ARTICLES

WILLAMETTE LAW REVIEW

54:1 Fall 2017

PROVING AEDPA UNLAWFUL: THE SEVERAL CONSTITUTIONAL DEFECTS OF § 2254(D)(1)

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> *[F]or the king is at all times intitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted.*[1]

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1. 3 WILLIAM BLACKSTONE, COMMENTARIES *131.

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I. INTRODUCTION

On April 24, 1996, President Bill Clinton signed into law the Antiterrorism and Effective Death Penalty Act (AEDPA),[2] which, among other things, imposed a number of limits on the power of federal courts to grant writs of habeas corpus. Among the most significant was a new requirement that any habeas petition based on a claim adjudicated in state court be denied unless the state courts' adjudication of that claim had been "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[3] A number of commentators have argued that this provision is unconstitutional;[4] however, the courts to date have been almost wholly uninterested in this contention[5] and have gone about interpreting and implementing AEDPA without stopping to consider any potential constitutional difficulties[6]—perhaps because AEDPA's opponents have thus far failed to construct an airtight argument against it. Making the case against AEDPA is especially tricky because, as this Article will demonstrate, the law's infirmity is a rather complex one: § 2254(d)(1) does not violate one provision of the Constitution, but rather it is in tension with two different provisions, and must necessarily violate one to avoid violating the other. Under § 2254(d)(1), habeas relief is to be denied in certain cases where it would otherwise have been available. It is not necessarily obvious, however, exactly what form that denial of relief takes. Perhaps § 2254(d)(1) deprives the federal courts of jurisdiction over these cases. Perhaps it provides a new, more stringent rule of decision for federal habeas cases. Or perhaps it simply alters the substantive law governing the states' lawful

2. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

3. 28 U.S.C. § 2254(d)(1) (2012).

4. *E.g.*, Dan Poulson, *Suspension for Beginners:* Ex Parte Bollman *and the Unconstitutionality of the 1996 Antiterrorism and Effective Death Penalty Act*, 35 HASTINGS CONST. L.Q. 373 (2008); Justin F. Marceau, *Un-Incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns that Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231 (2008); Joseph M. Brunner, *Negating Precedent and (Selectively) Suspending Stare Decisis: AEDPA and Problems for the Article III Hierarchy*, 75 U. CIN. L. REV. 307 (2006).

5. A few concurring and dissenting opinions, particularly in the Ninth Circuit, are the only real exceptions. *See, e.g.*, Irons v. Carey, 479 F.3d 658, 667 (9th Cir. 2007) (Noonan, J., concurring); Davis v. Straub, 430 F.3d 281, 291-99 (6th Cir. 2005) (Merritt, J., dissenting); Gibbs v. Frank, 387 F.3d 268, 278 (3d Cir. 2004) (Nygaard, J., concurring).

6. *See, e.g.* Williams v. Taylor, 529 U.S. 362 (2000).

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imprisonment authority. Any of these would deprive certain prisoners of habeas relief to which they would otherwise have been entitled.[7] Moreover, each would raise significant constitutional problems. However, they would raise different problems from one another. Therefore, since AEDPA can be understood in any one of several ways, the precise nature of its unconstitutionality is difficult to pin down. A challenge on any given ground may be evaded by switching to a different interpretation of the law.

This Article, therefore, will demonstrate that every possible interpretation of § 2254(d)(1) would be unconstitutional.[8] Part II will argue that the first two interpretations listed above—that § 2254(d)(1) partially withdraws the federal courts' habeas jurisdiction or that it alters the rule of decision for habeas cases—would violate the Suspension Clause,[9] properly construed. Part III will then argue that the third and final interpretation of AEDPA, which sees § 2254(d)(1) as altering the substantive law governing state imprisonment authority, would also be unconstitutional, because it would violate the Due Process Clause of the Fourteenth Amendment,[10] as well as broader principles of constitutional supremacy. Therefore, AEDPA must be unconstitutional: if we view it as consistent with the Suspension Clause it must violate Due Process, and if we understand it as respecting Due Process it must violate the Suspension Clause. Neither provision is independently sufficient to defeat AEDPA, and since each understanding of § 2254(d)(1) violates one or the other, but not both, it is impossible to state a single, unique defect with the law.

7. Under the first interpretation, prisoners whose cases are covered by § 2254(d)(1) would still have meritorious claims for relief, but the federal courts would have no jurisdiction to hear their habeas petitions. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Under the second interpretation, these prisoners do not have a meritorious claim for relief because, while they are being imprisoned unlawfully, this is no longer sufficient for a habeas claim under § 2254(d)(1). Under the third interpretation, these prisoners do not have a meritorious claim for relief because they are not being imprisoned unlawfully. There may be other ways to view AEDPA's denial of habeas relief in these cases, but I am not aware of any significant ones and doubt that they would avoid the problems that plague the three interpretations considered in this Article.

8. This is somewhat like a mathematical "proof by contradiction," which "establishes the truth of a given proposition by the supposition that it is false and the subsequent drawing of a conclusion that is contradictory to something that is proven to be true." *Proof by Contradiction*, WOLFRAM MATHWORLD http://mathworld.wolfram.com/ProofbyContradiction.html. Here, I will show that, supposing that AEDPA is consistent with one potentially problematic feature of the Constitution, it must be understood in a way that would contradict another feature of the Constitution—and hence that it is unconstitutional.

9. U.S. CONST. art. I, § 9, cl. 2.

10. U.S. CONST. amend. XIV, § 1.

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Through a careful consideration of every possible scenario, however, this Article will prove that AEDPA cannot be constitutional.

II. THE SUSPENSION CLAUSE

The obvious constitutional hazard that any law restricting habeas corpus must avoid is the Suspension Clause, the Great Writ's only explicit appearance in the Constitution. Article I, Section Nine, Clause Two provides that "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."[11] If AEDPA is constitutional, then it must not violate this prohibition; that is, the limits which AEDPA imposes on habeas corpus must not amount to a suspension of the writ.[12] This Part will argue that, on the best reading of the Clause, any law which denies a prisoner access to a traditional habeas forum in federal court is a suspension of the writ and thus invalid during peacetime. This rule would invalidate two of the three interpretations of § 2254(d)(1) mentioned in the introduction. I will also argue that these interpretations of AEDPA could be deemed invalid even under narrower, more widely accepted readings of the Suspension Clause. Therefore, this Part will establish that, in order to conclude that AEDPA is constitutional, we must adopt the third interpretation of the statute, which sees it as a substantive alteration of the states' authority to imprison. Part III will then argue that this interpretation, too, would be unconstitutional. To reach this point, however, we must come to understand the Suspension Clause itself.

This Article's exploration of the Clause begins with *Ex parte Bollman*,[13] a key Supreme Court precedent in which Chief Justice Marshall suggested that federal courts could not issue writs of habeas corpus unless authorized to do so by Congress. As Dan Poulson has persuasively argued, *Bollman* should also be understood as stating that, while Congress need not provide habeas jurisdiction in the first place, once it does so it cannot necessarily modify the content of the writ. This is what I will term the *jurisdictional* view of the Suspension

11. U.S. CONST. art. I, § 9, cl. 2.

12. If AEDPA does affect a suspension of habeas corpus, it is clearly not a valid suspension under the Clause. The law is not responding to any state of rebellion or invasion and does not purport to be.

13. 8 U.S. (4 Cranch) 75 (1807). The facts of *Bollman* are remarkable; in addition to interpreting the Suspension Clause, Chief Justice Marshall also held that the Burr conspiracy, in which former Vice President Aaron Burr had allegedly tried to foment an insurrection against the United States, did not constitute treason. *Id.* at 125-137.

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Clause. The Article then considers, and rejects, two alternate views which would read the Suspension Clause more narrowly than *Bollman*: a *nihilist* view on which the Clause has no judicially-enforceable content, and would in essence present a political question, and a *temporal* view, advocated by Justice Scalia, on which the Clause is concerned solely with temporary suspensions of the writ.

Far more formidable is a *federalist* view that sees the Clause as concerned solely with the protection of *state* habeas remedies. On this view, Congress is wholly without power to restrict habeas rights created by the states (absent a lawful suspension), but there is no constitutional right to a federal habeas forum whatsoever. This view has much to recommend it. Unlike the other theories, it respects habeas corpus as a right that exists independent of Congress, which the Clause strictly protects from congressional interference. It is also arguably supported by the historical record and consistent with the constitutional structure.

However, the federalist view as well is ultimately unsatisfactory because it fails to understand the Great Writ as a prerogative of the sovereign. In our constitutional system, this means that the sovereign American people are entitled to inquire into the lawfulness of any imprisonment anywhere within their dominion, and only a federal habeas remedy is adequate to the task. Therefore, I conclude that the true interpretation of the Suspension Clause is a *maximal* one on which federal courts have inherent authority to issue writs of habeas corpus, and Congress is strictly limited in its power to withdraw this authority. This maximal view is consistent with the Founding-era history and is reinforced by considering the role of slavery and Reconstruction in the Great Writ's history in our nation.

Finally, I turn to AEDPA itself, and conclude that the statute is clearly constitutional under any of the nihilist, temporal, or federalist views of the Suspension Clause, and is just as clearly unconstitutional, if understood as in any way restricting access to a traditional habeas forum in federal court, under the maximal view. AEDPA's status under the jurisdictional view is less clear and may depend on the precise interpretation of the law, though the interpretation most consonant with AEDPA's self-presentation would likely be invalid.

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A. Ex Parte Bollman *and the Jurisdictional View of Suspension*

The Supreme Court first addressed the Suspension Clause in the 1807 decision *Ex parte Bollman*.[14] Chief Justice Marshall's opinion for the Court strongly implied that, despite the Suspension Clause, federal courts do *not* have an inherent power to issue writs of habeas corpus. Unlike common law courts, he argued, "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."[15] Therefore, though "resort may unquestionably be had to the common law" to determine "the meaning of the term *habeas corpus*, . . . the power to award the writ by any of the courts of the United States, must be given by written law."[16] Chief Justice Marshall went on to find this authority in the Judiciary Act of 1789,[17] and the suggestion is that, had the judiciary not been authorized by Congress to issue the writ, it would have been unable to do so.[18] In this situation, "the privilege itself would be lost, although no law for its suspension should be enacted."[19] Fortunately though, the First Congress, "[a]cting under the immediate influence of [the Suspension Clause's] injunction," expressly provided "efficient means" for the privilege of habeas corpus to "receive life and activity."[20]

As Dan Poulson has argued, Chief Justice Marshall's language in *Bollman* suggesting that "resort may . . . be had to the common law" to define the content of the Great Writ resonates with what he calls the "dominant constitutional critiques of AEDPA,"[21] proceeding not from the Suspension Clause but from general principles concerning the judicial power of Article III.[22] This standard critique builds on Professor Henry M. Hart's view that Congress has nearly unlimited power to limit the scope of federal jurisdiction under Article III, but, when it confers jurisdiction, can only do so unreservedly. Like Chief Justice Marshall in *Bollman*, Hart thought that courts could not "assert[] any judicial control in the face of a total denial of

14. *Id.*
15. *Id.* at 93.
16. *Id.* at 93-94.
17. 1 Stat. 73.
18. *Bollman*, 8 U.S. at 94-95.
19. *Id.* at 95.
20. *Id.*
21. Poulson, *supra* note 4, at 389.
22. U.S. CONST. art. III, § 1.

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jurisdiction," but that courts can resist if "Congress gives jurisdiction but puts strings on it."[23] Professors James S. Liebman and William F. Ryan re-articulate this as the requirement that, whenever an Article III court has been empowered to decide a case, it must decide "(1) the whole federal question (2) independently and (3) finally, based on (4) the whole supreme law, and (5) impose a remedy that . . . effectuates supreme law and neutralizes contrary law."[24] Thus, while the Constitution does not require any given quantity of federal jurisdiction, it does require a consistent *quality* of judging in all Article III courts.[25]

This view of Article III is not necessarily enough to render AEDPA constitutionally infirm; Liebman and Ryan themselves thought that it need not be, if interpreted appropriately.[26] Essentially, they argue, habeas review under AEDPA, and under the similar retroactivity principles enunciated in *Teague v. Lane*,[27] functions to ensure adherence by state judges to the Supremacy Clause.[28] Therefore, they conclude, "[o]nce the federal court satisfies itself that state judges acted in accord with clearly established national law at the time, the constitutional-structural mechanism for preserving the supremacy of national law—i.e., the state judicial filter and the federal judicial spot-check—has functioned adequately."[29] However, Poulson argues, this sort of analysis is missing one thing: the Suspension Clause.[30] This is crucial, because, by giving it explicit textual recognition, the Clause makes "the Privilege of the Writ of Habeas Corpus" into a constitutional term of art—one whose meaning is, according to Chief Justice Marshall "unquestionably" to be

23. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372 (1953).

24. 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, 696 (1998).

25. *Id.*

26. *Id.* at 868. Liebman and Ryan wrote in 1998, before the Supreme Court had spoken on the issue, and it is quite possible that the Court's eventual interpretation of AEDPA goes beyond what Liebman and Ryan countenance. But this Article aims to prove that *any* interpretation of AEDPA must be unconstitutional and must therefore consider the more moderate construction offered by Liebman and Ryan as well as the Court's actual jurisprudence.

27. 489 U.S. 288 (1989).

28. Liebman & Ryan, *supra* note 24, at 862.

29. *Id.*

30. Poulson, *supra* note 4, at 395.

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determined through "resort . . . to the common law."[31] It imbues the common law definition of habeas corpus with constitutional significance, placing it beyond Congress's power to supersede. The Clause makes clear that the Great Writ's function is not confined to what Liebman and Ryan see as the central purpose of Article III, ensuring state obedience to supreme federal law.

Rather, the writ of habeas corpus forms a vital bulwark[32] protecting individual liberty against arbitrary restraint. The Court has seldom had occasion to give the most basic definition of the writ of *habeas corpus ad subjiciendum*,[33] perhaps because it is so well understood. Blackstone describes the writ in English law as one issued in the king's name, typically by the court of king's bench,[34] "directed to the person detaining another, and commanding him to produce the body of the prisoner" so that the king may "have an account, why the liberty of [the prisoner] is restrained."[35] Once the writ is issued, as Blackstone says it must upon a showing of "probable ground . . . that the party is imprisoned without just cause,"[36] the judge shall, "according to the circumstances of the case . . . discharge, admit to bail, or remand the prisoner."[37] This inquiry protects the "natural inherent right" of "personal liberty"[38] by imposing the "absolute necessity of expressing upon every commitment the reason for which it is made," and thereby preventing all imprisonments outside of the "clearly defin[ed]" circumstances in which "the imprisonment . . . may be lawful."[39] The Great Writ—which after all has no application in civil cases—is designed not to enforce federal supremacy but to safeguard liberty.

Now, if the Suspension Clause did not exist, and the Constitution never used the words "habeas corpus," then this definition might

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

32. *Cf.* THE FEDERALIST NO. 84, at 593 (Alexander Hamilton) (Lawrence Goldman, 2008) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *438).

33. There are many other forms of the writ; the *ad subjiciendum* form is the so-called "Great Writ" to which the Suspension Clause refers. *Cf.* 3 BLACKSTONE, *supra* note 1, at *131.

34. In America, of course, the writ is not issued in the king's name or by the court of king's bench since we have no king. We do, however, have a sovereign, the people of the United States, and by analogy that federal courts, the courts of the sovereign people, issue the writ in the name of the people. This point will become important shortly.

35. 3 BLACKSTONE, *supra* note 1, at *131.

36. *Id.* at *133.

37. *Id.* at *134.

38. *Id.* at *133.

39. *Id.*

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perhaps be subject to alteration by Congress, as the common law may typically be superseded by statute. The privilege of the writ, however, is a *constitutional* privilege, and it is to ascertain the meaning of this privilege that, following Chief Justice Marshall, we take "resort . . . to the common law."[40] Thus, just as constitutional rights generally are immune from statutory alteration,[41] the common law of habeas corpus lies beyond Congress's authority to supersede. Congress may, according to the great Chief Justice, decline to authorize issuance of the writ altogether, but it may not grant authority only to issue a deformed or degraded version of the writ. When Congress empowers the courts to issue writs of habeas corpus, it grants to them the full power to protect liberty in the name of the sovereign which that title signified under the common law. We might call this the *jurisdictional* view of the Suspension Clause.

B. The Nihilist View of Suspension

We need not, however, necessarily embrace this view of *Bollman*, or of the Suspension Clause. We might, for instance, doubt that Clause truly prohibits Congress from modifying the scope of the writ as it existed at common law. Marshall's remark that "resort may unquestionably be had to the common law" to determine the "meaning of the term habeas corpus"[42] could, for instance, have been directed solely to the task of interpreting the statutes conferring habeas jurisdiction. Or perhaps, even if we accept Poulson's reading of *Bollman*, we might disagree with the conclusion: Marshall provides no support for this observation, after all, and we might think that the greater power to withhold jurisdiction altogether should include the lesser power to narrow the scope of habeas authority. On this view, the Suspension Clause merely adverts to a privilege held by the people which Congress ought—but is under no enforceable obligation—to vindicate through legislation. On this *nihilist* view, no possible congressional limitation of habeas could possibly be declared invalid under the Suspension Clause; the Great Writ is, as a formal legal matter, wholly under Congress's control.

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

41. *Cf.* City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act on the grounds that it impermissibly redefined the constitutional right to the free exercise of religion).

42. *Bollman*, 8 U.S. at 94.

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This view is highly unsatisfying. It would in essence render enforcement of the Clause a political question,[43] susceptible to resolution not in any court of law but through the judgment of the elected political branches alone. But this issue shares none of the six traits which Justice Brennan's opinion in *Baker v. Carr*[44] declared characteristic of political questions. There is no "need for unquestioning adherence to a political decision already made,"[45] let alone an "unusual" one, nor "the potentiality of embarrassment from multifarious pronouncements by various departments on one question;"[46] problems which arise primarily in the foreign affairs context or in a national emergency. The question requires no "initial policy determination of a kind clearly for nonjudicial discretion;"[47] the Suspension Clause itself sets a clear policy regarding the writ, namely that it not be suspended except in certain narrow circumstances. Nor is there a "lack of judicially discoverable and manageable standards for resolving it;"[48] two simple, administrable standards are identified in the rest of this section. Courts would not, in resolving this question, be "expressing lack of the respect due coordinate branches of government"[49] any more than they do whenever they strike down an Act of Congress as unconstitutional.[50]

43. *See* Luther v. Borden, 48 U.S. (7 How.) 1, 46 (1849) ("Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline doing so.").

44. 369 U.S. 186, 217 (1962).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. Interestingly, quite a few of these factors, if not all of them, suggest that there is a political question lurking in the Suspension Clause, just not one concerning the meaning of the word "suspension." The determination of whether, in a given case of rebellion or invasion, the public safety may require suspending the writ has virtually every hallmark of a political question. The question is entirely one of policy, incapable of being expressed in principled judicial doctrine. Moreover, it is a question which will arise exclusively in the kind of national security emergency which might be thought to require unquestioning adherence to a political decision, and if the situation truly is dire enough to warrant a suspension, judicial interference with that suspension could impede our national defense, thus proving most "embarrassing." *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 402 (1819) ("The original act [incorporating a national bank] was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law."). Here, Chief Justice Marshall was referring, if obliquely, to the War of 1812; the embarrassments included the British setting fire to our nation's capital.

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Finally, and perhaps most importantly, there is no "textually demonstrable constitutional commitment of the issue to a coordinate political department."[51] To the contrary, the Suspension Clause is located in Article I, Section Nine: a series of prohibitions on Congress. The political branches, far from being expressly granted authority over suspension of the writ, are expressly forbidden that authority except in cases of rebellion or invasion. None of the other provisions of Article I, Section Nine could possibly be seen as legally unenforceable; *The Federalist No. 78* is particularly emphatic that any bills of attainder or ex post facto laws[52] should be declared void by the "courts of justice."[53] It follows that the same is true of any improper suspension of the writ of habeas corpus, and that therefore the Suspension Clause must actually place some enforceable limit on Congress. The nihilist view must be rejected.

C. The Temporal View of Suspension

Another narrow view of the Suspension Clause comes from Justice Antonin Scalia's dissent in *INS v. St. Cyr*.[54] He argued that the Clause was concerned exclusively with *temporary* suspensions that would, for a time, "entirely eliminat[e] the 'Privilege of the Writ' for a certain geographic area or areas, or for a certain class or classes of individuals."[55] Congress could, however, simply "fail to enact" the writ, or "refuse to accord it particular content."[56] We might call this a *temporal* view of the Suspension Clause, and it too is unsatisfying. There is something strange about saying that an abridgement of a constitutional "privilege"[57] is forbidden if it extends from today until tomorrow, but permissible if it extends from today until eternity. Justice Scalia would derive this aberrant view of the habeas privilege from the word "suspension."[58] But while it may be true that most suspensions are temporary ones, there is nothing illogical about the concept of an indefinite or permanent suspension,[59] and there is no

51. *Id.*

52. U.S. CONST. art. I, § 9, cl. 3.

53. THE FEDERALIST NO. 78, at 546 (Alexander Hamilton).

54. 533 U.S. 289 (2001) (Scalia, J., dissenting).

55. *Id.* at 337-38.

56. *Id.*

57. U.S. CONST. art. I, § 9, cl. 2; *cf.* U.S. CONST. art. IV, § 2, cl. 1; U.S. CONST. amend. XIV, § 1.

58. *St. Cyr*, 533 U.S. at 337

59. *Cf.* MAJOR LEAGUE BASEBALL, JOINT DRUG PREVENTION AND TREATMENT

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good reason for thinking that the Clause would permit an indefinite suspension of the writ. The temporal view, as well, must be rejected.

D. The Federalist View of Suspension

A third alternate approach is, in some ways, the most radical. It shifts the terms of the debate altogether by suggesting that the Suspension Clause protects state habeas corpus remedies, not federal ones.[60] This *federalist* view[61] sees the Clause as affording far more rigorous protection to the object of its protection than either the nihilist or the temporal views. However, by shifting the object of that protection to state habeas writs, it affords less of a right to a federal habeas forum even than the nihilist view. Since, under this theory, the Suspension Clause simply does not address habeas writs issued by federal courts, any power to issue such writs must be bestowed, gratuitously, by Congress. Thus, on this view, Chief Justice Marshall was wrong to speak of any "obligation" on the part of the First Congress to "provid[e] efficient means by which this great constitutional privilege should receive life and activity."[62] There already were ample means for vindicating the privilege—state habeas—and, indeed, Congress was sharply limited in its ability to restrict those means. Presumably, Congress may not interfere with or restrict state habeas proceedings at all, except in the narrow circumstances in which it was authorized to suspend the writ. The states themselves, on the other hand, would on this view be perfectly free to limit or abolish their own habeas remedies; the Clause merely protects whatever habeas rights the states should choose to create from federal interference.

There is much to recommend this theory, particularly compared with the nihilist and temporal approaches. Unlike them, it fits the text of the Suspension Clause itself, which presumes a privilege that exists independently of Congress and which could only be negated by express congressional action. Moreover, in recognizing the Clause as

PROGRAM § 7(A)(3), at 38 (2013) ("Third violation: Permanent suspension from Major League and Minor League Baseball. . . "), http://mlb.mlb.com/pa/pdf/jda.pdf.

60. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 126-80 (1980).

61. I mean this word chiefly in the modern sense, concerned with the authority of the states within the federal system. Whether it also applies in an older sense, connoting the policies of the Federalist Party and the principles underlying the Constitution, will in a way be the subject of this section.

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

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a federalism provision more than as a guarantee of individual rights, it coheres with the examples of the First and Second Amendments, which to modern eyes seem to speak in terms of individual rights[63] but which were, at least in part, originally understood as protecting states' rights (e.g., to establish a church) instead.[64] And as William F. Duker has argued, there is considerable evidence that this was indeed the original understanding of the Suspension Clause.[65] Additionally, this view has the virtue of greatly simplifying what might otherwise be a complicated and vexing issue: determining what exactly constitutes a suspension of the writ.[66] Congress can tinker with the federal writ to its heart's content, but *any* interference with or restriction of state habeas without a valid suspension whatsoever would be unconstitutional.

It might also plausibly be argued that this is the only view of the Suspension Clause which adequately respects the structure of Article III and the federal judiciary. In particular, under the "Madisonian compromise," Congress is under no obligation to create lower federal courts at all.[67] To be sure, there have in fact been lower federal courts since the first Judiciary Act,[68] but for the purposes of the Constitution as originally ratified, this did not have to be the case. This is important because, as Chief Justice Marshall held in *Marbury v. Madison*,[69] the original jurisdiction of the Supreme Court is exhaustively set out in Article III,[70] and cannot be expanded beyond that narrow scope. Habeas corpus cases are not mentioned among the Court's original jurisdiction. If, therefore, the Suspension Clause recognizes a right to federal habeas relief, what court could possibly afford that relief if there were no lower federal courts? Now, Chief Justice Marshall also held, in *Bollman*, that at least some habeas

63. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962); Lemon v. Kurtzman, 403 U.S. 602 (1971); District of Columbia v. Heller, 554 U.S. 570 (2008).

64. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (2000). Amar argues that, although the modern view of these provisions is inconsistent with their original meaning, it is nonetheless correct because of the Reconstruction Amendments' transformative impact.

65. *See* DUKER, *supra* note 60, at 126-80.

66. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1204-05 (7th ed. 2015); *see also* Boumediene v. Bush, 553 U.S. 723 (2008); INS v. St. Cyr, 533 U.S. 289 (2001).

67. FALLON ET AL., *supra* note 66, at 8.

68. *Id.* at 21, 26-33, 41-46.

69. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174-76 (1803).

70. U.S. CONST. art. III, § 2, cl. 2.

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actions were "clearly *appellate*" in nature,[71] allowing them to be heard by the Supreme Court. But while this might work when the writ involved "revision of a decision of an inferior court, by which a citizen has been committed to jail,"[72] the same logic would not apply to petitions by those held without judicial process.[73] In a world without lower federal courts, the only tribunals with the jurisdiction to grant these prisoners relief would be the state courts. Thus, it might be thought, the privilege recognized by the Suspension Clause cannot be a right to relief from a federal court, since under the plan of the Constitution such relief might have been impossible.

Why, then, has this federalist view of the Suspension Clause been repeatedly rejected by the Supreme Court, not just in *Bollman*, but in a number of more recent cases which have held that there is, in fact, at least some minimal right to federal habeas, or to some adequate substitute?[74] It is hard to say for sure, but it seems likely that this theory's major problem is that it does not recognize the "Privilege of the Writ of Habeas Corpus"[75] as a true constitutional right. On this view, after all, the federal Constitution guarantees no habeas rights of its own force but simply affords protection to whatever habeas rights the states might create. If a state should abolish the writ in its own courts, and provide no substitute, people within that state would have no constitutionally recognized habeas privilege whatsoever. But can it be doubted that habeas corpus is a "fundamental right,"[76] a "privilege[] or immunity[] of citizens of the United States,"[77] "implicit in the concept of ordered liberty"?[78] Certainly the Great Writ is "deeply rooted in this Nation's history and tradition";[79] indeed, it predates our nation by a considerable margin, and was

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

72. *Id.*

73. DUKER, *supra* note 60, at 140.

74. *E.g.*, INS v. St. Cyr, 533 U.S. 289, 300 (2001); Boumediene v. Bush, 553 U.S. 723, 745 (2008).

75. U.S. CONST. art. I, § 9, cl. 2.

76. Griswold v. Connecticut, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring).

77. U.S. CONST. amend. XIV, § 1.

78. Palko v. Connecticut, 302 U.S. 319, 325 (1937). Truthfully a right to be free from arbitrary imprisonment, and an effective means of vindicating that right, would seem to be among the first requirements for a scheme of ordered liberty—as Blackstone argues. 1 WILLIAM BLACKSTONE, COMMENTARIES *136.

79. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

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deemed the "bulwark"[80] of the English constitution which preceded it. Even without the Suspension Clause, it would make sense, on just about any methodology, to view habeas as a constitutionally protected if unenumerated right. The Suspension Clause merely removes any doubt.[81]

If this is correct, then the federalist view of suspension must, at least in its purest form, be wrong. The Suspension Clause must be seen as protecting, not merely whatever habeas rights the several states should choose to provide by statute, but the great constitutional privilege of habeas corpus itself. This privilege, moreover, must extend to those not within any state and therefore not able to avail themselves of state habeas protections—for instance, those held by the federal government at Guantanamo Bay.[82] But recognizing a true constitutional right to the writ of habeas corpus need not necessarily destroy the federalist view altogether, for this right need not necessarily be a right to a federal habeas forum as such. Thus, we might recast the federalist view in a more moderate fashion—one consistent with modern Supreme Court precedents—by focusing less on the remedy and more on the right. Even if the Constitution recognizes and, through the Suspension Clause, protects a right to relief from arbitrary or unlawful imprisonment, perhaps it does not guarantee any particular forum for obtaining this relief. On this view, a prisoner would only be entitled to a federal habeas hearing if no adequate alternative were available.[83] State habeas proceedings would, of course, be seen as the quintessential adequate alternative.

To be sure, this more moderate federalist approach would lack some of the hardline version's virtues. It would presumably be necessary to develop a doctrine for determining whether a given state's habeas laws qualified as an adequate substitute for federal habeas—the sort of line-drawing which is admirably unnecessary under the hardline approach. Moreover, since the moderate approach

80. 4 WILLIAM BLACKSTONE, COMMENTARIES *431.

81. *Cf.* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 101-02, 142-51 (Oxford University Press ed., 1982) (describing how specific provisions of the Bill of Rights reflect a broader constitutional ethos of limited government); *see also* Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1 (1998).

82. *See* Boumediene v. Bush, 553 U.S. 723 (2008); *see also* Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

83. *Cf. Boumediene*, 553 U.S. at 733 ("We hold that those procedures are not an adequate and effective substitute for habeas corpus.").

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would recognize that at least some prisoners have a right to a federal habeas hearing, it must confront the same tension with the structure of Article III and the Madisonian compromise, which the hardline version avoids.

Happily, however, the tension between *Marbury* and a right to federal habeas is weaker than it initially appears. *Marbury* held that Congress could not expand the original jurisdiction of the Supreme Court beyond its enumeration in Article III, Section Two.[84] As Chief Justice Marshall put it in *Bollman*, "it was decided that this court would not exercise original jurisdiction except so far as that jurisdiction was given by the Constitution."[85] As discussed earlier, this appears to suggest that the Supreme Court could not entertain a habeas petition by, for instance, a Guantanamo prisoner being held without judicial process. Since there need not be lower federal courts, such a prisoner seemingly could not have any right to bring a habeas action in federal court. But, if that prisoner's right to bring a federal habeas action itself comes from the Constitution, would not the authority to hear the petition also come directly from the Constitution, rather than any act of Congress? If our hypothetical Guantanamo prisoner has a constitutional right to habeas corpus which, under the circumstances, can only be vindicated in federal court (and moreover only in the Supreme Court since there are no lower federal courts), would not the High Court's original jurisdiction over the case have been "given by the constitution,"[86] thus erasing any supposed incompatibility with *Marbury*?

This is, to be sure, a radical proposition. The notion that the three heads of original Supreme Court jurisdiction listed in Article III, and followed immediately by a declaration that "[i]n all other cases . . . the supreme Court shall have appellate Jurisdiction,"[87] do not actually exhaust the constitutional grant of original jurisdiction is confessedly outlandish. This supposed original habeas jurisdiction could well overwhelm the Court's docket. And this would also be inconsistent with the view, advanced by Professor Akhil Amar, that the constitutional grant of original jurisdiction was chiefly designed with venue and geographic convenience in mind,[88] as it would not only

84. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174-75 (1803).

85. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 100 (1807).

86. *Id.*

87. U.S. CONST. art. III, § 2, cl. 2.

88. *See* Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the*

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make any jailer throughout the country potentially subject to suit in the nation's capital but would, on the traditional concept of habeas, require them to bring their prisoner to the High Court. None of these objections, however, are fatal. Professor Amar's view of original jurisdiction as a venue mechanism is not widely accepted.[89] And while it would surely be inconvenient in many regards to foist this original habeas jurisdiction upon the Supreme Court, there are many reasons why lower federal courts are highly convenient. The fact that, under the Madisonian compromise, Congress need not create lower courts hardly necessitates that there be no compelling reasons why they *should* create them.

Finally, while it is undoubtedly strange that a provision of the Constitution outside of Article III altogether would supplement the explicit grant of original jurisdiction, it is not entirely implausible. For example, suppose that Article I declared that presidential impeachment trials were to be held before the Supreme Court, rather than in the Senate, while Article III remained unchanged from its present form. We might think this a case of somewhat shoddy constitutional draftsmanship, but we would not doubt that the Court had original jurisdiction over presidential impeachments, *Marbury* notwithstanding. If, then, some provision of the Constitution outside of Article III is best read as conferring additional jurisdiction on the Court by implication, there is no ironclad reason why we should reject that reading. It might be added that the declaration that the Court's jurisdiction is appellate in all other cases applies to those other cases "before mentioned,"[90] that is, to all cases in the general enumeration of federal jurisdiction[91] except those where the Court has been given original jurisdiction. Arguably, this language does not mean that the Court cannot exercise original jurisdiction over cases that are not "before mentioned" in Article III itself, if those cases are placed within the federal judicial competence by some other constitutional provision.

This moderate federalist view of the Suspension Clause, then, is a mixed bag. Unlike any of the theories yet considered, it grants proper respect to the Great Writ's status as a true constitutional privilege. And it is broadly consistent with Supreme Court precedent,

Supreme Court, U. CHI. L. REV. 443, 467-88 (1989).

89. *See* FALLON et al., *supra* note 66, at 268 n.2.

90. U.S. CONST. art. III, § 2, cl. 2.

91. U.S. CONST. art. III, § 2, cl. 1.

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with the text of the Clause, and with historical evidence concerning the original understanding of the Clause. However, it lacks much of the theoretical simplicity and elegance of the hardline federalist view. Moreover, the tension between finding a constitutional right to federal habeas and the Madisonian structure of Article III was one of the strongest arguments for the federalist view in the first place. Alleviating that tension undermines the foundations of any federalist approach to the Suspension Clause even as it alleviates one problem with the moderate federalist view. Overall, this is probably the strongest theory discussed thus far, and yet it is difficult to accept for one very simple reason: in treating state habeas remedies as an adequate substitute for federal habeas, the federalist approach fails to grasp the true nature of the Great Writ, and its vital place in our constitutional scheme.

E. The Privilege of the Writ

This point is an intricate one, requiring a deep understanding both of the Great Writ and of the American constitutional system. For the former we must return to Blackstone, who provides the relevant key fact about habeas corpus: it is not merely a vital individual right but also an important prerogative of the sovereign.[92] In England, of course, the king was sovereign, and therefore, Blackstone tells us, habeas was a

> high prerogative writ . . . and therefore by the common law issuing out of the court of king's bench . . . and running into all parts of the king's dominions: for the king is at all times intitled to have an account, why the liberty of any of his subjects is restrained.[93]

That last part is key, for it establishes that habeas corpus is a vital element of the *relationship* between the sovereign and its subjects.[94] The subject has not only an individual right to be free of arbitrary confinement, but a right to petition the sovereign for relief from such confinement; the sovereign, conversely, has an interest in

92. 3 BLACKSTONE, *supra* note 1, at *131.

93. *Id.*

94. *Cf.* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (Louisiana State University Press ed., 1969).

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seeing that its subjects are not unlawfully detained. In America, the sovereign is not the king but rather the People, and specifically the People of the United States.[95]

This shows why state habeas proceedings are truly inadequate: they cannot possibly be the vehicle by which the People of the United States demand an account why the liberty of any of their subjects is restrained. State courts do not exercise the sovereign authority of the People of the United States; they exercise the (inferior) sovereign authority of the people of their own state. The same is true of state governments generally. If someone walks into a state court and files a petition for habeas corpus, they are requesting the aid of that state, and implicitly the people of that state, in securing the person's freedom. Their plea never reaches any agent of the American people. If, then, the relationship of sovereign and subject, as understood in the Anglo-American legal and constitutional tradition, includes this privilege of habeas corpus, the privilege can only be satisfied, for both parties to the relationship, by a writ which issues from the courts of the sovereign itself. State habeas can satisfy neither the sovereign American People's interest in ensuring the freedom of all within their dominion nor the right of individuals to invoke the People's assistance to secure their liberty. State habeas proceedings simply do not invoke the authority of the true American sovereign; only federal habeas can do that.

This is not overly to denigrate state habeas proceedings: to be sure, the people of every individual state, being partially sovereign within that state, are also entitled to an account why any person's liberty is restrained in that state. There is no reason why the Suspension Clause should not afford protection to state *as well as* federal habeas,[96] or indeed why, *contra* the result of *Ableman v. Booth*[97] and *Tarble's Case*,[98] state courts could not exercise habeas jurisdiction over those held in federal custody. And any state habeas case involving issues of federal law (as any case involving prisoners in federal custody assuredly would)[99] would properly fall within the

95. U.S. CONST. pmbl.

96. The interesting question is whether the congressional power of suspension would extend to state as well as federal habeas, in those cases where the Suspension Clause permits its exercise. This question is, however, wholly irrelevant for my present purposes.

97. *See generally* Ableman v. Booth, 62 U.S. (21 How.) 506 (1859).

98. *See generally In re* Tarble, 80 U.S. 397 (1871).

99. Specifically, a state court's grant of habeas relief to a prisoner held by the federal government necessarily involves a holding that their detention violated, or was at least

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Supreme Court's appellate jurisdiction over cases arising under federal law.[100] Indeed, as Professor Amar has persuasively argued, jurisdiction over these cases *must* be vested somewhere in the federal courts, in one form or another;[101] the state courts cannot have the final, unreviewable say over these cases. But this federal appellate review is not enough to make state habeas an adequate vehicle for satisfying the sovereign People of the United States that the liberty of their subjects is not being restrained without just cause—and not just because, in practice, the Supreme Court can hear so few of these cases in any given year. Rather, federal appellate review serves only to correct errors of federal law made by the state courts. It does not function as an independent investigation into the cause of confinement carried out in the name of the American People as a whole.

Now, all of this would not be a problem if the states truly were separate sovereigns, such that the people of Massachusetts had no fundamental political connection to events in Georgia and vice versa. Instead, of course, the Constitution created a "more perfect Union,"[102] such that the *entire* People of the *entire* United States are ultimately sovereign over *every* state. If someone's liberty is restrained in South Carolina, the people of New York are every bit as entitled to an account of why as are the people of South Carolina. And there is simply no reason why the people of New York, or of any other state, should be satisfied simply because the people of South Carolina have satisfied themselves on the matter. The only way that the American People as a whole can have an account of why the liberty of one of their subjects is restrained is through a writ of habeas corpus issued by the courts of the United States. Just as habeas corpus is a

unauthorized, by federal law. (The two may be the same. *See* U.S. CONST. amend. V.) After all, if the federal detention is authorized by valid federal law, then that federal law is supreme over any state law which would purport to free the prisoner. U.S. CONST. art. VI, cl. 2; *see* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1509-10 (1987) [hereinafter Amar, *Of Sovereignty and Federalism*] (discussing the legitimate role of state *habeas* in checking unconstitutional federal action).

100. *See* U.S. CONST. art. III, § 2, cl. 1.

101. *See* Amar, *Of Sovereignty and Federalism*, *supra* note 99 at 1510 ("But resolution of the merits by a state court would present a federal question that would trigger Supreme Court appellate review under the relevant jurisdictional statutes."); *see generally* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) [hereinafter Amar, *Neo-Federalist Article III*].

102. U.S. CONST. pmbl.; *cf.* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 21-39 (2005) [hereinafter AMAR, AMERICA'S CONSTITUTION] (discussing the significance of the "more perfect union").

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fundamental individual right recognized by the Suspension Clause, habeas is a prerogative of the sovereign People, expressly placed beyond the power of Congress—which is not sovereign—by the Suspension Clause. As the courts of the sovereign American People, the federal courts have inherent authority, derived from the Constitution (even if not explicitly spelled out in it) and therefore consistent with *Marbury*, to issue writs of habeas corpu*s*—authority with which Congress cannot generally interfere.

Recognizing that habeas is not just an individual right but a crucial part of the relationship between the sovereign People and their subjects also allows us to see why the Framers of the Constitution did not anticipate that federal courts would necessarily exercise inherent habeas powers, or at least hazard a plausible guess. After all, there is one notorious example of an area where these revolutionaries who had fought so bravely for popular sovereignty failed to understand the full implications of that principle: sovereign immunity. As a matter of political theory, the logic of governmental sovereign immunity simply does not apply in a democracy where the People—and not the government—are the true sovereign.[103] Nevertheless, Alexander Hamilton, in *The Federalist Papers*, wrote that sovereign immunity was "the general sense, and the general practice of mankind," and was therefore "enjoyed by the government of every State in the Union."[104] Then, after the Supreme Court followed the principles of popular sovereignty and the plain language of Article III to uphold federal jurisdiction over a suit against a state by a citizen of another state in *Chisholm v. Georgia*,[105] the American People responded by swiftly ratifying the Eleventh Amendment and overruling the Court's decision. Evidently the notion of sovereign immunity was so embedded in their "general sense" and "general practice" that, for the most part, they did not notice its striking inconsistency with popular sovereignty.

103. *See id.* at 335 ("The short answer [for why the states lack sovereign immunity] was that, in America, neither federal institutions nor state governments were truly sovereign. Only the people were."); *see also* Amar, *Of Sovereignty and Federalism*, *supra* note 99, at 1489-90 ("Thus, to accept the plenary sovereign immunity of governments as a structural principle is necessarily to reject the first postulate of popular sovereignty."); JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 82 (2014) ("Not only did those reasons for a rule of sovereign immunity vanish long ago, but it is also clear that neither of them would have been acceptable in America.").

104. THE FEDERALIST NO. 81, at 568 (Alexander Hamilton).

105. *See generally* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), *superseded by U.S. CONST.* amend. XI.

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Similarly, we may hazard a guess that the Framers and ratifiers of the Constitution did not fully comprehend the consequences of national popular sovereignty under a more perfect union for habeas corpus, or for the necessary habeas authority of the federal courts. We should not, therefore, be overly troubled by the slight oversight in structuring Article III such that, under certain circumstances which have never come to pass, giving federal courts inherent habeas powers would be somewhat awkward. Instead, we can—and should—read the Constitution in a way that fully realizes the Founders' commitment to popular sovereignty while doing no real violence to the text, doing justice to the rights of the People both to be free from arbitrary imprisonment and to ensure that their fellows are likewise free.

F. The Maximal View of Suspension

This, then, is the *maximal* view of the Suspension Clause: the American People, as the sovereign, are at all times entitled to have an account of why the liberty of any of their subjects is restrained, and accordingly the federal courts have inherent authority under the Constitution to issue writs of habeas corpus. Congress may, under its power to create inferior courts[106] and to make laws necessary and proper for carrying into execution the power of other government departments,[107] structure and regulate this habeas jurisdiction. And it has indeed done so, conferring power on "the Supreme Court, any justice thereof, the district courts and any circuit court within their respective jurisdictions" to issue the writ,[108] as well as permitting appellate judges to transfer habeas petitions to the district courts.[109] Congress cannot, however, strip any individual within the dominions of the United States of their constitutional right to bring a habeas petition in some federal court, except as permitted under the Suspension Clause in cases of rebellion or invasion.[110]

106. *See* U.S. CONST. art. I, § 8, cl. 9.

107. U.S. CONST. art. I, § 8, cl. 18.

108. 28 U.S.C. § 2241(a) (2012).

109. § 2241(b).

110. True, § 2241(c) provides that the writ "shall not extend to a prisoner unless" one of several named conditions is met. However, as currently written one of those conditions is that the prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." § 2241(c)(3). At least arguably, the sovereign American people are only interested in ensuring that no one is imprisoned in violation of federal laws. Imprisonments which violate only state laws, conversely, are solely the concern of the sovereign people of the individual

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The maximal view coheres with the text of the Suspension Clause, which as noted seems to presume a privilege that exists independently of Congress and which could only be negated by express congressional action. So too does it cohere with the expectations of the Founders. Hamilton, for instance, referred in *The Federalist No.* 84 to "the establishment of the writ of *habeas corpus*" by the new Constitution.[111] If the Suspension Clause merely protected state writs from federal interference, it would make little sense to speak of the Constitution as having "establish[ed]" the writ. Likewise, Hamilton's language is not consistent with the nihilist, temporal, or jurisdictional view of the Clause. Interestingly, like the hardline federalist view, the maximal view does not seem to require very much arbitrary line-drawing. Congress has *no* power to deprive any person of federal habeas relief, save through a valid suspension. And, if the great constitutional privilege of habeas corpus is in fact always and everywhere a right to federal habeas, there may not be much need to examine the sufficiency of state habeas laws. Finally, this view is broadly consonant with the modern Supreme Court's increasing willingness to find and enforce a constitutional right to habeas corpus.[112] The only real difficulty with this view is its inconsistency with Chief Justice Marshall's opinion in *Bollman*. But, as the next section will demonstrate, there is good reason not to let an apparent mistake from the early days of the Republic foreclose this best reading of the Suspension Clause.

G. Reconstructing Habeas

The First Judiciary Act, which Chief Justice Marshall viewed as fulfilling the promise of the Clause, expressly limited the writ's reach by providing that it would not extend to "prisoners in gaol," except those in federal prisons (or having business in federal court as either witness or defendant).[113] That is to say, as a general rule it withheld the privilege of the writ of (federal) habeas corpus from all state

state and can thus be fully remedied by state habeas. Section 2241(c)(3), therefore, is broad enough to satisfy the entire constitutionally-recognized habeas interest.

111. THE FEDERALIST NO. 84, *supra* note 32, at 592 (Alexander Hamilton); *see also* ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 12-26 (2001) for additional evidence that the Framers did not think the courts would depend on Congress for their habeas authority.

112. *E.g.*, INS v. St. Cyr, 533 U.S. 289 (2001); Boumediene v. Bush, 553 U.S. 723 (2008).

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

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prisoners. This seems inconsistent with Blackstone's definition of the writ. He states emphatically that it "run[s] into all parts of the king's dominions: for the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted."[114] The writ of habeas corpus is simply a means of vindicating the "natural inherent right"[115] against arbitrary and unlawful imprisonments, and, one might therefore think, is wholly indifferent to the identity of the jailer. Indeed, Congress later did extend the habeas corpus law to cover anyone who is "in custody in violation of the Constitution or laws or treaties of the United States,"[116] giving the writ its proper scope. Why, then, did it fail to do so from the outset?

The answer likely lies in the suspicious fact that Congress only extended habeas corpus rights to all in 1867.[117] This was the height of Reconstruction; the Fourteenth Amendment's ratification was pending before the states and the Thirteenth Amendment had been adopted just two years earlier. It makes sense to wonder if this not mere coincidence, whether this expansion of habeas corpus wasn't part of the broader project of Reconstruction—the Great Writ's fate intertwined with that of slavery. After all, prior to the Civil War, America was not a land where all enjoyed the "natural inherent right" of "personal liberty."[118] It was a land built upon utterly denying that right to millions. This required, as Professor Robert Cover among others has documented, certain profound distortions of the Constitution's guarantees of freedom and equality.[119] It would be almost surprising had habeas law not suffered from this same malignancy. After all, perhaps the most famous habeas case of all time (certainly during this period of American history) was *Somersett's Case*,[120] in which Lord Mansfield, a great enemy of the American colonists, used the writ to free a slave brought to England by his American master. This is speculative, but the potential connection to slavery is yet another reason to be skeptical of Chief

114. 3 BLACKSTONE, *supra* note 1, at *131.

115. *Id.* at *133.

116. 28 U.S.C. § 2241(c)(3) (2012). *See supra* n.112.

117. Habeas Corpus Act of 1867, 14 Stat. 385.

118. 3 BLACKSTONE, *supra* note 1, at *133.

119. *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS *passim* (1984).

120. Somerset v. Stewart, (1772) 98 Eng. Rep. 499 (KB), 20 State Tr. 1.

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Justice Marshall's views in *Bollman*—or, alternately, to think that it became far less appropriate after the Civil War.

Certainly, Reconstruction marked a sea change in the number of federal restrictions placed on state penal systems. Under the antebellum Constitution, the Bill of Rights did not apply to the states[121] and the original Constitution imposed little on the states beyond a ban on bills of attainder and ex post facto laws.[122] Even if state prisoners theoretically had access to federal habeas corpus, they would almost never be entitled to relief—so denying them that relief was no great tragedy. The Fourteenth Amendment changed all that. Its declaration that "No State shall . . . deprive any person of life, liberty, or property without due process of law"[123] made state justice systems subject to comprehensive constitutional constraint and, thereby, made the federal habeas process categorically more important to state prisoners.

The change runs deeper still. Prior to the Civil War, people were generally seen as citizens of their own state first, and of the United States second. In such a world it might have been easy to think that the primary sovereign "intitled to have an account, why the liberty of any . . . is restrained"[124] would be the sovereign people of each state individually, not the sovereign People of the United States as a whole. But this view of the American polity, too, was reconstructed after the Civil War: the Fourteenth Amendment's first sentence gives national citizenship primacy over state citizenship,[125] reinforcing the idea that the people of the *nation*, collectively, are sovereign.

This is not to say that *Bollman* was correct under the antebellum Constitution. The Fourteenth Amendment, after all, was hardly the first time the Constitution had affirmed the sovereignty of the American People as a whole.[126] Nor does this logic directly apply to *Bollman*'s main premise—that Congress must supply jurisdiction for the federal courts to issue writs of habeas corpus. It does suggest, however, that Reconstruction eradicated or amended all those features of the antebellum constitutional regime which made giving the

121. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

122. U.S. CONST. art. I, § 9, cl. 3.

123. U.S. CONST. amend. XIV, § 1.

124. 3 BLACKSTONE, *supra* note 1, at *131.

125. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside.").

126. *See, e.g.*, U.S. CONST. pmbl. ("We the People of the United States . . . do ordain and establish this Constitution . . . .").

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Suspension Clause its full and proper reading seem unnecessary or uncomfortable. Accordingly, any precedent decided before the Civil War reading the Clause more narrowly, like *Bollman*, should be accorded rather less weight. The Suspension Clause of the reborn, reconstructed Constitution[127] is best read as guaranteeing to anyone held in confinement anywhere within the United States a forum in federal court—subject only to congressional suspension during periods of invasion or rebellion—to demonstrate the illegality of their imprisonment and to invoke the judicial power of the United States in ordering their release.[128]

H. AEDPA and the Suspension Clause

How, then, would § 2254(d)(1) of AEDPA fare under each of these theories? Section 2254(d)(1) declares that

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .[129]

This language was enacted in 1996 against the backdrop of general federal court authority to issue writs of habeas corpus to all prisoners who are "in custody in violation of the Constitution or laws or treaties of the United States,"[130] and is clearly designed to restrict

127. *Cf.* Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) ("that this nation, under God, shall have a new birth of freedom . . ."); AMAR, CREATION AND RECONSTRUCTION, *supra* note 12.

128. *See also* Lee Koversky, *Prisoners and Habeas Privileges Under the Fourteenth Amendment*, 67 VAND. L. REV. 609 (2014). Koversky argues that the Fourteenth Amendment's Privileges or Immunities Clause granted state prisoners a constitutional right to the federal habeas forum. *Id.* He notes that this view would render § 2254(d)(1) unconstitutional; however, his theory seems to leave more room for both congressional "control over what qualifies as lawful custody," and for *Teague v. Lane*-style retroactivity law (if judicially created) than the arguments in this Article. *Id.* at 669.

129. 28 U.S.C. § 2254(d)(1).

130. 28 U.S.C. § 2241(c)(3).

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that authority. That is to say, § 2254(d)(1) mandates that certain prisoners who, in 1995, would have been entitled to federal habeas relief under then-current federal law will instead be denied that relief in the new, post-AEDPA regime. Litigants can be denied the relief they seek in many different ways, however, and in applying the Suspension Clause to AEDPA we must first determine which of these devices Congress purports to use to limit the Great Writ. To prove that AEDPA is unconstitutional we must show that it would be unconstitutional however we might plausibly understand it. As the Supreme Court has explained, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[131] This section will consider only those constructions of § 2254(d)(1) which see it as denying certain prisoners access to a traditional habeas forum in federal court; all other constructions will be addressed in Part III.

One such construction of AEDPA, arguably the most moderate and definitely the one most consistent with the statute's self-presentation, would see it as altering the rules of decision in certain habeas cases. On this view, the prisoners denied relief under § 2254(d)(1) are allowed to apply for the writ and are still entitled to at least a nominal habeas hearing before a federal district court. That hearing, however, will not be exactly what it would have been if the meaning of the Great Writ were ascertained through "resort . . . to the common law."[132] The substantive standard used to determine the merits of the application has been narrowed. Rather than granting relief for any prisoner whose confinement violates federal law, the courts would free only those whose confinement resulted from an unreasonable application of federal law.

Alternately, we could consider those denied relief under AEDPA not to have lost their claims on the merits under an altered rule of decision but rather to have had jurisdiction over their petitions removed from the federal courts. On this view, when a habeas judge determines that a prisoner's conviction was not contrary to, and did not involve an unreasonable application of, clearly established federal law, they must dismiss the petition altogether, never reaching its merits. Everyone whose claim survives this threshold inquiry, however, will receive a full and undiluted habeas hearing. Indeed, on

131. Nat'l Fed. of Ind. Bus. v. Sebelius, 567 U.S. 519, 563 (2012) (quoting Hooper v. California, 155 U.S. 648, 657 (1895)).

132. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93-94 (1807).

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this view, the prisoners whose claims are dismissed under § 2254(d)(1) might well have been entitled to relief on the merits; unfortunately for them, the courts simply lacked the power to grant that relief.[133]

Either of these laws would clearly be unobjectionable under both the nihilist view of the Suspension Clause, on which there simply is no constitutional right to federal habeas, and on the temporal view, under which Congress is under no obligation to afford the writ any particular content.[134] Both would likewise be valid on the hardline federalist view, since neither law would interfere with the states' own habeas procedures. Under the moderate federalist approach, the validity of either law would turn solely on the sufficiency of the state's habeas laws. After all, § 2254(d)(1) applies only to prisoners held pursuant to state court judgments, whose habeas rights should, on this view, most naturally be vindicated through their own state's courts. In any state with adequate habeas laws, then, either interpretation of § 2254(d)(1) would be unobjectionable.

Any reader who considers any of these theories correct, and who has not been persuaded by my arguments that each is incorrect, may as well stop reading. On any of these theories, AEDPA is clearly valid under multiple different readings, including the most natural one, and this Article's claim must necessarily fail.

Analyzing these different interpretations of AEDPA is considerably more interesting, however, under the jurisdictional view of *Ex parte Bollman*. The first understanding of § 2254(d)(1) outlined above, on which it alters the rule of decision for certain habeas cases, would clearly be unconstitutional on this view. After all, "the power to award the writ by any of the courts of the United States" has in fact been "given by written law"[135]—the general grant of habeas authority in 28 U.S.C. § 2241—and AEDPA does not purport to rescind this grant. In Henry Hart's words, then, in § 2254(d)(1) Congress has "[given] jurisdiction but puts strings on it."[136] Since these strings would restrict the common law definition of the writ, which is of

133. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 168 (1803) ("[H]aving legal title to the office, he has a consequent right to the commission; a refusal to deliver which, is a plain violation of that right, for which the laws of his country afford him a remedy. It remains to be inquired whether . . . [h]e is entitled to the remedy for which he applies. This depends on, 1st. The nature of the writ applied for, and, 2dly. The power of this court.").

134. INS v. St. Cyr, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting).

135. *Bollman*, 8 U.S. at 94.

136. Hart, *supra* note 23, at 1372.

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constitutional stature under the Suspension Clause, they are hence invalid and may be disregarded by the courts. If on the other hand we consider § 2254(d)(1) to be a jurisdiction-stripping measure, things are not so simple. Certainly the law would be in *some* sense unconstitutional, as it would violate the "obligation of providing efficient means by which this great constitutional privilege should receive life and activity."[137] But under *Bollman*, federal courts cannot issue the writ if Congress has not granted them the authority to do so, even if the failure to provide that authority was a dereliction of constitutional duty. Seen as a jurisdictional statute, then, § 2254(d)(1) might be wrongful or unconstitutional in a broad sense, but the courts would be powerless to disregard it.

This last conclusion is not totally inescapable. One could plausibly read *Bollman*, for instance, as recognizing congressional power *never* to grant the courts habeas authority in the first place, but not as recognizing a power to withdraw authority once granted except through the suspension mechanism. After all, the courts can strike down the later statute withdrawing jurisdiction as unconstitutional, thus leaving the earlier statute granting jurisdiction in place, whereas if Congress had never granted the authority in the first place the courts would have, in essence, had to write a new law in order to issue the writ. Thus one might think that the courts can validly strike down any restriction on habeas jurisdiction that leaves the text of the general grant of power in § 2241 intact. Either of these rules would, however, be exceedingly formalistic. It would be odd if Congress, by conferring habeas jurisdiction in 1789 and in 1868, had forever alienated its right to withhold that jurisdiction. And if we think that courts could strike down any partial withdrawal of habeas jurisdiction, we invite the argument that AEDPA implicitly repealed the federal courts' habeas authority altogether, replacing it with the power to issue a similar but subtly different writ. One which just happens also to be called *habeas corpus* but has, in certain cases at least, a less generous rule of decision.

This repeal and replace approach[138] would be strange, but at least some versions of the jurisdictional view would appear to permit it.

137. *Bollman*, 8 U.S. at 95.

138. *Cf.* Nat'l Fed. of Ind. Bus. v. Sebelius, 567 U.S. 519, 624 (2012) (Ginsburg, J., concurring) ("Congress could have recalled the existing legislation, and replaced it with a new law . . . ."); David A. Fahrenthold & Jenna Johnson, *Republicans' Obamacare 'Repeal and Replace' Dilemma Joins Presidential Contest*, WASH. POST (Aug. 18, 2015), https://www.washingtonpost.com/politics/health-law-repeal-and-replace-joins-republican-presidential-con

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Indeed, if this loophole were thoroughly exploited the jurisdictional view might collapse into nihilism, placing no firm limits on Congress that could not be evaded through clever and determined draftsmanship. This apparent possibility that Congress might abolish the writ of habeas corpus altogether and instead authorize the federal courts to issue writs of *schmabeus schmorpus* is in fact a major weakness of the *Bollman* jurisdictional approach.[139] If that approach is valid, however, AEDPA would be unconstitutional on certain readings of the statute (including the most natural one), and its constitutionality on a potentially very wide range of other readings would pose a most vexing question. Whether this Part has accomplished its goal, therefore, would depend chiefly on whether it is "fairly possible"[140] to construe § 2254(d)(1) as a jurisdiction-stripping measure rather than as imposing a new rule of decision.

On the *maximal* view of suspension, however, it is clear that any of these laws would be unconstitutional. After all, on that theory, every prisoner within the dominion of the United States[141] has a constitutional right to a federal habeas hearing, and Congress can only restrict or limit that right in any way through the sharply limited suspension power recognized by the Suspension Clause. Since the federal courts' habeas powers come directly from the Constitution, and are therefore defined by it, Congress cannot alter that constitutional definition—that is, provide for an alternate rule of decision—without running afoul of the Suspension Clause. It does no good to say that this is a modification of habeas rather than a suspension; a valid suspension is the only means by which Congress can restrict habeas rights. Nor, clearly, can Congress strip the federal courts of their inherent habeas jurisdiction except through a valid suspension. Indeed, on the maximal approach it is difficult, if not impossible, to conceive of *any* way Congress could validly deprive any prisoner of access to a traditional federal habeas forum. If the arguments in support of the maximal view have been persuasive,

test/2015/08/18/b620ee94-45ce-11e5-846d-02792f854297_story.html; James C. Capretta, *A Clear Path for Repealing and Replacing Obamacare is Coming Into View*, NAT'L REVIEW (Dec. 6, 2015, 7:04 PM), http://www.nationalreview.com/article/428091/repealing-replacing-obamacare-clear-path.

139. Thanks to Professor Akhil Reed Amar for inspiring the phrase *schmabeus schmorpus*.

140. *Sebelius*, 567 U.S. at 563 (majority opinion) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

141. *Cf.* Rasul v. Bush, 542 U.S. 466 (2004) (holding that the Guantanamo Bay detention facility was within this dominion for habeas purposes).

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therefore, this Part has successfully demonstrated that AEDPA cannot constitutionally be understood as altering or restricting access to the habeas forum in any way.

III. THE DUE PROCESS CLAUSE

We might think, therefore, that if the maximal view of suspension is correct, AEDPA is unconstitutional. But this is not quite true, for there is one way to understand § 2254(d)(1) as denying relief without denying access to a full and unimpeded habeas forum. If AEDPA neither prevents anyone from gaining access to a federal habeas forum nor modifies the rule of decision for any federal habeas case, then those it denies relief are, somehow, losing on the merits of their claim—that is, they are not "in custody in violation of"[142] federal law, even though they would have prevailed on that exact same claim prior to AEDPA. In other words, the only way AEDPA can comply with the Suspension Clause, as I have argued that Clause ought to be understood, is if it alters, not the rules of decision for habeas cases, but the substantive federal rules governing the scope of the states' lawful imprisonment authority. It says to those it denies relief not that they cannot get their habeas petition into federal court, nor that their petition will be denied on the merits even though their detention is unlawful, but rather that their detention *is lawful*. Part III of this Article will consider this interpretation of AEDPA, and will contend that it, too, violates the Constitution. On this understanding, however, § 2254(d)(1) violates not the Suspension Clause but the Due Process Clause.

This Part begins with a consideration of constitutional first principles regarding congressional power to define what is and is not lawful. It then considers three different scenarios under § 2254(d)(1) and demonstrates that, in at least two of these scenarios, AEDPA would violate these basic constitutional principles if it applies at all. This is followed by a consideration of difficult "retroactivity" issues raised by the third scenario. It might be thought that AEDPA can find refuge in this concept, but, as I will argue, the Court's existing retroactivity doctrine is ultimately irrelevant to AEDPA's fate. This Part then concludes by observing a final, simpler problem with understanding AEDPA to redefine the scope of lawful imprisonment—namely that it does not apply on direct appeal.

142. 28 U.S.C. § 2241(c)(3) (2012).

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Ultimately, therefore, this construction of § 2254(d)(1) cannot be deployed to save the law from unconstitutionality.

A. Constitutional First Principles

At first blush, there is nothing absurd about the proposition that Congress might, in AEDPA, declare certain otherwise-illegal imprisonments lawful. As much as lawyers like to quote Chief Justice Marshall's line from *Marbury* that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[143] it is the legislature's role to say what the law *shall be*. The legislative power[144] shapes the contours of *lawful* and *unlawful*; the judicial power[145] observes and identifies those contours. The ordinary business of a legislature is to pass statutes which either alter rights and obligations under the common law or create new rights and obligations altogether. Moreover, while the common law may govern questions of wrongful imprisonment by private parties, the government's power to imprison must typically be conferred by statute, e.g., the criminal statute forbidding a defendant's conduct.[146] Of course, the imprisonment authority of state governments will come predominantly from state statutes, but federal law, which is supreme over[147] and can preempt state law, can place limits on the permissible scope of this authority.[148] Certainly the 1867 expansion of federal habeas, which removed the old language limiting the writ's applicability to state prisoners and instead provided that it could issue to remedy any detention "in violation of the . . . laws . . . of the United States,"[149] seems to contemplate that state imprisonments might violate the laws enacted by Congress.

Presumably, therefore, if Congress has declared that certain state imprisonments shall be unlawful, it can reverse itself, and declare instead that those imprisonments shall be lawful. Thus, if we focus only on its application to imprisonments which are alleged to violate federal statutes, we might think that AEDPA can be understood as

143. Marbury v. Madison, 5 U.S. 137, 177 (1803).

144. U.S. CONST. art. I, § 1.

145. U.S. CONST. art. III, § 1.

146. *Cf.* United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812) (holding that there is no federal common law of crimes).

147. U.S. CONST. art. VI, cl. 2.

148. *See, e.g.*, Arizona v. United States, 567 U.S. 387 (2012) (holding that various Arizona criminal laws relating to immigration were preempted by federal law).

149. Habeas Corpus Act of 1867, 14 Stat. 385.

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Congress making an exception to every other law it has ever passed limiting state imprisonment authority. On this reading, AEDPA declares that states may lawfully detain anyone who was imprisoned pursuant to a state court judgment that was not "contrary to, or involv[ing] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court,"[150] even if that imprisonment might seem to violate some other Act of Congress. And the Court has explicitly held that Congress may create such implicit exceptions to the laws it has passed.[151] As we shall later see, there is reason to think that AEDPA cannot be understood to create this kind of exception to other federal statutes, but it is at least plausible that such a law might be constitutional.

Things are different, however, when § 2254(d)(1) is applied to imprisonments that are not merely unlawful but unconstitutional. Congress is simply without power to make lawful what the Constitution itself makes unlawful. It cannot, for example, authorize the states to pass bills of attainder or ex post facto laws.[152] Indeed, the example of Article I, Section Ten is instructive here. The first clause places several absolute prohibitions on the states, while the second and third clauses only prohibit the states from undertaking certain activities, e.g., entering into compacts with other states, "*without the Consent of Congress*."[153] This makes clear that Congress cannot bless violations of the prohibitions in the first clause. Similarly, if someone is imprisoned in violation of the Fourteenth Amendment's command that "No State shall . . . deprive any person of life, liberty, or property, without due process of law,"[154] and AEDPA declares the imprisonment lawful, Congress is directly countermanding the dictates of the Constitution. As Chief Justice Marshall explained in *Marbury*, however, the question of what should happen when Congress contradicts the Constitution is, "happily, not of an intricacy proportioned to its interest"[155]: the Constitution prevails, and the contrary act of Congress must be set aside.

150. 28 U.S.C. § 2254(d)(1) (2012).

151. City of Boerne v. Flores, 521 U.S. 507 (1997) (upholding the Religious Freedom Restoration Act's expansion of free exercise rights as applied to the federal government on the grounds that Congress may pass exceptions to its own laws).

152. U.S. CONST. art. I, § 10, cl. 1.

153. U.S. CONST. art. I, § 10, cl. 2, 3 (emphasis added).

154. U.S. CONST. amend. XIV, § 1.

155. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176.

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It might be objected that Congress has explicit power to "enforce" the provisions of the Fourteenth Amendment "by appropriate legislation,"[156] and that this includes the power to define the precise contours of the Amendment's prohibitions. This contention has, however, been rejected multiple times by the Court,[157] and for good reason. We can see in the drafting history that the drafters of the Fourteenth Amendment expressly rejected a system in which Congress would have total authority to define the scope of the new limits on the states. An early draft of the amendment would have stated merely that

> The Congress shall have power to make all laws which shall be necessary and proper to secure to all the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the right of life, liberty, and property.[158]

Had this draft been adopted as the final amendment, the Bill of Rights, and most other constitutional rights, would clearly apply against the states only insofar as Congress provided by statute, and AEDPA might therefore be justified as an exception to these statutes. Ultimately, however, the Amendment provided both congressional enforcement power[159] and a series of direct, self-executing prohibitions on the states.[160] Indeed, one of the objections against this initial draft was that it would not place the rights to be secured above the power of future Congresses to rescind by ordinary legislation.[161] Thus, if the Due Process Clause forbids a state from imprisoning someone under certain circumstances, Congress is wholly without power to countermand that edict and legalize the incarceration, just as it is wholly without power, under the analogous provision in the preceding Amendment,[162] to legalize slavery.[163]

156. U.S. CONST. amend. XIV, § 5.
157. *See, e.g.*, Boerne v. Flores, 521 U.S. 507 (1997).
158. CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866).
159. U.S. CONST. amend. XIV, § 5.
160. U.S. CONST. amend. XIV, § 1.
161. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).
162. U.S. CONST. amend. XIII, § 2.
163. U.S. CONST. amend. XIII, § 1.

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B. AEDPA versus the Constitution

It remains only to show that those imprisonments which AEDPA would, on this understanding, declare lawful are in fact prohibited by the Constitution. In thinking about this question, it is helpful to distinguish three different situations under AEDPA in terms of the "clearly established federal law as determined by the United States Supreme Court"[164] at the time of the state court's decision. In the standard case, the then-governing case is still good law. Here the only question is whether the state court's decision was "contrary to, or involved an unreasonable application of"[165] the High Court's framework. The Court has interpreted this standard as differentiating between a merely "*incorrect* application of federal law" and a truly "*unreasonable* application of federal law,"[166] and as allowing relief only in the latter case.

This is constitutionally troubling, for if the state court incorrectly applied federal constitutional law then it is presumably true that the imprisonment is unconstitutional. Indeed, it is hard to see what else it could mean for a court to apply the Constitution incorrectly in the course of upholding an imprisonment.[167] Therefore, (assuming the Court's interpretation of the Constitution is correct) these are indeed cases where Congress lacks power to sanction the incarceration, and if AEDPA truly applies to these cases then it is unconstitutional. It is not entirely clear, however, that the Court's interpretation of AEDPA as limiting relief in these cases is correct, and it is certainly not the only possible reading of the statute. Liebman and Ryan, for instance, argued (before the Court had spoken on the matter) that, in these situations featuring a stable body of governing federal law, AEDPA allowed for "independent review" of state court rulings by a federal habeas court.[168] This interpretation would seem to satisfy the requirements of constitutional supremacy. AEDPA's incurable infirmity, therefore, does not show itself in this context.

164. 28 U.S.C. § 2254(d)(1) (2012).

165. *Id.*

166. Williams v. Taylor, 529 U.S. 362, 410 (2000) (O'Connor, J.).

167. Of course, a state court might make various incorrect statements of constitutional law but nonetheless reach a correct result. However, § 2254(d)(1) sensibly speaks only of decisions that are contrary to or an unreasonable application of federal law, and this is clearly the right approach. For federal habeas purposes, we care not whether every piece of the state court's reasoning was correct, but whether its *decision*, and hence the detention which it authorized, violated federal law.

168. Liebman & Ryan, *supra* note 24, at 866.

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It begins to manifest, however, in the second scenario where there simply is no "clearly established federal law as determined by the United States Supreme Court"[169] at the time of the state court's decision: that is to say, when the case would have presented a question of first impression had the Court heard it on direct appeal. Liebman and Ryan thought that the "unreasonable application" test was designed precisely for this scenario, and that it applies to the reasonableness or unreasonableness with which the state court "extrapolated" a rule "from whatever noncontrolling [federal] law was available."[170] This might run into the same difficulty that § 2254(d)(1), as the Court has in fact interpreted it, encounters in the first scenario. Federal courts would be required to uphold state judgments authorizing imprisonments which violate the Constitution, properly construed.[171] In practice, however, the "unreasonable application" language has been read as applying instead to the first scenario, where it is even less acceptable. The Court has given no explicit guidance on what is to happen under AEDPA when the state court had no "clearly established federal law" to apply.[172] But it would appear from the Court's description of the circumstances under which the writ may issue[173] that in this scenario there is simply no possibility for relief: there was no "clearly established federal law"

169. 28 U.S.C. § 2254(d)(1) (2012).

170. Liebman & Ryan, *supra* note 24, at 867.

171. Liebman and Ryan state that, "If the extrapolated rule 'involved an unreasonable application of clearly established Federal law,' the federal court applies current federal law. Otherwise, it applies the rule the state court fashioned. In either event, the federal court exercises plenary review of legal and mixed rulings under the governing law and grants the relief that law requires." *Id.* (quoting 28 U.S.C. § 2254(d)(1)). This seems to leave open the possibility that a state might reasonably craft a rule from noncontrolling federal precedent that was nonetheless different from the rule ultimately adopted by the Supreme Court, and that in such a case federal *habeas* courts would follow the state court's rule. This would, of course, raise the standard concern about placing state court judgments above the Constitution, as currently understood by the federal courts. It is unclear, however, how often a habeas court under this standard would be supposed to find an erroneous extrapolation of federal law to have been reasonable.

172. 28 U.S.C. § 2254(d)(1).

173. "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams v. Taylor, 529 U.S. 362, 412-13 (2000) (O'Connor, J., concurring).

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for the state court's decision to contradict or apply unreasonably, and hence § 2254(d)(1) does not allow the writ to issue.

Here the full scope of the problem becomes apparent. Under this interpretation, any part of the Constitution to which the Court has not yet spoken, or had not yet spoken when the state court considered a case, becomes essentially invisible for a habeas court; it might as well not exist. But can an otherwise unconstitutional imprisonment lose its unconstitutional character simply because the Supreme Court has not yet had occasion to apply the specific rule of constitutional law which forbids it? Certainly the Supremacy Clause suggests otherwise; it states that "the Judges in every State shall be bound"[174] by the Constitution, with no exception for parts of the Constitution that have never been litigated before the Supreme Court. If these imprisonments are not constitutional, then in essence the Supreme Court stands as Congress would have under the earlier draft of the Fourteenth Amendment: no part of that Amendment's mandate is legally binding on the states until the Court has said so. Nothing in the text or structure of the Constitution gives any support to such a notion. Moreover, this approach would lead to the perverse result that precisely those parts of the Constitution which are least controversial and least likely to spawn litigation would be the ones rendered invisible.

The third and final scenario arises when the Supreme Court's precedents at the time of the state adjudication have subsequently been overruled. And in this scenario, there is no real disagreement about what AEDPA commands: Liebman and Ryan agree with the Court that under § 2254(d)(1) the petitioner is to be denied relief, with no exceptions.[175] This is to say, prisoners who were convicted and imprisoned in violation of the Supreme Court's current constitutional jurisprudence are denied habeas relief and allowed to languish in jail if, at the time of their conviction, the Supreme Court would have held their imprisonment constitutional. Under the constitutional first principles discussed above, we might think that this is the same as the second scenario. Since, in the current judgment of the Supreme Court,

174. U.S. CONST. art. VI, cl. 2.

175. Liebman and Ryan note that the Court's jurisprudence concerning the application of post-finality law to habeas petitions, which in general forbade such application, *Teague v. Lane*, 489 U.S. 288 (1989), allowed recourse to new rules which immunize behavior from criminal sanction or create "watershed" criminal procedure protections against convicting the innocent. AEDPA, however, contains no such exceptions. Liebman & Ryan, *supra* note 24, at 852 n.745 (citing Caspari v. Bohlen, 510 U.S. 383 (1994)); *supra* note 24, at 867-68.

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these imprisonments violated the Constitution, neither Congress nor the earlier Court had authority to declare them lawful. Thus, on this reading of AEDPA, Congress is not merely placing its own enactments above the Constitution, it is placing Supreme Court decisions above the Constitution as well! It is declaring, in effect, that no state imprisonment is to be deemed unlawful for the purposes of habeas review unless it was contrary, not to the United States Constitution, but to the United States Reports. Of course, the U.S. Reports are not the Constitution, and cannot be made "paramount law"[176] in the Constitution's stead.

There is, however, one key difference between the second and third scenarios. In the latter context, the Supreme Court was not simply silent as to the constitutional rule in question at the time of the state court's decision. Instead, it had affirmatively adopted the rule on which that decision relied. Thus it might be objected that to call a conviction unconstitutional in this third scenario would involve the "retroactive" application of the later Supreme Court decision reversing the earlier precedent. The concept of retroactivity raises a number of complex issues, and it is to those this Article now turns.

C. AEDPA and Retroactivity

Since the mid-1960s, the Supreme Court has held that some, but not all, of its decisions should be applied "retroactively," that is to say, applied on habeas review to "state court convictions which had become final before rendition of"[177] the decision. For decades, the task of determining which decisions would have retroactive force was essentially ad hoc; in 1989 the Court adopted a more categorical approach, first advocated by Justice John Marshall Harlan II, which somewhat resembled the AEDPA standard (as it plays out in this third scenario) but was noticeably more generous.[178]

Regardless of what standard is used, however, we might think that the entire notion is a category error. Supreme Court decisions are not acts of legislation creating law where before there was none; they are interpretations of the Constitution's eternal law. If a habeas court

176. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

177. Linkletter v. Walker, 381 U.S. 618, 622 (1965), *abrogated by* Griffith v. Kentucky, 479 U.S. 314 (1987.

178. *Teague*, 489 U.S. at 299-310; *see supra* note 175, discussing the exceptions to the *Teague* standard not present under AEDPA.

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in 2005 applied the rule of *Crawford v. Washington*,[179] announced in 2004, to the petition of a prisoner whose conviction became final in 2003, this would not be the "retroactive" application of a law that did not exist when the case was originally adjudicated.

Rather, it would be the application of the Sixth Amendment's Confrontation Clause, which has existed in its current form since 1791 and was incorporated to apply to the states by the Fourteenth Amendment's Due Process Clause in 1868. The federal law governing state court decisions to admit or exclude out-of-court statements in 2003 was not *Ohio v. Roberts*,[180] which *Crawford* overturned, but the Confrontation Clause; *Roberts* was merely the Court's erroneous (we now think) view of how this law should be applied. Violations of the Constitution do not become lawful simply because they were carried out with the wrongful permission of the Supreme Court. The Constitution does not cease to be, or cease to be the "supreme Law of the Land,"[181] when the Supreme Court of the United States fails to properly enforce it.[182]

Of course, the state court which followed *Ohio v. Roberts* in 2003 was not doing anything wrong. To the contrary, it would have

179. Crawford v. Washington, 541 U.S. 36 (2004) (holding that the Confrontation Clause forbids the admission of any out-of-court testimonial statement, regardless of its seeming reliability, without the opportunity for confrontation).

180. Ohio v. Roberts, 448 U.S. 56 (1980).

181. U.S. CONST. art. VI, cl. 2.

182. This is not to suggest, as Justice Scalia did when making something similar to this point, that the Constitution, being eternal and unchanging, must for all time be understood as having precisely that meaning which its framers would have given it. *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). There is more than one legitimate way to interpret the Constitution, and the historical modality championed by Justice Scalia is but one of them. *See generally* BOBBITT, *supra* note 81. To put it another way, sometimes the Framers might have been wrong about what the Constitution and amendments they enacted meant, *see, e.g.*, Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 3, 7 (2011), and we are not forevermore bound by their errors in judgment, just as the Supreme Court is not bound forevermore by its own erroneous judgments. Rather it is to say that whatever we think the Constitution means today, we should, as a general matter, also think it meant yesterday, and the day before that, and indeed every day going back to ratification—particularly if our interpretation is based primarily on the Constitution's text, history, and structure, which do not evolve over time. Our view of what the Constitution means, and has always meant, may change, but the Constitution itself does not. If, therefore, we believe that *Mapp v. Ohio*, 367 U.S. 643 (1961), *Gideon v. Wainwright,* 372 U.S. 335 (1963), and *Miranda v. Arizona*, 384 U.S. 436 (1966), were rightly decided, then we should also, in general, believe that the Constitution forbade using evidence obtained through an illegal search in securing a conviction in 1960, that it forbade convicting a defendant without providing them a lawyer in 1962, and that it prohibited exploiting a defendant's ignorance of their right to remain silent in 1965.

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been wrong for the state court to disregard what was at the time binding Supreme Court precedent.

Much of the impetus behind retroactivity doctrine likely comes from a feeling that retroactive application of new decisions unfairly punishes the states for their proper reliance on the Court's pronouncements. Indeed, the resemblance between both the AEDPA and *Teague* standards and the Court's "qualified immunity" doctrine, which shields government officials from "liability for civil damages [arising from their official actions] insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known,"[183] is striking. But the writ of habeas corpus does not impose liability on state officials who may have done nothing wrong. It is not about them—it is about the prisoner.[184] It seeks not a remedy for old constitutional wrongs, through either compensation of the victim or punishment of the perpetrator, but the cessation of an ongoing wrong. Those convicted in trials that do not comport with our current understanding of constitutional requirements are, per that understanding, being deprived of their liberty without ever having been given due process of law. Every minute they spend in jail, their rights are violated anew.[185] Accordingly, habeas exists not merely to ensure that no one is maliciously imprisoned but to ensure that they are not *wrongly* and *unlawfully* imprisoned. The intuition that the state should not personally punish government officials for conduct that did not violate the law as it was understood at the time is reasonable. It should not metastasize into the view that we ought not free those who were imprisoned by such innocently unlawful actions.

However, while the retroactivity cases employ highly unpersuasive reasoning to say the least, fully demonstrating their error is a task requiring an entire separate article. Fortunately, it is also unnecessary for this Article's purposes. The only present concern is whether prisoners denied habeas relief under AEDPA are being

183. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

184. Indeed, the writ is not issued to the judge who presided over the original case or the prosecutor who obtained the conviction, nor to any state appellate judges, but to the warden of the facility where the prisoner is incarcerated. The state officials who allegedly conducted an unconstitutional trial are literally not parties to the controversy in a habeas case.

185. This observation, of course, casts doubt as well on the validity of AEDPA's statute of limitations for habeas claims. 28 U.S.C. § 2244(d)(1) (2012). After all, if the constitutional injury is ongoing, the statute of limitations period should begin anew every day. However, this argument lies well outside the scope of this Article.

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imprisoned in a manner forbidden by the Constitution. The Court's existing retroactivity doctrine has a very clear answer to the question of whether the prisoners in this third scenario, where relevant precedents have been overruled since the conviction became final, are being imprisoned in violation of the Constitution. Resoundingly, and remarkably, the answer is "yes."

In *Teague v. Lane*, the key case in which the Court adopted Justice Harlan's theory and reorganized its retroactivity doctrine, the Court approvingly cited a passage from Professor Paul Mishkin stating that the issue was "not so much one of prospectivity or retroactivity of the rule but rather of the availability of collateral attack,"[186] i.e., of habeas corpus. Thus, the Court implicitly recognized that refusing to apply certain decisions retroactively will deny relief to prisoners whose trials were unconstitutional. This becomes even clearer when we consider *Griffith v. Kentucky*,[187] the flip-side of *Teague*, in which the Court adopted the other half of Justice Harlan's theory of retroactivity: that courts should *always* apply new decisions to all cases that are still "pending on direct review at the time a new rule is announced."[188] "Failure to apply a newly declared constitutional rule to criminal cases pending on direct review," the *Griffith* Court held, "violates basic norms of constitutional adjudication."[189] Indeed, the language from Justice Harlan, quoted approvingly in both *Griffith* and *Teague*, is worth reprinting in full:

> If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run

186. Teague v. Lane, 489 U.S. 288, 309 (1989) (quoting Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 77 (1965)).

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

188. *Teague*, 489 U.S. at 304. Note that the government actions in these other cases still pending on direct appeal, which either were or were not unconstitutional, may well have occurred before the Court's decision announcing the "new rule." If that rule did not actually apply until the Court announced it, then presumably those actions were not unconstitutional, and hence there is no error of federal law to be reversed on direct appeal. A related issue will be taken up shortly, in section (e).

189. *Griffith*, 479 U.S. at 322.

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> the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation. We apply and definitively interpret the Constitution, under this view of our role, not because we are bound to, but only because we occasionally deem it appropriate, useful, or wise. That sort of choice may permissibly be made by a legislature or a council of revision, but not by a court of law.[190]

In Justice Harlan's view, the Court ought—*must*—regard all government conduct which its current doctrine would deem unconstitutional to have been unconstitutional, regardless of when it took place. And this is precisely the view that the Court adopted in *Griffith* and *Teague*! Therefore, under the Court's existing retroactivity doctrine, if AEDPA is understood as declaring that imprisonments pursuant to since-overruled Supreme Court precedent are not unlawful, it is directly attempting to countermand the Constitution and is therefore invalid. Under existing doctrine, this is really no different than the first two scenarios considered in section (b). In all three, either § 2254(d)(1) does not apply at all (as Liebman and Ryan argued it did not to the first scenario) or it would, on the understanding explored in this Part, be unconstitutional.

Of course, *Teague* does hold that those imprisoned under then-extant Supreme Court precedent ought, in most cases, be denied habeas relief. The Court must therefore see retroactivity principles are an inherent part of the rules of decision for habeas proceedings. This is probably wrong; certainly it seems inconsistent with Blackstone's description of the writ as a remedy against all forms of illegal confinement. But this is truly irrelevant to AEDPA's fate. We have already considered the question of whether Congress may restrict the availability of habeas corpus in Part II. On any of the most compelling theories—the jurisdictional approach of *Bollman*, the moderate federalist approach, or the maximal view advocated by this Article—the *Teague* question is one of constitutional law, and Congress therefore cannot narrow the scope of the writ beyond what the Court itself considers correct.[191] And while, on the nihilist, the

190. Williams v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring).

191. Of course, since Congress can confer greater habeas authority on the federal courts than merely that guaranteed by the Constitution, it could potentially overrule *Teague* in the

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temporal, or the hardline federal views of suspension, Congress probably could impose strict retroactivity rules on federal habeas courts, on any of those theories, AEDPA is clearly constitutional anyway. The retroactivity principles which *Teague* holds inherent in the writ of habeas corpus, therefore, are of no help to AEDPA in any case.[192]

D. The Direct Appeal Problem

There is a further difficulty[193] with understanding AEDPA to make lawful all state imprisonments which do not fall within the scope of § 2254(d)(1): it does not apply on direct appeal. On those rare occasions when the Supreme Court grants certiorari to review a state supreme court's decision in a criminal law case, it reviews that court's determinations of federal law de novo. It will reverse applications of federal law that are incorrect, not merely those that are unreasonable, and will not hesitate to pronounce on an issue of first impression, or to overrule one of its own prior decisions, if it thinks that appropriate.[194]

There are two possibilities here. Either AEDPA, as this section has attempted to understand it, declares lawful not only the imprisonment, but also the conviction itself, if that conviction was wrong but not unreasonable, or it declares only the imprisonment and not the conviction lawful. In the former case, what authority does the Supreme Court have to reverse these convictions on direct appeal? It can only do so, after all, in the name of the Constitution and laws of the United States, but if AEDPA makes those convictions lawful then they should be upheld as such. In the latter case, however, AEDPA would explicitly authorize the imprisonment of people who never received a lawful trial. Perhaps nothing would strike more forcefully at the very heart of the Due Process Clause and of the "natural

opposite direction from that of AEDPA; that is, it could perhaps command the courts to provide habeas relief where *Teague* held that relief was not available. *Cf.* Katzenbach v. Morgan, 384 U.S. 641 (1966) (holding that Congress may go beyond the Fourteenth Amendment's self-executing content when using its Section Five enforcement powers).

192. Of course, if *Teague* is correct about the nature of habeas corpus, then insofar as AEDPA merely imposes the *Teague* rules, it is constitutional and has no actual effect on the world.

193. Unlike the objections presented in the rest of this section, this difficulty applies to AEDPA's limitations of statutory, as well as constitutional, claims.

194. Indeed, we have seen Justice Harlan's forcefully expressed view that if the Court *did* hesitate to do any of these things, it would be in serious dereliction of duty. *See Williams*, 401 U.S. at 679.

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inherent right" of "personal liberty"[195] which the writ of habeas corpus is meant to protect.[196]

IV. CONCLUSION

This completes the proof. One way or another, AEDPA violates the Constitution. It can be understood, in any of several different ways, as preventing state prisoners from ever receiving a genuine habeas corpus hearing to determine whether their imprisonment is truly lawful, but this would violate the best readings of the Suspension Clause. It can be alternatively understood as allowing state prisoners unrestricted access to the habeas forum but defining as lawful certain imprisonments which would otherwise be unlawful, but this would violate the Due Process Clause (or some analogous constitutional provision). Either interpretation would save AEDPA from the other's defect, but each suffers a fatal infirmity of its own. This gives AEDPA a curious constitutional status: it is clearly repugnant to the Constitution, but the precise grounds of that repugnance cannot be pinned down or uniquely identified.

The threat AEDPA poses to our system of constitutional government, however, is clear. As Justice Scalia once said, "this wolf comes as a wolf."[197] The Civil War was fought to cleanse the nation's soul of the great sin of slavery. In its wake, not only was slavery abolished but the very nature of the American Republic was reforged. National citizenship was made paramount, not state citizenship, and for the first time the national Constitution obliged states to respect the "privileges or immunities of citizens of the United States," to afford the "equal protection of the laws" to all, and to provide "due process of law" before "depriv[ing] any person of life, liberty, or property."[198] The Great Writ of habeas corpus is, today, the only means by which the federal government can satisfy itself that these commands, and the last in particular, are actually being obeyed and given effect by the

195. 3 BLACKSTONE, *supra* note 1, at *133.

196. Again, this is somewhat separate from the question of whether these prisoners are to be afforded habeas relief. On Justice Harlan's approach, it would seem, these prisoners' incarceration is actually illegal, but, for various prudential reasons, courts should not use the Great Writ to free them. I personally find the sense of "costs" and "benefits" behind such a sentiment, Teague v. Lane, 489 U.S. 288, 310 (1989) (quoting Solem v. Stumes, 465 U.S. 638, 654 (1984)), thoroughly repellent, but at least Justice Harlan would not go so far as to declare these imprisonments lawful.

197. Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

198. U.S. CONST. amend. XIV, § 1.

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states.[199] AEDPA, however it is understood, would remove this last arrow from the quiver of justice and thereby render genuine enforcement of the Fourteenth Amendment impossible.[200] It would oblige the sovereign People of the United States to sit idly by while the states imprison or execute their fellow Americans in contravention of the supreme Law of the Land. This is not federalism;[201] it is the anti-federalist vision of states' rights over human rights[202] that lost during the ratification debate over the new Constitution and which lost again, at terrible cost, during the Civil War. So long as AEDPA lives, that vision, so hateful to the Constitution's promise to "secure the Blessings of Liberty,"[203] lives. Fortunately, as this Article has shown, § 2254(d)(1) is repugnant not merely to the Constitution's principles, but also to its provisions, and should hence be declared unconstitutional and void.

199. *Cf.* Amar, *Neo-Federalist Article III*, *supra* note 101, at 268-70 (arguing that discretionary Supreme Court review on certiorari inadequately vindicates the interest in having all questions of federal law decided by federal courts).

200. *Cf.* Marceau, *supra* note 4, at 1302.

201. *See* Coleman v. Thompson, 501 U.S. 722, 758-62 (1991); *cf. id.* at 726.

202. *Cf.* Senator Hubert Humphrey, Address at the Democratic National Convention (July 14, 1948) ("The time has arrived in America for the Democratic Party to get out of the shadow of states' rights and to walk forthrightly into the bright sunshine of human rights.").

203. U.S. CONST. pmbl.

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