



IS SUSPENSION A POLITICAL QUESTION?

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INTRODUCTION

Of late, several scholars have contended that the political question doctrine is heading toward its demise.¹ Paraphrasing Mark Twain, one might say that

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1. See, e.g., Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 244 (2002) (“The end of the classical political question doctrine is a dangerous harbinger of where the Court is headed.”); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 153, 158 (2001) (viewing *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), as “emblematic” of the Rehnquist Court’s affinity for “control[ling] all things constitutional”); Laurence H. Tribe, Comment, *Erog v. Hsub and Its Disguises: Freeing*

rumors of the doctrine's death are much exaggerated. Notwithstanding what these scholars have viewed as the Supreme Court's proclivity for "control[ling] all things constitutional,"² three members of the Court recently suggested that the political question doctrine remains very much alive and well. These Justices may have breathed new life into the doctrine, particularly as they argued that it shields from judicial review certain tools available to the political branches in waging this country's ongoing war on terrorism.

The suggestion came in *Hamdi v. Rumsfeld*,³ a case in which the Court addressed whether the government may detain an American citizen (possibly indefinitely) outside of the judicial process, as the government claimed the right to do.⁴ The Suspension Clause of the Constitution lurked prominently in the background of *Hamdi*; indeed, Justice Scalia, joined by Justice Stevens, opined in dissent that the Clause rendered Hamdi's detention unlawful and dictated his immediate release.⁵ Justice Scalia further suggested that if Congress had suspended the writ of habeas corpus following the September 11 attacks, the judiciary could not have reviewed the constitutionality of such an act.

The Suspension Clause is one of the few express "emergency" provisions in our Constitution. It provides: "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."⁶ What precisely the Clause protects from suspension has invited to date scarce judicial discussion and authoritative guidance. Instead, this issue has for the most part been debated among legal scholars.⁷ But assuming, as most do, that the Clause protects some core habeas writ in the absence of a valid suspension, when and how the writ may be suspended takes on great importance.

Post-September 11, debating the suspension power is no longer the exclusive province of academics. Following the devastating September 11 attacks, the Bush Administration apparently asked Congress to suspend the writ of habeas corpus in some fashion.⁸ Five years later, this country is waging a

Bush v. Gore from Its Hall of Mirrors, 115 HARV. L. REV. 170, 299, 304 (2001) (lamenting that the Supreme Court did not "sit . . . out" *Bush v. Gore* and urging "a return to the contextual self-awareness that *Marbury* displayed").

2. Kramer, *supra* note 1, at 153.

3. 542 U.S. 507 (2004).

4. *See id.* at 509 (holding that Congress had authorized the detention of citizens captured on the battlefield as part of the government's response to the September 11 attacks, but that a citizen-detainee must be permitted the opportunity to challenge enemy combatant designation).

5. *See id.* at 573 (Scalia, J., dissenting) (concluding that the detention of an American citizen without formal charges requires suspension of the writ by Congress).

6. U.S. CONST. art. I, § 9, cl. 2.

7. *See infra* note 28 (detailing scholarly debate); *see also* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1289-93 (5th ed. 2003).

8. *See infra* note 80.

war on terrorism of indefinite duration. The potential for additional terrorist attacks on American soil is unfortunately all too real,⁹ and there is good reason to believe that another attack would be met with invocation of the suspension power by Congress. Accordingly, whether the judiciary could review the lawfulness of any such suspension could be one of the most important legal issues to arise out of the war on terrorism.

Imagine, for example, that Congress suspends the writ of habeas corpus with respect to “all known or suspected terrorists” or individuals of a particular ethnicity or religious affiliation. Could the judiciary review the constitutionality of the suspension or, to use the terminology of *Baker v. Carr*,¹⁰ would such a case present a nonjusticiable “political question”? What if Congress suspends the writ nationwide to address a localized “Rebellion” or suspends the writ to address an “Invasion” of illegal immigrants? How one answers these questions matters a great deal, if for no other reason than once suspension is executed lawfully, the courts are effectively shuttered and “the Government is entirely free from judicial oversight.”¹¹

In *Hamdi*, Justice Scalia suggested that the courts could not review an exercise of the suspension power to ensure that it followed from lawful premises.¹² In a separate opinion, Justice Thomas registered his strong agreement with the proposition.¹³ These Justices were not writing on a blank slate in addressing this issue. Indeed, several prominent early jurists offered similar views on this question, starting with Chief Justice John Marshall,¹⁴ the author of the Court’s maiden discussion of the political question doctrine,¹⁵ as well as Justice Story¹⁶ and Chief Justice Taney.¹⁷

Given the conventional view that suspension presents a nonjusticiable political question, one might be inclined to accept the matter as settled. This would be a mistake. Further scrutiny is warranted for several reasons. To begin, there is no settled authority on the justiciability of suspension, and the handful of jurists who have expressed an opinion on the question have done so cursorily, offering little more than an institutional hunch as a basis for their

9. Some commentators have predicted that “[t]errorist attacks will be a recurring part of our future.” Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1029 (2004).

10. 369 U.S. 186 (1962).

11. *Hamdi*, 542 U.S. at 564 (Scalia, J., dissenting).

12. *See id.* at 577-78 (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1336, at 208-09 (Boston, Hilliard, Gray & Co. 1833)). Justice Stevens joined Justice Scalia’s opinion without reservation.

13. *See id.* at 594 n.4 (Thomas, J., dissenting).

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

15. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (“Questions, in their nature political, . . . can never be made in this court.”).

16. *See* 3 STORY, *supra* note 12, § 1336.

17. *See Ex parte Merryman*, 17 F. Cas. 144, 152 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.).

conclusions. In fact, to date, no jurist or scholar has explored this matter in any detail. Here, I seek to fill that void and make a case for why the conventional wisdom is mistaken and suspension should not be viewed as a political question.

By its very terms, the Suspension Clause requires that there be an “Invasion” or “Rebellion” before Congress may suspend the writ. Congress’s suspension power also is limited by external constitutional restraints, such as the Fifth Amendment’s Due Process Clause and likely its equal protection component.¹⁸ An argument that suspension is a nonjusticiable political question would lead to the result that suspension is a matter on which the Constitution imposes such restraints, but that many, if not all, of those restraints are not subject to judicial enforcement. This conclusion should be rejected because it is at odds with the Great Writ’s heritage and place in our constitutional structure and because it would have troubling ramifications for the separation of powers and the institution of judicial review.

As background, Part I begins with an exploration of the ongoing debate over the meaning of the Suspension Clause and a review of historical exercises of the suspension authority in this country. Part II consults the Constitutional Convention and ratification debates as well as prior commentary to ascertain what has been said to date with respect to the justiciability of suspension. Part III begins the analysis of whether suspension should be viewed as nonjusticiable by reviewing the existing debate over the political question doctrine to see what guidance may be had from the Supreme Court’s decisions in this area¹⁹ as well as the academic literature.²⁰ In exploring the various

18. The Article will use the phraseology often invoked in describing limitations on congressional control over the judicial power: that of “internal” and “external” limitations. See Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 900 (1984); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 134 (1981). By internal limitations, I refer to the conditions of the Suspension Clause itself; by external limitations, I refer to limitations on the suspension authority that reside elsewhere in the Constitution.

19. The doctrine has provoked what may be charitably referred to as somewhat inconsistent Supreme Court pronouncements on its scope. See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam) (finding justiciable a challenge to the vote-counting procedures in a presidential election); *Nixon v. United States*, 506 U.S. 224 (1993) (declining to reach merits of challenge to Senate impeachment procedures); *Goldwater v. Carter*, 444 U.S. 996 (1979) (Rehnquist, J., concurring in the judgment) (assigning political question status, by four members of the Court, to the President’s authority to terminate a treaty); *Powell v. McCormack*, 395 U.S. 486 (1969) (reviewing a congressional determination whether one of its members was qualified to hold office under Article I, section 5); *Baker v. Carr*, 369 U.S. 186 (1962) (reaching equal protection challenge to apportionment scheme); *Colegrove v. Green*, 328 U.S. 549 (1946) (declining to reach challenge to state apportionment scheme); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (declining to resolve trespass claim that turned on a determination of which of two competing state governments was legitimate, on the basis that Guarantee Clause cases are nonjusticiable). Some eighty years after one commentator observed that “the Supreme Court has not yet worked out a satisfactory

models that have been proposed for defining the doctrine or rejecting it wholesale, however, it quickly becomes apparent that they advance our inquiry only so far. Although the academic debate raises many of the larger separation of powers concerns that must animate the analysis, ultimately seeking to determine the justiciability of suspension by referencing these models only highlights many of their larger failings. Part III concludes, accordingly, by arguing that resolving the justiciability of suspension instead requires narrowing our focus to the purpose and history of the Great Writ as well as how it fits within our broader constitutional scheme.

Part IV therefore explores the relationship between the Suspension Clause and other constitutional safeguards as well as the unique status of the writ of habeas corpus as a constitutional remedy, concluding that these inquiries demonstrate why suspension should not be viewed as a political question. As it came to this country from England, the Great Writ offers the judicial remedy of discharge to those deprived of their liberty without any—much less due—process. Where the Executive detains someone without affording that party an impartial forum to test the lawfulness of the detention, this act unquestionably constitutes a deprivation of liberty without due process. Indeed, the historic link forged between the habeas remedy and the realization of the most fundamental of due process guarantees is so strong that in the absence of a Suspension Clause the very same remedy likely still would be mandated by the Constitution. Thus, a suspension predicated on invalid grounds must be understood to violate the core ideals of due process. That is, the internal predicates required for a valid suspension (the existence of a “Rebellion or Invasion”) are inextricably intertwined with the core due process right to seek impartial review of the Executive’s justification for a prisoner’s detention. This relationship, in turn, has important ramifications for the justiciability analysis. To the extent that a suspension is predicated on invalid premises (the absence of a “Rebellion or Invasion”), an individual subject to the Due Process Clause’s protections and held extrajudicially will have a viable due process claim to press in the courts. In such a case, if a court declined to consider granting the writ, it would go beyond merely assigning political question status to the

answer” with respect to “the extent or the scope of the application of the standard of ‘political questions,’” Maurice Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 363 (1924), we are still in the same boat.

20. See, e.g., JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 2-3, chs. 2-3 (1980) (arguing that the courts should save their institutional capital for individual rights cases as opposed to structural disputes); Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (setting forth a “prudential” view of the political question doctrine); Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597 (1976) (arguing that there is no real political question doctrine); Martin H. Redish, *Judicial Review and the “Political Question,”* 79 NW. U. L. REV. 1031, 1033 (1985) (arguing against any form of the political question doctrine); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (setting forth the “classical” political question doctrine).

Suspension Clause's internal limitations. By leaving the prisoner's due process claim unprotected, the court would assign it the same status as well. And this simply cannot be squared with our constitutional tradition, which places protection of due process rights at the heart of the judicial role.

In addition, special problems are presented where Congress improperly withdraws the Great Writ—the only meaningful judicial remedy for unconstitutional deprivations of liberty. Strictly speaking, suspension itself does not withdraw jurisdiction from the courts, but displaces an important judicial tool for remedying unconstitutional deprivations of liberty. Thus, an act of suspension gives the custodian justification, when asked by a court, for refusing to set forth the precise cause of a prisoner's detention. Where a suspension follows from invalid premises, however, a court that accepts a custodian's blanket reliance on the suspension, and inquires no further into the legality of the detention, itself plays a role in the violation of the detainee's fundamental right to due process. In so doing, the court permits Congress to employ the courts "as a means to an [unconstitutional] end," something that the Court made clear long ago in *United States v. Klein*.²¹ Congress may not do.

Skeptics nonetheless will question the idea that the internal limitations of the Suspension Clause are judicially enforceable. As explored in Part V, however, from the time of Chief Justice Marshall to the recent *Hamdi* decision, the Supreme Court consistently has reserved a role for itself to review exercises of the war power in certain contexts, albeit often deferentially. Indeed, in the analogous martial law context, the Court has made clear that "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."²² The same should hold true with respect to exercises of the suspension power.

Finally, Part VI discusses an important question left in the wake of this analysis. Once it is accepted that the judiciary may enforce internal and external limitations on the suspension power, there remains the matter of how that policing is undertaken. In particular, when enforcing the internal limitations, courts will have little precedent on which to draw in choosing the appropriate measure of scrutiny. There may be reason to accord the political branches considerable deference in this realm, but if the availability of habeas corpus is a fundamental right (as its specific inclusion in the Constitution suggests), should that warrant a higher level of scrutiny where the right is displaced? (Deference, after all, gave us *Korematsu*.²³) I do not seek to make a

21. 80 U.S. (13 Wall.) 128, 145 (1871) (concluding that a statute passed by Congress that conflicted with the presidential pardon power and restricted the judicial power to decide pending compensation cases was unconstitutional); see also Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2549 (1998) (exploring this aspect of *Klein*).

22. *Sterling v. Constantin*, 287 U.S. 378, 401 (1932) (emphasis added).

23. *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the exclusion of persons of Japanese descent from parts of the western United States during World War II).

case in favor of one approach or the other, but instead contend that it is on this question that future discussion of the suspension authority should focus, not on the question of justiciability.

In the end, I contend that suspension does *not* present a political question, at least insofar as that assertion would be advanced to shield the constitutionality of an exercise of the suspension authority entirely from judicial review. As the war on terrorism continues with no end in sight, the occasion soon may come for the Court to resolve this matter. In such an event, the Court should recognize that suspension is indicative of many issues viewed generally as political: that certain legislative decisions are in some respects the culmination of political choices does not preclude a role for the courts in reviewing those choices for compliance with our constitutional values.

I. THE HISTORY AND MEANING OF SUSPENSION

Article I, Section 9, Clause 2 of the Constitution provides: “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.”²⁴ It is fair to observe that “[t]he suspension clause, so simple in appearance, is fraught with confusion.”²⁵ The Clause itself does not purport expressly to create a right to habeas corpus review; in the same vein, it offers little in the way of detail as to what precisely it protects. We have made it this far in our constitutional history without settling on the scope of its protections in large part because exercises in suspension have been few in number and of limited duration.

The Framers apparently believed in *some* inherent right to the writ of habeas corpus or at least assumed that it would be regularly available as a well-established common law writ. One is left to imply as much from the Suspension Clause, an affirmative habeas right being nowhere enumerated in the Constitution.²⁶ But even if one accepts this broad premise, which is controversial to be sure, questions abound as to the meaning of the Suspension

24. U.S. CONST. art I, § 9, cl. 2. The writ of habeas corpus is, as Chief Justice Marshall described it, a “high prerogative writ . . . the great object of which is the liberation of those who may be imprisoned without sufficient cause.” *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830); *see also Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 101 (1868) (observing that the Suspension Clause embodies the Framers’ intent “that every citizen may be protected by judicial action from unlawful imprisonment”). The First Congress provided for a general writ of habeas corpus in the Judiciary Act of 1789, Ch. 20, § 14, 1 Stat. 73, 81-82. Provision for the general writ is now found at 28 U.S.C. § 2241(a) (2000).

25. *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1263 (1970) [hereinafter *Developments*].

26. Proposals to include an express affirmation of the right to habeas corpus review never made it into the final draft of the Constitution. *See id.* at 1266-67. Historically, the most significant form of the writ and that which is most relevant to the Suspension Clause is the writ of habeas corpus ad subjiciendum. This writ by design tests the legality of a petitioner’s detention and is often referred to as “the Great Writ.”

Clause. It remains unsettled, for example, whether the right to habeas as conceived by the Framers and protected by the Suspension Clause guarantees some form of judicial review of the detention of both federal and state prisoners, or solely federal prisoners, which seem to have been on the minds of the Framers.²⁷ Nor have the courts resolved whether the assumed right to habeas review encompasses anything beyond a small core of traditionally protected claims: namely, those attacking the jurisdictional competency of a convicting court or the legal sufficiency of a detention, where the detained is restrained by a nonjudicial order.²⁸ It is likewise unclear whether the Clause “limits congressional authority to withdraw federal habeas jurisdiction if it is once conferred; or whether it merely restricts congressional authority to forbid the exercise of habeas corpus jurisdiction by *state* courts.”²⁹ Finally, there exists a debate over whether Congress, by expanding the scope of the writ, concomitantly expands the scope of the Clause’s protections.³⁰

27. Notably, Congress did not “extend access to the writ to all prisoners held under *state* authority” until 1867. FALLON ET AL., *supra* note 7, at 1291. Still, some scholars have contended for a right of state prisoners to collateral habeas review. *See, e.g.*, RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 7.2d, at 378 (5th ed. 2005) (arguing that state prisoners enjoy this right based on the Suspension Clause and the Fourteenth Amendment); Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 868 (1994) (arguing the same).

28. Scholars continue to debate the origins of the Suspension Clause and what it protects. *Compare* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 n.244 (1991) (“[The Suspension Clause] is most plausibly understood as extending only to cases of extrajudicial detention by federal authority, and thus does not guarantee a post-conviction remedy for state prisoners.”), Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 170 (1970) (“It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did.”), and Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 466 (1963) (contending that historical practice at the time of the Founding did not permit collateral review of criminal convictions but only of the competency of the tribunal), *with* James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2062-65 (1992) (finding support in nineteenth-century decisions for a broader conception of the habeas right to include review of some criminal convictions), and Steiker, *supra* note 27 (contending that the Suspension Clause, read with the Fourteenth Amendment, “mandate[s] federal habeas review of the convictions of state prisoners”).

29. FALLON ET AL., *supra* note 7, at 353; *accord* WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 126-56 (1980) (arguing that the Clause was designed to prevent congressional abridgement of state habeas remedies); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1509 & n.329 (1987) (contending that the Suspension Clause was intended to protect state common law habeas remedies from federal abridgement).

30. Justice Scalia has complained that his colleagues are deciding cases based on such a view. *See* *INS v. St. Cyr*, 533 U.S. 289, 342 (2001) (Scalia, J., dissenting) (criticizing the majority for transforming the Clause into a “one-way ratchet that enshrines in the Constitution every grant of habeas jurisdiction”); *id.* at 301, 305 (majority opinion) (positing

What little judicial guidance we have on these matters comes mainly from Chief Justice Marshall's opinion in *Ex parte Bollman*.³¹ There, some of the Chief Justice's language suggested that the Suspension Clause does not itself guarantee a right to habeas review in the courts but instead leaves the decision whether and to what extent to provide for habeas in the first instance largely to the discretion of Congress. *Bollman* posited that "the power to award the writ by any of the courts of the United States . . . must be given by written law."³² Building on this idea, Justice Scalia has suggested that the Clause does not "guarantee[] any particular habeas right that enjoys immunity from suspension" but promises only that whatever right is granted by the legislature may not be suspended temporarily except in cases of rebellion or invasion.³³

Notably, *Bollman* continued with the observation that the First Congress "must have felt, with peculiar force, *the obligation* of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted."³⁴ Here, Marshall planted the seeds of a middle-ground position: the Constitution does not by its own terms grant habeas jurisdiction (as, for example, it confers original jurisdiction upon the Supreme Court); at the very least, however, it does oblige Congress to give "life and activity" to the writ by permitting habeas review of core cases in some court.³⁵ This understanding of the Suspension Clause makes sense of other constitutional provisions. After all, as one scholar has noted, "the habeas corpus remedy is essential to the full realization of . . . other [constitutional] guarantees, most particularly that of due process of law in the Fifth Amendment."³⁶ Likewise, this understanding draws support from the writ's English heritage, for "the development of the writ in England was closely

that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789,'" while adding that curtailments on later expansions of the writ might also pose "serious" constitutional problems).

31. 8 U.S. (4 Cranch) 75 (1807).

32. *Id.* at 94. Building on this idea and drawing upon the Madisonian Compromise and the omission of an express habeas right in the Constitution, some have questioned whether the Suspension Clause requires Congress to enact any habeas jurisdiction in the first instance. See, e.g., Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 344 (1952).

33. *St. Cyr*, 533 U.S. at 338 (Scalia, J., dissenting).

34. 8 U.S. (4 Cranch) at 95 (emphasis added); accord *St. Cyr*, 533 U.S. at 300, 305 (observing that "a serious Suspension Clause issue would be presented" if the Court interpreted the deportation statute to preclude judicial review of questions of law).

35. In *Bollman*, the Court interpreted section 14 of the Judiciary Act of 1789 to confer both the power to grant the writ in matters over which courts and judges already possessed jurisdiction and also to authorize an independent cause of action in habeas corpus. See FALLON ET AL., *supra* note 7, at 1286.

36. David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 64 (2006).

linked with the need to make effective the guarantees of the Magna Carta, especially that of due process of law.”³⁷

It is well beyond the purview of this Article to explore in detail the difficult questions respecting the scope and meaning of the Suspension Clause. It will serve our purposes to presume that this “middle-ground” reading of *Bollman* is the best reading and that the Suspension Clause obliges Congress to provide for a habeas remedy in a range of core cases in the absence of a valid suspension of the writ.³⁸ As explained below, moreover, the relationship between the Great Writ and core due process values strongly supports such a reading.³⁹ With respect to the paradigmatic core case, I have in mind federal prisoners detained extrajudicially by the Executive, the scenario most implicated by the ongoing war on terrorism. (To simplify the case even further, assume that our federal prisoner is an American citizen who was detained domestically and is held on American soil.⁴⁰) There is good reason to view these cases as implicating the core of the writ’s protections, for at the time of the Founding, “the use of habeas corpus to secure release from unlawful physical confinement . . . was . . . an integral part of our common-law heritage.”⁴¹

Although the Supreme Court has never spoken as a full Court to the issue, it is widely thought that only Congress can suspend the writ.⁴² Given the location of the Suspension Clause in Article I, which “vest[s] in . . . Congress . . . all legislative powers herein granted” and imposes well-accepted limitations

37. *Id.*

38. Perhaps because the Framers did not mandate the creation of inferior federal courts, I should go no further than presuming that state courts will be available to our paradigmatic habeas petitioner in the absence of a valid suspension. But the analysis assumes for now that a suspension of the writ will displace the remedy in both federal *and* state courts. I will return to discuss the matter further below. *See infra* Part IV.C. In all events, the state courts will be open to federal prisoners in the event of a suspension only insofar as a congressional suspension does not or could not foreclose access to the state courts by such petitioners. *Cf. Tarble’s Case*, 80 U.S. (13 Wall.) 397 (1871) (holding that state judges may not grant habeas corpus petitions brought by federal prisoners). I will return as well to say an additional word on the potential importance of the source of the habeas jurisdiction in the first instance. *See infra* note 338.

39. *See infra* Part IV.A.

40. In the Court’s recent *Hamdan v. Rumsfeld* decision, Justice Scalia opined that petitioners who are enemy aliens detained abroad have “no rights under the Suspension Clause.” 126 S. Ct. 2749, 2818 (Scalia, J., dissenting). The majority did not address this question.

41. *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973). My own view is that the Clause promises at least this much. *See id.* (observing that “[t]he writ was given explicit recognition in the Suspension Clause of the Constitution . . .”); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1398 (1953) (“Habeas corpus has a special constitutional position.”); *id.* at 1397 (discussing *Bollman*).

42. The original proposal for a habeas clause advanced at the Constitutional Convention mentioned Congress expressly. *See Developments, supra* note 25, at 1264 (citing 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 341 (1911)).

on Congress's authority, this conclusion seems to be on point.⁴³ President Jefferson apparently thought so, for he acquiesced when Congress rejected his recommendation that it suspend the writ during the Burr conspiracy.⁴⁴ The clearest judicial pronouncement on the question came in Chief Justice Taney's opinion in *Ex parte Merryman*, in which he opined that the suspension authority clearly falls within Congress's purview.⁴⁵ President Lincoln, as is well known, did not agree with this view and suspended the writ on his own initiative several times.⁴⁶ Likewise, he ignored Chief Justice Taney's command in *Merryman* that a federal prisoner detained pursuant to presidential order be produced.⁴⁷ Congress defused the controversy with its subsequent delegation to Lincoln of the authority to suspend the writ.⁴⁸ Although it is hardly obvious that Congress may delegate the suspension authority to the Executive,⁴⁹ the few instances of suspension in this nation's history have each followed pursuant to congressional delegations of the power.

43. U.S. CONST. art. I, § 1; *see also* Ackerman, *supra* note 9, at 1053 (“[P]lacement [of the Clause in Article I] suggests that legislative consent is required for a suspension of habeas”); Collings, *supra* note 32, at 344-45; *Developments*, *supra* note 25, at 1264 (observing that the English practice, on which the Framers surely drew, placed the power of suspension in Parliament, and noting that the Massachusetts suspension during Shay's Rebellion followed from a legislative act).

44. *See* Collings, *supra* note 32, at 340.

45. 17 F. Cas. 144, 151-52 (C.C.D. Md. 1861) (No. 9487). The Chief Justice highlighted the placement of the Suspension Clause in Article I, which is “devoted to the legislative department of the United States, and has not the slightest reference to the executive department.” *Id.* at 148; *see also In re Kemp*, 16 Wis. 359 (1863) (holding that the President may not suspend the writ). There is a debate over whether the petition in *Merryman* was directed to Taney in his capacity as a Circuit Justice or as Chief Justice, which is summarized in Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 90 n.27 (1993).

46. *See infra* note 56 (citing one proclamation). For a defense of Lincoln's actions as addressing an emergency during a period when Congress was not in session, consult Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1269-71 (2004). *See also* *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (suggesting that “in a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear he is an imminent threat to the safety of the Nation and its people . . .”).

47. *See Merryman*, 17 F. Cas. at 148; *see also infra* note 121.

48. *See* Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755. The 1863 Act provided: “[D]uring the present rebellion, the President . . . , whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof.” *Id.*

49. To be sure, many exercises of the war power follow under delegations of this sort. Court decisions, however, have increasingly called into question delegations that depart from the formal constitutional structure. *See, e.g.,* *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding statute improper that placed executive functions with employee potentially subject to congressional influence); *INS v. Chadha*, 462 U.S. 919 (1983) (holding legislative veto provisions incompatible with the Constitution's provision for the lawmaking process).

The many questions going to the scope and meaning of the Suspension Clause remain unsettled largely because history has witnessed few attempts to suspend the writ in this nation. This trend stands in stark contrast to the more common suspension of habeas corpus in England during the late seventeenth and eighteenth centuries. Parliament suspended the Habeas Corpus Act of 1679⁵⁰ numerous times during this period, usually with respect to a limited class of persons who were thought to be plotting against the king.⁵¹ Suspensions occurred in 1688, 1696, 1714, 1722, 1744, and again in the colonies during the American Revolution.⁵²

By contrast, in keeping with its rejection of Jefferson's effort to secure suspension to deal with the Burr conspiracy,⁵³ "[o]nly in the rarest of circumstances has Congress seen fit to suspend the writ."⁵⁴ During the Civil War, Congress enacted its first statute authorizing suspension, empowering the Executive to suspend the writ as necessary to advance the war effort.⁵⁵ As noted above, President Lincoln did not await congressional delegation of the authority before proclaiming several suspensions of the writ.⁵⁶ Under the Suspension Act of 1863, Lincoln announced additional proclamations of suspension.⁵⁷ Notably, in the 1863 Act, Congress reserved a measure of judicial review over the suspension authority. It required, for example, that lists of those detained be provided to the local federal district court and directed the

50. 31 Car. 2, c. 2 (Eng.).

51. "[S]uspension in England was a legislative enactment which caused the Habeas Corpus Act to cease to operate, allowing confinement without bail, indictment, or other judicial process. The end result was to deny the right to trial by jury." Collings, *supra* note 32, at 340.

52. *See id.* at 339 & nn.23-26 (collecting citations to acts of suspension and listing additional occasions on which Parliament suspended the writ). Additionally, after the Revolution, the Massachusetts legislature suspended the writ during Shay's Rebellion in 1786-87. *See* Act of Nov. 10, 1786, ch. 10, 1786 Mass. Acts & Laws 510. Other state legislatures authorized suspensions during the confederation period as well. *See* DUKER, *supra* note 29, at 142.

53. *See* 16 ANNALS OF CONG. 402-25, 527-35 (1807). The Senate passed a bill suspending the writ for three months with respect to all persons "charged on oath with treason, misprision of treason, or other high crime or misdemeanor." *Id.* at 402. The House failed to enact the bill. *See id.* at 527-35.

54. *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (O'Connor, J.) (plurality opinion).

55. *See* Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755.

56. *See, e.g.*, Proclamation No. 1, 13 Stat. 730 (Sept. 24, 1862). Lincoln defended his unilateral suspensions of the writ in a message to Congress. *See* Paulsen, *supra* note 46, at 1265 (replicating message). There are also suggestions that then-General Andrew Jackson unilaterally suspended the writ during the War of 1812, *see* DANIEL FARBER, LINCOLN'S CONSTITUTION 160 (2003), and that President Andrew Johnson suspended the writ with respect to a conspirator involved with the assassination of President Lincoln, *see* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 165 (1998). For a narrative of General Jackson's imposition of martial law during the War of 1812, consult Abraham D. Sofaer, *Emergency Power and the Hero of New Orleans*, 2 CARDOZO L. REV. 233, 242-49 (1981).

57. *See, e.g.*, Proclamation No. 7, 13 Stat. 734 (Sept. 15, 1863).

courts to order release of a prisoner where the grand jury failed to indict and the prisoner took an oath of allegiance to the Union.⁵⁸ In all events, during the Civil War, Union forces detained thousands of individuals, many of whom were detained during the years preceding Congress's delegation of the power to suspend.⁵⁹

The three remaining episodes of congressional authorization of suspension likewise came pursuant to a delegation of the authority. In each of these three episodes, Congress limited its authorization to a confined geographic area. First, in the Ku Klux Klan Act of 1871, Congress authorized President Grant to suspend the writ as needed to address the lawless conditions wrought by the Klan in southern states.⁶⁰ The 1871 Act detailed the conditions that would justify suspension. For example, Congress authorized the President to use the power to address the Klan where "organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State"⁶¹ Congress also expressly limited the duration of its delegation, providing that "the provisions of this section shall not be in force after the end of the next regular session of Congress."⁶² Upon learning that nine counties in the South Carolina upcountry effectively were in a state of rebellion, Grant invoked his authority under the 1871 Act and suspended the writ to aid federal efforts to root out the Klan in that area.⁶³ Major Lewis Merrill's troops "responded with a massive round-up of

58. See Act of Mar. 3, 1863, ch. 81, § 2, 12 Stat. 755, 755-56.

59. See generally, e.g., MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* (1991) (detailing the suspensions that occurred during the Civil War).

60. See Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 13, 14-15.

61. *Id.* Congress passed the 1871 Act to address, among other things, the "wave of murders and assaults . . . launched against both blacks and Union sympathizers" by members of the Klan, *District of Columbia v. Carter*, 409 U.S. 418, 425 (1973), and "the unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others," *id.* at 425-26 (emphasis added). See also Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872*, 33 EMORY L.J. 921, 925 (1984) (noting that local law enforcement undermined federal efforts to restore order to the region prior to the suspension of the writ); Lou Falkner Williams, *The Constitution and the Ku Klux Klan on Trial: Federal Enforcement and Local Resistance in South Carolina, 1871-72*, 2 GA. J.S. LEGAL HIST. 41, 50 (1993) ("Klan brutality reached fearsome proportions in nine counties of the upcountry [of South Carolina] [M]asked riders rode almost nightly . . . terrorizing black families until they were forced to sleep in the woods and swamps in the dead of winter for fear of their lives."). Debates leading up to enactment of the law were "replete with references to the lawless conditions existing in the South in 1871." *Monroe v. Pape*, 365 U.S. 167, 174 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

62. Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. at 15.

63. See A Proclamation [of Oct. 17, 1871], in 7 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 136-39 (J. Richardson ed., 1899); see also Hall, *supra* note 61, at 925. During this period, President Grant also imposed martial law on over forty counties in the region. See Ackerman, *supra* note 9, at 1086 n.142.

suspects,”⁶⁴ a response that “would have been impossible if normal procedural safeguards had been honored.”⁶⁵ Most of those captured were then indicted on various federal charges.⁶⁶

Second, in a 1902 Act, Congress authorized the Governor of the Philippines Territory to suspend the writ of habeas corpus as needed to address rebellion, insurrection, or invasion therein.⁶⁷ Shortly thereafter, the Governor suspended the writ in two provinces for a period of approximately nine months.⁶⁸ He did so expressly to address an “open insurrection” by certain organized bands of *ladrones* against authorities in the provinces, which were experiencing a breakdown of the judicial process due to “a state of insecurity and terrorism among the people.”⁶⁹ Those arrested were “detained to quell the insurrection and to prevent the further perpetration of banditry on the people.”⁷⁰

Finally, in the Hawaii Organic Act of 1900, Congress enacted a broad authorization granting the governor of the Hawaiian Territory the power to suspend the writ as needed to address threats of rebellion or invasion in the territory.⁷¹ Under the Act, any suspension by the governor was to remain in effect only “until communication can be had with the President and his decision thereon made known.”⁷² It was not until the bombing of Pearl Harbor in December of 1941, however, that the governor exercised his powers under the Act. Immediately following the bombing (indeed, on that very afternoon), he

64. Hall, *supra* note 61, at 925.

65. Williams, *supra* note 61, at 53; *see also id.* at 55 (noting that hundreds more Klan members surrendered to federal authorities).

66. *See* LOU FALKNER WILLIAMS, *THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS: 1871-1872*, at 49, 56, 61 (1996); *see also* Williams, *supra* note 61, at 53 (“Taking confessions and properly charging the suspects overwhelmed the U.S. attorneys and the cavalry officers who assisted them for weeks thereafter.”). President Grant later granted clemency and pardons to Klansmen captured in the South Carolina efforts. *See* WILLIAMS, *supra*, at 125.

67. *See* Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 691, 692. Specifically, the Act provided that the writ “may be suspended by the President, or by the governor, with the approval of the Philippine Commission, wherever during such period the necessity for such suspension shall exist.” *Id.*

68. *See* Fisher v. Baker, 203 U.S. 174, 179-81 (1906).

69. *Id.* at 179-80 (noting that the Governor had concluded that “there exists a state of insecurity and terrorism among the people which makes it impossible in the ordinary way to conduct preliminary investigations before justices of the peace and other judicial officers”).

70. Estelito P. Mendoza, *The Suspension of the Writ of Habeas Corpus: Suggested Amendments*, 33 PHIL. L.J. 630, 632 (1958); *see id.* (“To legally detain them, certain legal requirements had to be satisfied. But conditions then existing did not permit compliance with such requirements. Hence, the suspension.”).

71. Hawaii Organic Act, ch. 339, § 67, 31 Stat. 153 (1900). The Act authorized the territorial governor to suspend the writ “in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it.” *Id.*

72. *Id.*

suspended the writ of habeas corpus and declared martial law on the islands.⁷³ President Roosevelt quickly approved the Governor's actions.⁷⁴ Military government took over all affairs in the territory, including the courts. "Trial by jury and indictment by grand jury were abolished" during this period.⁷⁵ Likewise, most if not all criminal defendants were tried before military tribunals,⁷⁶ and military authorities detained some number of citizens for subversive activities without bringing criminal charges against them.⁷⁷ A transition back to civil law began in 1943,⁷⁸ culminating in a 1944 Presidential Proclamation restoring the privilege of the writ and terminating martial law.⁷⁹

Since the time of World War II and the suspension of the writ in the Hawaiian Territory, the idea of suspension has resided largely outside the public discourse. Such was the case at least until the events of September 11, 2001. Circulated reports suggested that the Bush Administration proposed some form of suspension as part of the post-September 11 legislation that it sent to the Hill.⁸⁰ As the war on terrorism continues unabated some five years later and terrorism continues to be an ever-present concern,⁸¹ the possibility that Congress will enact some limited form of suspension no longer seems fanciful. If anything, the prospect seems all the more likely in light of the Supreme

73. See *Duncan v. Kahanamoku*, 327 U.S. 304, 307-08 (1946); Garner Anthony, *Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii*, 31 CAL. L. REV. 477 app. at 507 (1943) (reprinting full text of the Proclamation).

74. See *Duncan*, 327 U.S. at 308 & n.2; *id.* at 348 (Burton, J., dissenting); Anthony, *supra* note 73, at 478 (detailing communications between Territorial Governor Poindexter and President Roosevelt).

75. *Id.* at 481.

76. See *Ex parte Duncan*, 146 F.2d 576 (9th Cir. 1944) (detailing trial before military officer of two American citizens residing in Hawaii); *id.* at 579 (noting that "because of the prohibition against the assembling or empanelling of juries [the courts] were wholly disabled from trying criminal cases in the constitutional sense").

77. For details of three habeas corpus actions initiated on behalf of citizens detained while not charged criminally, consult Anthony, *supra* note 73, at 483-98. *Accord Ex parte Zimmerman*, 132 F.2d 442 (9th Cir. 1942) (upholding one such detention).

78. See Anthony, *supra* note 73, at 482-83.

79. See Proclamation No. 2627, 3 C.F.R. 41 (1943-1948) (Oct. 24, 1944).

80. Press accounts suggest that the original draft of the antiterrorism bill sent by the President to Congress in late 2001 included a provision calling for suspension of habeas corpus. See, e.g., Jonathan Alter, *Keeping Order in the Courts*, NEWSWEEK, Dec. 10, 2001, at 48 ("When Attorney General John Ashcroft sent the secret first draft of the antiterrorism bill to Capitol Hill in October, it contained a section explicitly titled: 'Suspension of the Writ of Habeas Corpus.'"); see also STEVEN BRILL, AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA 73-74 (2003) (reporting that the initial draft of the USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, included a proposal to suspend the writ for an undefined period); Petitioners' Brief on the Merits at 14 n.12, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334), 2004 WL 162758 (collecting cites and reporting reaction of Representative James Sensenbrenner to proposal).

81. See, e.g., Ackerman, *supra* note 9, at 1045 ("Crystal balls are notoriously unreliable, but as I write these lines in early 2004, episodic terrorism seems to be the most likely fate of the West in general, and America in particular, for a very long time to come.").

Court's recent willingness to review the detention of persons captured as part of our military's efforts to eradicate terrorism.

To be sure, it is not obvious that another suspension may be on the horizon. The September 11 attacks, however, reminded us all too vividly of the potential for violence to come to American shores, as it did on that infamous December day at Pearl Harbor. In our ongoing war on terrorism, moreover, the military has captured and detained numerous persons, and the current Administration has fought aggressively to preclude judicial review of the propriety of such detentions.⁸² Detainees, in turn, have sought review of their detentions in American courts by filing petitions for writs of habeas corpus. In the 2003 Term, the Supreme Court faced three such cases and issued opinions generally favoring the availability of the writ to such petitioners.⁸³ Yet another decision protective of detainee rights followed this past Term in *Hamdan v. Rumsfeld*.⁸⁴

These cases remind us that the writ remains the most prominent means of challenging government detention, whatever the likeability of the petitioner.⁸⁵ But the rising tide of political sentiment against expansive notions of federal habeas corpus (stemming in part from the Court's decisions in these cases) already has fueled proposals—some of which Congress has enacted into law—to curtail the writ's scope generally and to reverse outright some of the Court's decisions in this line. In the 2005 Real ID Act, for example, Congress curtailed the scope of 28 U.S.C. § 2241 habeas review over immigration removal orders.⁸⁶ Congress did so in response to the Court's broad interpretation of section 2241 to permit judicial review of removal matters in *INS v. St. Cyr*.⁸⁷

82. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 510-11 (2004) (O'Connor, J.) (plurality opinion) ("The Government contends that Hamdi[']s status as] an 'enemy combatant' . . . justifies holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the determination that access to counsel or further process is warranted."); see also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (rejecting Administration's claim that Guantanamo Bay detainees are not entitled to habeas review of the legality of their detention under the 1949 Geneva Convention); *Padilla v. Hanft*, 432 F.3d 582, 583 (4th Cir. 2005) (denying the government's motion to transfer petitioner from military to civilian custody while petition for Supreme Court review was pending in part based on the "appearance that the government may be attempting to avoid consideration of [the] decision by the Supreme Court").

83. See *Hamdi*, 542 U.S. at 533 (concluding that citizen-detainees must have an opportunity to challenge enemy combatant designations); *Rasul v. Bush*, 542 U.S. 466 (2004) (interpreting 28 U.S.C. § 2241 to permit detainees at Guantanamo Bay to petition for writs of habeas corpus); cf. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (dismissing petition for writ of habeas corpus brought by American citizen detained as enemy combatant on the basis that it was filed in the wrong jurisdiction).

84. 126 S. Ct. 2749 (holding that military commissions set up by the President following September 11 to try enemy combatants detained at Guantanamo Bay, Cuba lack the power to proceed).

85. See, e.g., *Bushell's Case*, (1670) 124 Eng. Rep. 1006, 1007 (C.P.) ("The writ of habeas corpus is now the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it.").

86. Real ID Act of 2005, Pub. L. No. 109-13, § 106, 119 Stat. 231 (2005) (amending

Most recently, Congress passed and the President signed the Military Commissions Act of 2006,⁸⁸ which extends the Detainee Treatment Act of 2005.⁸⁹ Together, the two laws purport to overrule the Supreme Court's holding in *Rasul v. Bush*. In *Rasul*, the Court interpreted the writ provided for in section 2241 to permit aliens detained at Guantanamo Bay and alleged to be enemy combatants to seek review of the legality of their detentions in federal court.⁹⁰ The Detainee Treatment Act amends section 2241 to clarify 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 Department of Defense at Guantanamo Bay, Cuba."⁹¹ The Military Commissions Act goes further, apparently applying to pending habeas petitions and barring any court or judge from considering any habeas petition filed "on or 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."⁹² The new Act provides instead that any judicial review of the detention of such individuals may only come at the conclusion of combatant status determination hearings and appeals, and that such review is limited to exclude, among other things, challenges relating to "any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of any such alien.⁹³

This new legislation surely will invite challenges rooted in the Suspension Clause.⁹⁴ Likewise, these legislative efforts suggest the possibility that

the Immigration and Nationality Act § 242, codified at 8 U.S.C. § 1252 (2000)).

87. 533 U.S. 289 (2001) (concluding that review lay under section 2241 over legal questions going to the Attorney General's authority to waive deportation, notwithstanding the existence of statutory language purporting to strip the courts of habeas jurisdiction over certain removal orders).

88. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

89. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2739.

90. 542 U.S. 466 (2004). Section 2241 provides generally that writs of habeas corpus may be granted by federal judges where, among other things, the detained "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(a), (c)(3) (2006).

91. See DTA § 1005(e)(1). The Court rejected application of this language to cases pending on the effective date of the Act. See *Hamdan*, 126 S. Ct. at 2762-69.

92. See MCA § 7(a) (amending 28 U.S.C. § 2241(e)(1)); *id.* § 7(b) (providing that amendments apply to "all cases, without exception, pending on or after the date of enactment of this Act").

93. See *id.* § 7(a) (amending 28 U.S.C. § 2241(e)(2), and incorporating procedures set forth in DTA § 1005(e)).

94. Arguably, so long as Congress supplants habeas review with an adequate and effective substitute, the Suspension Clause—where implicated—is not offended. See Hart, *supra* note 41, at 1366-67 (observing that Congress has a "wide choice in the selection of remedies"); see also Richard H. Fallon, Jr., *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068, 1082-84 (1998) (noting the same). Thus, among other things, anyone arguing that the Detainee Treatment Act and Military Commissions Act

Congress may experiment further with curtailing the availability of habeas corpus,⁹⁵ at least with respect to alien enemy combatants. Indeed, in the event of an additional terrorist attack on American soil, Congress surely will give serious consideration to suspending the writ in a broad and transparent fashion.⁹⁶ Suspensions have been rare and limited in our history, but they have always responded to a perceived need for extraordinary measures to reconstitute the public order. This same perceived necessity likely will inform any public debate following another terrorist attack and lead to the drawing of parallels between current times and the unrest wrought by Confederate sympathizers and the Klan during and following the Civil War, revolting *ladrones* in the Philippines at the turn of the century, and those engaging in subversive activities in Hawaii during World War II.⁹⁷ In short, it is fair to say (harkening back to Justice Jackson's observations following World War II) that after September 11, "[w]e can no longer take either security or liberty for granted."⁹⁸

The Suspension Clause was designed as a safety valve of sorts, the Constitution's only "express provision for exercise of extraordinary authority because of a crisis."⁹⁹ It is one of the few true "emergency" provisions in our

unconstitutionally suspend the writ will have to wrestle with the DTA's provision for some form of streamlined and limited judicial review of detainee claims in the United States Court of Appeals for the D.C. Circuit. *See* DTA § 1005(e)(2); *see also infra* note 152 (discussing this issue). For great discussion of the many issues raised by the MCA and DTA, consult Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. (forthcoming June 2007) (manuscript on file with author).

95. For example, the 109th Congress has considered bills that go further than the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8 U.S.C. and 28 U.S.C.), to curtail the scope of federal court post-conviction habeas review. *See, e.g.*, Streamlined Procedures Act of 2005, S. 1088, H.R. 3035, 109th Cong.

96. Congress will have to be quite clear should it decide to suspend the writ. In a series of recent cases including *INS v. St. Cyr*, 533 U.S. 289 (2001), and *Felker v. Turpin*, 518 U.S. 651 (1996), the Court has created a forceful clear statement rule requiring Congress to be particularly transparent when curtailing the scope of the writ. *See St. Cyr*, 533 U.S. at 298 (recognizing a "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction"); *see also* *Hamdi v. Rumsfeld*, 542 U.S. 507, 578 (Scalia, J., dissenting) ("If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court."). Given the ramifications of a suspension, a clear statement rule is clearly appropriate in this context.

97. It is difficult to predict the form that any such future suspension might take. The nature and unpredictability of current terrorist activities suggests, however, that the historical practice of limiting suspensions of the writ to confined geographic areas may not work in this context. (The government, for example, has included in its list of possible terrorist targets locations all over the country.)

98. Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 104 (1951).

99. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

Constitution¹⁰⁰ and its effect on fundamental liberties in this regard is dramatic.¹⁰¹ Whether the judiciary could review the lawfulness of any such suspension, accordingly, could well be one of the most important legal issues to arise out of the war on terrorism.¹⁰²

Indeed, the kinds of questions that could arise in the event of a suspension will be at the same time difficult and of serious consequence to the rule of law and protection of individual rights in this country. For example, what if Congress suspends the writ today—some five years after the September 11 attacks—based on the premise that further terrorist attacks may be on the horizon and therefore the President needs the authority to detain all suspected terrorists extrajudicially until the threat has passed? Could Congress do so with respect to “all known or suspected terrorists or members of al Qaeda”? With respect to individuals of a particular ethnicity or religious faith? Could Congress suspend the writ indefinitely in light of the current Administration’s assertion that this war will never end? What about in response to a war being waged overseas? Consider additional examples outside the context of the war on terrorism. For example, could Congress suspend the writ to counteract the so-called “invasion” of illegal immigrants that has captured headlines of late? Could Congress suspend the writ during peacetime because domestic crime is spiraling out of control? What if Congress, to address a localized insurrection, suspends the writ nationwide? Need the scope of a suspension be reconciled with the predicate conditions relied upon as justifying it? These are just some of the challenging and important questions implicated by the suspension authority. Arguably of still greater importance is the matter of who the final arbiter of these questions should be. It is to that matter that this Article now turns.

II. THE CONVENTIONAL WISDOM ON THE JUSTICIABILITY OF SUSPENSION

In reviewing the founding documents, it quickly becomes apparent that there is scarce evidence to suggest what, if anything, the Framers thought about

100. Accord David Cole, *The Priority of Morality: The Emergency Constitution’s Blind Spot*, 113 *YALE L.J.* 1753, 1796 (2004) (“On the Framers’ view, habeas corpus was to be suspended only in very specific and threatening situations, and even then only where *necessary to public safety*.”).

101. See *infra* Part IV.A (discussing some of the effects of suspension on other constitutional rights).

102. For example, it is not obvious that to the extent the habeas provisions in the new Military Commissions Act are unconstitutional, “the [C]ourt will clean it up” by striking the provisions down as unconstitutional, as Senator Arlen Specter has suggested. Charles Babington & Jonathan Weisman, *Senate Approves Detainee Bill Backed by Bush: Constitutional Challenges Predicted*, *WASH. POST*, Sept. 29, 2006, at A13 (quoting Senator Specter). The matter is particularly important within the context of the ongoing war on terrorism: because the war is of indefinite duration, detentions escaping any judicial review as a result of a suspension of the writ could be indefinite as well.

whether a decision to suspend the writ should be subject to judicial review. During the Constitutional Convention, the Framers engaged in very little discussion of the Suspension Clause. What little discussion they had focused on whether to include some form of a habeas clause at all.¹⁰³ The notion of recognizing the power to suspend the writ appears to have stemmed from a proposal by Charles Pinckney, who “urg[ed] the propriety of securing the benefit of the Habeas corpus in the most ample manner” and suggested that “it should not be suspended but on the most urgent occasions, [and] then only for a limited time not exceeding twelve months.”¹⁰⁴ Although acknowledging some need for suspension, Pinckney also thought it important to secure expressly the privilege of habeas corpus. When the matter emerged from the Committee of Detail, limited additional debate ensued. Madison’s notes report that John Rutledge “was for declaring the Habeas Corpus inviolable—He did not conceive that a suspension could ever be necessary at the same time through all the States.”¹⁰⁵ Wilson, in turn, “doubted whether in any case a suspension could be necessary, as the discretion now exists with Judges, in most important cases to keep in Gaol or admit to Bail.”¹⁰⁶ Ultimately, the drafters seized on Gouverneur Morris’s proposal that “[t]he privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion, the public safety may require it.”¹⁰⁷

During the ratification debates, discussion of the Suspension Clause focused on, among other things, the question whether the Suspension Clause sanctioned suspension of the writ by the national government with respect to state prisoners.¹⁰⁸ Debate over the Suspension Clause also became part of the broader debate over whether the federal government would enjoy powers not expressly given to it by the new Constitution.¹⁰⁹ Along these lines, some expressed concern during the debates that a suspension power vested in the national government could be abused by the majority to silence political foes.¹¹⁰ For this reason, various commentators, including Madison and Jefferson, were of the view that the Suspension Clause should be removed from

103. On the founding debates, see generally Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451 (1996). Freedman asserts that the Framers “were united in their belief that the maintenance of a vigorous writ was indispensable to political liberty.” *Id.* at 459.

104. 2 M. FARRAND, *supra* note 42, at 438.

105. *Id.*

106. *Id.*

107. *Id.* In all events, it is fair to say that the matter “did not receive the serious treatment it deserved.” Ackerman, *supra* note 9, at 1084.

108. See Freedman, *supra* note 103, at 458-59 (quoting, among others, Judge Increase Sumner speaking to the Massachusetts Ratifying Convention).

109. See *id.* at 460-63. For a useful summary of this broader ratification debate, consult Bradford R. Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319, 337-47 (2003).

110. See Freedman, *supra* note 103, at 464-65 & n.54.

the draft Constitution and in its place substituted a clause protecting the writ of habeas corpus as inviolate.¹¹¹

It does not appear that the Framers ever discussed during the Convention or ratification debates whether judicial review of the constitutionality of a suspension would be appropriate.¹¹² This is not altogether surprising, given the paucity of discussion of judicial review in general at the Constitutional Convention.¹¹³ Thus, we are left with little historical foundation from which to draw in analyzing the reviewability, if any, of a congressional decision to suspend the writ of habeas corpus. All that can be said is that some Framers, who ultimately lost on this matter, wanted no authority given to the new government to suspend the writ. It is also fair to say that many at the time of the Founding were concerned about the potential for the suspension power to be abused when placed in the hands of the majority.

Shortly following ratification, however, one of the leading early commentators on American law opined that a suspension following from

111. See *id.* at 464 n.54 (citing, inter alia, Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 250 (John P. Kaminski & Gaspare J. Saladino eds., 1984) [hereinafter DOCUMENTARY HISTORY] (“I do not like . . . the omission of a bill of rights providing clearly & without the aid of sophisms for . . . the eternal & unremitting force of the habeas corpus laws”); Letter from Thomas Jefferson to Alexander Donald (Feb. 7, 1788), in 8 DOCUMENTARY HISTORY, *supra*, at 354 (expressing a hope that the Constitution would be amended with “a declaration of rights . . . which shall stipulate . . . no suspensions of the habeas corpus”); Letter from Thomas Jefferson to William Stephens Smith (Feb. 2, 1788), in 14 DOCUMENTARY HISTORY, *supra*, at 500 (same)); see also Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 331-33 (observing Madison’s skepticism about the ability of a constitutional guarantee against suspension of the writ to stand up to passionate public opinion favoring suspension); Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in 5 DOCUMENTARY HISTORY, *supra*, at 112-13. As noted, Jefferson wanted the Bill of Rights to include a habeas provision. See *id.* As a separate matter, the New York State Convention suggested an automatic six-month termination clause for acts of suspension. See The Recommendatory Amendments of the Convention of this State to the New Constitution, POUGHKEEPSIE COUNTRY J., Aug. 12, 1788, at 1, reprinted in 18 DOCUMENTARY HISTORY, *supra*, at 301-02 (suggesting that “the privilege of the Habeas Corpus shall not by any law, be suspended for a longer term than six months, or until twenty days after the meeting of the Congress, next following the passing of the act for such suspension”). For more on the ratification debates, consult Ackerman, *supra* note 9, at 1084-85.

112. One French official observing the debates did recognize the issue: “The Congress will suspend the writ of *habeas corpus* in case of rebellion; but if this rebellion was only a resistance to usurpation, who will be the Judge? the usurper.” Letter from Louis Guillaume Otto to Comte de Montmorin (Oct. 20, 1787), in 13 DOCUMENTARY HISTORY at 424, cited in Freedman, *supra* note 103, at 464.

113. See FALLON ET AL., *supra* note 7, at 11 (noting that “[a]t no time did the Constitutional Convention systematically discuss the availability or scope of judicial review, but the subject drew recurrent mention in debates over related issues[.]” and that “the existence of a power of judicial review appears to have been taken for granted by most if not all delegates”); Philip Hamburger, *Law and Judicial Duty*, 72 GEO. WASH. L. REV. 1 (2003) (disputing “the conventional understanding that judicial review had rather late, American, and judicial origins” and arguing that judicial review was well-accepted prior to ratification).

invalid premises should not be respected by the courts as displacing the writ. In his “American’s Blackstone,” St. George Tucker observed that the writ may be suspended:

only[] by the authority of congress; but not whenever congress may think proper; for it cannot be suspended, unless in cases of actual rebellion, or invasion. A suspension under any other circumstances, whatever might be the pretext, would be unconstitutional, and consequently must be disregarded by those whose duty it is to grant the writ.¹¹⁴

Tucker’s Americanized version of Blackstone’s Commentaries was “the first major legal treatise on American law” and “one of the most influential legal works of the early nineteenth century.”¹¹⁵ Accordingly, his views on the justiciability of suspension should be taken seriously. Indeed, as I will argue below, I believe Tucker’s view is right.

The Supreme Court has never spoken definitively with respect to whether suspension presents a nonjusticiable political question. Nor have scholars explored this issue in any detail—indeed, the matter largely has evaded their attention.¹¹⁶ What little commentary exists on the issue instead comes in cursory discussion offered by various jurists usually speaking in dicta. Their views represent the conventional position on this issue, one that is at odds with that espoused by Tucker. The conventional view posits that the determination whether the circumstances warranting suspension exist (namely, whether there is a “Rebellion or Invasion”) presents a quintessential political question the likes of which the judiciary should not review.

The first to speak to this issue was Chief Justice John Marshall. Toward the end of his opinion for the Court in *Ex parte Bollman*,¹¹⁷ Marshall observed that the legislature has the power to suspend the writ “[i]f at any time the public

114. 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 292 (1803). On the role of Tucker in the early development of American law, consult Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111 (2006).

115. Douglas, *supra* note 114, at 1114.

116. Only a handful of passing references to the issue may be found in the literature. See, e.g., Trevor W. Morrison, *Hamdi’s Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411, 430 (2006) (noting that the prevailing view is that suspension matters are nonjusticiable); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1806 n.16 (2004) (“Perhaps the determination of precisely when an ‘invasion’ becomes an act of ‘war’ against the United States . . . is, within broad boundaries, nonjusticiably political.”); Mark Tushnet, *Meditations on Carl Schmitt*, 40 GA. L. REV. 877, 879-80, 885-86 & n.33 (2006) (suggesting that judicial review of the validity of a suspension of the writ might follow and observing that “we might think [that] the categories ‘rebellion’ and ‘invasion’ could be given reasonably crisp definitions of a sort courts could administer” in contrast to whether the public safety might require a suspension). In a similarly brief discussion, Jesse Choper recently passed on the matter as well. See *infra* text accompanying notes 232-33.

117. 8 U.S. (4 Cranch) 75 (1807).

safety shall require [it].”¹¹⁸ In a brief passage that spoke to issues not immediately presented in the *Bollman* case, Marshall said of the suspension authority: “That question depends on political considerations, on which the legislature is to decide.”¹¹⁹

Some years later, in *Ex parte Merryman*,¹²⁰ Chief Justice Taney renewed these observations and expanded on them. The case posed the question whether the President enjoyed the constitutional authority to suspend the writ on his own. Taney held that Lincoln had acted beyond his powers in declaring the writ suspended because the authority to suspend resides with the legislature.¹²¹ Taney went on to pen a lengthy opinion discussing the Suspension Clause in which he observed, among other things, that the Clause constitutes “a standing admonition to the legislative body of the danger of suspending [the writ], and of the extreme caution they should exercise, before they give the government of the United States such power over the liberty of a citizen.”¹²² He continued: “[C]ongress is, of necessity, the judge of whether the public safety does or does not require [suspension]; and their judgment is *conclusive*.”¹²³

In this discussion, Taney also quoted Justice Story’s *Commentaries*.¹²⁴ There, Story observed:

[C]ases of a peculiar emergency may arise, which may justify, nay even require, the temporary suspension of any right to the writ. . . . [T]he right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it. . . . It would seem, as the power is given to congress to suspend the writ of habeas corpus, in cases of rebellion or invasion, that *the right to judge, whether the exigency had arisen, must exclusively belong to that body.*¹²⁵

118. *Id.* at 101.

119. *Id.* The passage above constitutes Marshall’s entire discussion of the matter in *Bollman*.

120. 17 F. Cas. 144, 151-52 (C.C.D. Md. 1861) (No. 9487); *see also supra* note 45 (discussing *Merryman*).

121. *See Merryman*, 17 F. Cas. at 152. Taney, in turn, ordered the release of the prisoner; Lincoln, however, did not comply with the order. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1845 & n.269 (2005) (citing ABRAHAM LINCOLN, Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430-31 (Roy P. Basler ed., 1953)).

122. *Merryman*, 17 F. Cas. at 148.

123. *Id.* (emphasis added). Taney authored one of the most famous decisions invoking the political question doctrine. In that case, *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), the Court concluded that Congress’s decision to recognize a state government pursuant to the Guarantee Clause, U.S. CONST. art. IV, § 4, is “binding on every other department of government, and could not be questioned in a judicial tribunal,” *Luther*, 48 U.S. (7 How.) at 42.

124. *See Merryman*, 17 F. Cas. at 151-52 (quoting 3 STORY, *supra* note 12, § 1336). Justice Scalia cited this same passage in his *Hamdi* opinion. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 578 (2004) (Scalia, J., dissenting).

125. 3 STORY, *supra* note 12, § 1336 (emphasis added). Story was otherwise thought to be a “staunch . . . friend of judicial review.” Michael J. Gerhardt, *Rediscovering*

The most recent articulations of the conventional view came in the opinions of Justices Scalia and Thomas in *Hamdi v. Rumsfeld*.¹²⁶ The *Hamdi* case did not itself pose the question, as no Justice interpreted Congress's post-September 11 legislation as suspending the writ. Instead, it explored whether the Executive could detain an American citizen designated as an enemy combatant as part of counterterrorism efforts. A fractured Court concluded that Congress, in the Authorization for Use of Military Force (AUMF)¹²⁷ enacted following the September 11 attacks, granted the Executive this power. The Court determined, however, that any citizen detained must be given some opportunity to challenge his classification as an enemy combatant.¹²⁸ Justice Scalia, joined by Justice Stevens, dissented, arguing that Hamdi's detention was not authorized by Congress and, in any event, could follow only pursuant to a congressional suspension of the writ of habeas corpus.¹²⁹

In his *Hamdi* opinion, Justice Scalia also offered the following views regarding the proper role of the judicial branch with respect to a suspension of the writ. Ascertaining whether the ends chosen by the Congress are sufficient to address a national emergency, he wrote,

is far beyond my competence, or the Court's competence, to determine
But it is not beyond Congress's. If the situation demands it, the Executive can ask Congress to authorize suspension of the writ—which can be made subject to whatever conditions Congress deems appropriate To be sure, suspension is limited by the Constitution to cases of rebellion or invasion. But whether the attacks of September 11, 2001, constitute an “invasion,” and whether those attacks still justify suspension several years later, are questions for Congress rather than this Court.¹³⁰

Justice Thomas also dissented in *Hamdi*, albeit on far different grounds from Justice Scalia. Thomas, for his part, believed that the detention of someone like Hamdi fell “squarely within the Federal Government's war powers,” and as such, the Court should not “second-guess that decision.”¹³¹ He

Nonjusticiability: Judicial Review of Impeachments After Nixon, 44 DUKE L.J. 231, 255 & n.122 (1994).

126. 542 U.S. 507 (2004).

127. Pub. L. No. 107-40, 115 Stat. 224 (2001).

128. See *Hamdi*, 542 U.S. at 509. Justice O'Connor's plurality opinion set forth a framework in keeping with *Mathews v. Eldridge*, 424 U.S. 319 (1976), pursuant to which Hamdi and others could challenge the basis for their classification. See *Hamdi*, 542 U.S. at 528-29. Justices Souter and Ginsburg disagreed with much of the plurality opinion but joined its conclusions to make a Court. See *id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

129. See *id.* at 561-63, 573-76 (Scalia, J., dissenting). As I have written elsewhere, I agree with Justice Scalia that the AUMF could not be read to authorize Hamdi's detention. See Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1455-57 (2005).

130. *Hamdi*, 542 U.S. at 577-78 (Scalia, J., dissenting) (citing 3 STORY, *supra* note 12, § 1336, at 208-09).

131. *Id.* at 579 (Thomas, J., dissenting).

also understood his colleague Justice Scalia to say “that this Court could not review Congress’ decision to suspend the writ.”¹³² With this idea, Justice Thomas registered his agreement.¹³³

The views of these Justices represent the conventional understanding of the justiciability of suspension. Beyond these cursory explorations of the justiciability of suspension, little else has been said on the matter. The most promising occasions for an actual holding from the Supreme Court on the justiciability of suspension arose out of the suspension of the writ in the Hawaiian Territory during World War II.¹³⁴ Nonetheless, in two cases, the Court found the issue moot. During the same period, however, the lower courts did have occasion to speak to the validity of the suspension of habeas in the Hawaiian Territory. First, in *Ex parte Zimmerman*,¹³⁵ the Ninth Circuit rejected a direct challenge to the legality of the suspension in the Territory. The military had detained Zimmerman, an American citizen, for subversive activities based on an informal hearing lacking any standard constitutional protections. He argued that this fact, coupled with the illegality of the suspension in place, warranted his release. As the Ninth Circuit saw things, the ongoing imminent threat of invasion of the Islands more than justified the suspension in place:

The emergency inspiring the [Governor’s] proclamation [suspending the writ] did not terminate with the attack on Pearl Harbor. The courts judicially know that the Islands, in common with the whole Pacific area of the United States, have continued in a state of the gravest emergency; and that the imminent threat of a resumption of the invasion persisted. In the months following the 7th of December the mainland of the Pacific coast was subjected to attacks from the sea. Certain of the Aleutian Islands were invaded and occupied. And as late as the early summer of 1942 formidable air and naval forces of Japan were turned back at Midway from an enterprise which appeared to have Hawaii as its ultimate objective.¹³⁶

On this basis, the Ninth Circuit held that the suspension was well-founded and it left intact the military’s detention of Zimmerman without charges. The day before Zimmerman’s attorneys filed their petition for certiorari with the

132. *Id.* at 594 n.4.

133. *Id.*

134. Here I note that Henry Hart reads the post-Civil War case of *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), as precedent for the argument advanced here. In his famous Dialogue, Hart cites *Milligan* for the proposition that “where statutory jurisdiction to issue the writ obtains, but the privilege of it has been suspended in particular circumstances, the Court has declared itself ready to consider the validity of the suspension and, if it is found invalid, the detention.” Hart, *supra* note 41, at 1398. I question, however, whether *Milligan* really sweeps this far. See *infra* text accompanying note 153.

135. 132 F.2d 442 (9th Cir. 1942).

136. *Id.* at 445. It does not appear from the opinion that the government argued that suspension presented a political question. Either way, the court’s opinion never questioned its authority to reach these issues.

Supreme Court, he was released.¹³⁷ Accordingly, the Court denied his petition on the basis that it was moot.¹³⁸

Two different habeas petitions filed in the District Court for the Territory of Hawaii during this same period called on that court to reach the merits of whether circumstances justified suspension of the writ in the Territory. In both cases, the district court took up the invitation. In the matter of two naturalized citizens being detained by the military without being charged of any crime, the district judge concluded that no showing had been made that the Islands remained in imminent danger of invasion such that writs should not issue.¹³⁹ An ugly confrontation with military officials ensued;¹⁴⁰ ultimately, the matter was mooted upon the release of the two petitioners.¹⁴¹ Next, in *Ex parte Duncan*,¹⁴² the district court held a hearing on the matter of whether circumstances justified suspension of the writ in the Islands. The court heard from military witnesses, including Admiral Nimitz, on the state of affairs on the Islands.¹⁴³ The court ultimately decided the case on narrower grounds,¹⁴⁴ and the Ninth Circuit did not reach the matter anew, having already done so in *Zimmerman*.¹⁴⁵

The *Duncan* case advanced to the Supreme Court, presenting the Court with a challenge to the legality of suspension as well as the operation of martial law in the Hawaiian Territory during World War II.¹⁴⁶ *Duncan* involved two civilians who had been tried and convicted by military tribunals in the Territory while deprived of a number of procedural protections otherwise available in the courts.¹⁴⁷ As the case made its way to the Court, however, President Roosevelt terminated martial law in Hawaii and restored the writ of habeas corpus.¹⁴⁸ In

137. See Anthony, *supra* note 73, at 486.

138. See *Zimmerman v. Walker*, 319 U.S. 744 (1943) (“Petition . . . denied on the ground that the cause is moot, it appearing that Hans Zimmerman, on whose behalf the petition is filed, has been released from the respondent’s custody.”).

139. See Anthony, *supra* note 73, at 486-87 (detailing histories of *Ex parte Seifert* and *Ex parte Glockner*).

140. *Id.* at 486-92 (detailing events).

141. See *id.* at 490-91.

142. 66 F. Supp. 976 (D. Haw. 1944).

143. This testimony is detailed in *Ex parte Duncan*, 146 F.2d 576, 587-88 (9th Cir. 1944) (Wilbur, J., concurring).

144. See *id.* at 578 (Healy, J.) (noting that the district court held that the suspension of the writ had been terminated by a proclamation of the Governor).

145. See *id.*

146. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). The question on which the Court granted certiorari read: “Was the privilege of the writ of habeas corpus suspended as to this case on April 20, 1944?” Petition for Writ of Certiorari, *Duncan*, 327 U.S. 304 (No. 791).

147. See *Duncan*, 327 U.S. at 307, 311. The civilians were tried before military tribunals on charges of embezzlement and assault. See *id.*

148. Proclamation No. 2627, 3 C.F.R. 41 (1943-1948) (Oct. 24, 1944).

light of the President's acts, the Supreme Court chose "not [to] pass upon the validity of the order suspending the privilege of habeas corpus"¹⁴⁹

Accordingly, courts on occasion have wrestled directly with the matter of whether the predicate conditions for invoking the suspension authority are satisfied. These episodes, however, are but a handful in number and the Supreme Court has never taken up the matter directly. The conventional wisdom, reflected in Justice Scalia's *Hamdi* opinion, remains that reviewing such claims is not the proper province of the judiciary.

* * *

One does not lightly challenge a view assigned to the likes of Marshall, Taney, and Story (not to mention three members of the current Court). Nonetheless, I believe that the conventional view is misguided.¹⁵⁰ As set forth below, there are forceful reasons to pause before granting the political branches final authority to monitor their own compliance with the limitations on the suspension power, particularly given the fact that exercise of the power displaces one of the only two constitutionally mandated remedies.¹⁵¹ I argue, accordingly, that there remains an important role for the judiciary in this context. Most simply, I believe that it falls on the judiciary to ensure that any curtailment of the core habeas remedy does not contravene the limitations on the suspension authority that are imposed by the Constitution both within the Suspension Clause itself and in other provisions of the document.

There are many questions that might arise in the suspension context. Several are plainly subject to judicial review. Such questions include resolving

149. *Duncan*, 327 U.S. at 312 n.5. In its opinion, the Court never questioned its authority to review the validity of the suspension.

150. I will also suggest below that the conventional view has misread Marshall's statement in *Bollman* as standing for something much broader than it actually does. Parsing his words suggests at most that he was speaking to the public safety requirement and not the requirement that there be a "Rebellion or Invasion" justifying a suspension. See *infra* text accompanying notes 187-90; see also Mark Tushnet, "Our Perfect Constitution" Revisited, in *TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES* 146 & n.53 (Peter Berkowitz ed., 2005) (suggesting that Story's language in his *Commentaries* likewise should be read in this limited fashion).

151. The other is that of just compensation. See U.S. CONST. amend. V. Although one might argue that suspension strips the courts of habeas jurisdiction (and one could imagine a suspension taking the form of a congressional repeal of 28 U.S.C. § 2241), it is more accurate to describe an exercise of the suspension authority as stripping the courts of a particular remedy. In *Ex parte Milligan*, the Court described the effects of a valid suspension as follows: "If the President thought proper to arrest a suspected person, [then the suspension means] that he should not be required to give the cause of his detention on return to a writ of *habeas corpus*." 71 U.S. (4 Wall.) 2, 115 (1866). Thus, suspension does not effect a stripping of habeas jurisdiction per se, but merely quashes a remedy otherwise provided for in the Constitution. See *id.* at 130-31; see also Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 979 (1998) (noting this distinction). And, from the time of *Bollman*, the Court has treated the issues (remedy and jurisdiction) as presenting distinct inquiries. See *supra* note 35. I will return to this point below. See *infra* note 328.

which branch has the authority to suspend the writ, as was explored in *Merryman*, and the determination whether an act of the political branches constitutes a suspension. Bound up in many respects with the latter question is the determination of what core habeas privilege the Suspension Clause protects from infringement.¹⁵² Judicial review is also appropriate with respect to the question whether a suspension, once put in place, encompasses a particular habeas petitioner. That issue came before the Court in the Civil War case of *Ex parte Milligan*. There, the Court concluded that Congress's Civil War delegation of the suspension power to the President did not permit him to suspend the writ with respect to individuals like Milligan, who were detained in states where the courts were open and operating.¹⁵³

The debate over whether suspension presents a political question is primarily concerned with whether the judiciary may review a determination by the political branches that the triggering conditions for a suspension exist (namely a "Rebellion or Invasion") and that the public safety requires a suspension. The debate may additionally encompass possible claims that an act of suspension is otherwise illegal because it violates certain constitutional principles found outside the Suspension Clause, such as due process or equal protection. As I discuss below, I believe that it is only the public safety requirement that is potentially nonjusticiable in this group. The determination that the triggering conditions for a suspension exist and the relationship between an act of suspension and any external constitutional limitations clearly present judicial questions. This conclusion better comports with our legal tradition in many respects, for, among other things, it is responsive to the Framers' general fear that the suspension power could prove despotic if left unchecked in the hands of the political majority.

In undertaking a detailed analysis of the justiciability of suspension, it bears emphasizing what is at stake. A conclusion that suspension is a political

152. The Court has on occasion entertained other Suspension Clause claims on the merits. *See, e.g.,* *Swain v. Pressley*, 430 U.S. 372, 380-82 (1977) (rejecting Suspension Clause challenge to congressional assignment of habeas matters to Article I tribunal); *United States v. Hayman*, 342 U.S. 205, 223 (1952) (rejecting claim that Congress violated the Suspension Clause by establishing framework in 28 U.S.C. § 2255 for federal prisoner post-conviction challenges). As noted above, many of the hardest questions about the meaning of the Suspension Clause remain unsettled. *See supra* Part I. Such questions include whether the Clause promises that the writ be made available to non-citizens detained outside of U.S. borders, and whether the Clause permits postponement of judicial review of any such detentions. These questions are extremely timely and implicated by the Detainee Treatment Act and Military Commissions Act. *See supra* text accompanying notes 88-94. There is also the question whether the authority to suspend is subject to delegation. *See supra* note 49. Full exploration of the merits of each of these questions is beyond the scope of this Article. As relevant here, I believe that all of these are judicial questions.

153. 71 U.S. (4 Wall.) 2, 115-17, 127 (1866) (concluding that because Milligan was not being held as a prisoner of war and was a resident of Indiana, where the courts were open and operating, he was entitled to judicial review under the statute). For additional discussion of this kind of claim, *see infra* text accompanying note 294.

question would mean that suspension is a matter on which the Constitution imposes internal restraints—namely, the Clause itself provides that there must be a “Rebellion or Invasion” justifying a suspension—but that those restraints as well as others found elsewhere in the Constitution may not be judicially enforced.¹⁵⁴ Put another way, it would fall to the political branches (as elected and therefore influenced by the body politic) to police themselves in honoring the Constitution’s limitations with respect to suspension. In exercising the prerogative to suspend the writ, the political branches would enjoy virtually “uncontrolled discretion.”¹⁵⁵ As one commentator at the time of the Founding observed: “The Congress will suspend the writ of *habeas corpus* in case of rebellion; but if this rebellion was only a resistance to usurpation, who will be the Judge? [T]he usurper.”¹⁵⁶

Accordingly, ascertaining whether suspension presents a nonjusticiable political question could matter a great deal in the event of a future suspension of the writ. Because suspension effectively closes the courts to individuals detained by the Executive (by cutting off the only meaningful remedy—discharge), it is fair to say that the conventional view shielding suspension from judicial review sits rather uncomfortably alongside the justification for including the countermajoritarian judicial branch in our governmental structure in the first place. The Framers viewed the judicial branch, unlike its counterpart branches, as the ultimate forum for protecting individual and minority rights from unfounded infringement by the majority. The judiciary’s key tool for fulfilling this role historically has been the writ of *habeas corpus*, which Blackstone termed “the most celebrated writ in English law”¹⁵⁷ and the Framers adopted as an “integral part of our common-law heritage.”¹⁵⁸ The writ stands as such a core hallmark of the rule of law that the Court has said that it has “no higher duty than to maintain [the writ] unimpaired.”¹⁵⁹

The conventional view of suspension as a political question does not give nearly enough credence to the writ’s heritage and role in our constitutional

154. As the Court observed in *United States Department of Commerce v. Montana*: “In invoking the political question doctrine, a court acknowledges the possibility that a constitutional provision may not be judicially enforceable. Such a decision is of course very different from determining that specific congressional action does not violate the Constitution.” 503 U.S. 442, 458 (1992).

155. Bickel, *supra* note 20, at 45. On the potential for the Executive to check the legislative suspension power, *see infra* text accompanying notes 228-31.

156. Letter from Louis Guillaume Otto, *supra* note 112.

157. 3 WILLIAM BLACKSTONE, COMMENTARIES *129.

158. *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973); *see also Rasul v. Bush*, 542 U.S. 466, 473 (2004) (observing that *habeas corpus* is “a writ antecedent to statute, . . . throwing its root deep into the genius of our common law” (quoting *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945))).

159. *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (quoting *Bowen v. Johnston*, 306 U.S. 19, 26 (1939)).

regime. Further explication of these considerations demonstrates resoundingly why the conventional view should be rejected.

III. JUDICIAL TREATMENT OF “POLITICAL QUESTIONS”

A starting point for analyzing the justiciability of suspension is the familiar passage in *Marbury v. Madison*¹⁶⁰ setting forth the foundations of what has now come to be known as the political question doctrine. As Chief Justice Marshall envisioned things:

The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.¹⁶¹

In this passage, Marshall sought to distinguish between those matters properly posed to the courts and those that present “[q]uestions in their nature political.” Given the context of *Marbury*, Marshall’s dichotomy surely envisioned as a “political” question the Executive’s prerogative to name his choices to those posts, such as justice of the peace, entrusted to his care (subject of course to the Appointments Clause¹⁶²).

In the very same opinion, however, Marshall included passages that have fueled the arguments favoring a robust vision of judicial review. After positing that “[q]uestions, in their nature political . . . can never be made in this court[,]” Marshall also asserted in *Marbury* that it is very much the province of the courts “to say what the law is.”¹⁶³ To put it mildly, these passages stand in considerable tension. Perhaps it is best to read in them a presumption that the judiciary’s ultimate charge is to speak to the meaning of the Constitution within the context of a properly posed case or controversy, with the proviso that “questions in their nature political” fall outside that mandate.

Since *Marbury*, it has been accepted that there are indeed “political questions”—that is, matters that are informed by political considerations and are delegated by our Constitution to the political branches for conclusive resolution. Indeed, no one can seriously question this proposition. In considering whether suspension falls within the realm of those questions not properly “made” to the courts, one must first look to the broader debate over the contours and legitimacy of the political question doctrine.

160. 5 U.S. (1 Cranch) 137 (1803).

161. *Id.* at 170.

162. U.S. CONST. art. II, § 2, cl. 2.

163. 5 U.S. (1 Cranch) at 170, 177; *see also* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) (“We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”).

A. Defining Political Questions

Picking up on *Marbury*'s discussion of political questions, scholars have proposed three leading frameworks for identifying what I will call "true" or "nonjusticiable" political questions.¹⁶⁴ These include the "classical" political question doctrine, the "prudential" political question doctrine, and what might be termed the "rights-based" political question doctrine. Consideration of how each of these frameworks applies to the matter of suspension reveals that, at best, they raise many of the larger separation of powers concerns that must animate the analysis but offer no clear resolution of our question. The analysis will have to draw instead upon the special status of the Great Writ in our legal tradition and its relationship with other core constitutional guarantees.

The work of Herbert Wechsler perhaps best represents the "classical" approach. Wechsler viewed judicial review as following directly from the Constitution.¹⁶⁵ He believed, however, that some questions are by their very nature political and should not be reviewed by the courts. Wechsler posited that "[t]he courts have both the title and the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices, as invariably action does."¹⁶⁶ The real issue on which to focus, according to Wechsler, was the determination whether a case is "properly before" the courts. As to that question, Wechsler contended that courts may only abstain from resolving cases where the Constitution clearly has committed determination of the underlying issue to a coordinate branch. "Difficult as it may be to make that judgment wisely[,] . . . what is involved is in itself an act of constitutional interpretation, to be made and judged by standards that should govern the interpretive process generally."¹⁶⁷ The judiciary's review of a claim should end, in Wechsler's view, if the interpretive exercise concludes that the matter is delegated for final resolution to the political branches.

Writing on the heels of Wechsler, Alexander Bickel agreed that certain questions should be left untouched by the courts. In contrast to Wechsler, however, Bickel's vision for a political question doctrine incorporated "prudential" elements that seemingly expanded the range of cases in which a court should stay its hand. This followed largely from Bickel's differing view of the institution of judicial review. Bickel, unlike Wechsler, viewed such review in "practical" terms and as born of prudential considerations.¹⁶⁸ Thus,

164. By this phraseology, I mean to refer to matters on which the Constitution imposes restraints not subject to judicial enforcement.

165. See Wechsler, *supra* note 20, at 3-6.

166. *Id.* at 19.

167. *Id.* at 9.

168. In this regard, he built on the work of Learned Hand, who wrote: "[S]ince th[e] power [of judicial review] is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised

Bickel opined, when courts choose not to reach questions due to their “political” nature, they do so based not on interpretive principles, but instead on “prudence” and “flexib[ility].”¹⁶⁹ Any suggestion that courts should *not* be in the business of “ducking” certain cases, Bickel warned, is born of “rampant activism.”¹⁷⁰

Bickel proposed the following now well-known list of factors as animating his vision for a political question doctrine:

[T]he court’s sense of a lack of capacity, compounded in unequal parts of the strangeness of the issue and the suspicion that it will have to yield more often and more substantially to expediency than to principle; the sheer momentousness of it, which unbalances judgment and prevents one from subsuming the normal calculations of probabilities; the anxiety not so much that judicial judgment will be ignored, as that perhaps it should be, but won’t; finally and in sum . . . , the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from.¹⁷¹

This prudential view suggests that the judiciary should expend its legitimacy capital quite cautiously.¹⁷² In all events, it argues that “there are times when avoidance [of momentous decisions] should rest on merits of its own”¹⁷³

Bickel’s criteria for determining that a matter presents a nonjusticiable political question turn quite openly on rather nebulous factors. Wechsler, for his part, seems to have made a more formidable attempt to construct a principled political question doctrine. Nonetheless, the Supreme Court’s most famous explication of the political question doctrine, in *Baker v. Carr*,¹⁷⁴ adopts a variant on Bickel’s formulation, albeit with a small nod to Wechsler’s emphasis on constitutional text. There, Justice Brennan, writing for the Court, elaborated:

[S]everal formulations which vary slightly . . . may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of

whenever a court sees, or thinks that it sees, an invasion of the Constitution. It is always a preliminary question how importunately the occasion demands an answer.” LEARNED HAND, *THE BILL OF RIGHTS* 15 (1958).

169. Bickel, *supra* note 20, at 46; *see also* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 184 (1962) (elaborating on his “*Passive Virtues*” article). For a view of how prudential concerns might counsel in favor of the *exercise* of judicial review, consult RICHARD POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 143, 162 (2001) (positing that the Court had compelling reasons to intervene in the 2000 Presidential election, including the “*potential* for disorder and temporary paralysis” that might have otherwise resulted).

170. Bickel, *supra* note 20, at 47 (observing that “judicial review is at least potentially a deviant institution in a democratic society . . .”).

171. *Id.* at 75.

172. Bickel further argued that the Court has other tools available to sound its voice short of deciding “momentous” cases: “the resources of rhetoric and the techniques of avoidance enable the Court to exert immense influence.” *Id.* at 75, 77.

173. *Id.* at 58.

174. 369 U.S. 186 (1962).

any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁷⁵

After setting out this largely Bickelian prudential framework, the Court concluded that a question previously thought to be nonjusticiable was well within its competence to decide and remedy.¹⁷⁶

In adopting this multifactor standard, the *Baker* Court invited criticism on the ground that its framework offered no clear guidance on how to distinguish the justiciable from the nonjusticiable. As one critic put it, in *Baker*, “the Court did not tell us precisely what the [political question] doctrine is”¹⁷⁷ When studied individually, moreover, the factors within the *Baker* framework—even their initial emphasis on constitutional text—are each problematic in their own right. Revisiting some of the prominent critiques of the model reveals why we must look elsewhere to resolve our suspension inquiry.

The *Baker* Court, building on Wechsler, suggested that determining whether a question is “political” in the first instance warrants inquiring whether “the Constitution has committed the determination of the issue to another agency of government than the courts.”¹⁷⁸ In the subsequent case of *Nixon v. United States*,¹⁷⁹ the Court moved further toward Wechsler's view, suggesting that the Constitution's textual commitment of a matter “to a coordinate political department” may well be a linchpin to the inquiry.¹⁸⁰ There is no question that

175. *Id.* at 217.

176. Compare *Colegrove v. Green*, 328 U.S. 549 (1946) (declining to resolve Guarantee Clause challenge to state apportionment of congressional districts), with *Baker*, 369 U.S. 186 (reaching and upholding equal protection challenge to apportionment scheme). One scholar accounts for the change in course by observing that “the political question doctrine did not sit so comfortably alongside the aggressive judicial review of the Warren Court.” Barkow, *supra* note 1, at 263.

177. Louis Henkin, *Viet-Nam in the Courts of the United States: “Political Questions,”* 63 AM. J. INT'L L. 284, 285 (1969). For a forceful critique directed specifically at Bickel's model, consult Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

178. Wechsler, *supra* note 20, at 9; see also *Baker*, 369 U.S. at 217.

179. 506 U.S. 224 (1993) (deeming nonjusticiable the claim that Senate impeachment procedures were inconsistent with the requirements of the Impeachment Clause). For two different views of the *Nixon* decision, compare Gerhardt, *supra* note 125, with Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, 1993 SUP. CT. REV. 125.

180. *Nixon*, 506 U.S. at 228; see also *Powell v. McCormack*, 395 U.S. 486, 521 n.43 (1969) (noting that “the force” of a political question argument “depends in great measure on

the existence of a textually demonstrable commitment would limit political questions to a well-defined and seemingly principled group. Even accepting that some demonstrable commitments exist, however, a theory that turns on such a criterion will more often than not come up short, for judicial review itself is nowhere mentioned in the Constitution and “constitutional clauses do not come with footnotes attached saying which clauses are enforceable through judicial review and which are not.”¹⁸¹ Finding a demonstrable commitment, moreover, may be nothing more than the equivalent of determining that the matter is one on which the Constitution does not actually impose limitations in the first instance.¹⁸²

When one attempts to analyze the matter of suspension through this framework, it becomes apparent why textual parsing rarely will be conclusive. On one hand, there is no obvious indication in the text of the Suspension Clause that the Framers believed that judicial review of exercises of the suspension authority would be appropriate. On the other hand, as noted, this is also true with respect to virtually every other clause in the Constitution. Also, unlike the Impeachment Clause, there is no language in the Suspension Clause suggesting that the Framers intended to grant to Congress unlimited discretion over how to exercise the suspension authority.¹⁸³ If anything, the fact that the Suspension Clause abuts the Ex Post Facto and Bill of Attainder Clauses

the resolution of the textual commitment question”); THE FEDERALIST No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution.”).

Nixon presented the Court with a good occasion to focus on this aspect of *Baker*, given that it invited the Court to review the procedural integrity of a federal judge’s impeachment by the Senate. The Constitution by its text delegates to the Senate the “sole power to try all Impeachments.” U.S. CONST. art. I, § 3, cl. 6. A majority of the Supreme Court appears to have concluded that these words in the Constitution constitute a textually demonstrable commitment; some Justices, however, found the matter quite debatable. See *Nixon*, 506 U.S. at 229-32; *id.* at 239 (White, J., concurring in the judgment) (asserting that the courts may review a claim that the Senate has violated its obligations under the Impeachment Clause); *id.* at 253-54 (Souter, J., concurring in the judgment) (observing that certain questions going to the Senate’s exercise of its impeachment power might warrant judicial review). The majority also observed that the word “try” “lacks sufficient precision to afford any judicially manageable standard of review of the Senate’s actions . . . [.]” and catalogued several separation of powers concerns supporting its holding. *Id.* at 230. In this respect, the majority’s analysis harkens back to some of the broader notions of the *Baker* framework.

181. Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 157 (1995).

182. For more discussion of this point, see *infra* text accompanying notes 247-50.

183. *Accord Nixon*, 506 U.S. 224 (declining to review Senate impeachment procedures largely on the basis that the Constitution delegates to the Senate the “sole” power to try impeachments). *But see id.* at 241-42 (White, J., concurring in the judgment) (suggesting that the word “sole” was intended to differentiate the powers given to the Senate from those given the House with respect to impeachment).

supports judicial review in this context. The constitutional restraints embodied in the latter two Clauses are routinely enforced by the courts,¹⁸⁴ and there is support in the Federalist Papers for the idea that the Framers endorsed this practice.¹⁸⁵ Indeed, in *Marbury*, Chief Justice Marshall used the two provisions as an example of why “the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature.”¹⁸⁶ Arguably no great leap is required to view the Suspension Clause as falling within the same category of protections.

If one parses the language of the Clause in detail, moreover, one could fashion an additional argument that it supports judicial review of at least the two predicates to invocation of the suspension authority. But for the existence of a “Rebellion or Invasion,” the Constitution is clear that the suspension power may not be invoked. This is the kind of bright-line limitation on political authority that seems to invite judicial enforcement. Once one of these conditions exists, though, there remains the additional, separate determination whether the public safety “may” require suspension. This latter determination may be a true political question, as it is phrased expressly in discretionary terms and therefore arguably delegated to the legislature for final resolution. On this view, if, and only if, the conditions for invoking the authority are present, it falls to the legislature to resolve whether the public safety warrants invocation of the suspension power. Put another way, a parsing of the Clause’s language suggests that the matter of suspension is “textually committed” to the legislature only in cases of “Rebellion or Invasion.”

Returning to the very language on which the conventional view has been built over time—that of Chief Justice Marshall in *Bollman*—on close read, the language supports just this interpretation. Marshall’s words posited only that the legislature has the power to suspend the writ “[i]f at any time *the public safety* should require [it].”¹⁸⁷ He continued: “That question depends on political considerations, on which the legislature is to decide.”¹⁸⁸ Nowhere did Marshall reference the “Rebellion or Invasion” requirement in the Suspension Clause; his focus, by contrast, was the “public safety” determination that follows once at least one of these predicates exists. Determining the needs of public safety, he explained, depends on political considerations. That others have read more

184. See, e.g., *Carmell v. Texas*, 529 U.S. 513 (2000) (granting relief on Ex Post Facto Clause claim); *United States v. Brown*, 381 U.S. 437 (1965) (declaring statute unconstitutional under Bill of Attainder Clause); *id.* at 442 (observing that the Framers intended the Bill of Attainder Clause to implement the separation of powers and act as “a general safeguard against legislative exercise of the judicial function”).

185. See THE FEDERALIST, No. 78, at 426 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Limitations [like that on ex post facto laws and bills of attainder] can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.”).

186. 5 U.S. (1 Cranch) 137, 179-80 (1803).

187. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (emphasis added).

188. *Id.*

into Marshall's words is unfortunate,¹⁸⁹ for those words sweep no further than to suggest that the public safety determination, and not the predicate conditions, presents a political question.¹⁹⁰

The Framers, moreover, knew well enough how to draft a constitutional provision giving unbridled authority to the legislature. Consider, for example, Madison's negative, which would have empowered Congress to strike down state laws inconsistent with the Constitution. The delegates ultimately voted down the provision, but it stands in stark contrast to the language of the Suspension Clause. The provision, as modified by Pinckney's proposal, read: "[T]he National Legislature shd. have authority to negative all Laws which they shd. judge to be improper."¹⁹¹ A Suspension Clause so designed would have read: "The National Legislature should have authority to judge that the existence of a Rebellion or Invasion and the needs of public safety require suspension of the privilege of the writ of habeas corpus." Of course, the Framers did not so draft the Suspension Clause. Rather, the text of the Clause suggests that the predicate conditions are judicially enforceable and that at best only the public safety determination falls exclusively to the legislature.¹⁹² Ultimately, however, determining the justiciability of suspension based on textually based arguments calls on one to speculate as to matters that the Framers likely did not consider.¹⁹³

Returning to the *Baker* test, its prudential factors are even more problematic than its initial focus on constitutional text. Consider *Baker's* reference to the "lack of judicially discoverable and manageable standards."¹⁹⁴ As countless scholars have observed, if the courts were to abandon cases in which there was little in the way of clear standards to be drawn from the constitutional text, the courts would get out of the business of interpreting, among other things, the Commerce Clause, the First Amendment, and the Due Process and Equal Protection Clauses.¹⁹⁵ Perhaps John Hart Ely put it best

189. See *supra* Part II (exploring the conventional view of the justiciability of suspension).

190. For more on the distinction between the "Rebellion or Invasion" requirement and the "public safety" determination, see *infra* pages 387-89.

191. Notes of James Madison on the Federal Convention (June 8, 1787), in 1 M. FARRAND, *supra* note 42, at 164. For a more detailed history of the negative, consult Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 107-09 (2003).

192. For this reason, my main focus with respect to defending the justiciability of suspension is on the predicate conditions.

193. There is, at least, no indication that the matter of judicial review of the Clause was even discussed during the Constitutional Convention or ratification debates. See *supra* note 113 and accompanying text.

194. 369 U.S. 186, 217 (1962); see *supra* note 175 and accompanying text.

195. See, e.g., Redish, *supra* note 20, at 1047 ("If we were really to take seriously the 'absence-of-standards' rationale, then we would once again be proving considerably more than most of us had intended, for a substantial portion of all constitutional review is susceptible to the same critique."). On the matter of judicial manageability generally, consult

when he suggested instead that “manageability is certainly a consideration, but primarily at the stage of devising principles and remedies as opposed to the stage of determining whether to decide the issue at all.”¹⁹⁶ In all events, the Court now routinely reviews what is properly deemed “commerce” subject to federal regulation,¹⁹⁷ but has declined to rule on what “try” means in the Impeachment Clause (a matter of procedural justice on which the courts would seem to be far more qualified to speak);¹⁹⁸ this suggests that the Court’s line-drawing in this context is hardly a model of clarity.

Nor does *Baker*’s reference to the need to avoid “initial policy determination[s]” advance the inquiry a great deal. One could interpret the passage to refer to the importance of declining to review unripe cases. To the extent that the reference was intended to sweep more broadly, it would seem to beg the question at hand.¹⁹⁹ Similarly, *Baker*’s reference to the need to hesitate before using up judicial capital and avoid evincing a “lack of the respect due coordinate branches of government” or “multifarious pronouncements . . . on one question” is also problematic.²⁰⁰ Here, *Baker* relied most heavily on Bickel in presupposing that the Court should invalidate acts of a coordinate branch only when such an expenditure of its limited capital is likely to yield a result acceptable to the other branches and to the people. The controversial nature of this proposition likely explains the Court’s reluctance to rely expressly on it in subsequent decisions. There are also serious problems with the idea. First, as many commentators have noted, *Baker*’s concern with deciding cases against the interests of the companion branches “ha[s] the potential for swallowing judicial review entirely.”²⁰¹ Second, a problem with this “exhaustible capital theory” is the fact that, as Jesse Choper has catalogued, decisions by the

Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006).

196. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 56 (1993).

197. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000) (holding federal statute creating private cause of action for gender-based violence beyond Commerce Clause authority).

198. *See Nixon v. United States*, 506 U.S. 224, 248 (1993) (White, J., concurring in the judgment) (making this point).

199. The entire point of the exercise is to ascertain whether and to what extent a question is appropriate for judicial consideration. *Cf.* I M. FARRAND, *supra* note 42, at 97-98 (noting King’s opposition to a Council of Revision comprised in part with members of the judiciary: “the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation”).

200. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

201. ELY, *supra* note 196, at 177 n.54 (noting the same with respect to the “notion that ‘multifarious pronouncements by various departments on one question’ were to be avoided” (quoting *Baker*, 369 U.S. at 217)); *see also* *United States v. Munoz-Flores*, 495 U.S. 385, 390 (1990) (recognizing that “disrespect . . . cannot be sufficient to create a political question . . . , [for i]f it were, every judicial resolution of a constitutional challenge to a congressional enactment would be impermissible”).

Supreme Court are often ignored, at least for a time.²⁰² Does this in turn undercut the Court's legitimacy? No—instead, this is the natural corollary of the fact that the courts, by design, “have neither FORCE nor WILL but merely judgment.”²⁰³ Finally, as one commentator observed even before the Court decided *Roe v. Wade*,²⁰⁴ “[h]owever controversial the issues avoided in political question cases may have been, they cannot possibly have been more hotly disputed” than any number of important cases that the Court *has* decided on the merits.²⁰⁵ It strikes me as both misguided and dangerous to suggest that the Court put much stock in the legitimacy capital theory—misguided because occasions for outright disobedience of Court decisions will be rare; dangerous because any theory of abdication based itself on political considerations risks undermining the very respect for the institution of judicial review that the Court should seek to preserve.²⁰⁶

If one analyzes suspension in light of the prudential factors that animate a Bickelian/*Baker* approach, it quickly becomes apparent why these many criticisms are well-founded. Generally speaking, the framework's heavy emphasis on prudential factors suggests that courts should defer generously, if not entirely, to war power decisions reached by the political branches. There are few more “momentous” matters than those pertaining to war,²⁰⁷ and if any subject matter warrants “unquestioning adherence to . . . political decision[s] already made,” it would seem to be this one.²⁰⁸ With respect to suspension, declaring the existence of a “Rebellion or Invasion” calls on Congress in effect

202. See generally CHOPER, *supra* note 20, at 140-66; see also *id.* at 56 (noting that President Jackson thought that John Marshall should be left to enforce his decision in the *Cherokee Indian Cases*, President Lincoln ignored Taney's order in *Merryman*, President Roosevelt planned to defy any adverse Court decision in *Ex parte Quirin*, and President Eisenhower was hardly the most robust supporter of the school desegregation decisions).

203. THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

204. 410 U.S. 113 (1973).

205. Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 552 (1966); see also Michael E. Tigar, *Judicial Power, The “Political Question Doctrine,” and Foreign Relations*, 17 UCLA L. REV. 1135, 1164-65 (1970).

206. Accord Redish, *supra* note 20, at 1061 (“[T]he Court perhaps risks a greater expenditure of its moral capital if . . . it washes its hands of a sensitive constitutional issue . . .”).

207. Bickel, *supra* note 20, at 75.

208. *Baker v. Carr*, 369 U.S. 186, 217 (1962); accord Ackerman, *supra* note 9, at 1066 (“I am skeptical about the wisdom of immediate judicial intervention. With the country reeling from a terrorist strike, it simply cannot afford the time needed for serious judicial review.”). To offer another example in this vein, the possibility of two Presidents claiming office in the event of a judicial rejection of a presidential impeachment is one scenario in which Bickel's concerns may be well-founded. It is not so much “the potentiality of embarrassment from multifarious pronouncements by various departments on one question,” *Baker*, 369 U.S. at 217, but the potential for chaos that could result from contrasting pronouncements.

to declare that we are under siege, if not at war. There is much to be said for the proposition that the courts are poorly equipped to second-guess such a determination or to pronounce on whether certain circumstances constitute an “Rebellion or Invasion.” Indeed, this idea seems to be at the heart of Justice Scalia’s objection to judicial review of the legality of a suspension of the writ.²⁰⁹

Two considerations, however, demonstrate why this view should not carry the day. First, it is hardly obvious that a serious threat would be posed to effective advancement of a war effort by permitting judicial review of the question whether suspension is warranted. Suspension presents a war powers question of an entirely different order than that of a court questioning a President’s decision to commit troops to a battlefield or put down an insurrection. It is what we might call a *second-order* war powers question, which asks the courts to review the *effects* of certain strategic choices made during a war effort on individuals and their property. In all events, once satisfied that the Constitution’s requirements for suspension have been met, the judiciary necessarily must respect the displacement of the Great Writ and stay its hand. Second, despite the often compelling need to respect coordinate branches in the war powers context, the exercise of the war power has never been understood to be entirely immune from judicial review, particularly in contexts analogous to the decision to suspend the writ such as the declaration of martial law.²¹⁰ Indeed, as is explored below, courts have routinely engaged in review on the merits of certain war powers decisions (albeit often with a certain measure of deference), particularly those presenting such *second-order* questions, and it is fair to say that no major constitutional crisis has erupted as a result.²¹¹ Ultimately, *Baker*’s prudential criteria, although highlighting broader separation of powers concerns that must animate any political question analysis, offer little in the way of concrete guidance to help resolve our inquiry.²¹²

209. *Accord* *Korematsu v. United States*, 323 U.S. 214, 224 (1944) (Frankfurter, J., concurring) (“[T]he validity of action under the war power must be judged wholly in the context of war.”); *see also* *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (observing that the war power of the government is “the power to wage war successfully”). Richard Fallon observes that in many war and foreign affairs cases, “judgments of nonjusticiability . . . tend to conjoin reasoning that emphasizes judicial incompetence with suggestions that the disputed questions are assigned to other branches.” Fallon, *supra* note 195, at 1291-92.

210. Indeed, these concerns are better accounted for, if at all, in the merits question of the degree of deference owed to the political branches by the courts. *See infra* Part VI.

211. *See infra* at Part V.

212. In light of the *Baker* model’s failings, perhaps it should be no surprise that trying to make sense of—or, for that matter, to offer a principled descriptive framework encompassing—the Court’s decisions in this line is an exercise in futility. *See supra* note 19 (cataloguing major political question decisions). Further, as already noted, the Court’s adherence to the *Baker* test has been inconsistent at best. *See supra* note 180 and accompanying text. In some post-*Baker* cases, moreover, the Court has responded to

Baker's failings unsurprisingly have fueled a continuation of the scholarly debate over how to frame a principled political question doctrine. One of the most intriguing proposals for re-conceptualizing the political question doctrine comes in the work of Jesse Choper. He proposes something akin to a hierarchy of rights, and posits that disputes between the legislative and executive branches (separation of powers disputes), as well as those matters involving questions of national versus state power (federalism disputes), should effectively be nonjusticiable.²¹³ In such circumstances, Choper submits that the “put upon” branch or state can use political means to protect its interests; it does not need the help of the courts.²¹⁴ Conversely, Choper views cases involving the protection of individual rights as lying at the other end of the spectrum and warranting judicial review.²¹⁵

Choper's spectrum is intuitively attractive; indeed, it builds on the Founders' primary justification for the inclusion of judicial review in our constitutional structure—namely, the institution is necessary to check majoritarian abuses of minority and individual rights.²¹⁶ In this respect, Choper's model preserves the expenditure of judicial capital for a category of core matters to which the political process is by design insensitive.²¹⁷ Maybe

formidable contentions that questions lie beyond the province of the judicial power by stating in *Marbury*-esque language that “it is the responsibility of this Court to act as the ultimate interpreter of the Constitution.” *Powell v. McCormack*, 395 U.S. 486, 549 (1969); cf. FALLON ET AL., *supra* note 7, at 266 (observing that in *Bush v. Gore*, “there were colorable arguments . . . that the cases involved political questions Nonetheless, the Court opinions did not refer to the political question doctrine in either decision, and the concurring and dissenting opinions in *Bush v. Gore* dealt with the doctrine only glancingly”).

213. CHOPER, *supra* note 20, at 169, 295-96. Here, Choper's work builds on Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). Choper has expanded on his earlier work in a recent article. See Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457 (2005) (suggesting four criteria to determine whether a matter presents a political question).

214. See CHOPER, *supra* note 20, at 169, 295-96. The Court has not, however, adopted this approach. See, e.g., *United States v. Munoz-Flores*, 495 U.S. 385, 393 (1990) (“[T]he fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy by labeling the issue a political question.”); *Morrison v. Olson*, 487 U.S. 654 (1988) (reaching merits of challenge to Independent Counsel provisions of the Ethics in Government Act of 1978); *INS v. Chadha*, 462 U.S. 919 (1983) (concluding separation of powers challenge to legislative veto did not present a political question).

215. See CHOPER, *supra* note 20, at 64 (“[T]he overriding virtue of and justification for vesting the Court with this awesome power [of judicial review] is to guard against governmental infringement of individual liberties secured by the Constitution.”); *id.* at 127-28, 169-70; see also Barkow, *supra* note 1, at 242 (criticizing the Court's inclination to decide all constitutional questions, while acknowledging that individual rights cases generally warrant judicial review); Kramer, *supra* note 1, at 124-25 (setting forth similar views).

216. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

217. Choper's theory is built on the idea that the Court enhances its legitimacy by

Choper is right that we should be far less concerned over turf battles between the political branches, which often can check one another, as well as over any trampling of states' rights, given that the states are represented qua states in the national legislature.²¹⁸ In all events, I believe that he is certainly right to put the protection of individual rights outside the scope of nonjusticiable political questions. In the end, though, Choper's spectrum can only carry us so far, for often one person's "structural" claim is another person's "individual rights" claim. Isolating a question at one end of his proposed spectrum or the other often will present considerable challenges or, even worse, turn on semantics. Consider the Court's decision in *Bush v. Gore*,²¹⁹ thought by some commentators to involve a nonjusticiable political question.²²⁰ In that case, one could advance a forceful argument that the claims at issue were structural in nature. Such an argument would sound something like this: Overseeing Presidential elections is the proper province of the legislature, and arguably this role is assigned by the text of the Constitution to that branch.²²¹ This is, moreover, a question that implicates the balance of powers between the political branches, as well as between the states and the federal government. Accordingly, it is precisely the kind of matter in which the judiciary should stay its hand. Alternatively, one could argue—as the attorneys did on behalf of George W. Bush—that the case implicated the equal protection and due process rights of individual voters whose votes were being counted improperly and/or arbitrarily due to, among other things, the various recounts ordered by state officials.²²²

The same tension lies in a number of areas of constitutional jurisprudence. Consider the matter of the impeachment power. *Nixon* could be viewed as a case going to the heart of the separation of powers (as the majority opinion suggested²²³) or, alternatively, as one involving Judge Nixon's individual procedural rights.²²⁴ This tension exists in many federalism cases,²²⁵ and may

reserving judicial review exclusively for individual rights cases. It is not clear, however, that "the Court could effectively 'store' its capital with the public for unpopular individual rights decisions by avoiding review in non-individual rights cases." Redish, *supra* note 20, at 1058. Indeed, possibly the opposite is true. *See id.*

218. For more on the debate over the political safeguards of federalism, see Wechsler, *supra* note 213.

219. 531 U.S. 98 (2000) (per curiam).

220. *See, e.g.,* Barkow, *supra* note 1, at 242 & n.14; Tribe, *supra* note 1, at 299, 304.

221. For elaboration of the textual commitment argument as it applied to the case, see Tribe, *supra* note 1, at 277-79 & nn.433-34.

222. In this respect, had the Court been so inclined, it could have dismissed Bush's claims as improperly based on the assertion of third-party rights under the prudential *jus tertii* doctrine. *See* Craig v. Boren, 429 U.S. 190, 193 (1976) (exploring the *jus tertii* doctrine).

223. 506 U.S. 224, 233-36 (1993).

224. *See* Brown, *supra* note 179, at 126 (noting this tension).

225. Consider the individual challenging his conviction in *United States v. Lopez*, 514 U.S. 549 (1995). The case was most fundamentally about federalism and the reservation of

also account for the Court's inconsistent approach in the apportionment cases.²²⁶ In short, if justiciability is thought to turn on the jeopardizing of individual rights, often one can construct a case to invite judicial review.

This tension is further highlighted by studying the matter of suspension through the lens of Choper's spectrum. Suspension precludes a detained individual from meaningfully challenging the deprivation of liberty via the Great Writ. (Specifically, the only meaningful remedy—discharge—will be unavailable to the petitioner.) Suspension, in short, strikes at the heart of traditional individual rights.²²⁷ On this view, it would seem that suspension presents a justiciable matter under Choper's theory.

But one could also mount an argument that suspension is a structural question and the propriety of a suspension would be better left for resolution by the political branches. More often than not, war powers decisions implicate both political branches; indeed, this is what the Framers intended.²²⁸ There is surely something to be said for the idea that courts should steer clear of these matters—at least for a time—and leave them to be sorted out between the political branches. Consider an example that easily could arise in this context: if the President commits troops to an exercise that Congress does not support, Congress can cut off funding for the President's initiative.²²⁹ One could argue, along these lines, that the executive and legislative branches could check any abuses of the suspension power by the other.²³⁰ I happen to believe that there

the authority to regulate localized criminal conduct to the state governments. When looked at from the perspective of the individual, however, the case was about not being subjected to prosecution under an unconstitutional law. *Accord* Clark, *supra* note 109, at 334 (noting that “[t]hose who framed and ratified the Constitution generally equated individual liberty with limited federal power”).

226. Compare *Colegrove v. Green*, 328 U.S. 549 (1946), with *Baker v. Carr*, 369 U.S. 186 (1962). See generally *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (holding that political gerrymandering claims are nonjusticiable). This past Term, the Court divided on the justiciability of gerrymandering yet again. See *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594 (2006).

227. The fact that the Suspension Clause abuts the prohibitions on bills of attainder and ex post facto laws, provisions well-accepted to protect individual liberty, further supports viewing the habeas privilege as a core individual right. See U.S. CONST. art. I, § 9, cl. 2 (Suspension Clause); *id.* cl. 3 (Bill of Attainder Clause, Ex Post Facto Clause); see also *supra* notes 184-85 and accompanying text. Note also that a suspension could be targeted to reach unpopular minority groups, although historically, suspensions have been targeted instead at particular geographic areas. See *supra* Part I.

228. The Framers gave Congress the power to “declare war” while designating the President “Commander in Chief.” See U.S. CONST. art. I, § 8, cl. 11; *id.* art. II, § 2, cl. 1.

229. Such an example, Choper says, presents a clear political question unfit for judicial resolution. See Choper, *supra* note 213, at 1497.

230. The Executive, for example, presumably could veto an act of suspension with which he disagrees (though of course the legislature potentially could override the veto). If, as has usually been the case, an act of suspension delegates the suspension authority to the Executive, see *supra* Part I, he need not invoke the authority. There may be additional ways for the two branches to police one another. See generally Ackerman, *supra* note 9 (arguing for an emergency “regime” within which decisions about how to respond to terrorism

are serious problems with this argument²³¹ because suspension effects a diminution of the judicial power and the “put upon” branch—the judiciary—cannot rely on politics to protect its interests. The only means by which the judiciary can ensure that Congress has not improperly displaced the Great Writ is by exercising judicial review to ensure as much.

Choper acknowledges that a matter of individual rights, even in the war powers context, may warrant judicial involvement. Thus, in a recent and brief explication of how his model applies to suspension, Choper observed that the questions whether a state of “rebellion” exists, whether the “public safety” requires suspension, and whether suspension quashes other constitutional protections (such as the Fourth Amendment) “should be subject to judicial review.”²³² In the very next sentence, however, he posits that the first two questions “are plainly candidates for substantial judicial deference to the properly constituted political bodies, if not for a conclusion of no manageable standards, which would foreclose any further judicial involvement whatsoever.”²³³ As I will argue below, my own view is that the individual rights aspect of the suspension inquiry (embodied in related constitutional provisions) should be accorded far more weight by Choper. In all events, Choper’s line-drawing is hardly an exact science and often, as here with respect to suspension, fails to offer clear guidance on matters of justiciability.

B. *Questioning the Political Question Doctrine*

In contrast to those who sought to define and justify a political question doctrine, Louis Henkin suggested that the doctrine was nothing more than shorthand for courts rejecting constitutional claims on the merits.²³⁴ Henkin did not question that there are political decisions that are delegated by the Constitution to the executive and legislative branches. But, he said, it requires a second more radical step to say, as a true political question doctrine would, that “some constitutional requirements are entrusted exclusively and finally to the political branches of government for ‘self-monitoring.’”²³⁵ Support for such a step, moreover, may not be found in the Court’s decisions. Where the courts purport to abstain from speaking on such questions, they effectively are saying:

(including the detention of individuals) will be sorted out between the political branches).

231. David Cole observes: “Precisely because it is politically responsive, the legislative branch is generally likely to be less willing to stand up to the President than are the courts in times of crisis, when the easy political course is to trumpet the necessity for broad national security measures.” Cole, *supra* note 100, at 1766.

232. See Choper, *supra* note 213, at 1499.

233. *Id.*

234. See generally Henkin, *supra* note 20.

235. *Id.* at 599. Such a view calls for “an exception” to *Marbury*’s vision of the judiciary as expositor of the Constitution’s meaning and asks the courts to “forego their unique and paramount function of judicial review of constitutionality.” *Id.* at 599-600.

The act complained of violates no constitutional limitation on that power, either because the Constitution imposes no relevant limitations, or because the action is amply within the limits prescribed. We give effect to what the political branches have done because they had political authority under the Constitution to do it.²³⁶

As Henkin saw things, “[o]ne needs no special doctrine to describe the ordinary respect of the courts for the political domain.”²³⁷

In keeping with this theme, Henkin posited that many of the cases celebrated as emblematic of the political question doctrine are better read as involving meritless claims. To him, *Luther v. Borden* was nothing more than a run-of-the-mill case in which the Court reached the merits and concluded that “the actions of Congress and the President . . . were within their constitutional authority and did not violate any prescribed limits or prohibitions.”²³⁸ Similarly, in the Court’s foreign relations cases, Henkin saw no evidence of judicial abstention that left intact decisions by the President whether “right or wrong.”²³⁹ By contrast, the Court in such cases recognized “the generous grant of constitutional powers to the President or Congress.”²⁴⁰ Finally, Henkin argued that any Bickelian prudential considerations should come into play only at the remedial stage. He defended the invocation here on the basis that unlike a true political question doctrine, which is difficult to square with *Marbury*, “[d]enial of a particular, or any, equitable remedy is . . . not an exception to judicial review.”²⁴¹

There are two aspects to Henkin’s primary argument: descriptive and normative. As to the former, Martin Redish, among others, has pointed out that “[d]espite Professor Henkin’s valuable insights, a political question doctrine does in fact exist.”²⁴² Taking the Supreme Court at its word, Professor Redish does seem to have the better of the argument here, at least with respect to the handful of decisions that quite transparently invoke the political question doctrine.²⁴³ With that said, the Court’s *Nixon* decision lends some support to

236. *Id.* at 601.

237. *Id.* at 598.

238. *Id.* at 608.

239. *Id.* at 612; *see id.* at 610-13.

240. *Id.* at 612-13. Henkin also read the famous dissents of Justices Frankfurter and Harlan in *Baker v. Carr* not to quarrel with the justiciability of that case but instead to disagree with the majority’s view of the merits of the one-person, one-vote claims brought by the plaintiffs. *See id.* at 614-17.

241. *Id.* at 606. For a critique of Henkin’s position on this matter, consult Redish, *supra* note 20, at 1055-57.

242. *Id.* at 1032 (“[T]he fact remains that [certain decisions] were in actuality premised on recognition of a certain discretionary judicial authority to defer to the other branches that potentially extends well beyond the traditional rationales.”); *see also* Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 449-50 (2004) (arguing that certain decisions not expressly invoking the doctrine nonetheless apply it).

243. For example, although Henkin’s descriptive account of the debate in *Baker* has

Henkin's observations, for there is considerable evidence in the majority opinion that the Court was intermingling matters of justiciability and the merits. Judge Nixon claimed that his impeachment by the Senate, which received evidence before a committee as opposed to the whole body, violated the Impeachment Clause's requirement that the Senate "try" him.²⁴⁴ Writing for the majority, Chief Justice Rehnquist deemed the claim nonjusticiable for a variety of reasons, yet his opinion also parsed the possible meanings of the word "try" and concluded with a statement that reads a lot like a rejection on the merits: "[W]e cannot say that the Framers used the word 'try' as an implied limitation on the method by which the Senate might proceed in trying impeachments."²⁴⁵

Descriptive contentions aside, it is Henkin's normative argument that should command our attention because it challenges head-on the notion that certain domains of constitutional adjudication fall outside judicial cognizance.²⁴⁶ Here, I question just how much distance actually separates

some support (particularly with respect to Justice Harlan's dissent), one would have to strain to read Justice Frankfurter's opinion in *Colegrove v. Green*, 328 U.S. 549 (1946), in the same light. There, Frankfurter posited that the apportionment question before the Court was "beyond its competence" and that the Court "ought not to enter this political thicket." *Id.* at 552, 556 (Frankfurter, J.) (plurality opinion). Frankfurter believed that the case "must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination." *Id.* at 552. This sounds an awful lot like a political question doctrine.

244. *Nixon v. United States*, 506 U.S. 224, 228 (1993); see U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.").

245. *Nixon*, 506 U.S. at 230. There is little to distance this statement in the majority's opinion from Justice White's concurrence, which expressly resolved the case on the merits. *See id.* at 250 (White, J., concurring in the judgment) ("[The] evidence reveals that the Impeachment Trial Clause was not meant to bind the hands of the Senate beyond establishing a set of minimal procedures [beyond which the Senate did not deviate here]."). Later in the majority opinion, moreover, the Court registered its agreement with the assertion that "courts possess power to review either legislative or executive action that transgresses identifiable textual limits." *Id.* at 238. Here, the Court suggested that if the Senate impeached while not under on Oath or Affirmation, or by a vote of less than two-thirds of those present—two actions that would clearly violate the terms of the Impeachment Clause—the Court would step in, notwithstanding the fact that the Constitution grants the Senate the "sole power" to try impeachable offenses. *See id.*; see also *id.* at 253-54 (Souter, J., concurring in the judgment) (hypothesizing scenarios in the impeachment process that would merit judicial intervention).

246. Building on Henkin's work, other scholars, including Redish, have suggested that "[o]nce we make the initial assumption that judicial review plays a legitimate role in a constitutional democracy, we must abandon the political question doctrine, in all of its manifestations." Redish, *supra* note 20, at 1059-60; see also ERWIN CHERMERINSKY, *INTERPRETING THE CONSTITUTION* 99-100 (1987) (positing that the doctrine is "inconsistent with a Constitution committed to protecting separation of powers").

Henkin from Wechsler. To be sure, Wechsler is credited with modeling the “classical” political question doctrine. But Wechsler, recall, suggested that because the Constitution “commits” certain matters to the political branches for handling, it follows that the judiciary shall not have a say on such matters.²⁴⁷ The judiciary, he said, should not stay its hand until firmly satisfied that the Constitution has committed the relevant matter for resolution to the political branches.²⁴⁸ This sounds like another way of asking whether the Constitution has committed the relevant matter to the *discretion* of the political branches. Both Wechsler and Henkin, in short, are fundamentally arguing that such matters are better understood as ones upon which the Constitution does not impose restraints, and so naturally the judiciary cannot either if called to do so.²⁴⁹ Understood this way, their work sits comfortably with *Marbury*’s original explication of this concept. There, Chief Justice Marshall’s words suggest nothing more than the same general point: to the extent that the Constitution assigns unchecked “discretion” over a matter to the political branches, the courts may not second-guess decisions made within the scope of that delegated authority.²⁵⁰ *Marbury* hardly precludes a judicial policing of the constitutional boundaries in those contexts where discretion is bounded; if anything, the decision supports such review.²⁵¹

Thus, even Henkin’s view of the political question doctrine (and *Marbury* itself) returns us to constitutional text. As explored above, however, the text can only carry the inquiry so far.²⁵² Thus, although there is textual support for concluding that portions of the Suspension Clause are justiciable, the text of the Clause alone does not resolve the issue definitively one way or the other. In short, simple reliance on *Marbury*’s validation of the institution of judicial review is insufficient to defeat the conventional view on the justiciability of suspension. Ultimately, something more is required to accomplish this feat.

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247. See *supra* text accompanying notes 165-67.

248. See Wechsler, *supra* note 20, at 9.

249. Wechsler said elsewhere, for example, that “all the [political question] doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised.” HERBERT WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 11-12 (1961).

250. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803) (“By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.”); accord *FALLON ET AL.*, *supra* note 7, at 254 (“[I]n *Marbury* itself Chief Justice Marshall suggested that questions should be deemed ‘political,’ and therefore not subject to judicial review, if non-judicial officials possessed ‘discretion’ to act as they did in the circumstances.”).

251. See *Marbury*, 5 U.S. (1 Cranch) at 177 (positing that within a properly framed Article III case, it is the judiciary’s province to “say what the law is”).

252. See *supra* text accompanying notes 178-82.

As yet, no one has come forward with a principled framework for isolating those matters that are conferred to the unchecked discretion of the political branches. This is hardly surprising, for such a task presents overwhelming challenges. For example, most would likely agree that Cabinet appointments fall within the complete discretion of a President. Many in turn would agree that no one could bring an equal protection claim challenging the President's decision to name a slate of all-male Cabinet members. But articulating just what distinguishes such a claim from one challenging a decision to segregate school children—a decision that is clearly justiciable²⁵³—is not easy. Still others may argue—and have argued, rather convincingly—that matters of internal housekeeping in the other branches are not fit for judicial resolution.²⁵⁴ Thus, for example, to the extent that the House of Representatives has satisfied itself that a bill has complied with the Origination Clause (which the Framers included for the House's benefit), what point is there in the judiciary reviewing a claim to the contrary?²⁵⁵

The point of this discussion is not to develop in full measure my own theory of how to separate “true” political questions from justiciable matters. It is instead to highlight the difficulties that any such enterprise entails. Nor do I intend here to deny that there are some true political questions. My aim here is merely to demonstrate that suspension is not one of them.

Because a one-size-fits-all approach to defining political questions presents potentially insurmountable challenges, it is necessary to explore the purpose and history behind a constitutional provision as well as its position within our broader constitutional scheme in order to ascertain whether it presents a political or legal question. When one studies the history and purpose of the Great Writ along with its relationship with other constitutional provisions—most principally due process—it becomes clear that judicial review of the predicate conditions required for a valid invocation of the suspension authority is fully consistent with our constitutional traditions.

253. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

254. See, e.g., Choper, *supra* note 213, at 1505-07.

255. But see *United States v. Munoz-Flores*, 495 U.S. 385 (1990) (rejecting argument that such a claim is nonjusticiable). In *Munoz-Flores*, some Justices made just this argument, positing that the House was in a position to police any constitutional violation itself. See *id.* at 403 (Stevens, J., concurring in the judgment) (concluding that any Origination Clause violation may be cured by an otherwise lawful enactment, in part because “the House is in an excellent position to defend its origination power”); *id.* at 409 (Scalia, J., concurring in the judgment) (positing that the Court “should not undertake an independent investigation into the origination of the statute at issue here”).

IV. MAKING THE AFFIRMATIVE CASE FOR JUDICIAL ENFORCEMENT OF
LIMITATIONS ON THE SUSPENSION POWER

When we ask if Congress may suspend the writ based on certain circumstances, or structure a suspension in a particular fashion, what we are asking is how the Suspension Clause itself and other constitutional provisions restrain the suspension authority, if at all. No matter how the questions are framed, ultimately the judiciary should play a role in answering them. To be sure, *how* that role is undertaken itself presents an important question and may turn on the source of the asserted restraint on the suspension authority.²⁵⁶ But that is a far different matter than the first-order question *whether* that role is valid. Here, I aim to put the latter question to rest by making the case in favor of a role for the courts to ensure that any suspension follows from valid constitutional premises.

The discussion has already suggested two reasons why suspension should not be considered a political question. First, a parsing of the text of the Suspension Clause, which distinguishes between the requisite predicate conditions (the existence of a “Rebellion or Invasion”) and a “public safety” judgment, suggests that at most only the latter is assigned for final determination by the legislature.²⁵⁷ The former pose strict, bright-line limitations on the legislative power, limitations that should be subject to judicial enforcement just as similar limitations are today.²⁵⁸

Second, the Great Writ at its core is concerned with individual rights and liberty, the protection of which was crucially important to the Framers and assigned in the last resort to the judicial branch. Indeed, the most important justification for the countermajoritarian institution of judicial review is that the judiciary—unlike the other branches—can protect “the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action.”²⁵⁹ This is why Alexander Hamilton viewed the courts as the “bulwarks of a limited Constitution against legislative encroachments,”²⁶⁰ an idea that he appeared to connect with the Suspension

256. See *infra* Part VI.

257. See *supra* pages 367-68.

258. Consider, for example, the justiciability of prohibitions on bills of attainder and ex post facto laws. See *supra* text accompanying notes 184-85; see also *supra* note 227. Consider as well as the enforcement power under Section 5 of the 14th Amendment and commerce power. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

259. *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring). As Justice Powell observed: “It is this role . . . that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.” *Id.*

260. THE FEDERALIST No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also *id.* at 467 (observing that the federal courts “were designed to be an intermediate body between the people and the legislature in order, among other things, to

Clause. The Framers included the Suspension Clause, Hamilton wrote, to guard against “[a]rbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions.”²⁶¹ Accordingly, perhaps it is enough to defend the position that both internal and external constitutional limitations on the suspension power should be judicially enforceable to observe that the possible targets of a suspension—unpopular minorities—are those whose rights most cry out for judicial protection.²⁶² But I aim to dig deeper to make my case.

Further exploration into the role of the Great Writ in our constitutional structure demonstrates why St. George Tucker was correct to assert that “[a] suspension under any . . . circumstances [other than a rebellion or invasion], whatever might be the pretext, would be unconstitutional, and consequently must be disregarded by those whose duty it is to grant the writ.”²⁶³ In particular, three points, explored below, support this conclusion. To begin, those who have staked out the conventional view that suspension is a political question have overlooked the relationship between the Suspension Clause and limitations on the suspension authority found elsewhere in the Constitution. The relationship between the Great Writ and the fundamental right to due process, however, cannot be overstated. Protection of this core right lies at the heart of the Great Writ’s very purpose and the connection between the two makes clear that enforcement of the predicate conditions for a suspension should be judicially enforceable.

Next, special problems would be presented if Congress unlawfully withdrew the Great Writ, as it is the only meaningful remedy for unconstitutional deprivation of liberty. Strictly speaking, suspension itself does not withdraw jurisdiction from the courts, but displaces the important judicial remedy of discharge. An act of suspension gives the custodian justification, when asked by a court, for refusing to set forth the precise cause of a prisoner’s detention. But if the suspension follows from unconstitutional premises, then through the suspension, Congress has “direct[ed] the court to be instrumental to [an unconstitutional] end,” something that *United States v. Klein* says it may not do.²⁶⁴ That is, in the event of an illegal suspension, a court that accepts a custodian’s refusal to set forth the cause and inquires no further into the legality of the detention itself plays a role in the violation of the detainee’s fundamental right to due process.

keep the latter within the limits assigned to their authority”).

261. THE FEDERALIST No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

262. See CHOPER, *supra* note 20, at 69 (“The smaller the allegedly aggrieved group and the more intense the felt need or the contempt of the majority, the greater the necessity of judicial review for the preservation of personal liberty.”).

263. See TUCKER, *supra* note 114, at 292.

264. 80 U.S. (13 Wall.) 128, 148 (1871).

Finally, although I have put the state courts to the side for much of this analysis, a brief word on their special place in our constitutional structure demonstrates all the more why suspension should not be viewed as a political question.

A. Of the Link Between the Great Writ and Core Due Process Safeguards

The relationship between the writ of habeas corpus and due process traces its roots to the writ's English heritage. The Framers built on this tradition in crafting our Constitution, forging an important link between the Great Writ and the core due process right to seek impartial review of the cause of one's detention at the hands of the Executive. To be sure, the Bill of Rights, with its Due Process Clause, was not part of the original constitutional text; there was, all the same, widespread understanding that it would be added shortly following ratification.²⁶⁵ The very essence of the Great Writ, moreover, is to protect one from being deprived of liberty without due process. At its core, the writ "insure[s] the integrity of the process resulting in imprisonment"²⁶⁶ and affords "a swift and imperative remedy in all cases of illegal restraint upon personal liberty."²⁶⁷

The link between the Great Writ and due process principles evolved over the course of the writ's development in English law. Although the Great Writ and Magna Carta ("Great Charter") were not linked at their origins, over time, the Great Writ came to be understood to be tied closely to the Great Charter's guarantee that one may be detained only in accordance with the rule of law.²⁶⁸ Thus, "due process was concerned with how and why a man was imprisoned; the writ was a procedural avenue by which a prisoner could get those questions before a court" and be granted a remedy for any due process violations.²⁶⁹ In two of the most influential English works on the development of American law, the link between the two was made particularly transparent. In his

265. See Clark, *supra* note 109, at 344.

266. DUKER, *supra* note 29, at 3; see also *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.) ("The writ of *habeas corpus* is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause.").

267. *Price v. Johnson*, 334 U.S. 266, 283 (1948).

268. See generally DANIEL JOHN MEADOR, *HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY* 1-38 (1966) (tracing the Great Writ evolution from the twelfth century to the accepted linking of due process principles and the writ in the seventeenth century); ROBERT S. WALKER, *THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY* (1960) (tracing the same); David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2502 & nn.113-14 (1998) (collecting cites).

269. MEADOR, *supra* note 268, at 19; see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 554-55 (2004) (Scalia, J., dissenting) ("The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.").

Commentaries, Blackstone famously referred to the Great Writ as “another *magna carta*” that protected the “natural inherent right” of the “personal liberty of the subject.”²⁷⁰ Coke, in his *Institutes on the Law of England*, asked: “Now it may be demanded, if a man be taken, or committed to prison *contra legem terrae*, against the Law of the land [the equivalent of due process of law²⁷¹], what remedy hath the party grieved?” To this, he answered: “He may have an *habeas corpus*”²⁷² In the debates leading up to ratification, advocates influenced by these works proclaimed that the “privilege [of the writ] . . . is essential to freedom.”²⁷³

Thus, at their respective cores, the right to due process and the Great Writ are coextensive.²⁷⁴ The Supreme Court has recognized as much, treating challenges to curtailments of habeas jurisdiction as inviting inquiry under the Due Process Clause.²⁷⁵ This marriage of constitutional protections follows because “[t]o hold someone in detention without affording her a judicial forum to test whether the detention is lawful . . . is the very essence of a deprivation of

270. 3 WILLIAM BLACKSTONE, COMMENTARIES *133, *135. Blackstone elaborated that individual liberty is “established on the firmest basis by the provisions of *magna carta*, and a long succession of statutes enacted under Edward III.” *Id.* at *133; *see also id.* (“[T]he glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful.”).

271. *See Duncan v. Louisiana*, 391 U.S. 145, 169 (1968) (noting that “by the end of the 14th century ‘due process of law’ and ‘law of the land’ were interchangeable”).

272. SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 55 (6th ed. 1681), *detailed in* MEADOR, *supra* note 268, at 22-23; *see id.* at 23-24, 28 (collecting cites on the influential nature of the *Institutes* and *Commentaries* on American law).

273. Massachusetts Ratifying Convention 26 Jan. 1788, *reprinted in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION: AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 108-09 (Jonathan Elliot ed., 1891) (remarks of Judge Sumner); *see also* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 117 (2d ed. 1829) (“It is the great remedy of the citizen or subject against arbitrary or illegal imprisonment; it is the mode by which the judicial power speedily and effectually protects the personal liberty of every individual, and repels the injustice of unconstitutional laws or despotic governors.”).

274. Accordingly, although I will sometimes refer to certain constitutional limitations as “external” to the suspension authority, the right to due process is not actually an external limitation on the suspension authority but is instead better understood as inextricably intertwined with the internal limitations (the triggering conditions set forth in the Suspension Clause itself).

275. For example, the Court has held that “the 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.” *Swain v. Pressley*, 430 U.S. 372, 381 (1977). It does not matter whether the substituted remedy is labeled as habeas review or not, so long as it clearly provides due process as a constitutional matter. *See generally id.*; *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202-03 (1830) (Marshall, C.J.) (observing that the judgment of a competent tribunal may be treated as conclusive in habeas actions brought before other courts); Fallon, *supra* note 94, at 1083 (“Congress can permissibly preclude habeas review when other mechanisms of sufficiently searching judicial oversight remain available.”).

liberty without due process.”²⁷⁶ Although due process has come to mean many things over time, at its most fundamental and as it relates to the Great Writ, the guarantee of due process promises that the Executive must answer to an impartial body with a valid cause for depriving one of his or her liberty.²⁷⁷ Indeed, that the habeas remedy is so crucial to the realization of this due process guarantee suggests that “had there been no Suspension Clause, such a remedy would still be implicitly mandated by the Constitution.”²⁷⁸ This conclusion follows, moreover, because the Suspension Clause should be read “as an integrated component of a broader constitutional scheme of rights to judicial review and judicial remedies.”²⁷⁹

Accordingly, in the absence of a valid suspension, an American citizen detained on American soil (our paradigmatic habeas petitioner) enjoys at a minimum the due process right to ask a court to inquire into the cause for his or her detention.²⁸⁰ But just as the core due process right stands inviolate in the

276. Cole, *supra* note 268, at 2494; *see* Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 617 (1993) (“[D]ue process requires a ‘neutral and detached judge in the first instance.’” (quoting *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972))). As Justice Story observed, the writ “is the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement; and if no sufficient ground of detention appears, the party is entitled to his immediate discharge.” 3 STORY, *supra* note 12, § 1333.

277. Thus, when I refer herein to the “core” or “fundamental” right to due process, I mean to refer to the understanding of due process that dates back to the Great Charter, as opposed to many of the expansive readings of the principle that courts have adopted in more recent times. *Accord* *Duncan v. Louisiana*, 391 U.S. 145, 169 (1968) (“[T]he origin of [due process] was an attempt by those who wrote Magna Carta to do away with the so-called trials of that period where people were liable to sudden arrest and summary conviction in courts and by judicial commissions with no sure and definite procedural protections and under laws that might have been improvised to try their particular cases.”).

278. Shapiro, *supra* note 36, at 65.

279. Fallon, *supra* note 94, at 1084.

280. The Court said as much in *Hamdi*, reaffirming that a citizen detained without charges on American soil enjoys a Fifth Amendment due process right to a hearing to ensure that the Executive is not acting beyond his authority. Of course, the Court also held that the citizen in *Hamdi*, captured on an overseas battlefield and being detained on American soil, could be held as the equivalent of a prisoner-of-war so long as the government could prove in a proceeding structured to afford him some process that he was an enemy combatant. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 526-39 (2004) (O’Connor, J.) (plurality opinion); *see also id.* at 537 (“Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to . . . process.”). And the Court likewise did not rule out that *Hamdi*’s hearing could occur before a military tribunal. *See id.* at 538. The Court correctly held that due process governed the inquiry; its conclusion, by contrast, that all due process promised the citizen-detainee was a hearing on his status was troubling. As Justice Scalia forcefully argued in dissent, the Constitution does not contemplate a prisoner-of-war category with respect to citizens, but instead provides that they must be either tried for treason or other crimes, *see id.* at 558-61 (Scalia, J., dissenting), or released, *see id.* at 575 (“If the Suspension Clause does not guarantee the citizen that he will either be tried or released, unless the conditions for suspending the writ exist and the grave action of suspending the writ has been taken . . . it guarantees him very little indeed.”); *id.* at 576 (“The role of habeas corpus is to determine the legality of executive detention, not to supply the omitted process

absence of a valid suspension, the very same due process guarantee is displaced by a suspension following from constitutional premises. This is what makes suspension the emergency provision that it is. Suspension operates as a “trigger” of sorts, quashing the right of one detained within the terms of a suspension to force the Executive to justify his actions to a court.

There is considerable debate regarding the full effects of a valid suspension once in place.²⁸¹ For example, does a valid suspension displace the protections found in the Bill of Rights entirely, including one’s right to indictment by grand jury, speedy trial, a jury of one’s peers, and counsel? Does a valid suspension displace the Fourth Amendment’s ban on unreasonable searches and seizures (or at least the exclusionary rule) as well as the Eighth Amendment’s prohibition on cruel and unusual punishment? And after a suspension has lapsed, may the judiciary award a remedy in damages for any detention that violated these protections during the period of suspension?²⁸² Putting these questions to the side for the moment, what is clear is that the immediate effect of a suspension is the facilitation of detaining individuals during times of crisis. Suspension accomplishes this end by displacing a prisoner’s core due process rights. “The effect of [a] suspension is to make it possible for military commanders or other officers to cause the arrest and detention of obnoxious or suspected persons, without any regular process of law.”²⁸³ The Executive is empowered in turn to “deprive those persons of the right to an immediate hearing and to be discharged if the cause of their arrest is found to be unwarranted by law.”²⁸⁴

In practice, this means that with respect to a prisoner held during a period of a valid suspension, if asked by a court, his custodian “should not be required to give the cause of his detention on return to a writ of *habeas corpus*.”²⁸⁵ As the Supreme Court observed in *Ex parte Milligan*:

It is essential to the safety of every government that, in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of *habeas corpus*. . . . In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make

necessary to make it legal.”). For greater discussion of this aspect of *Hamdi*, consult Fallon & Meltzer, *supra* note 94.

281. *See infra* note 394 (citing recent scholarship on this issue).

282. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (implying a damages remedy for violations of the Fourth Amendment committed by federal officers).

283. HENRY CAMPBELL BLACK, *HANDBOOK OF AMERICAN CONSTITUTIONAL LAW* § 267, at 703-04 (4th ed. 1927).

284. *Id.* at 704.

285. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 115 (1866).

arrests, should not be required to produce the persons arrested in answer to a writ of habeas corpus.²⁸⁶

Thus, the very purpose of suspension is to permit Congress to override core due process safeguards during times of crisis. In effect, suspension operates as an “on/off” switch for this due process right and possibly other portions of the Constitution as well.²⁸⁷ Some of the hardest questions regarding suspension alluded to above fall in the balance. Just how much of the Constitution does a valid suspension shut off?

Before exploring some of these questions, more needs to be said on the relationship between suspension and the core due process right to impartial review of the cause of one’s detention. This relationship provides a crucial clue to understanding why the judiciary should play a role in ensuring that any suspension follows from lawful premises. If one subscribes to the conventional view that suspension is a political question, one must also accept that through *any* act of suspension (whether following from lawful premises or not), Congress effectively can switch “off” the guarantee of due process and shield this fundamental individual right from judicial protection. Concededly, the Suspension Clause is an emergency provision with dramatic ramifications. But to defend the proposition that these ramifications should follow even in the absence of a true emergency, so long as Congress musters the requisite votes to suspend, is difficult to reconcile with the traditional role of the courts in our constitutional tradition. The judiciary is the sole branch constituted for the very purpose of ensuring that individual rights are not improperly displaced by a political majority merely for the sake of expediency, and the Framers expected that “independent tribunals of justice will consider themselves in a peculiar manner the guardians of the [protections set forth in the Bill of Rights].”²⁸⁸ Indeed, because the ramifications of a valid suspension are so dramatic, the

286. *Id.* at 125-26.

287. As Representative Smilie put it during the House debate over whether to suspend the writ when requested by President Jefferson: “A suspension of the privilege of the writ of habeas corpus is, in all respects, equivalent to repealing that essential part of the Constitution which secures that principle which has been called . . . the ‘palladium of personal liberty.’” *See* Debate in the United States House of Representatives on the Suspension of the Habeas Corpus (Jan. 26, 1807), reprinted in 3 THE FOUNDERS’ CONSTITUTION 335 (Philip B. Kurland & Ralph Lerner eds., 1987); *see also id.* at 333 (remarks of Rep. Eppes) (“[An act of suspension] suspends, at once, the chartered rights of the community . . .”).

288. Debates in the House of Representatives (June 8, 1789) (remarks of James Madison), reprinted in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 83 (Helen E. Veit et al. eds., 1991). The quote is from Madison’s statement in the House (without contradiction) during the debates over adopting the Bill of Rights that “independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; . . . they will be naturally led to resist every encroachment upon [these] rights . . .” *Id.* at 83-84. Jefferson likewise referred to the declaration of rights as placing a “legal check . . . into the hands of the judiciary.” Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), reprinted in CREATING THE BILL OF RIGHTS, *supra*, at 218.

on/off switch that it embodies requires this independent guardian. And it is these ramifications that make suspension categorically different from other questions traditionally understood to be “political” or nonjusticiable.²⁸⁹

To offer an example of the nature of the relationship between suspension and core due process safeguards, consider the suspension that Congress enacted during the Civil War. Clearly, portions of the country were in a state of rebellion and therefore the 1863 Act followed from exceedingly valid premises.²⁹⁰ Accordingly, those aiding the Confederate war effort who were captured during this period of suspension did not have the right to seek impartial review of the cause of their detentions, the Great Writ having been lawfully suspended. In effect, their core due process rights were displaced by the suspension. And with such rights, perhaps additional constitutional safeguards were suspended as well. Along these same lines, consider the events of September 11 and the *Hamdi* case. Assume that shortly following the attacks of September 11 Congress suspended the writ for those accused of complicity with the Taliban and al Qaeda. Assume further that the attacks of September 11 constituted an invasion for purposes of the Suspension Clause. What if Hamdi, detained solely on the basis of the Mobbs declaration,²⁹¹ then sought to challenge his detention as violating his due process right to confront the evidence that the government had against him? Surely it would have been enough for the government to respond in return that the writ has been suspended and that Hamdi clearly fell within the terms of the suspension. Permitting a detainee to advance a host of narrower due process or other related claims (for example, that one is entitled to grand jury indictment, bail, or a speedy trial, etc.) would undercut the very purpose of suspension in the first instance.

By contrast, one could easily imagine scenarios in which claims sounding in the Bill of Rights should remain viable even in the face of a suspension. Imagine first that Congress suspends the writ nationwide in response to the belief that crime is spiraling out of control. Would the due process rights of all those detained pursuant to the suspension be insulated from judicial protection? No rebellion or invasion justified the suspension. (Indeed, there was no rebellion or invasion at all.) Along these same lines, imagine that Congress

289. Consider, for example, the matter of impeachment. Losing one’s employment, *see, e.g.*, *Nixon v. United States*, 506 U.S. 224 (1993), simply cannot be viewed as threatening rights of the same order as one’s core liberty interest. Nor, for example, is the congressional choice to recognize one state government over another where two vie for control comparable to suspension. *See Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). In the latter scenario, Congress *must* choose sides and this choice, in any event, does not suspend fundamental individual rights in the process.

290. *See supra* text accompanying notes 55-58 (discussing the 1863 Act).

291. The Mobbs declaration, upon which the government relied as the basis for Hamdi’s detention, asserted that Hamdi was complicit with the Taliban and was captured in Afghanistan while aiding its forces. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 512-14 (2004) (detailing declaration).

suspends the writ in response to what it views as an “Invasion” of illegal immigrants across our southern border.²⁹² One captured and held pursuant to such a suspension should be permitted to advance due process claims in a court by arguing that the suspension’s predicate is not remotely close to the kind of “Invasion” that the Suspension Clause’s terms contemplate. The same should hold true in the event that Congress suspends the writ domestically in response to the dangers posed by ongoing military operations on foreign soil. The predicate conditions for invocation of the suspension authority (namely, a “Rebellion or Invasion” on American soil) are lacking in each of these scenarios.²⁹³ Accordingly, due process requires that our paradigmatic habeas petitioner detained pursuant to any such suspension be permitted to seek judicial review of the lawfulness of his detention.

It takes another step to argue in favor of a broader role for the courts to check abuses of the suspension power, but such a step is warranted all the same. Imagine that as part of efforts to round up al Qaeda members pursuant to a post-September 11 suspension of the writ, a citizen is detained without charges for possession of child pornography. He should be able to contend in a habeas petition that the act of suspension does not apply to him and therefore that his due process rights remain fully intact. The petitioner would argue that such rights were not displaced by the suspension, even assuming that it followed from valid premises, because Congress did not seek to reach him with the suspension. Indeed, this is essentially the claim upheld by the Supreme Court in *Milligan*—there, the geographic sweep of the suspension authorized by Congress did not reach states in which the courts were open and operating, and *Milligan* had been captured in such a state.²⁹⁴

Of course, a *Milligan* claim could quickly shade into a claim that one is not really a “terrorist” at which a suspension is aimed and courts should hesitate to entertain such contentions, lest they undermine the very point of the suspension in the first instance (namely, to make the capture and detention of prisoners during times of crisis easier). Otherwise, in the *Hamdi* hypothetical above, *Hamdi* could have challenged the reliability of the Mobbs declaration.

The claims explored above challenge wholesale the existence of the predicate conditions justifying suspension and whether Congress even intended as part of an act of suspension to reach a particular detainee. There are

292. My appreciation to David Shapiro and Daniel Meltzer for raising in our discussions many of the hypothetical scenarios explored here. One could easily imagine other scenarios along these lines, some approaching the fanciful. For example, what if Congress had suspended the writ to address the “Invasion” of the Beatles?

293. Consider here what Bruce Ackerman has said of the “constitutional concept of ‘Invasion.’” Ackerman, *supra* note 9, at 1085. “The text does not speak in terms of a legal category like ‘war,’ but addresses a very concrete and practical problem: If invaders challenge the very capacity of government to maintain order, a suspension . . . is justified when ‘the public Safety may require it.’ It is this challenge to effective sovereignty that makes the constitutional situation exceptional.” *Id.* at 1085-86.

294. See *supra* text accompanying note 153.

additional claims that could arise in the event of a suspension and concededly, they present a harder case when it comes to the matter of justiciability. Continuing with the above pornography hypothetical, assume that the act of suspension on its face clearly encompassed the possessor of child pornography. (Assume that the act is clearly predicated on the attacks of September 11 but is drafted in sweeping terms.) Should the habeas petitioner be able to argue that Congress has exceeded its authority under the Suspension Clause by including him within the scope of the suspension? Put another way, should he be free to argue that the predicate condition (the invasion) simply does not justify a suspension of such magnitude? Imagine instead that Congress suspends the writ throughout the country in response to a localized rebellion. May a citizen in Alaska be held without charges based on a rebellion launched in Florida, particularly if there is no reason to suggest that the Alaskan has any connection to the rebellion? As in the above scenarios, in both of these examples no rebellion or invasion justified the suspension, insofar as there is no link between the invasion and the detainee, nor was one ever claimed.

Proper respect for the importance of due process rights and the role of the courts in our constitutional structure dictate that the child pornographer and the Alaskan should be able to contend that the rebellion only justified a suspension on a much narrower scale. Perhaps the Alaskan would lose if the government could demonstrate a sufficient connection between the offense and the justification behind the suspension of the writ, but on these terms, the government would have a tough case to make. To be sure, one could view these kinds of challenges as shading into arguments over whether the “public safety” required a suspension of a particular scope or duration.²⁹⁵ Such a distinction may have real bite to the extent that the public safety prong, unlike the predicate requirements, is nonjusticiable.

All the same, these claims should be viewed as justiciable. For one, I read the public safety prong of the Suspension Clause narrowly.²⁹⁶ Even if I am wrong to do so, however, the judiciary still has some role to fulfill in these cases in light of its clear authority to police the bright-line limitations on the

295. Another scenario highlighting this problem would be presented if Congress suspended the writ of habeas corpus today in light of the attacks of September 11 (as some argue Congress has done in the recent Military Commissions Act). Assuming that all agree that the attacks constituted an “Invasion,” would one detained pursuant to the suspension be limited to arguing that it fails the public safety prong of the Suspension Clause? Or could one detained in such circumstances argue that the predicate invasion has lapsed? At some point, the invasion as a predicate for suspension must lapse (for example, surely Congress could not suspend the writ today in light of the Civil War “Rebellion”), so viewing such a claim as grounded in an argument over the absence of the predicate conditions is likely the better course.

296. The public safety prong should be understood to provide that where the predicate conditions exist and justify a suspension within a particular geographic area or directed at particular suspects (or all suspects in an area, if the area has become lawless), it is up to Congress whether to suspend the writ. In such circumstances, Congress’s decision to suspend or not to suspend the writ should be understood as not subject to challenge.

suspension authority. Before honoring a suspension as displacing the habeas remedy in these circumstances, the judiciary should require, at a minimum, a clear statement from Congress setting forth the justification for the suspension and its reach. Indeed, given that the fundamental right to individual liberty is at stake, a clear statement rule is entirely appropriate.²⁹⁷ Only by requiring such a clear statement can the courts ensure that Congress is not using its suspension power as a “pretext” for unconstitutionally depriving individuals of their liberty.²⁹⁸ A clear statement norm in this context, moreover, ensures that “the political process [has] pa[id] attention to the constitutional values at stake”²⁹⁹ and, by the same token, that Congress appreciates the magnitude of the ramifications of its actions.³⁰⁰

Ultimately, my larger goal here is to convince the reader that suspension should not be viewed categorically as a political question. This is because the fundamental right to due process that the Framers understood as embodying the core of liberty stands for the idea that the Executive cannot arbitrarily lock someone up without some process grounded in the rule of law. To ensure that this fundamental right would withstand political tides, the Framers created the judicial branch and assigned it the role as ultimate guardian of individual liberty. Of course, the Framers recognized that in times of national crisis, Congress should be given the extraordinary power of suspension to displace the core right to due process to restore order and the public confidence. The Framers, however, narrowly confined the circumstances within which Congress would enjoy this power precisely because of the dramatic effects on individual liberty that follow from its exercise. To allow an unchecked suspension power (as one would have to do to view suspension as a true political question) has the unfortunate, but very real, potential for undercutting the Framers’ purpose

297. The Supreme Court’s precedents strongly support requiring a clear statement rule in the habeas context. *See supra* note 96 (citing, inter alia, *INS v. St. Cyr*, 533 U.S. 289 (2001)); *id.* at 298 (noting “the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction”); *cf.* *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (requiring clear statement from Congress where it purports to reach state actors with federal legislation).

298. *See* TUCKER, *supra* note 114, at 292 (warning that courts should not permit Congress to use its suspension power as a pretext for acting unlawfully); *cf.* *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (Marshall, C.J.) (“[S]hould Congress, under the pretext of executing its power, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.”). The larger idea here is that courts have a role to play in ensuring that our government operates within the bounds of the law. *See* Fallon & Meltzer, *supra* note 28, at 1778-79.

299. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992); *see also* Tyler, *supra* note 129, at 1422-23, 1460 (defending the use of clear statement rules).

300. Thus, for example, requiring Congress to be clear as to how long it intends a suspension to remain in place will serve these same goals. *See supra* text accompanying notes 60-62 (detailing Congress’s temporal restriction on its 1871 delegation of suspension authority to the President).

behind enshrining due process values in our constitutional scheme. In effect, to assert that suspension is a political question is to say that we all enjoy the most fundamental of due process guarantees at the pleasure of the political branches. And it is impossible to imagine that the Framers would have countenanced such a proposition.

As suggested above, harder questions lie in the balance. For example, do equal protection and First Amendment principles provide an external check on the suspension authority? Or are these constitutional protections displaced by a suspension, whether following from valid premises or not? And is it for the courts to say one way or the other? Take the example of Congress suspending the writ with respect to individuals of a particular race or religion. If no true rebellion or invasion underlies the suspension, our tradition clearly dictates that courts have a role to play in upholding equal protection values.³⁰¹ But the political question argument as it applies to suspension does not permit such second-guessing: it does not allow the courts to look behind Congress's decision to suspend the writ.

Imagine instead that in response to members of al Qaeda orchestrating a series of terrorist attacks on American soil and then dispersing into neighborhoods with high concentrations of Muslims, Congress suspends the writ exclusively in those neighborhoods. Assuming that one of the constitutional predicates for suspension exists, does a role remain for the courts to ensure that any infringement on First Amendment and equal protection principles is justified? There exists a formidable argument that even in the event of a valid suspension, equal protection principles at a minimum would have something to say about the matter. Speaking to Congress's analogous power to shape federal court jurisdiction (power that is quite broad),³⁰² scholars are largely in agreement "that a provision restricting jurisdiction to plaintiffs of a particular race, religion, or political affiliation would fit the bill" as a "patently unconstitutional limitation."³⁰³ This suggests that even where one of

301. In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Court read the Due Process Clause of the Fifth Amendment to contain an implied equal protection component derived from the Fourteenth Amendment. *Id.* at 500.

302. See *infra* note 346.

303. Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 26 (1981); see Gunther, *supra* note 18, at 916 (noting that most scholars would agree that Congress could not limit court access based on race or "wholly irrelevant criteria"); Tribe, *supra* note 18, at 132 ("I have yet to meet the advocate of sweeping congressional power who would not concede at least that an Act of Congress denying federal jurisdiction [to litigants as a class based on race or religion] would be, and ought to be, held flatly unconstitutional."). Suggestions that external limitations in this vein should *not* influence the proper understanding of the scope of congressional control over the judicial power draw support from the statement in *Ex parte McCordle* that the courts "are not at liberty to inquire into the motives of the legislature" in shaping the jurisdiction of the federal courts. See 74 U.S. (7 Wall.) 506, 514-15 (1869) (honoring Congress's repeal of legislation granting appellate jurisdiction over denials of habeas petitions while noting that

the predicate conditions is present, a racially or religiously targeted suspension may still have to wrestle with strict scrutiny.³⁰⁴ And to the extent that judicial review of such claims is appropriate, the argument for denying judicial review of the internal restrictions on the suspension authority, which are subsumed within due process principles, weakens considerably.

If one accepts that certain external limitations on the suspension authority, like equal protection, are judicially enforceable, it does not necessarily follow that the same may be said of the internal limitations found in the Suspension Clause itself. Indeed, those jurists who have opined upon the justiciability of suspension—Marshall, Taney, Story, and Scalia—have focused exclusively on the Suspension Clause’s terms alone. But with respect at least to the core due process guarantee explored above, there is no way to draw a principled line between the two. In his *Hamdi* dissent, Justice Scalia recognized the historic link between due process and the Great Writ,³⁰⁵ but did not follow that recognition to its logical conclusion: where a suspension is predicated on invalid premises, one detained should be able to press his or her fundamental right to due process in court. Faced with such a claim—one that has always been understood to fall at the heart of judicial competence and authority to remedy—a court should not be distracted from its inquiry by the mere assertion on the part of the government that the writ has been suspended. Indeed, to accept such an assertion without inquiring into the validity of the underlying suspension presents its own constitutional problems, explored below. More to the instant point, it leaves the fundamental right to due process wholly unprotected, a result that simply cannot be squared with our constitutional tradition.³⁰⁶

jurisdiction to review habeas corpus petitions remained intact under section 14 of the 1789 Judiciary Act). The *McCardle* decision, however, predated the Court’s application of equal protection principles to federal conduct and therefore seems at most to speak to the internal limitations in Article III itself.

304. There is considerable disagreement over whether Congress may single out classes of *issues* as falling outside federal court jurisdiction. Compare Gunther, *supra* note 18, at 917-22 (positing that such line-drawing likely is permissible), with Tribe, *supra* note 18, at 141-55 (arguing that singling out particular claims for exclusion from federal court jurisdiction unacceptably burdens the underlying constitutional rights). *But see* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 48 n.27 (2d ed. 1988) (retreating some from this position). Suspension, however, affects classes of *litigants*, so the argument in favor of applying Fifth Amendment equal protection ideals is stronger here. *See* Gunther, *supra* note 18, at 916-17.

305. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 557 (2004) (Scalia, J., dissenting) (observing that “due process rights have historically been vindicated by the writ of habeas corpus”).

306. *See* Gunther, *supra* note 18, at 916 (“Scholars agree that the Bill of Rights applies to all areas of congressional action, and that some jurisdictional restraints would indeed be vulnerable to fifth amendment attack.”); *cf.* Fallon & Meltzer, *supra* note 28, at 1788 (“[T]he framers also feared the arbitrariness and tyranny that could result if power were concentrated in the political branches. Within the constitutional scheme, an important role of the judiciary is to represent the people’s continuing interest in the protection of long-term values, of

Accordingly, with respect to the availability of judicial enforcement, the core due process right and predicate conditions for a valid suspension must stand or fall together. There is much to be debated in terms of the appropriate level of scrutiny to be applied, but it is on that merits question—and *not* on matters of justiciability—that the inquiry should focus.³⁰⁷

B. *Of Remedy-Stripping and Klein Problems*

The Great Writ not only enjoys a special relationship with core due process values, it is also a remedy of constitutional dimensions in its own right. Indeed, the writ is one of only two remedies mentioned in the Constitution's text (the other being that of just compensation). As such, special concerns would be presented should Congress withdraw the Great Writ in contravention of the Suspension Clause's terms. These concerns are best understood as presenting a "*Klein* problem."

*United States v. Klein*³⁰⁸ is an important, as well as somewhat elusive,³⁰⁹ post-Civil War decision. During the War, Congress authorized Union officers to seize abandoned property in the rebellious states. Congress also gave individuals the right to petition the federal government in the Court of Claims for compensation or to reclaim the property if they could show that they were loyal.³¹⁰ In 1868, President Johnson issued a general pardon making it possible for many of those previously tied to the Confederacy, like Klein, to file claims under the abandoned property statute. This result followed under a Supreme Court decision that interpreted the pardon power as effectively rendering pardoned individuals loyal.³¹¹ In reaction, Congress did not repeal the abandoned property statute but chose instead to enact legislation that ordered the Court of Claims and Supreme Court to treat the acceptance of a presidential pardon in these circumstances as conclusive proof of *disloyalty*. For good measure, Congress also directed all courts to dismiss for want of jurisdiction any pending claims once the court determined that they were based on a presidential pardon.³¹²

which popular majorities, no less than their elected representatives, might sometimes lose sight.”)

307. See *infra* Part VI.

308. 80 U.S. (13 Wall.) 128 (1871).

309. One scholar has said that "*Klein* is sufficiently impenetrable that calling it opaque is a compliment." Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 34 (2002).

310. Specifically, Congress enacted the Abandoned and Captured Property Act, ch. 20, 12 Stat. 820 (1863), which provided that the proceeds from the sale of property that was seized in the rebellious States should be turned over to the original landowners, so long as they had not "given any aid or comfort" to the rebellion.

311. See *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869).

312. See Act of July 12, 1870, ch. 251, 16 Stat. 230, 235 (1870).

In the then-pending *Klein* appeal, the Court refused to honor the supervening 1870 Act, declaring it unconstitutional. To this day, *Klein* stands as the only Supreme Court decision “invalidating a legislative restriction on federal court authority that is framed in jurisdictional terms.”³¹³ The Court’s decision may be read to stand for a number of different propositions.³¹⁴ For one, the opinion suggests that Congress may not prescribe “rules of decision” for “cases pending.”³¹⁵ This proposition, however, has been undermined by subsequent Court decisions.³¹⁶ Narrower strands of the opinion have held up better over time. In one important passage, the Court opined:

Undoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make “such exceptions from the appellate jurisdiction” as should seem to it expedient.

But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. . . . It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.³¹⁷

Although commentators correctly observe that it is difficult to offer “an entirely tidy account of the *Klein* opinion,”³¹⁸ this passage is best read to stand for an important and fundamental principle governing the relationship between Congress and the judiciary: “whatever the breadth of Congress’s power to regulate federal court jurisdiction, it may not exercise that power in a way that requires a federal court to act unconstitutionally.”³¹⁹

313. Meltzer, *supra* note 21, at 2538.

314. See generally FALLON ET AL., *supra* note 7, at 339-40; Evan Caminker, Schiavo and *Klein*, 22 CONST. COMM. 529, 532-33 (2005); Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437, 441-47 (2006).

315. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871) (distinguishing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856)).

316. See, e.g., *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429 (1992).

317. 80 U.S. (13 Wall.) at 145-46; see *id.* at 147 (observing that the statute “infring[ed] the constitutional power of the Executive”).

318. Meltzer, *supra* note 21, at 2549.

319. *Id.* Scholars have gleaned from *Klein* variations on this principle. See, e.g., Hart, *supra* note 41, at 1373 (“[I]f Congress directs an Article III court to decide a case, I can easily read into Article III a limitation on the power of Congress to tell the court *how* to decide it[,] . . . [a point made] clear long ago in *United States v. Klein*.”); Redish & Pudelski, *supra* note 314, at 444 (“If Congress wishes to make use of the legitimacy of the politically insulated federal judiciary, it must simultaneously allow the judiciary to make its own determinations.”); Sager, *supra* note 303, at 70-77 (reading *Klein* to say that Congress may

In *Klein* itself, this principle dictated that the Court would *not* dismiss the appeal before it, as the government urged it to do. (Specifically, the government had argued that the 1870 Act was a proper exercise of Congress's authority to make "exceptions" to the Supreme Court's appellate jurisdiction.) Instead, once the Court determined that the claim before it rested on a presidential pardon, it chose to give no effect to Congress's unconstitutional mandate in the 1870 Act that the otherwise proper case be dismissed. It reached the merits of the claims before it (presumably based on the jurisdictional grant in the abandoned property statute),³²⁰ and affirmed the lower court's decision upholding Klein's claims against the government.³²¹ The Court refused to undertake its review of Klein's case only to dismiss it mid-flight based upon a congressional mandate that clashed with the proper understanding of the pardon power, for in so doing, it would have tolerated Congress "requir[ing] a court to decide cases in disregard of the Constitution."³²²

The *Klein* principle has garnered only modest traction over time,³²³ but there is hardly anything revolutionary about the idea. Indeed, this is the very evil at which Chief Justice Marshall leveled his case in *Marbury*. Marshall rejected the idea that in deciding cases the "courts must close their eyes on the constitution, and see only the law [as enacted by Congress]."³²⁴ Such a doctrine, he wrote, would:

subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits.³²⁵

not compel the judiciary to act inconsistently with its independent judgment); *see also* Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2530-31 (1998). One could also question *Klein's* broader relevance based on the fact that compensation claims there were available only because of Congress's waiver of sovereign immunity. Others have responded convincingly to these concerns. *See* James S. Liebman & William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 822 (1998); Meltzer, *supra* note 21, at 2539 & n.12.

320. *Cf.* Hart, *supra* note 41, at 1387 ("If the court finds that what is being done is invalid, its duty is simply to declare the jurisdictional limitation invalid also, and then proceed under the general grant of jurisdiction.").

321. 80 U.S. (13 Wall.) at 148.

322. Gunther, *supra* note 18, at 910 (reading *Klein* to prohibit Congress from giving the courts such a mandate).

323. *See* Redish & Pudelski, *supra* note 314, at 437-38. To my mind, this is true not because the principle is without foundation, but instead because Congress is not generally in the habit of writing laws like the 1870 Act at issue in *Klein*.

324. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

325. *Id.*

Finally, in a familiar verse the essence of which has been repackaged in *Klein*, Marshall asked: “Could it be the intention of those who gave this power [of judicial review], to say that . . . a case arising under the constitution should be decided without examining the instrument under which it arises?” To this, he responded: “This is too extravagant to be maintained.”³²⁶

Along these same lines, *Klein* dictates a similar result in the event of a suspension of the writ following from invalid premises. Suspension has always been understood to accomplish the stripping of a judicial remedy, namely the power to order a discharge of a prisoner who is being held in contravention of fundamental law.³²⁷ As the Court put it in *Milligan*, “The suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.”³²⁸ In modern habeas practice, a court petitioned for a writ of habeas corpus issues an order to show cause, to which the custodian submits a return generally setting forth the justification for detention.³²⁹ In the event of a suspension, the custodian’s return will cite the act of suspension as justification for the detention and likewise as a limitation on the court’s power to discharge the prisoner. As explored above, where the suspension follows from valid premises, in most cases that will be the end of the matter—the court will be powerless to offer the prisoner the remedy of discharge. But where a suspension follows from invalid premises (namely, the lack of an actual rebellion or invasion), a very real *Klein* problem exists. It is not so much that

326. *Id.* at 179.

327. *See, e.g.*, DUKER, *supra* note 29, at 171 n.118 (observing that an act of suspension by Parliament was understood to “suspend[] the benefit of a particular remedy in the specified cases”).

328. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 130-31 (1866). Thus, suspension does not in and of itself strip the courts of jurisdiction over a prisoner’s due process claim to impartial review of the cause of his or her detention. *See supra* note 151. Further, to the extent that the federal courts possess background federal question jurisdiction (regardless of whether specific habeas jurisdiction existed), one held extrajudicially without charges pursuant to an invalid act of suspension should be able to bring an officer suit based on a due process claim for judicial review of the cause of his detention under the theory of *Ex parte Young*, 209 U.S. 123 (1908). “[I]n *Young*, the Court recognized a judicially implied *federal* cause of action for injunctive relief under the Fourteenth Amendment[’s]” Due Process Clause. FALLON ET AL., *supra* note 7, at 994. *Young* implied both a cause of action and an injunctive remedy; accordingly, a *Young* action operates akin to a habeas action. In all events, the likelihood that a *Young* action would remain provides yet another reason to discard the conventional thinking on the justiciability of suspension. Where a court is stripped entirely of jurisdiction over federal questions, different circumstances likely are presented, as is explored in part below. *See infra* Part IV.C.

329. *See, e.g.*, ROLLIN C. HURD, II, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS ch. III (reprint 1972); MEADOR, *supra* note 268, at 39-40. Previously, upon filing of a petition, courts issued the writ directing the custodian to bring the prisoner before the tribunal at a certain time and place. *See id.* at 7-8. This, for example, is what Chief Justice Taney ordered in *Ex parte Merryman*. *See* 17 F. Cas. 144, 147-48 (C.C.D. Md. 1861) (No. 9487).

Congress has dictated a result in such cases³³⁰ (to wit, that the remedy of discharge is unavailable), but rather that a suspension following from invalid premises calls on the courts to resolve habeas petitions in direct contravention of the fundamental right to due process (and, as explored above, the Suspension Clause itself).³³¹ In short, if a court simply accepts a return citing an act of suspension as justification for a prisoner's detention without first assuring itself that the suspension follows from constitutional premises, it risks complicity in Congress's violation of the core due process guarantee.

The Second Circuit's well-regarded decision in *Battaglia v. General Motors Corp.*³³² is very much in keeping with this idea. There, the court declined to honor Congress's inclusion of a jurisdiction-stripping provision in the Portal-to-Portal Act of 1947.³³³ The Act amended certain "incidental work" provisions in the Fair Labor Standards Act (FLSA) that had been interpreted by some courts to render employers liable for unpaid overtime to employees. Further, the Act stripped all courts—federal and state—of jurisdiction to enforce any liabilities that employers may have incurred for time spent on incidental work prior to the amending of the FLSA. Following the Act's passage, employees argued that its retroactive application destroyed vested rights in violation of the Fifth Amendment.³³⁴ When one such case came before the Second Circuit in *Battaglia*, the "court in effect rendered [Congress's] limitation on its jurisdiction void,"³³⁵ and reached the merits of the employees' underlying Fifth Amendment claims. The court did so because it believed that Congress could not insulate from judicial scrutiny the possible elimination of vested property rights:

[W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty or property without due process of law or to take private property without just compensation.³³⁶

330. See Caminker, *supra* note 314, at 543 (suggesting on this basis that the Schiavo Relief Act violates *Klein*).

331. See *supra* Part IV.A (exploring the relationship between habeas corpus and the fundamental right to impartial review of the cause of one's detention). Where one is being detained extrajudicially and unlawfully, presumably the only effective remedy comes via a writ of habeas corpus. (Damages, for example, cannot restore individual liberty.) Accordingly, Congress's otherwise broad authority to "substitute" one remedy for another is not implicated here. See Hart, *supra* note 41, at 1366-67. See generally Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993).

332. 169 F.2d 254 (2d Cir. 1948) (reaching the merits of a Fifth Amendment challenge to the constitutionality of the Portal-to-Portal Act of 1947, despite the Act's inclusion of a jurisdiction-stripping provision).

333. 29 U.S.C. §§ 251-62.

334. See FALLON ET AL., *supra* note 7, at 346.

335. Sager, *supra* note 303, at 72.

336. 169 F.2d at 257. Similar views may be found in Justice Rutledge's dissent in *Yakus v. United States*, 321 U.S. 414 (1944). There, he argued that "whenever the judicial

The court declined to accept the carve-out of its jurisdiction without first assuring itself that Congress had not “withh[e]ld . . . jurisdiction . . . as a means to an [unconstitutional] end.”³³⁷ *Battaglia*, like *Klein*, can be read to say many things, and indeed, the decision arguably sweeps far more broadly than *Klein* to suggest limitations on Congress’s power to strip jurisdiction from the courts. The narrowest reading of the decision, and that which is most on point here, dictates that courts will not honor a congressional stripping of a constitutionally based remedy—in *Battaglia*, just compensation; here, the writ of habeas corpus—where doing so will require the court to decide a case in contravention of clear constitutional requirements.

Thus, *Klein*’s core lesson, derived from *Marbury* and reaffirmed in *Battaglia*, undoubtedly speaks to exercises of the suspension authority. Where Congress improperly suspends the writ, just as if the Executive relies on that suspension as cause to hold a detainee or another, valid suspension to hold one not falling within its scope, the suspension operates as congressional remedy-stripping as a means to an unconstitutional end.³³⁸ And with this, the courts should not be made to go along without considerable protest.³³⁹

power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it.” *Id.* at 468 (Rutledge, J., dissenting, joined by Murphy, J.); *see id.* (“It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them.”). In *Yakus*, Congress had barred certain arguments from being advanced as part of a criminal defense to an enforcement proceeding; instead, covered claims had to be brought in a specialized court. The Court upheld the statutory scheme and *Yakus* is now understood to rest on the “adequate judicial review” that was said to be available in the specialized court. *See United States v. Mendoza-Lopez*, 481 U.S. 828, 838 n.15 (1987); *see also Liebman & Ryan, supra* note 319, at 829-31 (defending Rutledge’s dissent as consistent with *Yakus*’s holding). Suspension would present a different scenario insofar as no other tribunal possessed the power to discharge a habeas petitioner.

337. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145 (1871).

338. I have assumed throughout the analysis that *Bollman*’s middle-ground reading is the right one and the First Congress was obliged to give life to the core writ by providing for commensurate habeas jurisdiction. *See supra* text accompanying notes 26-39. As explored above, I believe that a habeas remedy is required in any event to address violations of the core guarantee of due process. *See supra* Part IV.A. But even if Justice Scalia’s narrower view of that which the Suspension Clause protects is right, it does not follow that suspension is a true political question. *See supra* text accompanying note 33 (detailing Justice Scalia’s view that the Suspension Clause promises only that whatever habeas right is granted by the legislature may not be suspended temporarily except in cases of rebellion or invasion). At most, his view suggests that if Congress eliminates habeas jurisdiction entirely, judicial review of that act may not lie (because, as he sees things, the Suspension Clause does not guarantee any affirmative right to habeas in the first instance). To the extent that Congress does provide for some habeas jurisdiction more generally and then suspends the remedy temporarily, Justice Scalia’s view still contemplates that the Constitution sets limits on when Congress can suspend in these circumstances, and *Klein* speaks equally to this situation.

339. There is, moreover, precedent for the Court rejecting similar claims in the martial law context. *See infra* text accompanying notes 375-78 (discussing the Court’s rejection in *Ex parte Milligan* of the government’s “broad claim for martial law”).

In all events, Henry Hart was right when he suggested (albeit to make a different point) in the Dialogue:

The great and generating principle . . . that the Constitution always applies when a court is sitting with jurisdiction in habeas corpus . . . forbids a constitutional court with [such] jurisdiction . . . from ever accepting as an adequate return to the writ the mere statement that what has been done is authorized by act of Congress. The inquiry remains, if *Marbury v. Madison* still stands, whether the act of Congress is consistent with the fundamental law. Only upon such a principle could the Court reject, as it surely would, a return to the writ [saying as much] . . .

Granting that the requirements of due process must vary with the circumstances . . . it still remains true that the Court is obliged, by the presuppositions of its whole jurisdiction in this area, to decide whether what has been done is consistent with due process—and not simply pass back the buck to an assertedly all-powerful and unimpeachable Congress.³⁴⁰

Klein and *Marbury* demand no less.

C. In the Background: The State Courts

A final point bears brief discussion here. The analysis throughout has assumed that state courts will be closed to federal prisoners in the event of a suspension, as they are currently understood to be closed to federal prisoners where federal habeas is available.³⁴¹ If a suspension follows from valid premises, surely this assumption carries forward and Congress likely may suspend the writ in both the state and federal courts. But if Congress suspended the writ improperly while at the same time stripping federal courts of all jurisdiction over habeas petitions and due process claims, the state courts may well be open to those detained without charges at the hands of the Executive. If so, the argument for judicial enforcement of restraints on the suspension power becomes even stronger.

In *Tarble's Case*,³⁴² as in *Ableman v. Booth*³⁴³ before it, the Supreme Court held that state courts may not issue writs of habeas corpus ordering the discharge of federal prisoners. Notably, at the time of both decisions, federal courts were open to such petitioners. Critics have attacked the rule of *Tarble's* as inconsistent with the Madisonian Compromise and pre-Civil War practices of state courts, which had long assumed the authority to issue such writs.³⁴⁴ In

340. Hart, *supra* note 41, at 1393-94; *cf. id.* at 1372 (positing that “the power to regulate jurisdiction is subject [in whole] to the other provisions of the Constitution”).

341. *See supra* note 38.

342. 80 U.S. (13 Wall.) 397 (1871).

343. 62 U.S. (21 How.) 506 (1859) (overturning two orders of discharge of a federal prisoner by the Wisconsin state courts, one directed to Booth's federal custodian and one directed to a federal court).

344. *See, e.g.*, Charles Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 353-57 (1930) (noting prior state court practice and resistance to *Tarble's*

light of these considerations, the most defensible reading of *Tarble's Case* is that the Court interpreted Congress's provision for federal court habeas jurisdiction with respect to federal petitioners as impliedly exclusive of state courts.³⁴⁵

If Congress eliminated all federal court jurisdiction over habeas and due process claims,³⁴⁶ *Tarble's* seemingly would collapse of its own weight. To the extent that the Constitution protects some underlying habeas privilege (and concomitant due process right),³⁴⁷ some court would have to be open to hear the argument that the privilege has been suspended unconstitutionally. As Henry Hart once said, it is "a necessary postulate of constitutional government—that a court must always be available to pass on claims of constitutional right to judicial process, and to provide such process if the claim is sustained."³⁴⁸ In the constitutional design, accordingly, state courts stand ready to fill any such void where the federal courts are shuttered.³⁴⁹ (Recall that state courts often will have their own general jurisdiction on which to fall back and that state judges are bound by the Supremacy Clause.³⁵⁰) The point is that if federal courts are closed to federal prisoners whose habeas rights have been unconstitutionally suspended (whether by act of Congress or by a federal court erroneously concluding that suspension presents a nonjusticiable political question), a state court should be open to such petitioners.³⁵¹ And if this is true, there simply is no principled justification for federal courts declining to hear such claims on justiciability grounds.

* * *

The political question doctrine has been called "an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to

holding).

345. See FALLON ET AL., *supra* note 7, at 439-40 (implying that such a reading is the right one).

346. Article III by its own terms does not mandate the creation of inferior courts, *see* U.S. CONST. art. III, § 1; *see also* *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers."), and it provides that the Supreme Court's appellate jurisdiction exists subject to "such Exceptions" and "such Regulations as the Congress shall make," U.S. CONST. art. III, § 2; *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810) (positing where Congress has "described" the appellate jurisdiction, "this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it").

347. *See supra* Parts I, IV.A.

348. Hart, *supra* note 41, at 1372; *see also* *Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948).

349. *See* Hart, *supra* note 41, at 1401 ("[State courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."); *id.* (positing that Congress cannot "regulate the jurisdiction of state courts . . . unconstitutionally").

350. *See id.*

351. If this conclusion is wrong, at best it demonstrates that in order to preclude all judicial review of detentions under an invalid suspension, Congress must do away with general federal question and habeas jurisdiction in the federal courts. *See supra* note 328.

find in it things that were never put there and make it far more than the sum of its parts.”³⁵² Nonetheless, calls for its revival are growing in number. Critics of the alleged demise of the political question doctrine fear that the modern trend against invoking it “correlates with the ascendancy of a novel theory of judicial supremacy” that ignores both halves of the *Marbury* opinion.³⁵³ But is not likewise troubling the assertion that certain liberty-protecting limitations on the political branches imposed by the Constitution may be checked only via the political process and not the courts?³⁵⁴

The events of September 11 have led current members of the Court to suggest that when Congress exercises the emergency power of suspension, there is no role for the courts to play in ensuring that Congress has acted within its authority. This position should give pause, for if the ongoing war on terrorism is, as the current Administration suggests, one that will never end, any related suspension may escape judicial review for all time. The better view contemplates a role for the courts to ensure that the suspension authority is not abused. In particular, I believe that it is the relationship between the Suspension Clause and the fundamental right to due process, as well as the unique status of the writ of habeas corpus as a constitutional remedy, that make the case that suspension should not be viewed as a political question.

The Suspension Clause permits Congress to suspend the writ of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it.” By its very terms, the grant of power *is* conditioned on the existence of one of two predicate conditions. If Congress exercises the suspension power where such circumstances clearly do not exist—just as if Congress exercises the power to trample on the core guarantee of due process—our tradition properly dictates that it is for the courts to hold the line.³⁵⁵

A conclusion, by contrast, that suspension presents a nonjusticiable political question would lead to the insulation of the matter from judicial review seemingly for all time.³⁵⁶ This is why Martin Redish warns that it is

352. Henkin, *supra* note 20, at 622.

353. Barkow, *supra* note 1, at 240-41; *see also* Kramer, *supra* note 1, at 158.

354. There is much to doubt about the ability of the modern political process to provide a sufficient check on itself as a general matter. As Jonathan Siegel has argued, the ballot box is unlikely to provide a meaningful check in most “political question” matters. *See* Jonathan R. Siegel, *Political Questions and Political Remedies* 21-29 (George Wash. Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 93, 2004), *available at* <http://ssrn.com/abstract=527264> (observing that single-issue voting does not exist at the national level). Further, as Choper correctly notes, individual rights “were mainly designated in the Constitution for those who could not be expected to prevail through orthodox democratic procedures.” CHOPER, *supra* note 20, at 64-65.

355. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 666-67 (1952) (Clark, J., concurring) (quoting Justice Story: “It is our duty to expound the laws as we find them in the records of state; and we cannot, when called upon by the citizens of the country, refuse our opinion, however it may differ from that of very great authorities.”).

356. *See* Fallon, *supra* note 195, at 1309 (“[B]y holding a category of cases nonjusticiable, the Court establishes a rule of decision, mandating dismissal, that leaves a

“vital to distinguish between appropriate ‘substantive’ deference—in which the judiciary, while retaining power to render final decisions on the meaning of the constitutional limits, nevertheless takes into account the need for expertise or quick action—and unacceptable total ‘procedural’ deference, where the court concludes simply that resort to the judiciary constitutes the wrong ‘procedure,’ because the decision is exclusively that of the political branches.”³⁵⁷

V. THE COURTS AND WAR POWERS CASES MORE GENERALLY

At this point, some may remain unconvinced that it will do no violence to the separation of powers to permit a role for the courts in policing the constitutional limitations embodied within the Suspension Clause itself. After all, it is commonly thought that exercises of the war power, of which the suspension authority would seem to be a part, are informed by quintessentially “political” considerations. Thus, the skeptic will argue that wrestling with whether certain circumstances constitute a “Rebellion or Invasion” is hardly the standard work of judges.³⁵⁸ Courts, however, have performed similar analyses in war powers cases since the time of Chief Justice Marshall.³⁵⁹ In these cases, the judiciary at times has *deferred* to the political branches, but there is a world of difference between this merits question and first-order questions of justiciability.

As John Hart Ely observed, “[T]he Supreme Court has routinely decided ‘foreign affairs’ and ‘national security’ cases throughout the nation’s history, and more specifically has from the outset decided numerous cases involving the

constitutional norm completely judicially unenforced . . .”).

357. Redish, *supra* note 20, at 1048-49; *id.* at 1051 (observing that where the political branches claim special circumstances require certain actions, judicial review may be deferential, but “at least [it] provides greater protection against encroachments on liberty by the majoritarian branches than does total judicial abdication”); *see also infra* Part VI.

358. Admittedly, “[t]he jurisprudence of ‘rebellion or invasion’ is not so well-developed. . . .” Tribe & Gudridge, *supra* note 116, at 1806. *Compare id.* (positing that it is not clear that “anything less than a ‘war,’ in the ordinary constitutional sense of that term . . . could suffice to permit a suspension of habeas by Congress”), with Ackerman, *supra* note 9, at 1085-86 (suggesting that “Invasion” contemplates “invaders challeng[ing] the very capacity of government to maintain order,” and observing that “[f]uture cases may well require further reflection on the concept of ‘Rebellion,’ and how it differs from riots and mass disturbances”).

359. *Cf. ELY*, *supra* note 196, at 60 (“Certainly this is not a question that will generate automatic answers—legal questions rarely do—and it is not one respecting which judges are particularly expert. This, however, is the way our legal system habitually works. Judges . . . make their decisions (in a variety of areas on which others are more expert than they) by listening to the relevant facts, and where necessary the opinions of experts, and coming to a decision.”). *But see, e.g.*, Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2679 (2005) (“Judges rarely have the background or the information that would allow them to make sensible judgments about whether some particular response to a threat to national security imposes unjustifiable restrictions on individual liberty . . .”).

‘war power,’” including “the question whether Congress had sufficiently authorized a military action the president was conducting.”³⁶⁰ As Ely noted, it was Chief Justice Marshall himself who, only one year after authoring *Marbury*, wrote the opinion in *Little v. Barreme*³⁶¹ that “invalidated the seizure of a foreign ship during the naval war with France, *even though the seizure was on the President’s order*, on the ground that the President had thereby exceeded the authorization granted him by Congress.”³⁶² Marshall did so, moreover, “without so much as a moment’s pause to inquire whether *this* might not be one of those political questions to which he had alluded in *Marbury*.”³⁶³

During the Civil War, the Supreme Court reached the merits of a claim that the President had exceeded his constitutional authority in ordering a naval blockade of the Confederacy.³⁶⁴ Although the Court divided 5-4 on the matter (the majority voting to uphold the blockade), no Justice questioned the Court’s authority to decide the case.³⁶⁵ Speaking to military practices invoked during that same war, the Court held that the President does not have the authority to try civilians domestically by military commission when the civilian courts are open and available.³⁶⁶ Nearly a century later, again without pausing to consider whether the matter might be nonjusticiable, the Court held that President Truman exceeded his constitutional authority when he seized several steel mills in the name of the Korean War effort.³⁶⁷ And, in *The Pentagon Papers Case*, the Court reached the merits and ultimately rejected the Administration’s assertion that the publication of a classified study of Vietnam policy would threaten the American military situation in Southeast Asia.³⁶⁸

360. ELY, *supra* note 196, at 55, 176 n.46 (citing numerous cases in which the Court has reached the merits, including: *Ludecke v. Watkins*, 335 U.S. 160 (1948) (power to expel aliens in wartime), and *United States v. U.S. Dist. Court*, 407 U.S. 297 (1972) (national security wiretaps)); accord Scharpf, *supra* note 205, at 583 (“[T]he political question doctrine has found only very limited application in the war and security cases.”).

361. 6 U.S. (2 Cranch) 170 (1804).

362. ELY, *supra* note 196, at 55; see *Little*, 6 U.S. (2 Cranch) at 177-79. Note that in *Little*, the Court did not have before it a case involving a direct confrontation between the branches, but instead a damages claim brought by a private citizen. See *id.* at 179.

363. ELY, *supra* note 196, at 55. Ely relies on this and other historical caselaw as support for his contention that although “courts have no business deciding when we get involved in combat, . . . they have every business insisting that the officials the Constitution entrusts with that decision [i.e., Congress] be the ones who make it.” *Id.* at 54.

364. See *The Prize Cases*, 67 U.S. (2 Black) 635, 671 (1863).

365. See *id.* at 671 (upholding the President’s power to impose military blockade of Confederate ports in the absence of a congressional declaration of war).

366. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121-24 (1866); see *id.* at 28-29, 129-30 (rejecting government’s reliance on *Luther v. Borden* for the assertion that President’s war powers “must be without limit” and are not subject to judicial review).

367. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The Court held that Truman had taken power for himself that properly belonged to Congress. The Court reached this conclusion even though Congress had not registered formally its disapproval of the President’s actions.

368. See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam). The

Bickel's prudential values and Choper's structural arguments suggest that the courts should not be reaching the merits in many, if not all, of these cases.³⁶⁹ Textual arguments might also be marshaled in favor of viewing the war power as committed to the political branches.³⁷⁰ But the reality is that the Court often speaks to matters in this context,³⁷¹ and the proverbial sky has yet to fall as a result.³⁷² In short, the exercise of the war power has *never* been understood to be entirely immune from judicial review.³⁷³

To be sure, courts have shied away from deciding cases that would call into question, among other things, a President's decision to commit troops to battle.³⁷⁴ But suspension presents a second-order question relating to the

Court has also reached the merits in war power cases to uphold executive authority. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 45-46 (1942) (upholding executive authority to try suspected German saboteurs who conceded that they were enemy combatants, one of whom claimed American citizenship, before domestic military commissions rather than ordinary courts). Courts have also reached, albeit rarely, questions going to the legality of war efforts. *See, e.g., Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir. 1971) (reaching the merits of challenge to the legality of the Vietnam War and observing that "the constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation . . .").

369. Of course, where the Court has reached the merits and upheld war time actions that are hard to reconcile with constitutional norms, as it did in *The Japanese Relocation Cases*, Bickel's argument carries some force, given that the Court's decisions constitute precedent legitimizing the questionable practices. *See* Scharpf, *supra* note 205, at 562. Nonetheless, the general public is unlikely to make fine distinctions between the Court's denial of a claim on the merits and its decline of review under the political question doctrine. *See* Gunther, *supra* note 177, at 7 (making this point). In all events, I believe that the debate in these cases often is better focused on how much deference should be accorded claims of military necessity.

370. *See supra* note 228.

371. Similarly, "courts [have been] routinely called upon, without incident, to decide insurance cases in which the existence or nonexistence of hostilities must be judicially determined for purposes of giving effect to a war risk clause." ELY, *supra* note 196, at 61.

372. The same may be said for heated inter-branch disputes. *See, e.g., United States v. Nixon*, 418 U.S. 683, 692-93 (1974) (rejecting President Nixon's assertions of executive privilege and the political question doctrine in support of his refusal to turn over the Watergate Tapes).

373. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (O'Connor, J.) (plurality opinion) ("We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."); *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919) ("The war power of the United States, like its other powers . . . is subject to applicable constitutional limitations."); *see also* Tigar, *supra* note 205, at 1175 (arguing that there is no general and unreviewable grant of a "war power" to the executive).

374. *See, e.g., Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973) (dismissing challenge to commitment of troops to Indochina); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987) (dismissing challenge to naval assault on an Iranian Navy ship on political question grounds); *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983) (dismissing challenge to commitment of troops to El Salvador); *cf. Conyers v. Reagan*, 765 F.2d 1124 (D.C. Cir. 1985) (dismissing as moot challenge to commitment of troops to Grenada); *United States v. Bolton*, 192 F.2d 805 (2d Cir. 1951) (dismissing challenge to commitment of troops to Korea on standing grounds); *Dellums v.*

consequences of the exercise of the war power. Compared with the prospect of conflicting judgments with respect to a decision to commit troops or put down an insurrection, the prospect of courts fulfilling their time-honored role of protecting individual liberty from arbitrary government action does not pose nearly the same threat to strategic and time-sensitive war decisions. Along these lines, in perhaps the most analogous situation to suspension—the declaration of martial law and the concomitant shuttering of civilian courts—the Court has reiterated time and again that the propriety of martial law presents a judicial question. On several occasions, the Court has not only reached the merits of challenges to the legality of declarations of martial law, but in so doing has also rejected executive assertions of military necessity. In one of the best known decisions in this line, *Ex parte Milligan*, the Court held unlawful the imposition of martial law in Indiana during the Civil War.³⁷⁵ The majority opinion for five Justices declared that “where the courts are open and their process unobstructed,” as was the case in Milligan’s home state of Indiana, citizens may not be tried before military tribunals.³⁷⁶ The Court did not stop there, though. The majority further rejected the government’s “extensive” and “broad claim for martial law” on the basis that it was “difficult to see how the *safety* of the country required martial law in Indiana.”³⁷⁷ The opinion posited that martial law was inappropriate for responding to “a *threatened* invasion.” By contrast, the Court majority posited that “[t]he necessity must be actual and present; the invasion real”³⁷⁸

The four Justices who concurred separately in *Milligan* thought the case should be decided on narrower grounds. It was enough, in their view, that Congress had not authorized the military tribunals at issue.³⁷⁹ (Indeed, they stated that Congress had the power to do so.³⁸⁰) But two important lessons may be drawn from *Milligan*. First, none of the Justices questioned the propriety of the Court reaching the merits of Milligan’s claims. Second, even though the majority opinion went further than it needed to in upholding Milligan’s claims³⁸¹ and later Supreme Court opinions have called some of *Milligan*’s

Bush, 752 F. Supp. 1141 (D.D.C. 1990) (dismissing challenge to commitment of troops to Operation Desert Storm on ripeness grounds).

375. See 71 U.S. (4 Wall.) 2 (1866).

376. *Id.* at 121; see also *id.* at 124 (“Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectively renders the ‘military independent of and superior to the civil power’ . . .”).

377. *Id.* at 126-27 (emphasis added); see *id.* at 127 (opining that while martial law may have been appropriate in Virginia, “it does not follow that it should obtain in Indiana”).

378. *Id.* at 127. “As necessity creates the rule,” the Court continued, “so it limits its duration; for if [military rule] is continued *after* the courts are reinstated, it is a gross usurpation of power.” *Id.* (emphasis added).

379. See *id.* at 137 (Chase, C.J., concurring in the judgment).

380. See *id.*

381. See, e.g., Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 12-13 (2004), available at <http://www.bepress.com/til/>

conclusions into question,³⁸² the majority opinion demonstrates that it is hardly unprecedented for the judicial power to review on the merits claims of military necessity predicated on assertions that a “Rebellion or Invasion” has taken place.

Milligan, moreover, is hardly an aberration in this respect. In the World War II case of *Duncan v. Kahanamoku*, involving a challenge to the declaration of martial law in the Hawaiian Territory following the Pearl Harbor bombing, the Court again rejected claims predicated on assertions of military necessity, insofar as the government asserted them to substantiate the need to try civilians by military tribunal.³⁸³ Rejecting the notion that such questions should be immune from judicial review, Chief Justice Stone observed, “[E]xecutive action is not proof of its own necessity, and the military’s judgment here is *not conclusive* that every action taken pursuant to the declaration of martial law was justified by the exigency.”³⁸⁴

The same affirmation of judicial review may be found in the Court’s decision in *Sterling v. Constantin*.³⁸⁵ In *Sterling*, the Court reviewed the 1931 declaration of martial law and other military orders issued under the authority of the Governor of Texas. In a resounding rejection of the argument that “courts may not review the sufficiency of facts upon which martial law is declared,”³⁸⁶ the Court said:

It does not follow from the fact that the executive has [a] range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action that [he] may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.³⁸⁷

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382. See *Ex parte Quirin*, 317 U.S. 1, 45 (1942). The various opinions in *Hamdi* debated how to read *Milligan* in light of *Quirin*. Compare *Hamdi v. Rumsfeld*, 542 U.S. 507, 523 (2004) (O’Connor, J.) (plurality opinion) (observing that *Quirin* “both postdates and clarifies *Milligan*”), with *id.* at 569 (Scalia, J., dissenting) (observing, among other things, that *Quirin* “was not this Court’s finest hour”).

383. See 327 U.S. 304, 317 (1946).

384. *Id.* at 336 (Stone, C.J., concurring) (emphasis added). *Duncan*, of course, was decided after the conclusion of the war, as was *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), a reality that may have influenced the Court’s willingness to reach the merits and issue decisions critical of political branch actions. Notably, *The Japanese Relocation Cases* and *Quirin*, both of which upheld political branch actions, did so during wartime. *Accord* Scharpf, *supra* note 205, at 554-55 (observing that the timing of cases like *Milligan* is significant insofar as it enables the Court to avoid direct conflict with the military and public opinion while eschewing reliance on the political question doctrine).

385. 287 U.S. 378 (1932). The parties challenging the Governor’s declaration brought their challenge under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

386. *Sterling*, 287 U.S. at 393.

387. *Id.* at 400-01 (emphasis added).

To this day, *Sterling* continues to be relied upon as sound authority for the notion that exercises of the war power and declarations of martial law stand “subject to judicial review.”³⁸⁸ In fact, in *Hamdi*, the Court plurality relied on *Sterling* as support for its review and ultimate rejection of the broadest arguments advanced by the government in that case. Justice O’Connor’s opinion did acknowledge that the judiciary should “accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide.”³⁸⁹ With that said, her plurality opinion highlighted that with respect to claims brought by detainees challenging their confinement, “it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving [such] claims.”³⁹⁰

Thus, from *Sterling* to *Hamdi*, the Court has reiterated that even when the war power is at its zenith, its exercise does not stand immune from judicial review, particularly in cases dealing with the consequences of war. And when the war power is abused in this context, the courts have interposed respectfully to remind the political branches that exercises of the war power are not without restrictions.³⁹¹ This line of authority comfortably encompasses exercises of the suspension power and suggests that the judiciary has a role in reviewing exercises of that authority not only as it is limited by external sources (such as the Bill of Rights), but likewise as it is limited by its own terms.

388. *Laird v. Tatum*, 408 U.S. 1, 19 (1972); *see id.* (“Even when ‘martial law’ is declared, as it often has been, its appropriateness is subject to judicial review.” (citing *Sterling*, 287 U.S. at 401)). In *Sterling*, the Court focused on the finding below that there had been no violence to suppress and therefore concluded that the invocation of martial law was excessive. For additional examples of abusive declarations of martial law, *see* Charles Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253, 1275-78 (1942).

389. *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (O’Connor, J.) (plurality opinion).

390. *Id.* (“[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.” (quoting *Korematsu v. United States*, 323 U.S. 214, 233-34 (1944) (Murphy, J., dissenting))).

391. *See also Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Even the author of *Luther and Merryman* did not necessarily disagree with this larger idea. In *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851), Chief Justice Taney posited that where martial law is imposed, “the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. . . . Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.” *Id.* at 134 (emphasis added); *see also United States v. Russell*, 80 U.S. (13 Wall.) 623, 628 (1871) (holding that government seizures of private property during times of war comes with an implied promise of just compensation).

VI. THE NEXT QUESTIONS: THE EFFECTS OF A VALID SUSPENSION AND HOW COURTS SHOULD SCRUTINIZE EXERCISES OF THE SUSPENSION POWER

Once the propriety of judicial enforcement of the internal limitations on the suspension authority is accepted, the next question is *how* such review is undertaken. How much scrutiny is appropriate of the Suspension Clause's requirement that there be a "rebellion" or "invasion" warranting suspension? This merits question, important in its own right, is distinct from the initial question of justiciability.

Before turning to that matter, a brief word is in order on other challenges that may be brought against an act of suspension. As discussed above, a number of limitations found elsewhere in the Constitution may speak to the scope of the suspension authority.³⁹² Where a habeas petitioner invokes these "external" limitations to challenge exercises of the suspension power, the judiciary will have to wrestle in the first instance with whether such restraints may be displaced by the suspension itself.³⁹³ (For example, are the protections of the Fourth and Eighth Amendments "suspended" by a suspension?) These questions are of great importance, yet little attention has been paid to them to date. Scholars are just now beginning a dialogue on this score and future work in the field should be encouraged.³⁹⁴ Assuming that some external restraints, such as those found in the First Amendment and Fifth Amendment's equal protection component govern exercises of the suspension authority, the judiciary then must determine the appropriate level of scrutiny to apply to such claims. In such cases, courts may be able to rely upon settled doctrines to ascertain the appropriate level of scrutiny.³⁹⁵ So, for example, if Congress enacts a racially targeted suspension, the judiciary likely should analyze the question through the lens of equal protection strict scrutiny.³⁹⁶

Harder questions are posed when it comes to enforcing the Suspension Clause's requirement that there be a "Rebellion or Invasion." Here, the

392. See *supra* Part IV.A.

393. See, e.g., *supra* text accompanying notes 281-84.

394. In particular, the forthcoming work of David Shapiro warrants attention. See Shapiro, *supra* note 36. Shapiro responds in part to Trevor Morrison's earlier work, see Morrison, *supra* note 116, at 426-42, contending that suspension of the writ does not abrogate any underlying constitutional or legal rights. Shapiro argues in contrast that such a view cannot be squared with the essence of the Great Writ or with a proper understanding of the Suspension Clause. See Shapiro, *supra* note 36; cf. James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497 (2006) (exploring additional habeas issues implicated by the ongoing war on terrorism and recent Supreme Court decisions).

395. Here, I do not mean to speak to the fundamental due process right to seek a judicial inquiry into the cause of one's detention, for as discussed in *supra* Part IV.A, this requirement is coextensive with the internal restrictions on the suspension authority.

396. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (reaffirming that government distinctions drawn on the basis of race must be "narrowly tailored to achieve . . . [a] compelling interest . . .").

judiciary has little precedent on which to rely in choosing the proper measure of scrutiny. There are two possible directions in which the judiciary could proceed. On one hand, courts could draw on the martial law and war power cases, which often give deference to political branch assertions of military necessity. On the other hand, the suspension authority could be viewed as implicating a fundamental right, particularly as it is intertwined with a core due process right; if so, exercises of this power may warrant heightened scrutiny. Each position is spelled out briefly below.

The first view—that the internal limitations on the suspension authority should be reviewed deferentially—would build on how the Court often reviews analogous exercises of the war power as well as claims that Congress has acted beyond the scope of its Article I powers. If deferential scrutiny is appropriate here, many of the concerns that animate the conventional view that suspension is a political question would be mitigated by the Court’s “substantive interpretation of the scope of constitutional power and discretion, and its flexible definition of constitutional limitations, varying with the necessities of the situation.”³⁹⁷ Indeed, one of the handful of commentators to discuss the issue (albeit in passing) has suggested that if suspension is in fact a justiciable matter, then the judiciary should review any challenges sounding in the Clause’s internal restraints with “substantial . . . deference to the properly constituted political bodies.”³⁹⁸

By way of comparison, where reviewing political branch decisions to declare martial law, the Court at times has accorded the Executive considerable deference. In *Duncan*, for example, Chief Justice Stone’s concurrence posited that the Executive enjoys “broad discretion in determining when the public emergency is such as to give rise to the necessity of martial law, and in adapting it to the need.”³⁹⁹ In the earlier *Sterling* decision, the Court also viewed things this way:

The nature of the [executive] power . . . necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace.⁴⁰⁰

This idea finds its genesis in the Court’s jurisprudence pertaining to enforcement of other Article I internal limitations on legislative authority. In *M’Culloch v. Maryland*,⁴⁰¹ for example, Chief Justice Marshall recognized that

397. Scharpf, *supra* note 205, at 561.

398. Choper, *supra* note 213, at 1499.

399. *Duncan v. Kahanamoku*, 327 U.S. 304, 336 (1946) (Stone, C.J., concurring).

400. *Sterling v. Constantin*, 287 U.S. 378, 400-01 (1932).

401. 17 U.S. (4 Wheat.) 316 (1819).

the Necessary and Proper Clause imposes limitations on congressional authority. Insofar as the legislature operates within those larger limits, however, Marshall acknowledged that it enjoys considerable “discretion . . . to perform the high duties assigned to it, in the manner most beneficial to the people.”⁴⁰² As Rachel Barkow has said of the case, Marshall’s opinion “described [the Court’s] role as policing the boundaries of the legislative power, not dictating legislative conclusions within those bounds.”⁴⁰³

Building on this model, deference in the suspension context would recognize that in exercising this authority, the political branches must be given considerable latitude to define those situations warranting suspension of the writ. This approach would counsel that the judiciary question suspensions only where the political branches come forward with a very weak argument that current conditions amount to a “Rebellion or Invasion,” or very thin evidence of a public safety need for suspension (if the latter consideration is justiciable).⁴⁰⁴ Assume, for example, that shortly following September 11, Congress had declared those terrorist acts to be an “Invasion” and concluded that the “public Safety” warranted suspension of the writ with respect to those individuals thought to have played a role in the planning and execution of the attacks. Under a deferential model of scrutiny, a court would have been hard-pressed to second-guess the legislative assessment of the circumstances as warranting the emergency response provided for in the Suspension Clause.⁴⁰⁵

Deference, however, can certainly be taken too far. Indeed, it gave us the terrible decision in *Korematsu*.⁴⁰⁶ In this vein, some commentators have argued

402. *Id.* at 421.

403. Barkow, *supra* note 1, at 252; *see id.* at 253 (“[T]he substantive content of ‘necessary’ would be supplied by Congress, not the Court.”). Other Court decisions build on this idea. In *Eldred v. Ashcroft*, 537 U.S. 186 (2003), for example, the Court upheld the 1998 Copyright Term Extension Act against formidable arguments that the Act’s extension of copyrights violated the Copyright Clause. *See* U.S. CONST. Art. I, § 8, cl. 8 (providing that copyrights may only be granted “for limited Times”). The Court observed, “[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives. . . . [We are] [s]atisfied that the legislation before us remains inside the domain the Constitution assigns to the First Branch . . .” 537 U.S. at 212, 222.

404. *Cf.* *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 31 (1827) (observing in another context that “in many instances, the evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment”).

405. One could argue that this is the approach adopted by the Ninth Circuit when it reviewed the suspension that followed the bombing of Pearl Harbor. *See supra* text accompanying notes 135-36.

406. *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the broad exclusion of all persons of Japanese descent from parts of the western United States during World War II); *accord* Paulsen, *supra* note 46, at 1294 (observing that *Korematsu* represents the “dangers of too-great judicial deference to the judgments of military officials as to when ‘necessity’ really exists and what ‘necessity’ truly requires”); Redish, *supra* note 20, at 1037 (positing that the Court affirmed in *Korematsu* “with effectively no review on the merits”).

that “judicial deference to Congress or the executive branch” effectively “leaves a constitutional issue to nonjudicial resolution.”⁴⁰⁷ Accordingly, there may be good reason to question whether the importance of the Great Writ in our legal tradition as a bulwark of individual liberty warrants heightened judicial scrutiny when Congress seeks to displace it.

This alternative approach would build on other decisions in which the Court has recognized that government activities burdening fundamental rights call for more searching judicial scrutiny.⁴⁰⁸ The writ, after all, represents “the very core of liberty secured by our Anglo-Saxon system of separated powers.”⁴⁰⁹ There are seeds of this argument in some of the martial law decisions. Many, as discussed above, adopt deferential models. Others, however, have been far more questioning of the political branches on the basis that martial law is difficult to reconcile with our legal tradition. Thus, in *Duncan*, the Court rejected the imposition of martial law in the Hawaiian Territory based in part on the observation that:

military trials of civilians charged with crime, especially when not made subject to judicial review, are so obviously contrary to our political traditions and our institution of jury trials in courts of law, that the tenuous circumstance offered by the Government can hardly suffice to . . . permit[] such a radical departure from our steadfast beliefs.⁴¹⁰

Martial law, the majority opined, represents the “antithesis” of our system of “[c]ourts and . . . procedural safeguards.”⁴¹¹ The decision also drew on the *Milligan* majority opinion’s “emphatic[] declar[ation] that ‘civil liberty and this kind of martial law . . . [are] irreconcilable’”⁴¹² In practice, the heightened scrutiny approach would not accept assertions by the political branches of

As Bruce Ackerman notes, “*Korematsu* has never been formally overruled.” Ackerman, *supra* note 9, at 1043. Thus, he raises the important question: “Are we certain any longer that the wartime precedent of *Korematsu* will not be extended to the ‘war on terrorism’?” *Id.*

407. J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 146 (1988).

408. See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 116-17 (1996) (reaffirming idea that where government actions burden rights “of basic importance in our society,” the Court’s “close consideration” is warranted, and citing as examples *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage), and *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (raising children)); see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

409. *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (Scalia, J., dissenting); see also Gunther, *supra* note 18, at 917 (“[M]ost agree that legislation . . . impeding [the] exercise of fundamental federal rights triggers a strict scrutiny inquiry.”).

410. *Duncan v. Kahanamoku*, 327 U.S. 304, 317 (1946).

411. *Id.* at 322. To be sure, in *Duncan*, the Court interpreted the Hawaiian Organic Act not to permit the imposition of martial law, but the Court reached this statutory determination by applying a heavy dose of constitutional avoidance. See generally *id.*

412. *Id.* at 323 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 124-25 (1866)); see also *Duncan*, 327 U.S. at 325 (Murphy, J., concurring) (“Th[e] supremacy of the civil over the military is one of our great heritages. It has made possible the attainment of a high degree of liberty regulated by law rather than by caprice. Our duty is to give effect to that heritage at all times, that it may be handed down untarnished to future generations.”).

national security necessity without searching independent assessment. Thus, for example, had Congress suspended the writ in the wake of September 11, the courts would have applied a more skeptical eye to the claim that the September 11 terrorist attacks constituted an “Invasion” the likes of which the Framers would have thought warranted a departure from the general availability of the Great Writ.⁴¹³

Of course, one could also argue in favor of a middle ground between these two extremes. Bruce Ackerman, for example, has written that in times of emergency such as those following a terrorist attack, “[t]he longer the likely period of emergency, the greater the need for judicial supervision.”⁴¹⁴ Such a view would give considerable deference to suspension decisions made in the wake of attacks like September 11, but to the extent that a suspension remained in place for an extended period, the courts increasingly would scrutinize the need for such an exceptional state of affairs.

Ultimately, it is not my aim here to resolve the measure of scrutiny that courts should apply in this area, although I do believe that any wartime context within which the writ is suspended likely should factor into the judiciary’s consideration whether to defer in some measure to the political branches. A full explication of this difficult issue warrants its own full-scale article and requires an analysis of the range of possible scenarios in which this question might arise. In all events, I believe that it is on such questions of scrutiny and deference that future discussion of the suspension authority should focus, not on matters of justiciability.

CONCLUSION

Tocqueville once noted: “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”⁴¹⁵ I have here argued that his observation should not trouble us greatly, at least with respect to the proper exercise of the suspension authority. In this vein, I have contended that suspension of the writ of habeas corpus does not present a true political question, but instead that the limitations on the suspension authority, whether labeled internal or external, constitute judicial questions. This conclusion better comports with the history and purpose of the Great Writ, and gives recognition to the fact that the writ is inextricably intertwined with

413. This approach appears to have animated the district court’s rejection of the need for suspension in the Hawaiian Territories in the cases discussed above. *See supra* text accompanying notes 139-45.

414. Ackerman, *supra* note 9, at 1070. Specifically, Ackerman suggests that “it may make sense to design a graduated system of increasing judicial scrutiny: minimal for the first two months . . . with more intrusive scrutiny thereafter.” *Id.*

415. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley ed., 1945).

fundamental due process rights, the protection of which has always been understood in our tradition to fall at the heart of the judicial mandate.

Thus, although the conventional view is that suspension presents a nonjusticiable question, I believe that Justice Murphy had it right when he observed (rather presciently) at the close of the Second World War:

From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised. The right to jury trial and the other constitutional rights of an accused individual are too fundamental to be sacrificed merely through a reasonable fear of military assault. There must be some overpowering factor that makes a recognition of those rights incompatible with the public safety before we should consent to their temporary suspension.⁴¹⁶

416. *Duncan*, 327 U.S. at 330 (Murphy, J., concurring).

