, raising the question whether section 14 suffered from the same constitutional defect as section 13. Just four years after *Marbury*, the Court was confronted with that very issue.

Perhaps the most remarkable aspect of the background to *Ex parte Bollman*<sup>70</sup> is that it isn't more well-known. When President Thomas Jefferson ran for reelection in 1804, he opted to replace incumbent Vice President Aaron Burr given both the disrepute into which Burr had fallen as a result of his duel with Alexander Hamilton and the declining relationship between the two men.<sup>71</sup> The enigmatic Burr, facing charges in both New York and New Jersey arising out of the Hamilton duel, traveled to the West, where he allegedly attempted to lead various U.S. territories in an uprising against the federal government.<sup>72</sup>

In December 1806, General James Wilkinson, the U.S. military commander in New Orleans (who was himself allegedly part of the plot) arrested two of Burr's "co-conspirators," Samuel Swartwout and Dr. Erick Bollman.<sup>73</sup> Ignoring writs of habeas corpus issued by federal judges in New Orleans and Charleston, South Carolina,<sup>74</sup> Wilkinson transported the two men to Washington, where a divided D.C. Circuit Court issued an arrest warrant on charges of treason.<sup>75</sup> Both filed petitions for writs of habeas corpus from the Supreme Court, while, at the same time, Congress considered (and the Senate approved) a measure that would have suspended the writ in the pending cases.<sup>76</sup>

The first question before the Court in *Bollman* was whether the Court had the authority to entertain such habeas petitions (even though it had done so without comment on two prior occasions).<sup>77</sup> Writing for a

69. See, e.g., *Ex parte Hung Hang*, 108 U.S. 552, 553 (1883). See generally Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153.

70. 8 U.S. (4 Cranch) 75 (1807).

71. See generally NANCY ISENBERG, *FALLEN FOUNDER: THE LIFE OF AARON BURR* 223–79 (2007) (summarizing Burr's tempestuous vice-presidency).

72. For a more even-handed treatment of Burr that views some of the allegations with great skepticism, see *id.* at 271–316. For a recent account more suspicious of Burr, see BUCKNER F. MELTON, JR., *AARON BURR: CONSPIRACY TO TREASON* (2002).

73. See FREEDMAN, *supra* note 13, at 20–21 & 161 nn.3–4.

74. See, e.g., DUKER, *supra* note 13, at 135.

75. See *United States v. Bollman*, 24 F. Cas. 1189, 1192 (C.C.D.D.C. 1807) (No. 14,622). For a general discussion of the atmospheric of the case, see JEFFREY BRANDON MORRIS, *CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT 15–17* (2001).

76. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 79 (1807). For the background of the proposed suspension, see DUKER, *supra* note 13, at 135–37. See also Paschal, *supra* note 54, at 623–24.

77. See *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 449 (1806); *United States v. Hamilton*, 3 U.S. (3 Dall.) 17 (1795).

3–1 majority,<sup>78</sup> Chief Justice Marshall began by disclaiming the notion that the federal courts could exercise any jurisdiction not conferred by the Constitution or by statute.<sup>79</sup> As courts of limited subject-matter jurisdiction, the federal courts were not common-law courts, and could only be empowered by positive law. Thus, “for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.”<sup>80</sup> Marshall thus disavowed the power of the Supreme Court—or any federal court, for that matter—to issue common-law writs of habeas corpus, even though his subsequent analysis rendered such a conclusion irrelevant.

Marshall turned next to the question whether any statute conferred upon the Supreme Court the power to issue writs of habeas corpus.<sup>81</sup> Although section 14 of the Judiciary Act referred to the power of the Justices of the Supreme Court, and not the Court itself, Marshall read the statute as giving the Court the power to issue the writ en banc:

It may be worthy of remark, that this act was passed by the first congress of the United States, sitting under a constitution which had declared ‘that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it.’

Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; *for if the means be not in existence, the privilege itself would be lost*, although no law for its suspension should be enacted. Under the impression of this obligation, they give, to all the courts, the power of awarding writs of *habeas corpus*.<sup>82</sup>

Thus, in explaining why Congress must have empowered the Supreme Court to issue writs of habeas corpus, Marshall suggested, however inadvertently, that, absent section 14, there would have been no such thing as federal habeas corpus. Marshall may well have thought that the First Congress, once it decided to create the lower federal courts in the first place, was *required* to bestow upon those courts some modicum of habeas jurisdiction, but he nowhere suggested that absent such legislative action, the writ could nevertheless be issued by a federal court. Put another way, Marshall’s dicta rejected the notion that the Sus-

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78. Justices Cushing and Chase were both absent for health-related reasons. See *Bollman*, 8 U.S. (4 Cranch) at 93 n.4.

79. See *id.* at 77–80.

80. *Id.* at 93–94.

81. See *id.* at 94.

82. *Id.* at 95 (emphasis added).

pension Clause contemplated a self-executing federal jurisdiction over common-law habeas petitions. His opinion thereby intimated that the Suspension Clause would only protect whatever statutory writ Congress saw fit to provide.<sup>83</sup>

Finally, Marshall reached the central question: the constitutionality of section 14. Distinguishing *Marbury*, the majority concluded that “so far as that case has distinguished between original and appellate jurisdiction, that which the court is now asked to exercise is clearly *appellate*. It is the revision of a decision of an inferior court, by which a citizen has been committed to jail.”<sup>84</sup> Of course, that logic only held in cases, such as *Bollman* itself, where habeas was sought by a prisoner who had already been the subject of other judicial proceedings. Marshall’s logic—that the Supreme Court could issue an “original” writ of habeas corpus as an exercise of its constitutional “appellate” jurisdiction<sup>85</sup>—left open the question of the Supreme Court’s power to issue such original writs when there was no lower-court judgment to review.<sup>86</sup>

### C. *Federal Habeas in State Court: To Ableman and Tarble*

If the Supreme Court did not possess the constitutional authority to issue writs of habeas corpus as part of its constitutional “original” jurisdiction, which *Marbury* suggested (and *Bollman* appeared to reaffirm), and if the crux of the so-called “Madisonian Compromise” was that Congress needn’t have created the lower federal courts in the first place, then contemporary observers might wonder where, exactly, the Framers thought federal prisoners could seek habeas relief?<sup>87</sup> The answer,

83. To understand the implications of this logic, consider Justice Scalia’s dissent in *INS v. St. Cyr*, 533 U.S. 289, 326–47 (2001). Relying on *Bollman*, Justice Scalia argued that the Suspension Clause precludes *temporary* suspensions of habeas corpus except in cases contemplated by the Clause, but in no way bars a complete divestiture of habeas jurisdiction. *See id.* at 340 n.5 (Scalia, J., dissenting) (“If, as the Court concedes, ‘the writ could not be suspended,’ within the meaning of the Suspension Clause until Congress affirmatively provided for habeas by statute, then surely Congress may subsequently alter what it had initially provided for, lest the Clause become a one-way ratchet.”) (citations omitted).

84. *Bollman*, 8 U.S. (4 Cranch) at 100–01.

85. *See Felker v. Turpin*, 518 U.S. 651, 667 n.1 (1996) (Souter, J., concurring) (“Such a petition is commonly understood to be ‘original’ in the sense of being filed in the first instance in this Court, but nonetheless for constitutional purposes an exercise of this Court’s appellate (rather than original) jurisdiction.”).

86. Although the Court may have resolved this question in *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948) (per curiam), *Hirota* was—deliberately—unclear whether it was actually reaching this issue. *See Vladeck, supra* note 12, at 1518–22 & n.107.

87. *See, e.g.,* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 102 n.178. *See generally* Hartnett, *supra* note 27 (summarizing the “puzzle” that arises from reading *Marbury* and *Tarble* together with the Madisonian Compromise and the Suspension Clause).

entirely obvious to the Framers and yet forcefully repudiated by later case law, was in the state courts.

There is no real debate whether or to what extent common-law habeas for federal prisoners was available in antebellum state courts.<sup>88</sup> Well into the 1840s and early 1850s, state courts routinely inquired into the legality of federal detention via habeas corpus, whether in the context of challenges to military enlistment or to other forms of civil detention.<sup>89</sup> The problem that arose was in the context of the extremely controversial Fugitive Slave Act of 1850,<sup>90</sup> where common-law habeas for federal prisoners provided abolitionist (or at least sympathetic) northern state courts with a vehicle for frustrating enforcement of (or even invalidating) the Act.<sup>91</sup> Thus, in *In re Booth*, the Wisconsin Supreme Court ordered the release of Sherman Booth, who had been convicted by a federal court for violating the Fugitive Slave Act by “aiding and abetting[, and] assisting” the escape of a runaway slave.<sup>92</sup> The court held that Booth’s federal conviction was invalid on the ground that the Fugitive Slave Act was unconstitutional.<sup>93</sup>

After the court refused to respond to a writ of error issued by Chief Justice Taney,<sup>94</sup> the U.S. Supreme Court unanimously reversed the state court’s conclusion, denying to the Wisconsin Supreme Court the power to pass upon the legality of Booth’s federal conviction.<sup>95</sup> Although Taney used sweeping language that seemed to deny to state courts the

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88. See, e.g., Charles Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 353 (1930); cf. Dallin H. Oaks, *Habeas Corpus in the States—1776–1865*, 32 U. CHI. L. REV. 243 (1965) (surveying the nature and scope of habeas review in the antebellum state courts). As Oaks writes, “[i]n the five decades preceding 1865 there are numerous instances where state courts issued their writ of habeas corpus to release persons from the restraints imposed on their liberty by the alleged wrongful conduct of federal officers.” *Id.* at 288. For more on this period, including a discussion of numerous illustrative cases, see Pettys, *supra* note 22, at 270–81.

89. In an 1853 opinion, Attorney General Caleb Cushing discussed (and cited) several examples of such cases. See 6 OP. ATT’Y GEN. 103, 105–07 (1853); see also DUKER, *supra* note 13, at 178 n.192 (citing additional cases).

90. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864).

91. For a simply wonderful (and thought-provoking) discussion of the myriad legal, ethical, and moral issues that judges faced in enforcing the Fugitive Slave Act (along with its grandfather, the Fugitive Slave Act of 1793), see ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 175–91 (1975).

92. See *In re Booth*, 3 Wis. 1, 9 (1854) (quoting Fugitive Slave Act of 1850, 9 Stat. at 464). For more on the background to *Booth*, see Pettys, *supra* note 22, at 281–88.

93. See *Booth*, 3 Wis. at 17. *Booth* actually came before the Wisconsin Supreme Court twice—once pre-conviction and once post-conviction. On both occasions, the court ordered his discharge. See RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 434 n.\* (5th ed. 2003); see also Pettys, *supra* note 22, at 281–83 (summarizing the procedural posture).

94. See *United States v. Booth*, 59 U.S. (18 How.) 477, 478 (1856); *Ableman v. Booth*, 59 U.S. (18 How.) 479, 479 (1856).

95. *Ableman v. Booth*, 62 U.S. (21 How.) 506, 526 (1859).

power to *ever* entertain common-law habeas petitions by federal prisoners,<sup>96</sup> the decision was subsequently read by many courts and commentators as being limited to the facts—i.e., as barring federal habeas in state court only to review a federal conviction, and not precluding state court consideration of habeas petitions by federal prisoners held without any judicial process.<sup>97</sup>

It would not be until after the Civil War that the U.S. Supreme Court would decisively reject all federal habeas in state court once and for all. Distinguishing *Booth* on the ground that the Supreme Court's decision was a *sui generis* result compelled entirely by the slavery issue,<sup>98</sup> the Wisconsin Supreme Court ordered the release of Edward Tarble, a minor who had enlisted in the federal army without his father's consent, holding that such an enlistment was prohibited by federal law.<sup>99</sup>

Relying on (and incorporating) Chief Justice Taney's opinion in *Booth*,<sup>100</sup> Justice Field reversed:

There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. . . .

. . . .

Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribu-

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96. *See id.* at 523 (“[A]fter the return is made, and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. . . . He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress.”); *see also id.* at 524 (“No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. . . . No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence.”).

97. *See, e.g.,* *DUKER*, *supra* note 13, at 179 n.221 (citing cases); Warren, *supra* note 88, at 357; *see also* Pettys, *supra* note 22, at 284–88 (noting reactions to *Ableman* in both the state and federal courts, and within the federal government).

98. *See In re Tarble*, 25 Wis. 390, 394–95, 407 (1870). As Pettys notes, other courts and jurists agreed that *Ableman* could not be regarded as viable precedent because of the extent to which it was tainted by the slavery issue. *See Pettys*, *supra* note 22, at 289 n.142 (citing *Ex parte Holman*, 28 Iowa 88 (1869) (Beck, J., dissenting)); *see also* COVER, *supra* note 91, at 187 n.\*.

99. *Tarble*, 25 Wis. at 412–13. For more on the background, *see* Pettys, *supra* note 22, at 288–94.

100. *See Tarble's Case*, 80 U.S. (13 Wall.) 397, 412 (1872).



nals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other.<sup>101</sup>

Chief Justice Chase dissented, arguing that the defect in the Wisconsin Supreme Court's decision was not its authority to issue the writ, but its analysis of the merits.<sup>102</sup> Thus,

[t]o deny the right of State courts to issue the writ . . . is to deny the right to protect the citizen by *habeas corpus* against arbitrary imprisonment in a large class of cases; and, I am thoroughly persuaded, was never within the contemplation of the Convention which framed, or the people who adopted, the Constitution.<sup>103</sup>

Chief Justice Chase's vehemence notwithstanding, *Tarble* finally—if controversially—settled the question. As Pettys concludes, “the debate about the scope of state courts’ power to come to the aid of federal prisoners was over. Quickly falling into line, the state courts conceded that they could no longer order persons released from federal custody, no matter what the circumstances.”<sup>104</sup>

Contemporary commentators have tended to view the decision as a dangerously myopic misstep by the Court, sacrificing constitutional doctrine in the name of political expediency.<sup>105</sup> But whatever view one takes of the soundness of *Tarble* on either the stated or alternative grounds,<sup>106</sup> the decision was also written against the background of a much more expansive federal jurisdiction over habeas corpus (and, consequently, a much broader “statutory” federal writ), a point that has been

101. *Id.* at 406, 408.

102. *Id.* at 412 (Chase, C.J., dissenting) (“The State court may err; and if it does, the error may be corrected here. The mode has been prescribed and should be followed.”).

103. *Id.* at 412–13.

104. Pettys, *supra* note 22, at 293 (citing *Copenhaver v. Stewart*, 24 S.W. 161, 163 (Mo. 1893) (“[I]t must be taken as now well-established law that state courts and the judges thereof have no jurisdiction or power to discharge persons who are held in custody by authority of the federal courts . . . or by officers of the United States acting under the laws thereof . . .”).

105. See, e.g., Hartnett, *supra* note 27, at 258–60, and sources cited therein; see also Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2566–67 & n.158 (1998); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 596 (2002). Indeed, it is not hard to imagine how un-reconstructed state courts in the South could have used the federal Constitution to free anti-Union insurgents in the custody of the federal military.

106. For example, the authors of the leading federal courts casebook suggest that *Tarble* might alternatively be viewed as resting on the conclusion that the federal habeas statute impliedly excludes state court jurisdiction, along the lines later outlined by the Court in *Tafflin v. Leavitt*, 493 U.S. 455 (1990). See FALLON, JR. ET AL., *supra* note 93, at 439. Thus, any repeal of federal habeas jurisdiction would theoretically restore the authority of state courts to entertain those suits precluded from federal court consideration. For more on this argument, and suggestions for why it is unconvincing, see Pettys, *supra* note 22, at 294–308.

largely overlooked by most subsequent discussions of the decision. Thus, it is simply impossible to know whether the Court would have shown such hostility to state courts if, at the same time, habeas was not broadly available to federal prisoners in the federal courts.

D. *After Ableman and Tarble: The Habeas Corpus Act of 1867*

To briefly recap: In cutting off federal habeas in the state courts, *Ableman* and *Tarble* both evoked the specter of a serious constitutional problem when read together with Chief Justice Marshall's dicta in *Bollman*. After *Tarble*, any federal habeas petition would have to go to the federal courts. Except where there was already a lower-court judgment to review, *Marbury* precluded potential petitioners from going straight to the Supreme Court. And yet, if Marshall was correct in *Bollman*, the lower federal courts only had that habeas jurisdiction conferred upon them by Congress. What about cases where the lower federal courts lacked jurisdiction over a habeas petition alleging unlawful detention? Critically, by the time *Tarble* was decided, that question had become largely superfluous, thanks to the Habeas Corpus Act of 1867.<sup>107</sup>

Motivated largely by a desire to provide federal court access to state prisoners, particularly to enforce the provisions of the landmark Civil Rights Act of 1866<sup>108</sup> and the soon-to-be-ratified Fourteenth Amendment,<sup>109</sup> the 1867 Habeas Corpus Act purported to extend the jurisdiction of the federal courts over habeas "to their constitutional limit."<sup>110</sup> Thus, the Act made clear that federal courts—and the individual judges thereof—would have the authority "within their respective jurisdictions" to "grant writs of habeas corpus in 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."<sup>111</sup> Although the signal achievement of the 1867 Act was in its general extension of federal habeas corpus to state prisoners, the Act also expanded federal habeas jurisdiction for federal prisoners to extend to virtually any claim of unlawful federal detention. In so providing, the Act effectively mooted the *Bollman/Tarble* question, for it was hard, at least at the time, to imagine a case of allegedly unlawful federal detention over which the federal courts would not have had jurisdiction under the terms of the 1867 Act.<sup>112</sup> The question whether the Suspension Clause protected a

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107. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

108. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

109. See Evan Tsen Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U. L.Q. 151, 189–91 (1994).

110. DUKER, *supra* note 13, at 191.

111. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. at 385.

112. The famous case of *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868), arose out of an

common-law writ of habeas corpus in cases where there was no statutory writ was simply irrelevant in the context of a statutory writ that truly extended “to the constitutional limit.”

With respect to federal prisoners, then, the only question the 1867 Act left unanswered was the meaning of the phrase “within their respective jurisdictions.”<sup>113</sup> Were there, in fact, cases of federal detention where *no* federal court could issue the writ “within [its] respective jurisdiction[ ]”? With one exception,<sup>114</sup> the answer to that question rested in obscurity through the Second World War.

### III. THE *AHRENS* PROBLEM: STATUTORY JURISDICTION FOR EXTRATERRITORIAL HABEAS

#### A. *Extraterritorial Habeas After World War II*

At the end of the Second World War, the Supreme Court faced a largely unprecedented problem: the availability of habeas corpus to the thousands of individuals in U.S. custody overseas.<sup>115</sup> For obvious rea-

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attempt by Congress to repeal part of the Supreme Court’s appellate jurisdiction under the 1867 Act. *See id.* at 509. *McCardle*, however, did not have to reach the constitutional issue, since the Act repealing the Supreme Court’s appellate jurisdiction did not also repeal its “original” jurisdiction under section 14. *See Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 96 (1869) (sustaining jurisdiction under section 14). *See generally Felker v. Turpin*, 518 U.S. 651, 659–62 (1996) (summarizing the relationship between *McCardle* and *Yerger*).

113. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. at 385.

114. *Neely v. Henkel*, 180 U.S. 109 (1901), one of the so-called “Insular Cases,” is often cited for the proposition that the Suspension Clause did not apply to the “territories,” including Cuba. But *Neely* is entirely unhelpful (to either side). All that the elder Justice Harlan wrote for the Court in *Neely* was that the Suspension Clause and various other constitutional protections “have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country.” *Id.* at 122. In other words, *Neely* could not challenge his extradition for a Cuban conviction (that predated U.S. control) on the ground that the conviction violated his constitutional rights. A significant decision with respect to the law of extradition, it has little—if any—bearing on the Suspension Clause issues implicated herein.

Indeed, only one reported decision prior to the Second World War appeared to expressly reject the availability of habeas to an individual detained overseas. *See McGowan v. Moody*, 22 App. D.C. 148 (D.C. Cir. 1903). But in refusing to issue the writ in the case of a U.S. citizen detained in Guam, the D.C. Circuit also relied on the argument that the Secretary of the Navy was the improper respondent, suggesting that it might have issued the writ absent the procedural defect. *Cf. Rumsfeld v. Padilla*, 542 U.S. 426, 436 (2004) (holding that the Secretary of Defense was the improper respondent to a habeas petition filed by a U.S. citizen detained at a South Carolina Navy brig).

115. According to one contemporaneous commentator, the practice of returning U.S. citizens sentenced to lengthy prison terms abroad to the United States to serve their sentence may have helped explain the dearth of relevant case law. *See Note, Habeas Corpus Protection Against Illegal Extraterritorial Detention*, 51 COLUM. L. REV. 368, 368 n.3 (1951). Slightly more sarcastically, another writer suggested that “the exercise of criminal jurisdiction over aliens by American institutions abroad applying American law is indeed a rather peculiar phenomenon of the post-World War II period.” Douglas E. Dayton, Comment, *A Critique of the Eisentrager Case: American Law Abroad—Habeas Corpus at Home?*, 36 CORNELL L.Q. 303, 330 (1951).

sons, the absence of relevant case law put the Court in a difficult position, as it was faced with dozens—if not hundreds—of petitions from detained enemy (and friendly) prisoners by the early spring of 1946.<sup>116</sup> And although the Court was evenly divided on the question of its authority to entertain *original* habeas petitions,<sup>117</sup> it saw no defect whatsoever in exercising its constitutional appellate jurisdiction in 1946 to review the conviction by military commission of Japanese General Tomoyuki Yamashita, even though Yamashita was a noncitizen detained outside the continental United States.<sup>118</sup> The Court ultimately (and controversially) affirmed Yamashita's conviction on the merits,<sup>119</sup> but the overlooked significance of *Yamashita* is that the Court reached the merits *at all*, rather than holding that Yamashita had no right to judicial review.<sup>120</sup>

Later in 1946, in *Ex parte Betz*, the Court denied a motion for leave to file an original habeas petition brought by seven U.S. citizens detained overseas.<sup>121</sup> Justices Black and Rutledge, however, noted that they would deny the petitions without prejudice to refile in the appropriate district court, suggesting that the defect ran only to the Court's *original* jurisdiction, and not to the availability of the writ as a general matter.<sup>122</sup>

What is perhaps most telling about *Yamashita* and *Betz* is that the question of the potential extraterritorial availability of habeas corpus did not seem to bother the Court in either instance. In *Yamashita*, the Court affirmed the military commission's conviction, rendering habeas unnecessary. In *Betz*, the Court concluded that it lacked original jurisdiction to hear the petitions, but nevertheless suggested that the lower courts might not. In neither case did the Court suggest that habeas might as a general matter be unavailable, either because the petitioner was a noncitizen or because the petitioner was being held overseas (or, as in *Yamashita*, both).

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116. For summaries of these cases, and of the complicated jurisdictional issues they presented, see Vladeck, *supra* note 12, at 1506–11. The definitive accounting remains Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587 (1949).

117. See, e.g., *Everett ex rel. Bersin v. Truman*, 334 U.S. 824 (1948) (mem.). Only eight Justices participated in these cases, since Justice Jackson recused by virtue of his role as Chief Prosecutor at the Nuremberg tribunal. As a result, it was unclear at the time—and remains unclear today—whether it was the absence of a fifth vote, or the even division of the Justices, that precluded review. For more on the Court's "original" habeas jurisdiction, see Oaks, *supra* note 69.

118. See *In re Yamashita*, 327 U.S. 1, 4, 26 (1946).

119. *Id.* at 25–26.

120. *Id.*

121. 329 U.S. 672, 672 (1946) (mem.).

122. See *id.*

### B. *The Mess Ahrens Made*

Then, at the end of the 1947 Term, came *Ahrens v. Clark* and its crabbed reading of the "within their respective jurisdictions" language in the federal habeas statute to authorize jurisdiction over habeas petitions only in the district of confinement.<sup>123</sup> That is, *Ahrens* suggested that all federal habeas petitions had to be brought where the detainee was confined, rather than in an appropriate court with jurisdiction over the respondent.<sup>124</sup> Although *Ahrens* expressly reserved the question whether its holding applied in cases where the petitioner was not held in the territorial jurisdiction of any district court,<sup>125</sup> its logic appeared, however unintentionally, to divest the federal courts of statutory jurisdiction in those cases as well.<sup>126</sup> *Ahrens* thus forced the issue that the Supreme Court had otherwise been able to avoid since *Ableman* and *Tarble*: If the habeas statute did not itself authorize jurisdiction over petitions filed by detainees held outside the jurisdiction of any district court (as the district court in *Eisentrager* would soon hold<sup>127</sup>), then the question whether the statute so construed would violate the Suspension Clause was thrust to the forefront.

That fact was lost on the Court in its first meaningful post-*Ahrens* consideration of the extraterritorial availability of habeas petitions. I have written elsewhere in (nauseating) detail<sup>128</sup> about the Court's December 1948 decision in *Hirota v. MacArthur*,<sup>129</sup> but one point about *Hirota* bears emphasizing here: In cursorily denying an original habeas petition by noncitizens convicted by the Tokyo war crimes tribunal (and detained by the U.S. Army in Japan), the Court did *not* suggest that, as a general matter, the writ was unavailable to noncitizens overseas. On the contrary, although the Court was unclear as to the specific ground for its jurisdictional holding,<sup>130</sup> it was clear that its decision, however construed, rested upon the specific facts of the case, and not the general unavailability of the writ.<sup>131</sup> *Hirota*, in other words, presented the Court

123. 335 U.S. 188, 192 (1948), *overruled by* *Braden v. Thirtieth Judicial Cir. Ct. of Ky.*, 410 U.S. 484 (1973).

124. *See id.*

125. *See id.* at 192 n.4.

126. *See, e.g.,* Vladeck, *supra* note 12, at 1512-13 & nn.80-81.

127. *Eisentrager v. Forrestal*, unpublished opinion (D.D.C. Oct. 6, 1948), *reprinted in* Transcript of Record at 16-17, *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (No. 306), *rev'd*, 174 F.2d 961 (D.C. Cir. 1949), *rev'd*, 339 U.S. 763.

128. *See generally* Vladeck, *supra* note 12.

129. 338 U.S. 197 (1948) (*per curiam*).

130. *See* Vladeck, *supra* note 12, at 1518 & n.107.

131. *See, e.g., Hirota*, 338 U.S. at 198 ("We are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States. . . . Under the foregoing circumstances the courts of the United States have no power or authority to review, to affirm, set aside or annul the

with perhaps the easiest case in which to hold that the Suspension Clause did not protect habeas for noncitizens held overseas—and the Court refused to so conclude. Again, the Court did not suggest that habeas was generally available, either for noncitizens or for individuals held overseas (or both), but its refusal to take what would have been a much easier path out of the jurisdictional morass that *Hirota* presented simply cannot be ignored.<sup>132</sup>

Finally, at least with respect to citizens, the Court indicated not long after *Hirota* (and notwithstanding *Ahrens*) that extraterritorial habeas *might* be available despite the statutory problem, dismissing an original habeas petition filed by a U.S. serviceman without prejudice to refiling in “any appropriate court that may have jurisdiction.”<sup>133</sup> In that very case, the D.C. District Court subsequently *sustained* jurisdiction, suggesting, however implicitly, that *Ahrens* did not apply to U.S. citizens overseas.<sup>134</sup>

### C. *Eisentrager*

Of course, the implicit holdings and silent implications of the pre-1950 cases pale in comparison to some—if not much—of the language employed by the Supreme Court in *Eisentrager*, which rejected the availability of habeas to twenty-two German nationals seeking review of their convictions by a U.S. military commission convened in China.<sup>135</sup>

Lothar Eisentrager was one of a group of twenty-two German nationals stationed in China during the Second World War who, after Germany surrendered, continued to participate in intelligence operations on behalf of the Japanese military.<sup>136</sup> After the war, the group was taken into custody and tried by a U.S. military commission on charges that they had violated the laws of war by continuing their belligerency after the German surrender.<sup>137</sup> They were convicted and repatriated to Germany to serve their sentences at Landsberg Prison, at which point they brought habeas petitions in the D.C. District Court.<sup>138</sup> Basing its deci-

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judgments and sentences imposed on these petitioners and for this reason the motions for leave to file petitions for writs of *habeas corpus* are denied.”)

132. Nor is there any argument that the Court was trying to avoid the Suspension Clause question, for its narrower, murkier jurisdictional holding was also based upon its resolution of a constitutional question—either the scope of its constitutional appellate jurisdiction, or the scope of all federal question jurisdiction, under Article III.

133. *In re Bush*, 336 U.S. 971, 971 (1949) (mem.).

134. *See In re Bush*, 84 F. Supp. 873, 875 (D.D.C. 1949).

135. *Johnson v. Eisentrager*, 339 U.S. 763, 765, 776–78 (1950).

136. *See id.* at 765–66.

137. *See id.*

138. *See id.* at 766–67. For a comprehensive discussion of the factual and historical background, see Dayton, *supra* note 115.

sion entirely on *Ahrens*, the District Court dismissed the petitions for want of territorial jurisdiction.<sup>139</sup> The D.C. Circuit reversed.<sup>140</sup>

Writing for the appeals court, Judge E. Barrett Prettyman argued that it would be unconstitutional to read the federal habeas statute, 28 U.S.C. § 2241, to preclude *any* federal court from issuing a writ of habeas corpus to aliens detained abroad:

The question here is not whether a court, either state or federal, can exercise its judicial power within the jurisdiction of another and independent government. The question is whether it can exercise that power upon those Government officials within its territorial jurisdiction who have directive power over the immediate jailer outside the United States but acting solely upon authority of this Government. We think that it can, if that be the only means of applying the Constitution to a given governmental action.<sup>141</sup>

On appeal, faced squarely with a constitutional question that could easily have been avoided,<sup>142</sup> the Supreme Court reversed for two different—but related—reasons. First, invoking the Alien Enemy Act<sup>143</sup> as an analogy, Justice Jackson wrote that “the nonresident enemy alien, especially one who has remained in the service of the enemy, does not have . . . access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy.”<sup>144</sup> Jackson continued:

We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the

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139. *Eisentrager v. Forrestal*, unpublished opinion (D.D.C. Oct. 6, 1948), reprinted in Transcript of Record at 16–17, *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (No. 306), *rev'd*, 174 F.2d 961 (D.C. Cir. 1949), *rev'd*, 339 U.S. 763.

140. See *Eisentrager*, 174 F.2d at 968.

141. *Id.* at 967 (footnotes omitted).

142. The constitutional question could easily have been avoided if the D.C. Circuit had been more careful. The district court had found that *Ahrens* controlled, when it clearly didn't, and no earlier Supreme Court precedent filled the gap. Thus, the D.C. Circuit could simply have held that, where habeas petitions were filed by petitioners detained outside the United States, a sensible reading of the federal habeas statute permitted jurisdiction in the district court. Just two months later, Justice Douglas would suggest precisely as much in his post-hoc concurrence in *Hirota*. See *Hirota v. MacArthur*, 338 U.S. 197, 202–03 (1948) (Douglas, J., concurring).

143. 50 U.S.C. §§ 21–24 (2000). For a more detailed discussion of the Act and its application and interpretation during the Second World War, see Stephen I. Vladeck, *Enemy Aliens, Enemy Property, and Access to the Courts*, 11 LEWIS & CLARK L. REV. 963, 967–77 (2007).

144. *Eisentrager*, 339 U.S. at 765, 776.

United States.<sup>145</sup>

Notwithstanding these broad statements about the unavailability of habeas to enemy aliens detained overseas, the majority then proceeded to reach the merits of the petitioners' claims, devoting ten full pages to whether the petitioners could invoke the Fifth Amendment or the 1929 Geneva Convention as grounds for holding their trials unlawful.<sup>146</sup> Dismissing the Geneva Convention argument in a footnote,<sup>147</sup> the Court devoted careful attention to the question whether the Due Process Clause protected the petitioners, and ultimately concluded that it did not.<sup>148</sup> As such, the Court's analysis suggested that the petitions were ultimately meritless, whether there was jurisdiction to entertain them or not. Indeed, "[t]he opinion is unclear about which of [the] two rationales justified its holding that no habeas review was permissible . . . . The Court mentioned both factors and did not get into the tricky business of which was doing the work."<sup>149</sup>

Further support for the notion that the merits were central to the *Eisentrager* Court's resolution of the jurisdictional question might be derived from the final paragraph of Jackson's discussion of the availability of habeas:

[T]he doors of our courts have not been summarily closed upon these prisoners. Three courts have considered their application and have provided their counsel opportunity to advance every argument in their support and to show some reason in the petition why they should not be subject to the usual disabilities of non-resident enemy aliens. This is the same preliminary hearing as to sufficiency of application that was extended in *Quirin*, *Yamashita*, and *Hirota v. MacArthur*. After hearing all contentions they have seen fit to advance and considering every contention we can base on their application and the holdings below, we arrive at the same conclusion the Court reached in each of those cases, viz.: that no right to the writ of habeas corpus appears.<sup>150</sup>

*Quirin* and *Yamashita*, however, affirmed the denial of habeas petitions on the merits, and *Hirota* denied an "original" habeas petition on a ground other than that the writ was generally unavailable to noncitizens

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145. *Id.* at 777–78.

146. *See id.* at 781–90.

147. *See id.* at 789 & n.14.

148. *See id.* at 781–85.

149. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 *YALE L.J.* 1259, 1306 n.174 (2002); *see also* Dayton, *supra* note 115, at 322 (noting that the decision was "difficult indeed to disentangle"); *Developments in the Law—Federal Habeas Corpus*, 83 *HARV. L. REV.* 1038, 1163 n.55 (1970) ("[I]t is not clear whether reversal was on the basis of the *Ahrens* rule or on the merits of the claim.").

150. *Eisentrager*, 339 U.S. at 780–81 (citations omitted).



overseas.<sup>151</sup> Thus, whereas the majority in *Eisenrager* clearly rejected the D.C. Circuit's interpretation of the Suspension Clause, it appears that such a result rested at least largely on the absence of merit to the petitioners' claims, as opposed to a more general unavailability of habeas to noncitizens held overseas. Quite simply, if the writ protected by the Suspension Clause could not reach noncitizens outside the territorial jurisdiction of the United States then the merits should not have mattered.

The far more tenable reading of *Eisenrager* is as holding that, *because* the petitioners' claims lacked merit, the district court's interpretation of the habeas statute as precluding jurisdiction did not raise any Suspension Clause concerns.<sup>152</sup> Habeas should have been available, but only for the courts to do what the Supreme Court eventually did—deny the *Eisenrager* petitioners' claims on the merits.

#### D. *After Eisenrager: U.S. Citizens and the Suspension Clause*

Whereas *Eisenrager* held that habeas was not available to enemy aliens detained overseas—arguably because they had no rights capable of enforcement upon the merits—the Supreme Court would soon clarify that habeas *was* available for U.S. citizens detained overseas. Indeed, in those cases, the central question was not whether the detainees had rights, but whether those rights had been violated.

Thus, in *Burns v. Wilson*,<sup>153</sup> the Court affirmed the denial of a habeas petition filed by servicemen who were convicted of murder and rape, respectively, by courts-martial convened in Guam.<sup>154</sup> Writing for a plurality, Chief Justice Vinson held that the federal courts could only inquire into whether the courts-martial properly had jurisdiction over the cases, and could not review the judgments themselves.<sup>155</sup> That the courts could inquire into anything—i.e., that, after *Ahrens*, they had jurisdiction over petitions filed by U.S. citizens detained overseas—was itself significant. And yet, the plurality almost brushed over the point:

In this case, we are dealing with habeas corpus applicants who assert—rightly or wrongly—that they have been imprisoned and sentenced to death as a result of proceedings which denied them basic rights guaranteed by the Constitution. The federal civil courts have jurisdiction over such applications. By statute, Congress has charged them with the exercise of that power. Accordingly, our initial concern

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151. See *supra* notes 129–32 and accompanying text (discussing *Hirota*).

152. See generally Vladeck, *supra* note 12, at 1529–30 (further elaborating upon this view of *Eisenrager*).

153. 346 U.S. 137 (1953) (plurality opinion).

154. See *id.* at 138, 146.

155. See *id.* at 142–46.

is not whether the District Court has any power at all to consider petitioners' applications; rather our concern is with the manner in which the Court should proceed to exercise its power.<sup>156</sup>

*Burns* thus suggested that, even though the petitioners were detained outside the territorial jurisdiction of any district court, they were still entitled to habeas review of the merits of their claims, ostensibly because their claims might have merit.

After filing an opinion neither concurring in nor dissenting from the judgment in *Burns*,<sup>157</sup> Justice Frankfurter subsequently filed a more thorough statement (in the context of the Court's denial of rehearing) criticizing the plurality on a host of grounds, including its summary treatment of the jurisdictional issue.<sup>158</sup> In his words:

Both petitioners, alleging confinement in Japan and American citizenship, sought habeas corpus in the District of Columbia.

Thus there is raised squarely the question, thus far reserved by us, whether an American citizen detained by federal officers outside of any federal judicial district, may maintain habeas corpus directed against the official superior of the officers actually having him in custody.

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Petitioners have not discussed the question of jurisdiction, and the Government appears disinclined to argue it.

We should not permit a question of jurisdiction as far-reaching as this one to go by concession, or decide it *sub silentio*. I express no view on how we should determine the issue, or on what grounds, but I think that we should frankly face it, even at the risk of concluding that a legislative remedy is necessary. It is particularly important that we do so at this time when thousands of our citizens in uniform are serving overseas.<sup>159</sup>

Justice Frankfurter's angst notwithstanding, *Burns* appeared to settle the question. Even though *Eisentrager*, read together with *Ahrens*, suggested that the habeas statute did not extend to noncitizens held overseas, *Burns* came to the opposite conclusion in a case where the petitioners *were* citizens.<sup>160</sup>

156. *Id.* at 139 (footnote omitted). For the proposition that "[t]he federal civil courts have jurisdiction over such applications," Vinson cited 28 U.S.C. § 2241 and *In re Yamashita*, 327 U.S. 1, 8 (1946), even though *Ahrens* and the district court's decision in *Eisentrager* seemed to compel quite the opposite conclusion.

157. See *Burns*, 346 U.S. at 148–50 (Frankfurter, J.).

158. See *Burns v. Wilson*, 346 U.S. 844 (1953) (separate opinion of Frankfurter, J.).

159. *Id.* at 851–52 (citations omitted).

160. Cf. *Rasul v. Bush*, 542 U.S. 466, 497 (2004) (Scalia, J., dissenting) ("The constitutional doubt that the Court of Appeals in *Eisentrager* had erroneously attributed to the lack of habeas for an alien abroad might indeed exist with regard to a citizen abroad—justifying a strained

Subsequent decisions by the Supreme Court were to similar effect. In *United States ex rel. Toth v. Quarles*,<sup>161</sup> for example, the Court sustained a constitutional challenge to a conviction by court-martial brought by a U.S. citizen detained overseas, holding that the court-martial violated various of the petitioner's constitutional rights because he was no longer a serviceman at the time of his arrest.<sup>162</sup> Although Justice Reed, joined by Justices Burton and Minton, and Justice Burton, joined by Justice Minton, both filed opinions dissenting on the merits,<sup>163</sup> neither expressed concern with the Court's jurisdiction. Where there was a colorable claim on the merits, the Court again accepted, without deciding, that *Ahrens* simply did not apply.

In the ensuing decades, *Burns* and *Toth* were so read—as deciding, “sub silentio and by fiat, that at least a citizen held abroad by federal authorities has access to the writ in the District of Columbia.”<sup>164</sup> Only in the case of a noncitizen held overseas—where *Eisentrager* left unclear whether the issue was the unavailability of habeas in the abstract or the absence of substantive claims on the merits—might there be a common-law habeas claim falling outside the jurisdictional scope of § 2241.

#### IV. GUANTÁNAMO AND THE “STRUCTURAL” SUSPENSION CLAUSE

##### A. *Rasul* and Boumediene

The next time the Supreme Court would be asked to decide that question was in 2004, in *Rasul v. Bush*,<sup>165</sup> a case arising out of the detention of noncitizen “enemy combatants” at Guantánamo Bay, Cuba. With the exception of a tantalizing footnote,<sup>166</sup> *Rasul* declined to reach the merits of the Guantánamo detainees' claims, holding only that the federal habeas statute, 28 U.S.C. § 2241, does in fact confer jurisdiction upon the district courts to reach those claims, and remanding with instructions to the lower courts to do so.<sup>167</sup> On remand, two different

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construction of the habeas statute, or (more honestly) a determination of constitutional right to habeas.”).

161. 350 U.S. 11 (1955).

162. *See id.* at 17–23.

163. *See id.* at 23–44 (Reed, J., dissenting); *id.* at 44–45 (Burton, J., dissenting).

164. *Ex parte Hayes*, 414 U.S. 1327, 1328–29 (1973) (Douglas, Circuit Justice) (internal quotation marks omitted) (quoting PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 359 n.52 (2d ed. 1973)).

165. 542 U.S. 466 (2004).

166. *See supra* note 41 (citing *Rasul*, 542 U.S. at 483 n.15).

167. *See Rasul*, 542 U.S. at 475–85. As the Court held, to whatever extent *Ahrens* precluded the exercise of statutory habeas jurisdiction in *Eisentrager*, later cases, especially *Braden v. Thirtieth Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), called that holding into doubt. *See Rasul*, 542 U.S. at 475–85.

district judges reached conflicting conclusions on the merits.<sup>168</sup> Those decisions notwithstanding, the litigation has since been preoccupied with the question whether Congress can take away the statutory jurisdiction recognized in *Rasul*. After an abortive attempt to do so through the DTA,<sup>169</sup> which the Supreme Court held did not apply to pending cases in *Hamdan v. Rumsfeld*,<sup>170</sup> Congress responded with the MCA.<sup>171</sup> In sweeping terms, the Act provides that:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.<sup>172</sup>

Although the Act provides for an appeal of a military commission conviction (or “enemy combatant” determination) to the D.C. Circuit, there are serious and substantial questions as to whether that remedy is an “adequate” or “effective” substitute for habeas corpus,<sup>173</sup> particularly with respect to the petitioners’ claims under the Geneva Conventions.<sup>174</sup>

The D.C. Circuit, however, sidestepped such questions, holding in *Boumediene* that the Guantánamo detainees, by virtue of the fact that they are noncitizens detained outside the territorial United States, have no constitutional rights, including the “right” to habeas corpus.<sup>175</sup> Suggesting that “[t]he text of the Suspension Clause also does not lend itself freely to extraterritorial application,”<sup>176</sup> the court concluded that section

168. Compare *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), with *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

169. Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (to be codified in scattered sections of 10, 28 & 42 U.S.C.).

170. See 126 S. Ct. 2749, 2762–69 (2006).

171. Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28 & 42 U.S.C.).

172. *Id.* § 7(a), 120 Stat. at 2635–36 (to be codified at 28 U.S.C. § 2241(e)).

173. Compare, e.g., *Swain v. Pressley*, 430 U.S. 372, 381 (1977), with *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007) (considering the scope of the remedy provided by the MCA and the DTA). For more on the understudied question of Congress’s power to fashion alternative remedies to habeas, see Stephen I. Vladeck, *Habeas Corpus, Alternative Remedies, and the Myth of Swain v. Pressley*, 13 ROGER WILLIAMS U. L. REV. (forthcoming 2008).

174. The detainees’ Geneva claims are particularly problematic because of section 5 of the MCA, which provides:

No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

MCA § 5(a), 120 Stat. at 2631 (to be codified at 28 U.S.C. § 2241).

175. *Boumediene v. Bush*, 476 F.3d 981, 988–92 (D.C. Cir.), cert. granted, 127 S. Ct. 3078 (2007).

176. *Id.* at 992 n.11.

7 constitutionally divested it of jurisdiction.<sup>177</sup>

Dissenting, Judge Rogers focused on the nature of the Suspension Clause and the extent to which, unlike the Fourth, Fifth, and Sixth Amendments, it operates as a general, structural constraint on congressional action.<sup>178</sup> Thus, “[t]he court holds that Congress may suspend habeas corpus as to the detainees because they have no individual rights under the Constitution. It is unclear where the court finds that the limit on suspension of the writ of habeas corpus is an individual entitlement.”<sup>179</sup> Instead, Judge Rogers analogized the Suspension Clause to the Bill of Attainder and Ex Post Facto Clauses, casting the constitutional provision as a limit on the government’s authority, one that has universal application and can only be surmounted when its textual substantive prerequisites are satisfied.<sup>180</sup>

### B. *The Suspension Clause as a Structural Right*

What should be clear by now is that the difference between the majority and dissenting opinions in *Boumediene* epitomizes the distinction between the absolute view of the Suspension Clause and the qualified, merits-based view thereof. Judge Rogers viewed the Clause as an absolute and overriding limitation on Congress’s power to preclude access to the courts, one that should not vary with the circumstances. The post-*Bollman*, post-*Tarble*, post-*Eisentrager* view, on the other hand, posits that the Suspension Clause simply does not apply to non-citizens overseas because it is only implicated where habeas is unavailable for a *meritorious* claim (and noncitizens, according to the *Boumediene* majority, have no extraterritorial rights, and therefore no possible merit to their legal claims). This view, too, is predicated on the notion that the Suspension Clause is a limit—a limit on the government’s power to do away with federal jurisdiction over meritorious habeas petitions.

The reality, however, is that neither view is entirely accurate. As discussed above, the Suspension Clause was intended as an affirmative grant of authority to the federal government, in the absence of which the writ of habeas corpus, at least “as it existed in 1789,” must be available to federal prisoners *somewhere*. From the Framers’ perspective, except where validly suspended, habeas would be inviolable. The petitioner may be destined to lose on the merits—indeed, the claims may even be

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177. *See id.* at 994.

178. *See id.* at 995–97 & n.1 (Rogers, J., dissenting).

179. *Id.* at 995.

180. *Id.* at 996–97 & n.3.

frivolous—but it would be up to the courts, in the first instance, to say so.

Thus, although Judge Rogers incorrectly portrayed the Suspension Clause as a limitation on the federal government's authority (rather than as a grant of power to suspend), her opinion had at its core a premise far more analogous to that of the Framers, i.e., that the availability of habeas does not vary based upon the circumstances. Or, as Justice Souter has put it, “[t]here are not two writs of habeas corpus for some cases and for other cases. . . . [T]he rights that may be asserted, the rights that may be vindicated, will vary with the circumstances, but jurisdiction over habeas corpus is jurisdiction over habeas corpus.”<sup>181</sup>

The remaining question is whether the point of departure between these two views produces a distinction worth a difference. After all, if the *Boumediene* majority was correct that the Guantánamo detainees possess no rights capable of enforcement on the merits (a point with which I strongly disagree, but will assume for the sake of argument), the difference between Judge Randolph's view of the Suspension Clause and Judge Rogers's is the difference between a dismissal for lack of jurisdiction and a dismissal on the merits.

In a future article, I take up the broader question of which this is but a small piece—whether the Constitution protects a right of access to the courts even in cases where the plaintiff is bound to lose.<sup>182</sup> For now, though, the operative point is that it is simply incorrect to conclude, as the *Boumediene* majority did, that the Suspension Clause “does not apply” to the Guantánamo detainees because they are noncitizens outside the territorial jurisdiction of the United States. If the Suspension Clause applies to anyone, it applies to (and empowers) *Congress*. The “right” to habeas corpus is the right to nothing less than the writ as it existed in 1789 (or an adequate and effective substitute), and perhaps something far greater.<sup>183</sup> Unless the writ of habeas corpus, then, was categorically unavailable to noncitizens overseas at common law—and the absence of relevant case law does *not* itself answer this question—

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181. Transcript of Oral Argument, *supra* note 39, at 59.

182. See Stephen I. Vladeck, Access to Courts and the Separation of Powers (Nov. 26, 2007) (unpublished manuscript, on file with author).

183. The notion that the Suspension Clause protects the writ “as it existed in 1789” is only a constitutional floor. There are a number of arguments in support of the conclusion that the scope of the Clause has expanded drastically throughout American constitutional history, as (and because) the scope of the common-law writ has itself broadened. I do not mean to rehash those arguments here, although their relevance should be fairly obvious—if Congress has no power (other than the suspension power) to preclude whatever writ is protected by the common law, then identifying the contemporary parameters of the common law becomes an essential inquiry, its difficulty notwithstanding.

then the MCA interferes with the common-law writ, and can only do so if it is a valid exercise of Congress's Suspension Clause power.

## V. CONCLUSION

"After 165 years of constitutional history," one commentator observed in 1952, "one might expect that there would be few remaining areas of uncertainty as to the meaning and effect of the suspension clause. However, . . . this expectation is far from the truth."<sup>184</sup> Nor have the ensuing decades done much to provide further illumination.<sup>185</sup> Instead, what is perhaps most remarkable about the fundamental constitutional questions raised by *Boumediene* and the rest of the Guantánamo cases is that they are open questions in the first place. For as much as has been written about the Suspension Clause,<sup>186</sup> especially lately,<sup>187</sup> the answers to some of the central questions about one of the Constitution's most important provisions remain unsettled.

The central purpose of this essay has been to suggest that, at least with respect to the Suspension Clause, the contemporary debate is simply focusing on the wrong question. The Suspension Clause is unique among constitutional provisions in that it is a provision meant to secure a preexisting common-law right while identifying those circumstances where the right may be unabridged, without actually creating the right anew. Thus, the temptation to characterize the Suspension Clause as conferring a "structural right," as with the temptation to characterize the Clause as not protecting noncitizens overseas, is understandable, if misplaced.

The Suspension Clause is an affirmative grant of power to Congress to do away with the privilege of the writ of habeas corpus only in certain delineated circumstances. Where the privilege is otherwise available—i.e., at least where it would have been available in 1789, and

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184. Collings, *supra* note 47, at 335.

185. *Cf. Bartlett v. Bowen*, 816 F.2d 695, 699 (D.C. Cir. 1987) ("[I]t has become something of a time-honored tradition for the Supreme Court and lower federal courts to find that Congress did not intend to preclude altogether judicial review of constitutional claims in light of the serious due process concerns that such preclusion would raise.") (footnote omitted).

186. U.S. CONST. art. I, § 9, cl. 2.

187. It would be impossible to exhaustively list even those articles published in the last two years containing significant discussions of the Suspension Clause. For a representative sampling of recent writings, see Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007); Brian M. Hoffstadt, *The Deconstruction and Reconstruction of Habeas*, 78 S. CAL. L. REV. 1125 (2005); James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497 (2006); Steven Semararo, *Two Theories of Habeas Corpus*, 71 BROOK. L. REV. 1233 (2006); Amanda Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333 (2006); and Tor Ekeland, Note, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, of the United States Constitution and the War on Terror*, 74 FORDHAM L. REV. 1475 (2005).

probably in a broader class of cases today—the Constitution requires that some court, federal or state, be available to entertain lawsuits seeking the Great Writ. After all, as Justice Jackson suggested in a well-known 1951 speech at the University of Buffalo Law School, the “suspension of [the] privilege of the writ of habeas corpus is in effect a suspension of every other liberty.”<sup>188</sup> Such drastic action should only be possible where the Constitution expressly so provides. As a unanimous Court wrote almost a half-century ago,

Over the centuries [habeas corpus] has been the common law world’s ‘freedom writ’ by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free. We repeat what has been so truly said of the federal writ: ‘there is no higher duty than to maintain it unimpaired,’ and unsuspended, save only in the cases specified in our Constitution.<sup>189</sup>

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188. Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 *BUFF. L. REV.* 103, 109 (1951).

189. *Smith v. Bennett*, 365 U.S. 708, 712–13 (1961) (citation omitted).