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## ARTICLES

### Prisoners and Habeas Privileges Under the Fourteenth Amendment

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*The U.S. Reports contain no answer to a million-dollar question: are state prisoners constitutionally entitled to a federal habeas forum? The Supreme Court has consistently ducked the basic constitutional issue, and academic work on the question idles on familiar themes.*

*The strongest existing argument that state prisoners are constitutionally entitled to a federal habeas forum involves a theory of incorporation under the Fourteenth Amendment's Due Process Clause. I provide a new and different account: specifically, that the Fourteenth Amendment's Privileges and Immunities Clause ("PI Clause") guarantees a habeas privilege as a feature of national citizenship, and that the corresponding habeas power reaches state custody.*

*We now know that the common-law habeas writ did not evolve primarily as a security for individual liberty, but in service of judicial power. In *Boumediene v. Bush*, the Supreme Court blessed this revised writ history. This Article is the second entry in a series exploring the legal implications of*

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those revisions. In the first article, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 743 (2013), I argued that Article III judicial power secured for federal prisoners the habeas privilege identified in the Suspension Clause. The question that I reserved there—and that I answer here—was whether anything about Reconstruction changed the operation of the habeas guarantee embedded in the original Articles of Constitution.

The answer, in short, is yes. The Fourteenth Amendment PI Clause—not the Due Process Clause—expanded the constitutionally protected scope of the federal habeas privilege. The PI Clause yokes the habeas privilege to national citizenship, the rights of which neither the federal government nor states may abridge. And if, as I have argued, a federally protected habeas privilege requires a corresponding federal habeas power, then the PI Clause entitles state prisoners to a federal habeas forum.

The first-order question I answer here—whether the Constitution guarantees a state-prisoner privilege—is logically antecedent to second- and third-order questions about the privilege’s scope. Because the Constitution entitles state prisoners to a federal habeas forum, the legal community ought to hit reset on basic assumptions about Congressional power to restrict the habeas remedy, particularly in postconviction cases.

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## I. INTRODUCTION

The U.S. Reports contain no answer to a million-dollar question: Are state prisoners constitutionally entitled to a federal habeas forum to contest their custody? Endless controversy swirls around habeas review of state convictions, but the Supreme Court has consistently ducked the basic constitutional issue. Federal judges charge into controversies over constitutional rights of prisoners; why do they hesitate to declare the constitutional status of the most important federal remedy?

Academic work on the question idles on familiar themes: the original operation of the habeas guarantee on the several states;<sup>1</sup> the absence, until 1867, of a general statutory remedy for state detention;<sup>2</sup> or the salient features of the Supremacy Clause.<sup>3</sup> The strongest

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1. See, e.g., WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 126–80 (1980) (arguing that the Suspension Clause was a restriction on congressional authority to interfere with state habeas process).

2. See Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (giving federal courts the general power to issue writs of habeas corpus to state custodians).

3. See, e.g., 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, 860 (1998) (explaining that certain limits on federal review of state custody are unconstitutional based on a comprehensive theory of federal supremacy).

existing argument that state prisoners are constitutionally entitled to a federal habeas forum involves a theory of incorporation under the Fourteenth Amendment's Due Process Clause ("DP Clause").<sup>4</sup> In this Article, I provide a different account—one based on the Fourteenth Amendment's Privileges or Immunities Clause ("PI Clause"). Specifically, I argue that the PI Clause guarantees a habeas privilege as a feature of national citizenship, and that the corresponding habeas power reaches state custody.

A fresh account of how the habeas guarantee operates on state custody is timely, in part, because of the availability of new data about how the English privilege related to judicial authority. We now know that the common-law habeas writ did not evolve primarily as a security for individual liberty, but in service of judicial power.<sup>5</sup> In *Boumediene v. Bush*,<sup>6</sup> the landmark Supreme Court case holding that the Constitution guaranteed the habeas privilege to prisoners at the naval base in Guantanamo Bay, Cuba, the Supreme Court blessed much of the revised writ history.<sup>7</sup>

This Article is the second entry in a series exploring the legal implications of those revisions. In the first, *A Constitutional Theory of Habeas Power* ("Habeas Power"), I argued that the Article III judicial power secured, for federal prisoners, the habeas privilege identified in the Suspension Clause.<sup>8</sup> The question that I reserved in *Habeas Power*—and that I answer here—was whether anything about Reconstruction changed the operation of the habeas guarantee

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4. See Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners*, 92 MICH. L. REV. 862, 868 (1994) (arguing that "the Fourteenth Amendment constitutionalized [the] supremacy-ensuring role of the federal courts such that Congress is obligated to make federal review of state criminal convictions practically available through federal habeas corpus").

5. Professor Paul D. Halliday is most responsible for this work. See PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (2010) (providing a comprehensive historical perspective on the habeas writ); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 701 (2008) (discussing how the "writ of habeas corpus . . . was initially fashioned by judges").

6. 553 U.S. 723 (2008).

7. Professor Halliday examined King's Bench files, rolls, and rulebooks every fourth year, from 1502 to 1708. HALLIDAY, *supra* note 5, at 319. The result was data on 2757 prisoners. *Id.* *Boumediene* relied heavily on this survey. *Boumediene*, 553 U.S. at 740, 747, 752 (citing Halliday & White, *supra* note 5).

8. Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753, 754 (2013). Cf. ERIC FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 10 (2003) (arguing that judges always enjoyed common-law habeas power to relieve unlawful custody); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 607–08 (2009) (rejecting the view "that the Clause promises only that whatever habeas right is given by the grace of the legislature may not be suspended temporarily except in cases of rebellion or invasion").

embedded in the original Articles of Constitution (“original Constitution”). Indeed, the PI Clause established that there were privileges and immunities of *national* citizenship, which included a federal habeas privilege to contest state custody.

My argument proceeds in three Parts. In Part II, I specify the basic conditions defeating consensus that state prisoners are entitled to a federal habeas forum: (1) that there was no generally available federal habeas remedy for state prisoners until 1867, and (2) that theories accounting for a pre-1867 federal privilege for state prisoners invite serious objections involving text, intent, and precedent. In the process, I develop the habeas typology that I use to explain the normative positions I take in the remainder of the Article.

Part III shows that the PI Clause expanded the constitutionally protected scope of the federal habeas privilege, though not through the familiar mechanics of Fourteenth Amendment “incorporation.” The PI Clause restricts state governments by the familiar injunction that “[n]o State shall . . . abridge,” but it also restricts the *federal* government by declaring privileges of *national* citizenship. The PI Clause yokes the habeas privilege to American citizenship, and that connection remains unsevered even as the *Slaughter-House Cases* otherwise reduced the Clause to a constitutional afterthought.<sup>9</sup>

In Part IV, I argue that, in combination with the habeas privilege recognized in the original Constitution, the PI Clause entitles state prisoners to a federal habeas forum. The first-order question I answer here—whether the Constitution guarantees some sort of state-prisoner privilege—is logically antecedent to second- and third-order questions about its scope. Because the Constitution does entitle state prisoners to a federal habeas forum, then the legal community ought to hit reset on basic assumptions about congressional power to restrict the habeas remedy, particularly in the postconviction setting. If I am right, then multiple postconviction provisions supplied by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”)<sup>10</sup> require renewed constitutional scrutiny.<sup>11</sup>

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9. 83 U.S. (16 Wall.) 36, 79 (1872) (limiting the PI Clause to a few structural rights of national citizenship).

10. Pub. L. No. 104-132, §§ 101–08, 110 Stat. 1214, 1217–26 (1996) (codified in part at 28 U.S.C. §§ 2244–67 (2012)).

11. See *infra* Part IV.C (discussing postconviction application in greater detail). The Supreme Court takes this dispute quite seriously, as evidenced by its equivocation. See, e.g., *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996) (“But we assume, for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789.”).

## II. THE BASIC PROBLEM

The federal habeas privilege entitles a prisoner to argue, in federal court, that custody is unlawful. The privilege corresponds to judicial power over the prisoner's custodian. Every time Congress enacts new restrictions on federal habeas review of state custody—including restrictions on postconviction review—courts sniff at the idea that a restriction might be unconstitutional, but they always walk away. One reason they are unwilling to seriously entertain a constitutional challenge is that there is no consensus around even the basic proposition that the Constitution entitles state prisoners to *any* habeas forum.

Part II presents the basic problem. The fact that the original Constitution or the Bill of Rights ("Bill") entitled state prisoners to a federal habeas forum is tough to reconcile with Congress having provided no statutory habeas remedy until 1867.<sup>12</sup> Maybe the Constitution was interpreted too restrictively before 1867, and maybe that restrictive precedent should be discounted accordingly. But such opening caveats would severely degrade the type of account I want to provide here. Rooting the state-prisoner privilege in the PI Clause requires no such caveats, because the Fourteenth Amendment was ratified in 1868.

Even after clearing roadblocks thrown up by almost eighty years of American constitutional history, there are still significant problems lurking in a Fourteenth Amendment account. The proposition that an amendment directed primarily to state action actually restricts federal power requires an argument that pirouettes through various objections rooted in the Fourteenth Amendment's text, intent, structure, and precedent.

*A. The Habeas Privilege and Judicial Power*

The first step in a constitutional account of the habeas guarantee is to distinguish a prisoner's privilege from both the judicial power to which it corresponds and the suspension rules that permit its restriction. The *power* to issue a habeas writ and to review custody belongs to courts and judicial officers.<sup>13</sup> The *privilege* is a prisoner's

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12. Congress provided a federal habeas review for a very limited category of state custody in 1833 and in 1842. See *infra* note 60 (citing Act of August 29, 1842 and Act of March 2, 1833).

13. The English power to issue common-law habeas writs—the obvious forerunner to the parallel American power—was exercised by “[a]nyone designated as a ‘judge’ or ‘justice.’” BRANDON L. GARRETT & LEE KOVARSKY, HABEAS CORPUS: EXECUTIVE DETENTION & POST-CONVICTION LITIGATION 14 (2013). For example, Barons of Exchequer and Justices in Common

entitlement to ask that the habeas power be exercised.<sup>14</sup> So if a federal privilege exists, so too would a corresponding federal judicial power. The privilege-power pairing is native to English common law, which helps explain the rule against suspending the habeas privilege in the original Constitution's Suspension Clause.<sup>15</sup>

English common-law habeas writs—and there were several types—ordered a jailor to produce a prisoner for some purpose: to move the prisoner to another court, to secure testimony, and so on and so forth. Habeas corpus *ad subjiciendum*, which was a later-developing habeas writ, ordered a prisoner to be produced so a judge could decide whether a jailor was exercising “lawful custody.” The concept of “lawful custody” is perpetually evolving, but the basic habeas guarantee ensures that a judge may inspect custodial authority and discharge the prisoner. A habeas writ was denominated as an English privilege because an English subject enjoyed the benefits of process issued at the behest of a royal court.<sup>16</sup>

America's constitutional guarantee reflects the common-law privilege, as well as the power of suspension exercised by English monarchs. Article I, Section 9, Clause 2 provides that “[t]he 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.” This Clause does not actually create a suspension power—*let alone the privilege*. It simply restricts a suspension power that presumably comes from Article I, Section 8.<sup>17</sup> Section 8 enumerates legislative powers and also vests Congress with auxiliary powers that are “necessary and proper” to exercise them. The suspension power might be auxiliary to any number of enumerated powers: the power to provide for the common defense;<sup>18</sup> the power to govern the land and

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Pleas could issue the writ. Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523, 525–26 n.7 (1923). *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), interpreted the Judiciary Act of 1789 to empower both courts and judges to issue habeas writs. *See id.* at 94–100. 28 U.S.C. § 2241, the modern source of federal habeas power, vests authority in both courts and judges. *Id.* at § 2241(a)–(b).

14. This understanding of the relationship between the privilege and the corresponding judicial power is long established. *See* 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 107 (Worthington Chauncey Ford ed., 1904).

15. U.S. CONST. art. I, § 9, cl. 2.

16. *See* Halliday & White, *supra* note 5, at 630 (noting that the writ of habeas corpus was traditionally understood as “originating in the concept of the king’s mercy”).

17. This characterization makes more sense if one appreciates context. The Suspension Clause appears alongside several limits on otherwise-appropriate legislative power: the prohibitions on bills of attainder and ex post facto laws, the rule forbidding Congress from restricting the slave trade until 1808, et cetera. U.S. CONST. art. I, § 9.

18. *Id.* § 8, cl. 1.

naval forces;<sup>19</sup> or the power to “provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions.”<sup>20</sup> The most likely font of suspension power, however, is the enumerated authority to constitute the federal judiciary.<sup>21</sup> The important point is that the Suspension Clause merely restricts the suspension power. Everything else about habeas corpus, including the habeas power and the privilege itself, is a more active inferential exercise.<sup>22</sup>

### *B. A Typology of Habeas Privilege*

The normative position I take in Parts III and IV—that the PI Clause entitles state prisoners to a federal habeas forum—is built on top of a descriptive framework for classifying potential privilege features. I develop the typology here, and I refer to it frequently throughout the Article. The easiest way to classify the privilege’s scope is in three dimensions: (a) the sovereign from which the habeas power of judges springs, (b) the sovereign authority under which a prisoner is detained, and (c) the sovereign furnishing the law under which custody is potentially unlawful. For my purposes, there is actually no need to visually represent outcomes in dimension (c) because the U.S. Constitution secures some privilege to contest custody that might be in violation of federal law. Figure 1 therefore depicts the potential privilege features in two dimensions.

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19. *Id.* at cl. 12–14.

20. *Id.* at cl. 15.

21. *Id.* at cl. 9.

22. *But cf.* Paul Diller, *Habeas and (Non-)Delegation*, 77 U. CHI. L. REV. 585, 602–03 n.94 (2010) (noting that “[n]ot all legal commentators have agreed that . . . the Suspension Clause . . . provides Congress with the power to suspend habeas” but concluding that such a reading is superior to other accounts of the suspension power). I remain skeptical that the Suspension Clause—which appears in a list of Article I, § 9 limits on powers established elsewhere in the Constitution—contains text that expressly limits habeas power but also does double duty as an implicit source of the power so limited. The Supreme Court, at times, has recognized the shortcomings of the Suspension-Clause-as-suspension-power theory. *See, e.g.*, *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 619–20 (1842) (“No express power is given to congress . . . to suspend the writ in cases of rebellion or invasion. And yet it would be difficult to say . . . that it ought not to be deemed, by necessary implication, within the scope of the legislative power of congress.”); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting) (observing that the suspension power comes from somewhere other than Article I, § 9).



**Figure 1: Potential Forum-Custody Configurations**

	Federal Custody	State Custody
Federal Privilege	(1) federal privilege to contest federal custody	(2) federal privilege to contest state custody
State Privilege	(3) state privilege to contest federal custody	(4) state privilege to contest state custody

To state my thesis most simply, I argue that the PI Clause added Type 2 features to the habeas privilege that the Constitution guarantees.

As I argued in *Habeas Power*, the original Constitution guaranteed only a Type 1 privilege: a federal forum for federal prisoners.<sup>23</sup> Although I do not want to rehash *Habeas Power*, two of its conclusions are important here. First, the original Constitution guaranteed habeas process; Congress was not free to withhold habeas jurisdiction from federal courts.<sup>24</sup> Second, the original Constitution's habeas guarantee did not "apply to the states." In other words, at the turn of the nineteenth century, the Federal Constitution did not entitle state prisoners to habeas process in any court.<sup>25</sup>

In *Habeas Power*, I explained that the best interpretation of constitutional text *before the Fourteenth Amendment*—in light of history, structure, and established maxims of federal jurisdiction—is as a guarantee of a federal habeas privilege to contest federal custody.<sup>26</sup> Before going further here, I want to reiterate the problems with a school of habeas thought in which the original Constitution guaranteed no federal privilege at all. Understanding defects in that account of the privilege will in turn help readers understand the Fourteenth Amendment's effect. In terms of Figure 1, no-federal-

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23. Kovarsky, *supra* note 8, at 773–95; *see also Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1267 (1970) (concluding that the Framers contemplated a Type 1 privilege); Steiker, *supra* note 4, at 872 (collecting sources and concluding that "the general thrust of these positions is that the Suspension Clause requires the federal judiciary to provide a check against potential abuses of federal power").

24. *See* Kovarsky, *supra* note 8, at 754 (arguing that "Congress cannot restrict the prerogative of a federal judge to decide whether federal custody is 'lawful'").

25. *See id.* at 809 (laying the framework of the Habeas Power Theory). *But cf.* FREEDMAN, *supra* note 8, at 10 (concluding that the Judiciary Act of 1789 was supposed to allow courts to discharge unlawfully detained prisoners); Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 649 (same).

26. *See* Kovarsky, *supra* note 8, at 773–94 (refuting two theories "that are inconsistent with the principle that Article III vests and the Suspension Clause protects the power of a federal judge to review federal custody").

privilege arguments might sustain a Type 3 privilege—a state habeas privilege to contest federal custody—or they might support an undepicted outcome in which the Constitution guarantees neither a state nor a federal privilege. Because my account treats the original Constitution as guaranteeing a federal privilege to contest federal custody, readers should understand why that assumption is appropriate. *Habeas Power*, which is an article-length defense of that assumption, includes extensive treatment of each alternative discussed below.<sup>27</sup>

### 1. The No-Federal-Privilege Hypotheses

Dissenting in *INS v. St. Cyr*,<sup>28</sup> Justice Scalia speculated that the Constitution may not guarantee any privilege whatsoever. He noted that the language of Article I, Section 9 only limits a suspension power, and that it does not explicitly provide for the privilege to which the suspension power applies.<sup>29</sup> Justice Scalia was parroting an argument made many years before by Professor Rex Collings.<sup>30</sup> Justice Scalia mused about this possibility before discussing in greater depth the originalist alternative: that the scope of the habeas guarantee was frozen in 1789.<sup>31</sup> When given the opportunity to reprise the view that the Suspension Clause referenced a privilege that need not exist, Justice Scalia declined. In *Boumediene v. Bush*,<sup>32</sup> not a single Justice expressed doubt that the Constitution furnished a habeas guarantee of some sort.<sup>33</sup>

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27. See *id.* at 781–94 (addressing the “Null Power Hypothesis” and the “Inter-Sovereign Habeas Hypothesis”).

28. *INS v. St. Cyr*, 533 U.S. 289, 326 (2001).

29. See *id.* at 337 (Scalia, J., dissenting) (“A straightforward reading of this text discloses that it does not guarantee any content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended.”).

30. See Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 341–42 (1952). The position ultimately reflects Chief Justice Marshall’s dictum in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), stating that, absent a statute, “the privilege itself would be lost, although no law for its suspension should be enacted.” *Id.* at 95.

31. See *St. Cyr*, 533 U.S. at 341 (Scalia, J., dissenting) (assuming, for the sake of argument, that the Suspension Clause grants “some constitutional minimum of habeas relief”).

32. 553 U.S. 723 (2008).

33. There were two *Boumediene* dissenting opinions, one by Justice Scalia and one by Chief Justice Roberts. *Id.* at 801–26 (Roberts, C.J., dissenting); *id.* at 826–50 (Scalia, J., dissenting). Four Justices joined each dissent. Justice Roberts argued that, even if the habeas privilege did extend to such detention, Congress enacted a substitute remedial process that was constitutionally “adequate and effective” to test custody. *Id.* at 808 (Roberts, C.J., dissenting). Justice Scalia argued that there was no federal privilege available to “unlawful enemy combatants” who were not U.S. citizens and who were not detained either in one of the fifty

The Supreme Court mothballed the Scalia/Collings theory for good reason: the interpretive work necessary to deny the existence of any privilege whatsoever is substantial.<sup>34</sup> The framers of the original Constitution and the Bill did not write constitutional text purporting to create rights.<sup>35</sup> The framers of each document labored under theories of natural law in which rights were “recognized” or “declared” because they preexisted constitutions.<sup>36</sup> The Constitution bars suspension of the habeas privilege but lacks express language of creation because the Framers believed such language was unnecessary.<sup>37</sup> Suspension was one of the defining English abuses of the revolutionary struggle,<sup>38</sup> and those abuses were on the minds of those responsible for framing and ratifying the original Constitution.<sup>39</sup> Some of the drafters fought about the language in the Suspension Clause, but they did not disagree that the privilege existed. What they clashed over was whether the habeas privilege required an express textual guarantee and whether it could *ever* be suspended.<sup>40</sup> The axis of disagreement was the same at state ratifying conventions.<sup>41</sup>

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states or in a federal territory. *Id.* at 826–27 (Scalia, J., dissenting). Neither opinion entertained the idea that the Federal Constitution did not secure a habeas privilege. *Id.* at 801–26 (Roberts, C.J., dissenting); *id.* at 826–50 (Scalia, J., dissenting).

34. See generally Gerald L. Neuman, *The Habeas Corpus Suspension Clause After I.N.S. v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 570–87 (2002) (comprehensively rejecting Justice Scalia’s *St. Cyr* dissent).

35. See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1206 (1992); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 636–38 (2009); Howard Jay Graham, *Our “Declaratory” Fourteenth Amendment*, 7 STAN. L. REV. 3, 3–4 (1954); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 610 (1993).

36. See Amar, *supra* note 35, at 1206–08.

37. Virtually all of THE FEDERALIST No. 84 was devoted to the idea that the Constitution’s failure to specify certain rights should not be interpreted as a decision to exclude them. See THE FEDERALIST No. 84, at 577 (Alexander Hamilton). The habeas privilege would be a particularly poor candidate to read out of the Constitution because it is referenced in the Suspension Clause. See Paschal, *supra* note 25, at 608–09, 611.

38. Parliament authorized King George III to suspend the privilege in the American colonies during the Revolutionary War and renewed the suspension statute five times. Habeas Corpus Suspension Act, 1782, 22 Geo. 3, c. 1 (Eng.) (renewal); Habeas Corpus Suspension Act, 1781, 21 Geo. 3, c. 2 (Eng.) (renewal); Continuance of Acts Act, 1780, 20 Geo. 3, c. 5 (Eng.) (renewal); Habeas Corpus Suspension Act, 1779, 19 Geo. 3, c. 1 (Eng.) (renewal); Habeas Corpus Suspension Act, 1778, 18 Geo. 3, c. 1 (Eng.) (renewal); Treason Act, 1777, 17 Geo. 3, c. 9 (Eng.).

39. The American colonists followed suspension activity in broadly circulated newspapers. HALLIDAY, *supra* note 5, at 253; JUSTIN J. WERT, *HABEAS CORPUS IN AMERICA: THE POLITICS OF INDIVIDUAL RIGHTS* 33 (2011).

40. Specifically, ten states voted on the proposed wording, and three states lodged the initial objection that the privilege was not sufficiently secured: Georgia, North Carolina, and South Carolina. GARRETT & KOVARSKY, *supra* note 13, at 46; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 438 (Max Farrand ed., 1966). At least in *St. Cyr*, Justice Scalia makes confused use of this information. He argued that four state ratifying conventions lodged an

## 2. The State-Habeas Hypothesis

A moderated variation on the Scalia/Hollings position is Professor William Duker's argument that the original Constitution contemplated a Type 3 privilege: a state privilege to contest federal custody.<sup>42</sup> This position has spawned some nuanced accounts that are stronger than Duker's,<sup>43</sup> but I focus on Duker's position in the interest of space.<sup>44</sup> State courts did frequently grant habeas relief for federal

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objection to the Constitution's failure to include express words of creation, and that such objections indicate that the original meaning of the Suspension Clause was ambiguous. *INS v. St. Cyr*, 533 U.S. 289, 337 (2001). The states, however, were mollified by assurances that, despite the peculiar wording of Article I, § 9, the habeas privilege was constitutionally secured. In other words, the implication to be drawn from the objections of the state ratifying conventions and the responses thereto is precisely the opposite of that advanced by Justice Scalia. *Id.*

41. See Kovarsky, *supra* note 8, at 780.

42. See DUKER, *supra* note 1, at 126–80. The appeal of a Type 3 privilege will not be immediately apparent to most readers. Contrary to *Tarble's Case*, 80 U.S. (13 Wall.) 397, 411–12 (1871) (holding that the Supremacy Clause precluded state courts from issuing writs of habeas corpus for federal prisoners), states had all kinds of power to enforce federal law in state courts; but the privilege referenced in the Suspension Clause is still a federal privilege. The argument that the Suspension Clause referenced a state privilege to contest federal custody is less an assessment of original meaning or intent and more of an attempt to reconcile a privilege with the Madisonian Compromise and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803). Pursuant to the Madisonian Compromise, there need be no inferior federal courts. Under *Marbury*, the Supreme Court cannot exercise original jurisdiction other than that specified as original in Article III, § 2 of the Constitution. *Id.* If Congress eliminated the lower federal courts, and if the Supreme Court could not issue habeas writs, then the only account on which there remains a habeas remedy is if state courts provide it. For many people, then, a Type 3 privilege allows an interpreter to honor the principle that there must always be some sort of available habeas remedy. There nonetheless remain substantial problems with this version of the Type 3 privilege: it still gives short shrift to the importance of federal supremacy, and the pertinent precedent cannot sustain interpretation necessary to make the theory work. Kovarsky, *supra* note 8, at 792–94. For what it's worth, were the Supreme Court to confront a situation where Congress eliminated lower federal courts and the Justices were asked to exercise original habeas jurisdiction, there are at least two options preferable to a holding that there is no habeas guarantee. First, the Justices could have habeas relief in their individual capacities. Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 254 (2005). Second, the Supreme Court could overturn *Marbury's* interpretation of Article III, § 2, which many believe Chief Justice Marshall concocted to force the constitutional conflict, giving rise to judicial review. Kovarsky, *supra* note 8, 784–85 nn.168–77 and accompanying text (collecting authority).

43. Others have interpreted Supreme Court decisions rejecting the assertion of a state privilege to contest federal custody as a statutory preemption question. See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1510 (1987) (arguing that pertinent cases should be read as rules about implied exclusivity of the federal habeas statute); David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 64 n.17 (2006) (endorsing the view that, because Congress need not ordain and establish lower federal courts, the Suspension Clause restricts federal authority to interfere with a state privilege in instances where there is no federal remedy).

44. For a more thorough treatment of the problems, see Kovarsky, *supra* note 8, at 786–92.

custody during the early nineteenth century.<sup>45</sup> Indeed, the use of state habeas process to restrain a perceived federal leviathan might have been normatively appealing to many at the end of the eighteenth century. Just because state courts exercised habeas power to review federal custody, however, does not mean that the Constitution guaranteed it.

If the habeas privilege specified in the Suspension Clause contemplated state habeas process, and if state process was the means of securing the privilege, then one might expect to find a wealth of nineteenth-century discussion about whether state limits on the privilege were unconstitutional. I have yet to see any such discourse. Nor do the list of restrictions on states appearing in Article I, Section 10 of the original Constitution suggest that states must honor a habeas privilege. Professor Duker tries to skirt these objections by contending that the Federal Constitution really made no habeas guarantee whatsoever.<sup>46</sup> In this respect, Professor Duker's position basically reduces to the Collings/Scalia argument, and it is vulnerable to the same criticisms.<sup>47</sup> For example, Professor Duker's argument, like the Collings/Scalia position, selectively quotes Alexander Hamilton<sup>48</sup> and incorrectly interprets explanations provided to state ratifying conventions as excluding a federal privilege.<sup>49</sup>

In any event, the Supreme Court invalidated state habeas power to discharge federal prisoners in two cases bookending the Civil War: *Ableman v. Booth*<sup>50</sup> and *Tarble's Case*.<sup>51</sup> *Tarble* expresses a general view of judicial power that is inconsistent with virtually everything we know about the concurrency of state jurisdiction.<sup>52</sup>

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45. See *In re Reynolds*, 20 F. Cas. 592, 594–95 (N.Y. 1867) (collecting cases); DUKER, *supra* note 1, at 178 n.192 (same); see also Marc M. Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners*, 70 TUL. L. REV. 1, 7 (1995) (“At the very beginning of the nineteenth century, most state courts continued to draw their authority to issue the writ from their common-law powers which preceded independence.”).

46. DUKER, *supra* note 1, at 155 (“[The Federal Constitution] did not provide security against state interference, nor did it require a state to provide for the writ.”).

47. See *supra* Part II.B.1 (describing these criticisms in greater detail).

48. Compare DUKER, *supra* note 1, at 133 (evaluating Hamilton's position) with THE FEDERALIST Nos. 83 and 84 (Alexander Hamilton) (explaining that the habeas privilege was provided for “in the plan of the convention” and observing that New York law lacked the protection for the privilege appearing in the Federal Constitution).

49. See Kovarsky, *supra* note 8, at 791–92.

50. 62 U.S. (21 How.) 506, 514 (1859).

51. 80 U.S. (13 Wall.) 397, 409–10 (1871).

52. *Tarble* suggests that state courts lack the authority to enforce federal law. See *id.* at 407 (“[N]either [National nor State government] can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government . . .”). In fact, state courts were the primary forum for federal questions for many years, until Congress permanently vested lower federal courts with general federal question

Although the Court reasons from this problematic generalization, it reaches a specific conclusion that is probably right for other reasons. As a practical matter, state habeas power to discharge federal prisoners would seriously disrupt the operative supremacy of federal law.<sup>53</sup> Moreover, the English concept of a suspended privilege strongly suggests that suspension power vests in the sovereign that provides the privilege to contest custody.<sup>54</sup> Put differently, the Constitution would not have vested a federal suspension power unless federal courts were the forum intended to adjudicate the privilege.<sup>55</sup> Finally, even if *Tarble* was wrongly decided, the result would be that state courts were *permitted* to exercise habeas power, not that Type 3 features were the subject of the constitutional guarantee.

### 3. A Privilege to a Federal Forum

Insofar as the original Constitution is concerned, the remaining privilege possibilities are both federal. Privilege Type 1 is a federal privilege to contest federal custody, and privilege Type 2 is a federal privilege to contest state custody. In *Habeas Power*, I argued at length that the original Constitution contemplated only a federal habeas forum to contest federal custody: a Type 1 privilege.<sup>56</sup> Professor Eric Freedman has argued forcefully that the original Constitution secured a habeas privilege with *both* Type 1 and Type 2 features,<sup>57</sup> but I part

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jurisdiction in 1875. See Act of Mar. 3, 1875, § 1, 18 Stat. 470, 470 (“[T]he circuit courts of the United States shall have original cognizance . . . arising under the Constitution or laws of the United States . . .”); cf. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477–78 (1981) (citing THE FEDERALIST No. 82 (Alexander Hamilton) (explaining that, pursuant to intended constitutional design, state courts routinely adjudicate Article III subject matter); LARRY W. YACKLE, FEDERAL COURTS 152–53 (3d ed. 2009) (arguing that *Tarble* belies “the conventional understanding that Congress might never have created the lower federal courts and might have relied, instead, on state courts to police the system”).

53. Those reading *Tarble* as an implied preemption case—a theory identified in note 43, *supra*—would argue that the supremacy-inhibiting features of a Type 3 privilege would be minimal because Congress could simply pass a federal habeas statute to short-circuit officious state habeas activity.

54. The English “privilege” was suspended by the sovereign, and the habeas benefit was denominated as a privilege of English subjecthood because it entailed access to a court deriving its power from that same English sovereign. Kovarsky, *supra* note 8, at 762.

55. The states might “suspend” their own habeas privileges, but the Framers would not have used the word “suspend” to refer to federal interference with a state privilege.

56. See Kovarsky, *supra* note 8, at 773–94; see also *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1267 (1970) (“The framers’ decision to single out habeas corpus for particular protection against congressional ‘suspension’ suggests that they assumed that habeas jurisdiction would exist in some court for federal prisoners.”).

57. See FREEDMAN, *supra* note 8, at 14–19, 29 (“[A]most all of the participants in the ratification debates expected the Clause to protect the independent judicial examination on federal habeas corpus of all imprisonments, state or federal.”).

ways with Professor Freedman for reasons that I will elaborate upon shortly.

Absent a statute meeting the suspension criteria, any legislation substantially restricting judicial power corresponding with the Type 1 privilege is and always has been, in my view, unconstitutional.<sup>58</sup> The idea that the privilege in the original Constitution had Type 2 features—that it entailed federal power to review state custody—is a more difficult sell. Whatever the Framers actually thought, the Judiciary Act of 1789 did not provide for federal habeas review of *state* custody. The Act stated, “[W]rits of habeas corpus shall in no case extend to prisoners in [jail], unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same . . . .”<sup>59</sup> Congress enacted limited habeas review of certain types of state custody in 1833 and again in 1842,<sup>60</sup> but did not ratify a generally applicable state-prisoner privilege until 1867.<sup>61</sup>

Professor Freedman has argued that, in *Ex parte Bollman*,<sup>62</sup> Chief Justice Marshall incorrectly interpreted the grant of habeas jurisdiction in the 1789 Judiciary Act.<sup>63</sup> Chief Justice Marshall observed that federal courts could not conduct habeas review of state custody,<sup>64</sup> and Professor Freedman argues that *Bollman* set the United States down the course of law that erroneously restricted federal habeas relief.<sup>65</sup> I agree with parts of Professor Freedman’s account. Specifically, I agree that Chief Justice Marshall made mince meat of section 14 of the 1789 Judiciary Act; but even a proper interpretation of section 14 still would have given federal courts or

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58. See Kovarsky, *supra* note 8, at 795 (“It is federal judicial power to determine whether a federal prisoner’s custody is unconstitutional . . . . Congress may not break this prerogative under legislative saddle . . .”).

59. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82 (1789).

60. See Act of Aug. 29, 1842, ch. 257, 5 Stat. 539 (“[A]ny district court of the United States . . . in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of any prisoner . . . in custody . . . of the United States, or any one of them.”); Act of March 2, 1833, ch. 57, § 7, 4 Stat. 632, 634–35 (extending the writ to all prisoners confined under authority of federal law).

61. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.

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

63. See Eric Freedman, *Just Because John Marshall Said It, Doesn’t Make It So: Ex parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 536 (2000) (“[T]he mistake is that, according to dicta inserted by Chief Justice John Marshall into *Ex Parte Bollman*, Section 14 of the Judiciary Act of 1789 withheld from state prisoners access to the federal writ . . .”).

64. See *Bollman*, 8 U.S. at 99 (opining that the proviso at the end of section 14 applied to the first sentence, as well as the second).

65. See Freedman, *supra* note 63, at 537 (“Marshall’s misreading . . . survives to cloud Suspension Clause Analysis.”).

judges no power to issue writs of habeas corpus *ad subjiciendum* to state custodians.<sup>66</sup> Perhaps more importantly, a successful theory probably has to accommodate the consequences of Chief Justice Marshall's interpretation: until Congress changed the habeas statute in 1867, courts generally ruled that state prisoners could not invoke the federal privilege to relieve unlawful custody.<sup>67</sup>

In fact, many who believe that federal prisoners are entitled to a federal habeas forum nonetheless deny a constitutional guarantee for state prisoners.<sup>68</sup> That result is normatively appealing to those who believe that, with respect to enforcing constitutional guarantees, state judges have brains and will equal to those of their federal counterparts.<sup>69</sup> For many, the specter of lower federal judges using habeas process to review state judgments is, at best, "unseemly."<sup>70</sup>

The varied privilege configurations and corresponding implications yield the simple question I posed at the outset: Is there any persuasive account on which the Constitution guarantees a federal habeas forum to state prisoners? (There is.) Moreover, if I concede that the Constitution did not originally guarantee a privilege with Type 2 features, can that account be developed on the back of some other substantial constitutional event? (It can.)

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66. The proviso at the end of section 14 may have restricted only the habeas power given to federal judges in the second sentence, and not the habeas power given to federal courts in the first sentence. Indeed, that distinction is the crux of Professor Freedman's argument. *See id.* at 575–76 ("Soundly read, the proviso limits judges but not courts."). I am nonetheless skeptical that the first sentence of section 14 was intended to give *courts* the authority to issue writs of habeas corpus *ad subjiciendum*; the better reading is that the first sentence was vesting federal courts with authority to issue other kinds of habeas writs auxiliary to other forms of jurisdiction. *See* Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153, 176.

67. *See Ex parte Dorr*, 44 U.S. 103, 105 (1845) (rejecting proposition that habeas relief might issue simply because state law "was repugnant to the Constitution of the United States"). On several occasions, federal judges expressed frustration that they lacked habeas power to relieve unlawful custody. *See, e.g., Elkison v. Deliesseline*, 8 F. Cas. 493, 496–97 (C.C.D.S.C. 1823) (holding that, even though state act should be void as unconstitutional, there was no federal habeas remedy); *Ex parte Cabrera*, 4 F. Cas. 964, 966 (C.C.D. Pa. 1805) (statement of Washington, J.) (expressing principle that federal courts may not relieve even illegal state custody).

68. *See, e.g.,* Louis H. Pollak, *Proposals To Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 64 (1956) ("Nor is it likely that the Court would presently accept the rather elaborate argument that the Fourteenth Amendment retroactively inflated the scope of the constitutional privilege to include the newly created federal rights to protection against state action.").

69. *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 504 (1963) ("[R]esentment among state . . . judges, many of them surely as conscientious in their adherence to the Constitution and as intellectually honest as their critics, counsels . . . against . . . indiscriminate expansion [of habeas jurisdiction] without principled justification.").

70. *Ex parte Royall*, 117 U.S. 241, 253 (1886).



The PI Clause declared that a federal privilege for state prisoners was incident to national citizenship. I have located two other major attempts to deduce a general Type 2 privilege from some features of the Reconstruction Amendments,<sup>71</sup> but they are deficient in respects that I will address in Section III.C. Even after identifying the Fourteenth Amendment as the constitutional event guaranteeing a modified privilege, the account must still show *how* the Type 1 privilege gains Type 2 features upon contact with the PI Clause. The challenge is to show that the PI Clause extended the guarantee of a federal forum to state prisoners.

### C. *The Stakes*

If the PI Clause guarantees a privilege with Type 2 features, then Congress cannot repeal the judicial power that secures it. Although a repeal scenario is farfetched, scenarios in which Congress imposes substantial statutory restrictions are not. In fact, many restrictive scenarios have already materialized,<sup>72</sup> often precipitating dramatic institutional and academic clashes over state-prisoner remedies.<sup>73</sup>

If the Federal Constitution does not require a federal habeas privilege for state prisoners—and if the greater legislative power to revoke the privilege includes the lesser power to limit it—then there can be little dispute as to the constitutionality of limiting federal habeas power over state custodians. Establishing the constitutional

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71. See Michael P. O'Connor, *Time Out of Mind: Our Collective Amnesia About the History of the Privileges or Immunities Clause*, 93 KY. L.J. 659, 662 (2005) (contending that the PI clause means that Congress may not strip federal habeas jurisdiction over “claims predicated upon race-based deprivation of liberty”); Steiker, *supra* note 4, at 867–68 (arguing that the Fourteenth Amendment “incorporates” the habeas privilege against the states through the DP Clause, with the process of incorporation transforming the habeas privilege into one that may reach state custody).

72. See, e.g., 28 U.S.C. § 2244(b) (2012) (imposing various restrictions on claims appearing in successive habeas petitions lodged by state inmates); *id.* § 2244(d) (creating a statute of limitations applicable to all federal habeas claims by state inmates); *id.* § 2254(d)(1) (excepting from the general rule—that federal habeas relief is unavailable for claims decided on the merits in state court—cases where the state decision is contrary to or an unreasonable application of clearly established Supreme Court precedent); see also *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996) (deciding the constitutionality of AEDPA restriction on successive state-prisoner petitions).

73. Compare, e.g., Bator, *supra* note 69, at 463–64 (depicting mid-twentieth-century Supreme Court law permitting extensive habeas relitigation by state inmates as an expansion from previous understandings of the writ), with Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 661–63 (1982) (arguing that Professor Bator’s theory of the federal privilege for state inmates was too restrictive). Professors Bator and Peller are the two figures most readily associated with the two major sides in the debate.

status of a Type 2 privilege is therefore a necessary precondition to any argument that there might be something other than popular will resisting its contraction.

### III. THE HABEAS PRIVILEGE OF NATIONAL CITIZENSHIP

Among other things, Section 1 of the Fourteenth Amendment embraced the concept of national citizenship: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .”<sup>74</sup>

Setting aside momentarily that *The Slaughter-House Cases* forever disfigured the PI Clause,<sup>75</sup> the framers of the Fourteenth Amendment believed that the habeas privilege belonged to a set of privileges and immunities defined by national citizenship. And, even after *Slaughter-House*, the habeas privilege remains one of the few lifelike features of an otherwise “cadaverous” constitutional provision.<sup>76</sup> Those of all interpretive stripes should be able to agree that the PI Clause encompasses the habeas privilege.

Section 1 of the Fourteenth Amendment traffics in two kinds of status: personhood and citizenship. The PI Clause was, in part, a simple response to the Black Codes and their enabling precedent,<sup>77</sup> *Dred Scott v. Sandford*.<sup>78</sup> *Dred Scott*, of course, held that African Americans were persons but not U.S. citizens—that they were not

74. U.S. CONST. amend. XIV, § 1.

75. 83 U.S. (16 Wall.) 36, 74–75 (1872).

76. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 180 (1989).

77. More precisely, the Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–82 (2012)), was targeted at the Black Codes, and the Fourteenth Amendment was designed to constitutionalize the nondiscrimination rules that the Civil Rights Act contained, and also to establish a clear textual source of congressional power to pass civil rights legislation. See George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 SUP. CT. REV. 303, 309, 312–13. Several scholars have argued that the Fourteenth Amendment’s *exclusive* purpose was to constitutionalize the Civil Rights Act, most notably Raoul Berger. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 457–58 (2d ed. 1977) (“The historical records all but incontrovertibly establish that the framers of the Fourteenth Amendment . . . confined it to protection of carefully enumerated rights against State discrimination.”). I obviously join a crowded group rejecting that view. See, e.g., WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 63 (1988) (“The debates on the Fourteenth Amendment were . . . debates about high politics and fundamental principles . . . . The debates by themselves did not reduce the vague, open-ended, and sometimes clashing principles used by the debaters to precise, carefully bounded legal doctrine. That would be the task of the courts . . . .”).

78. 60 U.S. 393 (1856).

constitutionally entitled to the rights, privileges, and immunities of national citizenship.<sup>79</sup> Section 1's first sentence straightforwardly rebuked *Dred Scott*: "[A]ll persons born or naturalized in the United States . . . are citizens of the United States."<sup>80</sup> The second sentence of Section 1, among other things, forbids states from abridging the privileges and immunities of "citizens of the United States."<sup>81</sup> The formula is elegant and powerful: the Fourteenth Amendment declares a national citizenship, binds it to a bundle of privileges and immunities, and prohibits states from abridging them. The syllogistic conclusion is unavoidable. If all persons born or naturalized in the United States are entitled to rights of national citizenship, and if a person is born in the United States, then that person is entitled to the privileges and immunities that such status entails. Part III explains that, no matter what position one takes on *Slaughter-House* and the potential meaning of the PI Clause, the bundle of national citizenship rights includes a habeas privilege.

I should quickly pause to comment on methodology. The account I advance here is appealing in part because it need not reduce to a debate about the proper approach to constitutional interpretation and construction. My account can be sustained without fervent commitment to any strain of textualism or originalism, and without an adventurous foray into the cluster of theories we might describe under the umbrella of "living constitutionalism." Nor do I need a global interpretive theory to justify cherry-picked precedent; one of my account's signal virtues is its consistency with *Slaughter-House* and its progeny.<sup>82</sup> The only interpretive proposition upon which my account relies is the rather boring idea that judges should follow legal-process norms of judging: they should strive to cohere various sources of law as expressed in judicial decisions, authoritative texts, and normed behavior.<sup>83</sup> The strength of my account is that it exhibits such coherence, unlike other theories under which Congress enjoys only limited authority to restrict habeas review of state custody.

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79. See *id.* at 407 ("[N]either the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people . . .").

80. U.S. CONST. amend. XIV, § 1.

81. *Id.*

82. See *infra* Part III.B (describing the difficulties precedent has created for incorporation analysis).

83. Readers may recognize this interpretive position as Professor Richard Fallon's "constructivist coherence" theory. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1192–93 (1987).

### A. Original Meaning

The Thirty-Ninth Congress submitted the Fourteenth Amendment to the states,<sup>84</sup> and it also passed the Reconstruction Act requiring that the rebellious states ratify the Amendment as a precondition to restoration.<sup>85</sup> When the first session opened, neither house of Congress would seat members from the former confederacy.<sup>86</sup> Of the Congressmen seated for the first session, roughly seventy-five percent were Republican. Understanding the internal dynamics of that Republican coalition is indispensable to interpreting the Amendment.<sup>87</sup>

The legislators framing and states ratifying the Fourteenth Amendment understood the habeas privilege referenced in the Suspension Clause to be a “privilege . . . of citizens of the United States.”<sup>88</sup> The relationship runs far deeper than the superficial observation that the word “privilege” appears in both constitutional provisions. In fact, the habeas privilege was one of the central rights contemplated by the PI Clause. The Supreme Court ultimately gummed up application of the PI Clause, but I will not take up the decisional mayhem until Section III.B. The starting points for understanding how members of the so-called Rump Congress and their constituents viewed privileges and immunities of citizenship are (1) the “privileges and immunities” language in Article IV,<sup>89</sup> and (2)

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84. CONG. GLOBE, 39th Cong., 1st Sess. 3148–49 (1866).

85. Republican members struggled with the other sections in the Amendment: voting qualifications for disloyal citizens and how to calibrate congressional representation to reflect the anticipated disenfranchisement of freedmen. See JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT 8–9 (1997) (“[T]he debates did not focus primarily on Section 1, which today is *the* Fourteenth Amendment. Instead, the debates focused on . . . Negro suffrage[,] . . . apportionment and . . . exclusion of rebel leaders from office.”).

86. Barry Friedman, *This History of the Countermajoritarian Difficulty, Part II: Reconstruction’s Political Court*, 91 GEO. L.J. 1, 7 (2002).

87. A few things about that coalition are worth mentioning. First, labels that are often used to classify the Republicans in the Thirty-Ninth Congress—“radical,” “moderate,” and “conservative”—are most meaningful for the purposes of lining up membership on the issue of black suffrage, but are less useful for classifying membership with respect to other Reconstruction questions. See WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 47–48 (1965) (“Disagreeing by varying degrees with . . . the moderates, the radical Republicans nevertheless joined them in admitting that a constitutional amendment would principally enfranchise the northern Negro.”). Second, any assertion about what the coalition intended or what the words it produced meant cannot be divorced from the unique historical phenomena driving Congress to recommend the Fourteenth Amendment to the states. Third, the Republicans fought extensively over the text of the Fourteenth Amendment, but not so much over the content of § 1. See BOND, *supra* note 85.

88. U.S. CONST. amend. XIV, § 1.

89. U.S. CONST. art. IV, § 2, cl. 1.

*Corfield v. Coryell*,<sup>90</sup> the canonical circuit court decision interpreting that Article IV content.

### 1. The Comity Clause

The taut textual string of “privilege,” “immunity,” and “citizens” appeared originally in Article IV, and that constitutional provision informs the meaning of the PI Clause. Article IV, Section 2, Clause 1—styled the “Comity Clause”—provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” Right off the bat, the Comity Clause differs meaningfully from the PI Clause. Article IV features a restriction involving “Citizens of each State,” and the Fourteenth Amendment addresses the treatment of “citizens of the United States.” Article IV deals (perhaps exclusively) with the rights of state citizenship, and the Fourteenth Amendment deals with the rights of national citizenship. Those two phenomena may intersect substantially—a right might be incident to both state and national citizenship—although *Slaughter-House* basically defined that intersecting set out of existence.<sup>91</sup>

The Comity Clause was and remains subject to multiple interpretations. Radical, Moderate, and Conservative Republicans in the Thirty-Ninth Congress sat on a spectrum of Article IV interpretation, and the features of that spectrum are important pieces of the PI Clause puzzle. Most agree that the Comity Clause entitles citizens of a state to *something*; and then the plausible interpretations splinter. One might plot the interpretive variation on two axes: (1) the meaning of “privileges and immunities,”<sup>92</sup> and (2) the degree to which

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90. 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

91. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1872) (“[T]he privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government . . .”).

92. Under one school of thought, “privileges and immunities” referred to all rights under state law. See, e.g., *Paul v. Virginia*, 75 U.S. 168, 180 (1868) (“[T]he privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens.”). Under another interpretation, the terms included a set of natural rights. See *infra* Part III.A.2. Under still another, the phrase included rights enumerated in the Constitution. See, e.g., Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785, 816 (1982) (“The legal-linguistic history presented here shows that privileges and immunities [in Article IV] meant constitutional limitations.”). The important point was that, even for interpretations under which the Comity Clause was a nondiscrimination rule, it forbade only alienage disability involving “privileges and immunities.”

the Comity Clause imposed a rule of nondiscrimination instead of a rule of categorical prohibition.<sup>93</sup>

Pivotal Republican constituencies responsible for guiding the Fourteenth Amendment through Congress generally believed one of three things about the Comity Clause: (1) that, as of the Civil War, it did protect privileges and immunities of national citizenship;<sup>94</sup> (2) that it had at one point been intended to protect privileges and immunities of national citizenship but had incorrectly been interpreted primarily to do other things;<sup>95</sup> or (3) that it had never furnished either a nondiscrimination or an absolute rule regarding privileges and immunities of national citizenship, and that the omission needed to be rectified.<sup>96</sup>

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93. Some have argued that the Comity Clause was more than a rule of nondiscrimination—that it prohibited states from imposing even nondiscriminatory restrictions on “privileges and immunities.” See, e.g., Chester James Antieau, *Paul’s Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1, 5 (1967) (arguing that the Comity Clause actually restricted any sovereign interference with natural rights). That group would presumably consider “Comity Clause” a misnomer. A subcategory of people subscribing to this view of the Comity Clause believed that the privileges and immunities in question—for which even nondiscriminatory burdens were impermissible—included rights enumerated in the Constitution. See MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 114–15 (1986) (reciting pedigree of this position).

94. Joel Tiffany, who was a lawyer and the reporter for the New York Supreme Court, wrote the influential *Treatise on the Unconstitutionality of Slavery* in 1849. In it, he argued that state legislation depriving citizens of privileges or immunities was void, a principle that the federal judiciary had to enforce. See CURTIS, *supra* note 93, at 42–44 (“Tiffany concluded that slavery was unconstitutional, even in the state. Slaves were citizens.”). Tiffany’s treatise influenced a small set of Republicans in the Thirty-Ninth Congress who believed that Article IV was more than a rule of nondiscrimination. See Michael Kent Curtis, *The Bill of Rights and the States Revisited After Heller*, 60 HASTINGS L.J. 1445, 1487 (2009) (describing Tiffany’s impact on the *Heller* decision and subsequent Republican views).

95. John Bingham, discussed *infra* in notes 97–104 and accompanying text, belonged to this group. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 182–85 (1998). In part for this reason, he believed the Fourteenth Amendment—and its grant of enforcement powers to Congress in § 5—was necessary to establish that the Civil Rights Act of 1866 was a lawful exercise of legislative authority. See CONG. GLOBE, 39th Cong., 1st Sess. 1093, 1291 (1866) (“Where is the power in Congress, unless this or some similar amendment be adopted, to prevent the reenactment of those infernal [Black Codes.]”); Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 33 (1996):

Bingham pointed out that *Barron* held the Bill of Rights amendments did not limit the states nor, he insisted, did the Constitution provide for congressional enforcement of the Bill of Rights against state action. He insisted that a constitutional amendment was needed to allow Congress to enforce the Bill of Rights by passing the Civil Rights Bill.

96. See CURTIS, *supra* note 93, at 114 (“The clause was . . . not intended to control the powers of state governments . . . , but simply to ensure that a migrant citizen would enjoy the basic rights a state accorded to its own citizens.”).

John Bingham, a conservative Ohio Republican who belonged to the third group,<sup>97</sup> was one of the most influential Republicans in the Thirty-Ninth Congress.<sup>98</sup> Historian Michael Les Benedict concluded that Bingham “led . . . nonradicals in the House” and had “greater influence on the course of Reconstruction” than did radical leaders such as Thaddeus Stevens.<sup>99</sup> Bingham belonged to the hugely powerful Joint Committee on Reconstruction, charged with reporting the Fourteenth Amendment.<sup>100</sup> He drafted various iterations of Section 1 and shepherded the Amendment through the House. Justice Hugo Black called Bingham the James Madison of Section 1,<sup>101</sup> and historians interpreting the Amendment have spent decades harvesting Bingham’s speeches and writings for Fourteenth Amendment meaning.<sup>102</sup> Bingham had stated that the Section 1 prototype was patterned on Article IV, Section 2.<sup>103</sup> He believed, however, that the Comity Clause should have been interpreted not just as a nondiscrimination rule, but as a categorical protection for privileges and immunities of national citizenship.<sup>104</sup> Many of Bingham’s Republican colleagues agreed with his interpretation.

Jacob Howard, a Michigan Senator who was also a member of the Joint Committee on Reconstruction, was the Republican point

97. See MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869*, 27 (1974) (listing members of factions in the 38–40 Congresses).

98. See *id.* at 31, 36, 57, 143, 162–87 (identifying Bingham as a “Representative[ ] with pre-eminent influence”).

99. *Id.* at 36.

100. *Id.* at 143.

101. See *Adamson v. California*, 332 U.S. 46, 73–74 (1947) (Black, J., dissenting) (“Yet Congressman Bingham may, without extravagance, be called the Madison of the first section of the Fourteenth Amendment.”).

102. See, e.g., GERARD M. MAGLIOCCA, *AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT* (2013); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 334 (2011) [hereinafter Lash, *Origins, Part II*] (arguing that Bingham did not rely on Article IV when drafting the final version of the Fourteenth Amendment). Several scholars have been critical of Bingham’s intellect and therefore critical of arguments that attribute interpretive significance to what he said. See *id.* at 335 n.23 (showing that some scholars were distrustful of Bingham as a source of information).

103. In a debate that took place on February 26, 1866, Congressman Bingham argued that the Privileges or Immunities Clause of the proposed Fourteenth Amendment that he had authored protected the same rights found in the text of Article IV, other existing constitutional provisions, and the Supremacy Clause. William J. Rich, *Taking “Privileges or Immunities” Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 171 (2002) (citing CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866)).

104. See CURTIS, *supra* note 93, at 115 (stating that Bingham read Article IV, Section 2 “to protect privileges and immunities of citizens of the United States, including rights in the Bill of Rights, from state interference”).

person in the Senate.<sup>105</sup> His understanding of Section 1 is particularly important because, although technically classified by historians as a radical, he commanded the respect of the conservative flank of Senate Republicans—probably the conservative bound of the coalition necessary to push the Amendment through Congress.<sup>106</sup> Howard's reading of the Comity Clause appeared to differ from Bingham's,<sup>107</sup> but that disagreement was unimportant in light of their shared understanding of the Fourteenth Amendment. The Fourteenth Amendment framers had revised Section 1 to clarify that, no matter the proper Comity Clause interpretation, the PI Clause categorically protected privileges and immunities incident to a national citizenship that the Amendment would formally declare.

So Bingham, Howard, and their fellow congressional travelers understood that the PI Clause protected privileges and immunities of national citizenship, and they believed that (at least some) enumerated constitutional guarantees qualified.<sup>108</sup> Given the virtually undisputed understanding that the PI Clause would declare privileges and immunities of national citizenship, and bar states from abridging them,<sup>109</sup> the next logical question involves what those privileges and immunities are. More specifically, do they include the habeas privilege? Enter *Corfield*.<sup>110</sup>

## 2. *Corfield v. Coryell*

For almost two hundred years, the leading case interpreting the meaning of “privileges and immunities” has been *Corfield v.*

105. See Lash, *Origins, Part II*, *supra* note 102, at 359. Howard's Senate responsibility was something of an accident. Senator William Fessenden actually helmed the Joint Committee on Reconstruction—which had developed the Amendment—but Fessenden assigned management responsibilities to Howard when Fessenden became ill. See BENEDICT, *supra* note 97, at 184.

106. See BENEDICT, *supra* note 97, at 38 (Henry Wilson and Jacob Howard “had the confidence of more conservative Republication Senators and thus had larger impact on Reconstruction legislation than their more belligerent allies.”); 9 DICTIONARY OF AMERICAN BIOGRAPHY 278 (1927).

107. See CURTIS, *supra* note 93, at 115 n.162 (stating that Howard may not have accepted Bingham's view).

108. See BERGER, *supra* note 77, at 38 (providing the Congressmen's views of the rights that would “clothe the Negro”).

109. Although his theory is an outlier, Professor John Harrison has argued—with characteristic force and panache—that the PI Clause was simply a rule of nondiscrimination forbidding more than distinctions based on alienage. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1388 (1992) (“The main point of the clause is to require that every state give the same privileges and immunities of state citizenship—the same positive law rights of property, contract, and so forth—to all of its citizens.”).

110. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823).



*Coryell*,<sup>111</sup> an opinion that Justice Bushrod Washington issued while riding circuit. New Jersey had prohibited any person that was not an “actual inhabitant or resident” from raking oysters in state waters.<sup>112</sup> *Corfield* claimed that the Comity Clause barred New Jersey from discriminating, based on alienage, with respect to oyster-raking rights.<sup>113</sup> Justice Washington held that an oyster-raking right was not covered under the Comity Clause because it was not a privilege or immunity of citizens, and in the process he announced a now-famous inventory of those concepts.<sup>114</sup> (The idea that *Corfield* distinguished between the incidents of state and national citizenship came later.<sup>115</sup>)

Justice Washington expressed “no hesitation” in limiting privileges and immunities of citizens to those “which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union.”<sup>116</sup> He then lists some members of what I will call the “*Corfield* inventory”: the rights to the protection of government, to the enjoyment of life and liberty, to pursue and obtain happiness and safety, to reside anywhere and to travel as necessary to work, to have contractual capacities honored, to sue in state court, to hold and alienate property, to be subject to nondiscriminatory taxation, and a few others.<sup>117</sup> Most importantly, Justice Washington observed that the privileges and immunities of citizens in the several states included the right “to claim the benefit of the writ of habeas corpus.”<sup>118</sup>

The *Corfield* inventory was the primary decisional reference point for Fourteenth Amendment framers contemplating the meaning of “privileges or immunities.”<sup>119</sup> Senator Howard, in his remarks on the chamber floor, underscored that the PI Clause encompassed the privileges and immunities described in *Corfield*.<sup>120</sup> In introducing a passage from *Corfield*, which he read into the Congressional Record, Howard stated:

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111. *Id.* at 549.

112. *Id.* at 550.

113. *See id.* at 551 (“The inquiry is, what are the privileges and immunities of citizens in the several states?”).

114. *See id.* at 551–52.

115. *See infra* Part III.B.1 (discussing the *Slaughter-House* opinion).

116. *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823).

117. *Id.* at 551–52.

118. *Id.* at 552.

119. *See AMAR, supra* note 95, at 176 (pointing to *Corfield* as the “leading comity clause case on the books in 1866”).

120. For the record of what Senator Howard said, see CONG. GLOBE, 39th Cong., 1st Sess. 2764–65 (1866).

But we may gather some intimation of what probably will be the opinion of the judiciary by referring to [*Corfield*] . . . and I will trouble the Senate but for a moment by reading what that very learned and excellent Judge [Washington] says about these privileges and immunities of the citizens of each State in the several States.<sup>121</sup>

The list of immunities that Howard used *Corfield* to identify included “the benefit of the writ of *habeas corpus*.”<sup>122</sup> The public understood Howard’s position; the *New York Times* reported details of Howard’s famous speech on the front page.<sup>123</sup>

Other prominent advocates of the Amendment trotted out the *Corfield* inventory whenever they were pressed to explain the meaning of Section 1. Senator Lyman Trumbull was the coauthor of the Thirteenth Amendment and a pivotal Republican figure in passing the Fourteenth. In promoting the Civil Rights Act of 1866,<sup>124</sup> Trumbull described Justice Washington’s opinion as the “most elaborate upon” the meaning of “privileges and immunities,” and he read the *Corfield* inventory—including the reference to the habeas privilege—into the Congressional Record.<sup>125</sup> Trumbull’s view is particularly important because he was a primary exponent of the contemporaneous legislation expanding the habeas privilege to reach state custody.<sup>126</sup> James Wilson, Chairman of the House Judiciary Committee, also read into the record the *Corfield* inventory, including the habeas privilege.<sup>127</sup> Even academics who argue that the PI Clause did not apply the Bill to the states make their argument by positioning *Corfield* as the *exhaustive* list of privileges and immunities incident to national citizenship.<sup>128</sup>

There was obviously disagreement between Democrats and Republicans in the Thirty-Ninth Congress, and the Republican coalition was more heterogeneous than many treatments of the Fourteenth Amendment imply.<sup>129</sup> Notwithstanding all of that differentiation, virtually everyone in the Thirty-Ninth Congress understood (1) that the PI Clause barred some state action with

121. *Id.*

122. *Id.* (quoting *Corfield*).

123. See N.Y. TIMES, May 24, 1866, at 1.

124. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866).

125. CONG. GLOBE, 39th Cong., 1st Session, 474–75 (1866).

126. See *infra* notes 289–91 and accompanying text (discussing Trumbull’s actions).

127. CONG. GLOBE, 39th Cong., 1st Session, 1117–18 (1866).

128. See, e.g., BERGER, *supra* note 77, at 22, 36, 41, 43 (concluding that *Corfield* and the rights secured by the Civil Rights Act were exhaustive of “privileges or immunities” referenced in Fourteenth Amendment); Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger’s History*, 54 N.Y.U. L. REV. 651, 673–75 (1979) (concluding that *Corfield*’s list exhausts the definition of “privileges or immunities”).

129. See BENEDICT, *supra* note 97, at 21 (describing the types of Republicans during the Reconstruction).

respect to privileges and immunities bound to a person's status as a U.S. citizen,<sup>130</sup> and (2) that those privileges and immunities included a habeas privilege.<sup>131</sup>

### B. *The Minefield of Incorporation Precedent*

Few have given much thought to how contact with the Fourteenth Amendment affected the habeas privilege. The oversight reflects the interpretive difficulties that the exercise presents. The relationship has also been neglected because of the academic capital committed to whether and how the Fourteenth Amendment "incorporates" the Bill, and the fact that the privilege is a right not enumerated there.

As all law students learn, the Fourteenth Amendment contains two potential devices for incorporating rights against the states: the PI Clause and the DP Clause. The Supreme Court threw an early wrench into incorporation, snuffing the PI Clause in *Slaughter-House*.<sup>132</sup> As a result, most incorporation has been left to the DP Clause.<sup>133</sup> The meaning of each Clause has been warped around how programmatically it applies the Bill against the states and how much discretion it affords Justices to develop unenumerated rights. The thrust and parry of incorporation combat is well known,<sup>134</sup> as are the

130. See *supra* Part III.A.1 (discussing the original meaning of the Comity Clause).

131. See *supra* Part III.A.2 (discussing the *Corfield* case).

132. 83 U.S. (16 Wall.) 36 (1872).

133. See CURTIS, *supra* note 93, at 171–96 (discussing how the courts viewed incorporation).

134. Basically, the Supreme Court deployed the Due Process Clause to do the incorporation work that the Framers of the Fourteenth Amendment had probably intended for the PI Clause. See *infra* Part III.B.2 (discussing the PI clause after *Slaughter-House*). Different Justices became associated with each of three different incorporation paradigms. Justice Black was a champion of "total" or "mechanical" incorporation, which embraced the idea that the Fourteenth Amendment was intended to incorporate the first eight Amendments in the Bill, and nothing else. See *Betts v. Brady*, 316 U.S. 455, 474–75 (1942) (Black, J., dissenting) (concluding that the Sixth Amendment is incorporated by the Fourteenth Amendment); *Adamson v. California*, 332 U.S. 46, 68–123 (1941) (Black, J., dissenting) (concluding that the Fifth Amendment is incorporated by the Fourteenth Amendment). Justice Frankfurter advocated more fluid use of the Due Process Clause to force states to observe rights that are principles of fundamental fairness and implicit in ordered liberty. See *Adamson*, 332 U.S. at 59–68 (Frankfurter, J., concurring):

Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.

Justice Brennan charted a middle ground frequently described as "selective incorporation," in which the Supreme Court determines, clause-by-clause, whether rights enumerated in the Bill were sufficiently fundamental to be applied against the states via the Due Process Clause. See *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (holding that the "Fifth Amendment's exception from

combatants.<sup>135</sup> Although some discussion of incorporation is appropriate, I forego unnecessary detail and note simply that “incorporation mechanics” refers to two-step Fourteenth Amendment theories in which (1) a right is identified and (2) state action impairing it is prohibited.

The strength of my account is largely unaffected by one’s view of Fourteenth Amendment incorporation mechanics, for two reasons. First, even after *Slaughter-House*, precedent leaves no doubt that the habeas privilege is one of the few “privilege[s] or immunit[ies] of [U.S.] citizens” covered by the PI Clause. Second, my account does not really involve the second mechanical step of incorporation at all. The PI Clause declared a habeas privilege of national citizenship that is enforceable against the *federal government*, a function that is independent of how the Amendment activated rights against the states.

### 1. How *Slaughter-House* Marginalized the PI Clause

*Slaughter-House* is the big reason why so many overlook the effect of the Fourteenth Amendment on the habeas privilege. In *Slaughter-House*, the Supreme Court disabled the PI Clause by paring the covered privileges and immunities down to a thin sliver.<sup>136</sup> As it turns out, a signal virtue of my account is that the habeas privilege still occupies that real estate.

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compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States.”); *Cohen v. Hurley*, 366 U.S. 117, 154–60 (1961) (Brennan, J., dissenting) (concluding that the Fifth Amendment is incorporated by the Fourteenth); *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 274–76 (1960) (discussing the different views on what the Fourteenth Amendment incorporates).

135. The generative academic event was Justice Black’s dissent in *Adamson*, which three other Justices joined. Justice Black argued at length that the Fourteenth Amendment’s purpose was to incorporate, almost exclusively, the privileges and immunities enumerated in the Bill. See *Adamson*, 332 U.S. at 68–123 (Black, J., dissenting) (concluding that the Fifth Amendment is incorporated by the Fourteenth Amendment). Justice Black’s *Adamson* dissent provoked a snarling 139-page response by Professor Charles Fairman. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 5 (1949). Professor William Crosskey was the first major academic defender of Justice Black and critic of Professor Fairman. See 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1083–175, 1381 n.11 (1953); William Winslow Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 2–119 (1954). Justice Black’s dissent and Professor Fairman’s article have become elemental subjects for subsequent generations of influential incorporation scholars. See Amar, *supra* note 35, at 1194 (naming a few of these scholars, including Hugo Black, Felix Frankfurter, William Brennan, Henry Friendly, William Crosskey, Louis Henkin, Erwin Griswold, and John Ely).

136. See *infra* notes 140–49 and accompanying text.

Courts have largely interpreted the Article IV Comity Clause as a rule of nondiscrimination: states could not impose alienage disability with respect to privileges and immunities.<sup>137</sup> The PI Clause, on the other hand, was an absolute limit on government power to impair privileges or immunities of citizens, even if the impairment was nondiscriminatory.<sup>138</sup> *Slaughter-House* held that there was another salient distinction between the Comity and PI Clauses: that between rights of state citizenship and rights of national citizenship.<sup>139</sup>

*The Slaughter-House Cases* were six consolidated appeals.<sup>140</sup> Each involved the same Louisiana charter granting an exclusive privilege to butcher livestock around New Orleans.<sup>141</sup> The cases collectively presented the question whether the Fourteenth Amendment created an individual right to challenge a state-created monopoly—and, more abstractly, what kinds of individual rights the Amendment recognized as “privileges or immunities” enforceable against the states.<sup>142</sup>

The Supreme Court’s answer was “not many.” *Slaughter-House* held that the Fourteenth Amendment merely barred States from abridging privileges or immunities incident to *national* citizenship.<sup>143</sup> The list of national privileges and immunities is thin: to travel to the seat of government, to petition the federal government to redress grievances, to transact with it, to travel within the states, to access seaports, and a few others.<sup>144</sup> *Slaughter-House* held that the PI Clause did not bar the States from abridging privileges and immunities incident to *state* citizenship,<sup>145</sup> which are subject only to the Comity Clause’s nondiscrimination rule.

Justice Miller’s *Slaughter-House* opinion is logically problematic for a number of reasons. First, privileges and immunities

137. See Fred O. Smith, Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 *FORDHAM L. REV.* 1941, 1954 n.68 (2012) (“The clause has long been understood to mean that states cannot discriminate on the basis of an American citizen's state citizenship.”).

138. *But cf.* Harrison, *supra* note 109, at 1388 (arguing that PI Clause should be read as a nondiscrimination rule).

139. See *infra* notes 140–49 and accompanying text. For a defense of this distinction, see Lash, *Origins, Part II, supra* note 102, at 336–37.

140. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872) (caption).

141. See *id.* at 59 (discussing the Louisiana charter).

142. See *id.* at 72–73.

143. See *id.* at 73–74.

144. *Id.* at 79–80.

145. See *id.* at 74 (“It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.”).

of state citizenship might also be privileges and immunities of national citizenship.<sup>146</sup> Second, the *Corfield* inventory reads far more naturally as a set of rights incident to citizenship generally than it does as a set incident only to state citizenship.<sup>147</sup> Third, Justice Miller's textual analysis treated "privileges or immunities of citizens of the United States" as tantamount to "privileges or immunities unique to national citizenship." Fourth, any distinct set of national privileges and immunities is much broader than Justice Miller defined it.<sup>148</sup> Finally, the opinion seemed to ignore the basic structural changes wrought by the Civil War and Reconstruction.<sup>149</sup> Whatever combination of misgivings one might have about *Slaughter-House*, though, it has not been overruled. As a result, the PI Clause remains largely unavailable to litigants seeking to enforce most individual rights against the States.

Despite the pronounced Supreme Court division in *Slaughter-House*—four Justices generated three different dissents—the one thing upon which all Justices seemed to agree was that the habeas guarantee reflected in the Suspension Clause was a privilege of national citizenship. The majority's primary objective was to exclude the ability to challenge a slaughter-house monopoly from the bundle of privileges and immunities incident to national citizenship. And in order to show that the privileges and immunities of national citizenship was not a null set, Justice Miller listed several examples—including the "privilege of the writ of habeas corpus."<sup>150</sup> He also

146. See Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 646–48 (1994) ("Many of the same rights are protected by both the state and the federal constitutions.").

147. Justice Miller accomplished this feat by misquoting the Comity Clause. He paraphrased it as relating to the privileges and immunities of citizens "of the several States," but the Comity clause involves the privileges and immunities of citizens "in the several States." See LOUIS LUSKY, *BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION 194–95* (1975) (explaining how Justice Miller's opinion misquotes the Constitution).

148. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 96 (1872) (Field, J., dissenting) (reasoning that, if the PI Clause "only refers . . . to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.").

149. See Walter Dellinger, *Remarks on Jeffrey Rosen's Paper*, 66 GEO. WASH. L. REV. 1293, 1294 (1998):

The more fundamental error of *Slaughter-House* was its failure fully to recognize that the nation fought a great Civil War and in its aftermath changed the fundamental law of the republic. *Slaughter-House* erred by resurrecting antebellum presuppositions of state primacy and state autonomy that had been the justifications of the Confederacy. That mistake dwarfs . . . any concern about which clause the Court got wrong.

150. *Id.* at 79.

described the privilege as a “right[ ] of the citizen guaranteed by the Federal Constitution.”<sup>151</sup>

Justice Field dissented and was joined by all other dissenters: Justices Swayne and Bradley, as well as Chief Justice Chase. For these dissenters, the PI Clause did not refer merely to privileges and immunities of national citizens *qua* national citizenship, but to privileges and immunities that “of right belong to the citizens of all free governments.”<sup>152</sup> They believed that the PI Clause reached a bundle of privileges and immunities at least as broad as the *Corfield* inventory. And among those privileges and immunities mentioned by Justice Washington in *Corfield* was the right to “claim the benefit of the writ of habeas corpus.”<sup>153</sup>

There were two other dissenting opinions. Justice Bradley wrote to underscore the idea that rights of state and national citizenship were identical, and that one “of these rights was that of *habeas corpus*, or the right of having any invasion of personal liberty judicially examined into, at once, by a competent judicial magistrate.”<sup>154</sup> Justice Bradley also quoted the *Corfield* excerpt explicitly mentioning habeas corpus.<sup>155</sup> Justice Swayne’s dissent was more cryptic,<sup>156</sup> but he joined the dissents of both Justices Field and Bradley.<sup>157</sup> Ultimately, the Justices in *Slaughter-House* did not agree on much, but the proposition that the PI Clause included the habeas privilege commanded unanimous support.

## 2. The PI Clause after *Slaughter-House*

*Slaughter-House* announced that the rights associated with state and national citizenship were distinct, and the habeas privilege

151. *Id.*

152. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 97 (Field, J., dissenting).

153. To add insult to injury, worth mentioning is that, if Justice Miller were correct and Article IV and the Fourteenth Amendment were talking about privileges and immunities of distinct types of citizenship, then habeas probably should not appear on both lists. The fact that it does suggests that Justice Miller erred.

154. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 115 (Bradley, J., dissenting).

155. *Id.* at 117 (Bradley, J., dissenting) (citing *Corfield v. Coryell*, 6 F. Cas. 546, 546 (C.C.E.D. Pa. 1823)).

156. Justice Swayne stated that the “citizen of a State has the same fundamental rights as a citizen of the United States, and also certain others . . . arising from his relation to the State . . .” *Id.* at 126 (Swayne, J., dissenting). He then remarked that there “may thus be a double citizenship, each having some rights peculiar to itself.” *Id.* (Swayne, J., dissenting). Both statements cannot be true. If state citizenship carries all the rights of national citizenship, then the proposition in the second sentence—that there might be some rights of national citizenship that are not rights of state citizenship—cannot be true.

157. *Id.* at 124 (Swayne, J., dissenting).

remained in the latter category.<sup>158</sup> Even after the *Slaughter-House* mischief became a fully realized obstacle to incorporation, however, the PI Clause's relationship to the habeas privilege survived intact. Three years after *Slaughter-House*, in *United States v. Cruikshank*, the Supreme Court reiterated the distinction between citizenship types: "The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other."<sup>159</sup> Following *Slaughter-House* and *Cruikshank*, the Court declined a slew of opportunities to use the PI Clause to incorporate features of the Bill against the states.<sup>160</sup> The Supreme Court gestured towards the PI Clause's role in incorporating rights of national citizenship but refused to include various express constitutional guarantees in that category. (I address the role of the DP Clause in incorporation mechanics in Section III.C0)

Amongst those who envisioned a more robust role for the PI Clause—call them *Slaughter-House* contrarians<sup>161</sup>—the habeas privilege also remained central. In *Ex parte Spies* (also known as *The Anarchists' Case*),<sup>162</sup> well-known attorney and politician John Randolph Tucker made a celebrated argument in favor of incorporation under the PI Clause.<sup>163</sup> In that case, he argued that rights preexisting the Constitution (1) became privileges and immunities of citizens by enumeration in the original Constitution or the Bill, and (2) ran against the states by operation of the Fourteenth Amendment.<sup>164</sup> Included in the list of the declared privileges, according to Tucker, was the "security for habeas corpus."<sup>165</sup> A half decade later, Justice Field expressly relied on Tucker's reasoning

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158. *See id.* at 74.

159. 92 U.S. 542, 549 (1875).

160. *See, e.g.*, *Twining v. New Jersey*, 211 U.S. 78, 96–99 (1908) (Fifth Amendment right against self-incrimination); *Maxwell v. Dow*, 176 U.S. 581, 602–05 (1900) (Fifth Amendment right to criminal prosecution under indictment and Sixth Amendment right to criminal trial by jury); *In re Kemmler*, 136 U.S. 436, 448–49 (1890) (Eighth Amendment "cruel and unusual punishment" clause); *Presser v. Illinois*, 116 U.S. 252, 264–68 (1886) (Second Amendment right to bear arms); *Walker v. Sauvinet*, 92 U.S. 90, 90 (1875) (Seventh Amendment jury-trial right in civil cases).

161. This is a nod to Professor Akhil Amar, who coined the term "Barron contrarians" to describe those who thought that the Supreme Court wrongly decided *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), and that the Bill applied to the states of its own force. Amar, *supra* note 35, at 1203.

162. *The Anarchists' Case*, 123 U.S. 131, 151 (1887) (citing the oral argument).

163. *Id.*

164. *Id.*

165. *Id.*



when he dissented in *O'Neil v. Vermont*,<sup>166</sup> the case in which the Court formally considered whether the PI Clause incorporated parts of the Bill.<sup>167</sup> Justice Field's *O'Neil* dissent, in turn, became a staple of *Slaughter-House* contrarianism.<sup>168</sup> Justice Harlan, who had joined Justice Field in *O'Neil*, continued to champion incorporation under the PI Clause. He dissented in *Maxwell v. Dow*,<sup>169</sup> a case in which the Court refused to apply grand and petit jury guarantees against the states, and in *Twining v. New Jersey*,<sup>170</sup> a case in which the Court refused to incorporate the Fifth Amendment rule against self-incrimination. The *Twining* majority expressly associated Justice Harlan's PI Clause position with that offered in Justice Field's *O'Neil* dissent.

The most famous *Slaughter-House* contrarian is Justice Hugo Black. His *Adamson v. California* dissent remains the contrarians' pièce de résistance.<sup>171</sup> Justice Black's objective was twofold: (1) to establish that the Fourteenth Amendment framers intended the PI Clause as a vehicle of incorporation, and (2) to undermine the discretion that the Justices enjoyed under the ascendant DP Clause incorporation paradigm.<sup>172</sup> Having accepted that the DP Clause would be the vehicle declaring the pertinent rights, Justice Black sought to cabin judicial discretion by reference to limits native to the PI Clause.

Justice Black's preferred incorporation method is sometimes called "mechanical," to signify that it applies *only* the Bill, in its entirety,<sup>173</sup> to the states. The label is misleading in at least one respect: for Justice Black, the privileges and immunities of national citizenship encompassed a little more than the rights enumerated in the Bill. He concurred with a Justice Douglas dissent arguing that the PI Clause covered interstate travel, seemingly on the ground that it

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166. 144 U.S. 323, 361 (1892) (Field, J., dissenting).

167. *Id.* at 361 (Field, J., dissenting) ("I think the definition given at one time before this court by [Tucker] is correct, that the privileges and immunities of citizens of the United States are such as have their recognition in or guaranty from the constitution of the United States." (citing *The Anarchists' Case*, 123 U.S. at 150)).

168. *Twining v. New Jersey*, 211 U.S. 78, 98 (citing *O'Neil*, 144 U.S. at 361 (Field, J., dissenting)).

169. 176 U.S. 581, 605 (1900).

170. *Twining*, 211 U.S. at 114.

171. 332 U.S. 46, 68–123 (1947) (Black, J., dissenting).

172. See HUGO BLACK, A CONSTITUTIONAL FAITH 23–42 (1968).

173. Technically, Justice Black only believed that the Fourteenth Amendment was capable of incorporating the first eight Amendments, as the Ninth and Tenth could not be the logical operand of an incorporation function. Amar, *supra* note 35, at 1227.

was one of the rights specified in *Slaughter-House*.<sup>174</sup> Justice Black's later opinions indicate that he thought the PI Clause encompassed the rights enumerated in the Bill *and* the rights specified in *Slaughter-House*, but not the natural rights in the *Corfield* inventory.<sup>175</sup> That information is significant because the habeas privilege was an enumerated right that Justice Miller's *Slaughter-House* opinion brought within the scope of the PI Clause. To the extent that Justice Black was concerned with limiting judicial discretion, the idea that the PI Clause included the habeas privilege would have been unproblematic because the privilege *was* enumerated in the Constitution.

Justice Thomas is the leading *Slaughter-House* contrarian on the modern Supreme Court. In what could turn out to be an important footnote to his PI Clause concurrence in *McDonald v. City of Chicago*, the Second Amendment incorporation case,<sup>176</sup> he wrote:

I see no reason to assume that the constitutionally enumerated rights protected by the Privileges or Immunities Clause should consist of all the rights recognized in the Bill of Rights and no others. Constitutional provisions outside the Bill of Rights protect individual rights, see, e.g., Art. I, § 9, cl. 2 (granting the "Privilege of the Writ of Habeas Corpus"), and there is no obvious evidence that the Framers of the Privileges or Immunities Clause meant to exclude them.<sup>177</sup>

So Justice Thomas believes that the PI Clause refers to, among other things, the habeas privilege. Guessing what Justice Thomas thinks such incorporation entails is not easy, however, in part because he mischaracterizes the Suspension Clause as "granting" the privilege.<sup>178</sup> I will discuss the declared privilege's scope in Part IV, but first I want to address a superficially similar account, based on the DP Clause, in which the Fourteenth Amendment guarantees a federal habeas forum to state prisoners.

174. See *Edwards v. California*, 314 U.S. 160, 168–80 (1941) (Douglas, J., dissenting) ("The right to move freely from State to State is an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference.").

175. See Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 261 n.41 (1982) ("[Justice Black's] later opinions suggest that, apart from the Bill of Rights guarantees, he would have included only the rights relating directly to the *Slaughter-House* view of privileges and immunities—that is, rights that owe their existence to the federal government, federal constitution, or federal laws.").

176. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3084 (2010).

177. *Id.* at 3084 n.20 (Thomas, J., concurring in the judgment).

178. As explained in Part II.A, the Suspension Clause doesn't "grant" anything; it announces restrictions on a suspension power. The power to suspend and the privilege on which it operates originate from somewhere other than the Suspension Clause itself. I strongly suspect that somewhere in the details lies a dispute with Justice Thomas over what I believe the constitutional privilege entails, but not with the fact that the PI Clause covers it.

*C. Incorporating the Privilege Under the DP Clause*

Before reaching the status of a state-prisoner privilege under the PI Clause, it is worth asking whether an account based on the DP Clause and using traditional incorporation mechanics could get to the same place. It can't. Professor Jordan Steiker has developed the best version of the DP Clause account.<sup>179</sup> Pursuant to selective incorporation, the DP Clause incorporates "fundamental" rights "implicit in the concept of ordered liberty" and deeply rooted in our nation's history and traditions.<sup>180</sup> On Professor Steiker's account, the DP Clause guaranteed a federal habeas forum to state prisoners because, by 1868, that privilege met the selective-incorporation criteria.<sup>181</sup> Professor Steiker relies heavily on Professor Akhil Amar's theory of "refined incorporation."<sup>182</sup> According to Professor Amar, individual rights behave differently depending on whether they restrain the federal government (as specified in the original Constitution or the Bill) or whether they restrain the states (as required by the Fourteenth Amendment).<sup>183</sup>

Professor Steiker's account differs markedly from mine, most notably because he rejects the possibility that contact with the PI Clause could be the source of a federal privilege to challenge state custody.<sup>184</sup> A DP Clause account has other complications, however: it requires an argument that a state-prisoner privilege was historically

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179. See Steiker, *supra* note 4, at 899 ("In light of the Court's 'incorporation' decisions, the courts should recognize the privilege of habeas corpus protected by the Suspension Clause as a Fourteenth Amendment due process right."). Professor Michael O'Connor wrote an article arguing that the PI Clause entitles state prisoners to a federal forum when they are incarcerated on account of race. See O'Connor, *supra* note 71, at 666 ("The Privileges or Immunities Clause was intended to constitutionalize federal habeas corpus review of any state attempts to deprive an individual of liberty based upon race."). Professor O'Connor is more comfortable relying on PI Clause contact than is Professor Steiker, but on his account, the privilege translates ultimately only into a limited constitutional guarantee against racially biased custody. O'Connor, *supra* note 71, at 660. That limit is premised on a flawed reading of the 1867 Habeas Corpus Act's legislative history. Compare O'Connor, *supra* note 71, at 686–87 ("While the language of the act would change, its purpose to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery, would remain unchanged." (internal quotation marks omitted)), with *supra* Part IV.B.4. Moreover, Professor O'Connor does not explain why PI Clause contact would restrict federal action, and he relies on traditional incorporation mechanics. O'Connor, *supra* note 71, at 718–19.

180. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quotations omitted).

181. Steiker, *supra* note 4, at 869–70.

182. *Id.* at 869.

183. Amar, *supra* note 35, at 1264–66.

184. Professor Steiker occasionally invokes the text of the PI Clause as supporting the spirit of Due Process incorporation, but he believes that the PI Clause cannot do the work. Steiker, *supra* note 4, at 869.

fundamental, and it struggles to show how the Fourteenth Amendment produced a restriction on the *federal* government. An account of the same privilege based on the PI Clause avoids these issues.

### 1. A Note on Terminology: The Incorporated Object

Too much is made of incorporating the Suspension Clause. Professor Steiker's titular question is whether the Fourteenth Amendment incorporates the Suspension Clause,<sup>185</sup> but the incorporated phenomenon is the habeas privilege. The Suspension Clause references that privilege, but the Suspension Clause itself is nothing more than a limit on suspension power. Habeas power was an incident of the habeas privilege, which is defined largely by corresponding judicial power over categories of custodians.<sup>186</sup> If "creation" of the privilege must be attributed to any string of constitutional text, then the strongest candidate is Article III, not the Suspension Clause.<sup>187</sup> And if Article III secures a constitutionally guaranteed habeas privilege, then the more generally applicable principle that Congress can electively vest Article III judicial power does not apply to habeas jurisdiction.<sup>188</sup>

Also, Framers of the original Constitution were legal naturalists: they believed that rights preexisted acts of textual declaration.<sup>189</sup> When people write about incorporating something that the Suspension Clause "created," they are reading the original Constitution—a document written by legal naturalists—through positivist lenses. Analyzing Fourteenth Amendment contact with the Suspension Clause, rather than Fourteenth Amendment contact with the habeas privilege that the Suspension Clause recognizes, produces answers to the wrong questions. No function that the Suspension Clause actually performs is involved in an account of what happens when processing the privilege through the PI Clause.

The mistaken attribution is more than a semantic issue. If the corollary of the habeas privilege is Article III judicial power, then the implications of guaranteeing the privilege to a new category of

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185. *Id.* at 862.

186. *See supra* Part II.A (introducing the habeas privilege)

187. Kovarsky, *supra* note 8, at 754, 774–78.

188. *See* Martin H. Redish & Curtis E. Woods, *Congressional Power To Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 46–47 (1975) (stating the general rule).

189. *See generally* AMAR, *supra* note 95, at 147–56 (describing how declaratory theory influenced the development of the Fourteenth Amendment).

prisoners change. *Habeas Power* explained that a prisoner's habeas privilege corresponds to federal habeas power, the vesting of which is mandatory, over that prisoner's custodian.<sup>190</sup> If the Constitution guarantees a habeas privilege reaching state custodians, then that privilege necessarily means that Congress cannot strip the corresponding judicial power to discharge state prisoners.

## 2. The Vehicle of Incorporation

An account based on the DP Clause suffers from some of the more general problems afflicting selective incorporation: the absence of Framers' intent,<sup>191</sup> no textual anchor,<sup>192</sup> adherence to an open-ended incorporation methodology,<sup>193</sup> and the subjectivity involved in declaring a "privilege" sufficiently fundamental to qualify for due process enforcement at all.<sup>194</sup> That ground is well traversed, and I will not cross it much here.

Recall specifically the test for an incorporated right: whether it is a necessary feature of "ordered liberty," and whether it is "fundamental" because it is a "principle of justice [deeply] rooted in the traditions and conscience of our people"<sup>195</sup> Although the Anglo-American role of the habeas writ is difficult to overstate, the privilege did not manifest in general federal power to review state custody for the first eight decades of American history. That state of affairs creates different problems depending on one's preferred approach to constitutional interpretation. If one is an originalist who measures from 1868 the extent to which a right is fundamental, then defenders of a DP Clause theory must establish that American tradition encompassed a broad right to contest state custody even though

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190. See Kovarsky, *supra* note 8, at 774–78 (discussing a conceptualization of the habeas privilege as a corollary of Article III judicial power).

191. See Louis Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 YALE L.J. 74, 77–78 (1982) ("There is no evidence, and it is difficult to conceive, that anyone thought or intended that the amendment should impose on the states a selective incorporation. In the absence of any special intention revealed in the history of the amendment, we have only the language to look to.").

192. See Bryan H. Wildenthal, *The Road to Twining: Reassessing the Disincorporation of the Bill of Rights*, 61 OHIO ST. L.J. 1457, 1526 (2000) (calling the theory of selective incorporation "textually untenable").

193. See STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION 161 (1994).

194. See Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again,"* 74 N.C. L. REV. 1559, 1560 (1996) ("While fundamental fairness nominally incorporates most of the procedures set out in the Bill of Rights, the Court has qualified those procedures according to ad hoc balances of competing interests.").

195. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quotation marks omitted).

Congress did not provide for it until 1867.<sup>196</sup> Or, if one is not an originalist and believes that Justices can rank a right as fundamental even if it was not so viewed in 1868, then the argument slips back into the most severe problems associated with the absence of authoritative legal sourcing.

### 3. State Action and Incorporation

The most significant problem with traditional incorporation—irrespective of the vehicle—is that Section 1 of the Fourteenth Amendment is a prohibition on *state* action: “No *State* shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any *State* deprive any person of life, liberty, or property without due process of law . . . .”<sup>197</sup> The problem with an account in which the DP Clause incorporates the habeas privilege is its attempt to support a constitutional restriction on the *federal* government. This problem is probably the reason why Professor Steiker refers to incorporation as the “more circuitous” route to a privilege with Type 2 features.<sup>198</sup>

Recall our diagram from Part II.B. Figure 2 presents a slightly modified diagram of habeas privilege configurations. Any Fourteenth Amendment account should be assessed by how effectively it justifies adding Type 2 privilege features to the preexisting Type 1 guarantee.

**Figure 2: Fourteenth Amendment Accounts**

	Federal Custody	State Custody
Federal Privilege	(1) federal privilege to contest federal custody (original Constitution)	(2) federal privilege to contest state custody (Kovarsky: PI Clause; Steiker: DP Clause)
State Privilege	(3) state privilege to contest federal custody	(4) state privilege to contest state custody

196. The earlier provisions creating habeas power to relieve state custody were very limited. The 1833 Force Act created a habeas remedy for federal officials in state custody for performing official duties, and the 1842 Force Act created a remedy for foreign-state representatives acting in their official capacities. See Habeas Corpus Act of 1842, ch. 257, 5 Stat. 539 (1842); Habeas Corpus Act of 1833, ch. 57, § 7, 4 Stat. 634 (1833).

197. U.S. CONST. amend. XIV, § 1 (emphasis added).

198. Steiker, *supra* note 4, at 867.

As Section IV.B will explain, the proposition that Fourteenth Amendment contact results in a state habeas privilege is implausible in light of the intent and structure of the Reconstruction Amendments.<sup>199</sup>

Traditional incorporation mechanics do not adequately explain how the Fourteenth Amendment added Type 2 features to the preexisting habeas guarantee. If the Fourteenth Amendment truly incorporates the habeas privilege against the states, then either “no state shall make or enforce any law” abridging it (the PI Clause version), or a state unconstitutionally takes “life, liberty, or property” by violating it (the DP Clause version). In either formulation, a habeas privilege processed using traditional incorporation mechanics generates hiccups: privileges with Type 3 and 4 features. The existing DP Clause incorporation model is at its weakest in explaining how it avoids that implausible result.

The DP Clause account basically relies on structure and purpose to dominate a textually expressed limit on state action.<sup>200</sup> Professor Amar’s theory of refined incorporation provides a deeply satisfying account of how individual rights might change when they are incorporated against the states, but it does not alter the way we understand the words “no *State* shall . . . abridge” and “nor shall any *State* . . . deny.”<sup>201</sup> For the federal habeas privilege, even the best DP Clause incorporation account still struggles against the Clause’s text.

#### *D. The Habeas Privilege Consensus*

Now consider what I call the declarative function of the PI Clause. Combining the second sentence of Section 1 of the Fourteenth Amendment with content of the first yields a federal privilege to contest state custody that is consistent with *both* the PI Clause’s text and the more general structure and purpose of the Fourteenth Amendment. Section 1’s first two sentences together declare national citizenship and the bundle of rights it entails. By definition, the federal government may not abridge that newly declared bundle of rights. Under my account, there is simply no need to develop a

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199. Professor Steiker realized this problem. *See id.* at 894 (“The difficulty in reconstructing the privilege of habeas corpus in this way is that it runs contrary to the Reconstruction Congress’s apparent belief that recourse to the state courts would not adequately ensure enforcement of the newly established rights.”).

200. *See id.* at 899 (“On the other hand, though, the text does not support, and in fact undermines, the claim that the Fourteenth Amendment establishes a right to federal habeas corpus. Accordingly, the case for constitutionalizing such federal review must be based on other considerations.”).

201. U.S. CONST. amend. XIV, § 1 (emphasis added).

complex theory explaining why the absence of a federal habeas forum constitutes state abridgment (PI Clause) or deprivation (DP Clause).

The PI Clause inspires many interpretive disagreements, including the meaning of “privileges” and “immunities,” as well as the extent to which state action is restricted. One of the few Fourteenth Amendment propositions that should provoke no interpretive resistance, however, is that the PI Clause declares the habeas privilege to be a right of national citizenship.<sup>202</sup> That conclusion is perhaps most easily drawn for textualists—habeas is the only entitlement denominated as a *privilege* in the Articles of Constitution or the Bill. The proposition also works well in an originalist idiom, whether focused on intent or understanding. Perhaps most importantly, the proposition’s acceptability does not differ depending on whether one is a *Slaughter-House* enthusiast or contrarian. As I explained in my introduction to Part III, my account does not require readers to declare allegiances in pitched battles over interpretive methods.

#### IV. A PRIVILEGE OF NATIONAL CITIZENSHIP TO CHALLENGE STATE CUSTODY

In Part IV, I work from a premise established in Part III: virtually all authority recognizes that the PI Clause does *something* to the habeas privilege. But what does it do? What features of the habeas privilege does the PI Clause constitutionalize? The best interpretation is that the PI Clause entitles state prisoners to a federal habeas forum, thereby adding Type 2 features to the original constitutional guarantee. Congress submitted Fourteenth Amendment at the same time as it enacted the nation’s most important change in habeas privilege: the Habeas Corpus Act of 1867. The Act extended the federal privilege to reach state custody. The PI Clause declared *that* version of the habeas guarantee to be an incident of national citizenship. If habeas power over state custodians is constitutionally inviolable, then federal courts must revisit basic questions about the modern structure of postconviction review for state prisoners.

In Part IV, I want to distinguish two concepts that observers frequently conflate. In short, the first-order issue of whether habeas power reaches state custody is distinct from the second-order issue of whether such power permits federal review of a state criminal

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202. In his seminal work on the Bill and incorporation, Professor Amar repeatedly identifies the privilege as a Fourteenth Amendment referent. AMAR, *supra* note 95, at 175, 179, 211, 219, 227, 297.



conviction. In state-prisoner cases, those questions often appear in tandem, because criminal convictions are the primary (but not exclusive) form of custody exercised by states.<sup>203</sup> Sections IV.A and IV.B focus on the state-custody question. Section IV.C reaches some preliminary conclusions about the postconviction question, but the habeas privilege belonging to criminally confined state prisoners deserves comprehensive treatment in another Article.

### A. Rejecting the State-Privilege Products

Before analyzing the federal privilege that the PI Clause secures, I want to deal briefly with the state-privilege possibilities. Whatever power corresponds to an expanded privilege, that power is federal. The PI Clause, that is, does not entitle prisoners to a state habeas forum. Consider once again our familiar matrix, slightly modified to preview the content of this Part:

**Figure 3: New Features of Privilege**

	Federal Custody	State Custody
Federal Privilege	(1) federal privilege for federal custody (disqualified under Section IV.B.1)	(2) federal privilege for state custody (created by PI Clause contact, Sections IV.B.2 to IV.B.5)
State Privilege	(3) state privilege for federal custody (disqualified under Section IV.A.1)	(4) state privilege for state custody (disqualified under Section IV.A.2)

Here, I argue that the PI Clause added Type 2 features to the original Constitution's Type 1 guarantee. First, though, I devote Part IV.A to the implausibility of accounts in which the Civil War amendments produced a constitutional guarantee for Privilege Types 3 and 4, both of which involve state judicial power. The PI Clause did not transform the federal habeas guarantee into a state privilege any more than the DP Clause converted the First Amendment into a state right.

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203. For example, habeas process is used to review civil custody such as pretrial detention, mental health commitment, quarantines, and restrictions on sexual predators. *See, e.g., Seling v. Young*, 531 U.S. 250, 253–56 (2001) (reviewing Washington state statute for civilly committing “sexually violent predators”).

### 1. A Type 3 State Privilege for Federal Prisoners

This one is easy. If Reconstruction was designed to force the rebellious states to swallow federal supremacy as the price of restoration, then the Fourteenth Amendment does not empower state judges to void federal custody. In *Tarble's Case*,<sup>204</sup> moreover, the Supreme Court held that a Type 3 privilege was unconstitutional. In fact, even if *Tarble* had broken the other way, the Fourteenth Amendment would not have been the reason. The argument in favor of a Type 3 privilege is predicated on the intent of the 1789 Framers and common practice during the early years of the republic—not some subsequent constitutional event.<sup>205</sup> Thus, contact with the PI Clause did not guarantee a state forum to contest federal custody.

### 2. A Type 4 State Privilege for State Prisoners

Privilege Type 4 is slightly more difficult to dismiss. A PI Clause–created state privilege to contest state custody is a more plausible outcome than is a PI Clause–created state privilege to challenge federal custody. No less a figure than Professor William Crosskey, the earliest academic ally of Justice Black, appears to have taken this view.<sup>206</sup> Its pedigree notwithstanding,<sup>207</sup> the proposition breaks down under the microscope.

First, in the abstract, there was no need to secure a state habeas privilege. When the Fourteenth Amendment was ratified,

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204. 80 U.S. (13 Wall.) 397 (1871).

205. See *supra* note 52 (collecting authority explaining argument that the constitution did permit state habeas review of federal custody). This argument has been accomplished by reading *Tarble's Case* as setting forth a rule of federal preemption rather than a rule of categorical prohibition. See, e.g., Shapiro, *supra* note 43, at 64 n.17 (citing RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 437–39 (6th ed. 2009)) (arguing that reading *Tarble's Case* as a broad constitutional rule about exclusive federal jurisdiction over the writ of habeas corpus, rather than only as a statutory preemption rule precluding states from granting the writ to a petitioner in federal custody, would “run afoul of basic concepts of the role of the state courts in enforcing federal, and especially constitutional, rights”); see also Amar, *supra* note 43, at 1510 (contending that *Booth* and *Tarble* should be read as “attributing to Congress a desire for exclusive federal court jurisdiction in habeas proceedings against federal officers”).

206. See CROSSKEY, *supra* note 135, at 1129 (reading Fourteenth Amendment contact to show that “the guaranty against suspension [of the writ is] now operative against the states in their own courts”).

207. Professor Amar also seemed to endorse this understanding. See Amar, *supra* note 35, at 1258 (citing CROSSKEY, *supra* note 135, at 1128–30) (stating that Justice Miller, in his *Slaughter-House* opinion, “had in mind only state interference with efforts to assemble and petition the federal government, and to secure habeas relief on the basis of federal laws in federal courts”).

almost every state already guaranteed one, in some form or another.<sup>208</sup> In 1787, four of the twelve states with written constitutions provided habeas guarantees.<sup>209</sup> True, some early state constitutions omitted habeas language, but that was only because nobody questioned that citizens had a state privilege.<sup>210</sup>

By the Civil War, formal state commitment to habeas privileges was even more pronounced. Except for Vermont, every state admitted to the Union since 1787 had a written constitutional provision resembling the federal Suspension Clause.<sup>211</sup> Vermont had a habeas provision, but it provided that the privilege should *never* be suspended.<sup>212</sup> Furthermore, six of the nine original states that lacked written habeas guarantees eventually enacted state constitutional provisions providing them.<sup>213</sup>

The states prolifically used the common-law writ,<sup>214</sup> so legislation was unnecessary.<sup>215</sup> Using state habeas statutes to supplement common-law process was old hat; such was the relationship between the English common-law writ and the Habeas Corpus Act of 1679.<sup>216</sup> The state privilege was largely useless to slaves and abolitionists before the Civil War—and to freedmen and southern

208. See Dallin H. Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 249 (1965) (“All twenty-one of the new states admitted after 1787 and prior to 1860, with the sole exception of Vermont, wrote into their constitutions a habeas corpus provision practically (and in most cases exactly) identical to the federal provision.”).

209. GA. CONST. of 1777, art. LX; MASS. CONST. ch. 6, art. VII (1780); N.C. CONST. of 1776, art. XII; N.H. CONST. (unnumbered provision) (1784).

210. See Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143, 146 (1952)

211. ALA. CONST. art. I, § 17 (1819); ARK. CONST. of 1836, art. II, § 18; CAL. CONST. of 1849, art. I, § 5; FLA. CONST. of 1838, art. I, § 11; ILL. CONST. of 1818, art. VIII, § 13; IND. CONST. of 1816, art. I, § 14; IOWA CONST. of 1846, art. I, § 13; KAN. CONST. of 1855, art. I, § 8; KY. CONST. of 1792, art. XII, § 16; LA. CONST. of 1812, art. 6, § 19; ME. CONST. art. I, § 10 (1820); MICH. CONST. of 1835, art. I, § 12; MINN. CONST. art. I, § 7 (1857); MISS. CONST. of 1817, art. I, § 17; MO. CONST. of 1820, art. XIII, § 11; OHIO CONST. of 1802, art. VIII, § 12; OR. CONST. art. I, § 23 (1857); TENN. CONST. of 1796, art. XI, § 15; TEX. CONST. of 1845, art. I, § 10; WIS. CONST. art. I, § 8 (1848).

212. VT. CONST. art. XII (1836).

213. CONN. CONST. of 1818, art. 1, § 14; DEL. CONST. of 1792, art. I, § 13; GA. CONST. of 1798, art. IV, § 9; N.J. CONST. of 1844, art. I, § 11; N.Y. CONST. of 1821, art. VII, § 6; PA. CONST. of 1790, art. IX, § 14; R.I. CONST. of 1842, art. I, § 9. In other words, when the Civil War started, only Maryland and South Carolina lacked express constitutional habeas provisions. And both of those states added habeas provisions to their constitutions as the Fourteenth Amendment was being ratified. Md. CONST. art. III, § 55 (1867); S.C. CONST. of 1868, art. I, § 17.

214. See Oaks, *supra* note 208, at 287–88 (“[T]he availability of the writ [of habeas corpus] for many types of restraints—differing from state to state—remained under the authority of the common law.”).

215. State habeas statutes were not prevalent until well into nineteenth century. See *id.* at 251–52.

216. Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.).

loyalists after it—but the Equal Protection Clause was the Fourteenth Amendment text addressed to that problem.<sup>217</sup>

Second, the Supreme Court has repeatedly held that prisoners have no constitutional right to postconviction review in state court.<sup>218</sup> Of course, state *postconviction* review is not synonymous with state *habeas* review, but if that distinction were important, one might expect it to register in at least some federal opinions. I have been unable to locate a single one.

Third, conceptualizing the federal enforcement mechanism for a state privilege is a challenge. If a state unconstitutionally restricted habeas relief in a particular case, then the prisoner would need federal enforcement. Relying exclusively on the appellate review in the Supreme Court is a dubious enforcement model.<sup>219</sup> Using lower federal courts to enforce a Type 4 privilege, on the other hand, would be a tad ironic. The state custody would become unlawful only after the state violated the Type 4 privilege, at which point a federal enforcement action would ripen. The vehicle for such *à la carte* review of state custody is . . . a federal habeas proceeding. Naturally, constructing a Type 4 privilege to avoid federal habeas process makes little sense if the only plausible way of enforcing the privilege necessarily entails that very same process.<sup>220</sup>

### *B. The Type 2 Federal Privilege for Federal Prisoners*

The case for interpreting the PI Clause to guarantee a Type 2 privilege is a lot stronger than the accounts necessary to support other outcomes. The Fourteenth Amendment and the 1867 Habeas Corpus Act were both outputs of the Thirty-Ninth Congress, in which Republican membership was struggling internally with a consensus approach to Reconstruction and was at loggerheads with President

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217. For an explanation of the relationship between a habeas privilege and sovereign protection, see *infra* Part IV.B.5.

218. See *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (citing *Johnson v. Avery*, 393 U.S. 483, 488 (1969)) (“We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions . . .”).

219. Its direct review of the custody determination necessarily precedes any state collateral adjudication, so there would always need to be an additional round of review to adjudicate the collateral restriction. Supreme Court review of state collateral determinations is technically feasible, but the idea of the Supreme Court reviewing all state custody is unappealing and, to say the least, unlikely to be what the Framers of the Fourteenth Amendment had in mind.

220. Of course, if Congress stripped the federal habeas jurisdiction of the lower federal courts, then this version of the incorporated habeas privilege would just be a right without a remedy. I am not arguing that every constitutional right requires a judicial remedy, but I am making a more atmospheric point: the adopted vehicle would, ironically, place more pressure on the vehicle nominally avoided.

Andrew Johnson.<sup>221</sup> Republicans had used the Fourteenth Amendment's promise to secure their seats on one end of Pennsylvania Avenue and were about to try to evict the occupant living at the other.<sup>222</sup> When Congress submitted the Fourteenth Amendment for state consideration, almost all of the Southern governments rejected it on the first go-around, and there was real doubt as to whether they would approve it on a second.<sup>223</sup> The Reconstruction Acts were therefore designed to kneecap the wayward Southern governments and to promote replacements more receptive to, among other things, the Fourteenth Amendment.<sup>224</sup> With much of their proposed legislation left vulnerable amidst the rift with President Johnson and with the uncertain status of restoration,<sup>225</sup> Congressional Republicans were simply trying two different ways to skin the cat: they were expanding the habeas privilege through both veto-proof legislation and a constitutional amendment.<sup>226</sup>

Congressional Republicans wanted an amendment redundant of statutory habeas principles for the same reasons they wanted an amendment redundant of the Civil Rights Act of 1866: because the Fourteenth Amendment would make the statutory principles immune both from adverse judicial review and from legislative reversal when rebellious states were restored.<sup>227</sup> Habeas legislation and the Amendment were ultimately successful, so the 1867 Habeas Corpus Act was as much a definition of the privilege specified in the

221. See BENEDICT, *supra* note 97, at 162–68; Raoul Berger, *Activist Indifference to Facts*, 61 TENN. L. REV. 9, 27 (1993).

222. For a succinct account of the impeachment of President Johnson, see Arthur M. Schlesinger, Jr., *Reflections on Impeachment*, 67 GEO. WASH. L. REV. 693, 696 (1999).

223. Florida, Georgia, and Texas rejected the Amendment before the beginning of the second session. BENEDICT, *supra* note 97, at 212. The rest of the rebellious states soon followed, prompting congressional Republicans to rethink how the conditions for restoration would relate to the Amendment. See *id.* at 212–17 (explaining the internal debates between radical and conservative Republicans on how to proceed). For a substantial book on Fourteenth Amendment consideration in the former confederacy, see BOND, *supra* note 85.

224. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 500–01, 505–06 (1989).

225. Although the House had not yet impeached him, President Johnson had vetoed two signature pieces of the 1866 Reconstruction legislation: the Civil Rights Act and the Freedman's Bureau Bill. See ERIC L. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* 287–90, 314–15 (1960).

226. See BENEDICT, *supra* note 97, at 169 (explaining how the Reconstruction Committee “accepted as its basis of action” that it would incorporate “into one constitutional amendment nearly all the elements of the centrist program”).

227. For a discussion of the relationship between the Civil Rights Act of 1866 and the Fourteenth Amendment, see *supra* notes 77, 128, 225.

Amendment as an effectuation of it.<sup>228</sup> That privilege entitled state prisoners to a federal habeas forum.

### 1. Rejecting the Redundant Type 1 Interpretation

If the PI Clause protects some habeas privilege, then might it be one with Type 1 features: a federal privilege to test federal custody? Unlikely. Positioning Type 1 features as a product of the PI Clause would mean that the PI Clause changed nothing about the guarantee whatsoever—an outcome inconsistent with the Part III’s basic premise.<sup>229</sup> All available information indicates that the PI Clause changed at least *something* about the habeas guarantee.

The Fourteenth Amendment did bar states from abridging the privilege, but under the Supremacy Clause,<sup>230</sup> states could not abridge a Type 1 privilege under the original Constitution anyway.<sup>231</sup> Professor Crosskey recognized this problem and believed (incorrectly, by my lights) that Fourteenth Amendment contact guaranteed some state habeas privilege.<sup>232</sup> Interpreting the PI Clause to guarantee nothing more than a federal habeas forum to federal prisoners is redundant enough to disqualify the outcome from the potential solution set.

### 2. Declaring a Habeas Privilege, Circa 1868

Because the PI Clause performs the “declarative function,”<sup>233</sup> someone constructing the Clause’s effect on the habeas privilege would be more interested in the scope of the privilege in 1868 than in 1789. Albeit far from a consensus, more and more scholars are endorsing Reconstruction, not the Constitutional Convention, as the historical

228. For this reason, the 1867 Habeas Corpus Act was not an anticipatory exercise of enforcement power under Section 5 of the Fourteenth Amendment, but legislatively defined the scope of the privilege the PI Clause requires.

229. Even if the Articles of Constitution did not guarantee a federal privilege to contest federal custody, an outcome with Type 1 features would still result in no change in the existing relationship.

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

231. See Amar, *supra* note 35, at 1258–59:

Miller had in mind only state interference with efforts to assemble and petition the federal government, and to secure habeas relief on the basis of federal laws in federal courts . . . . Clearly the supremacy clause standing alone, or as glossed by [*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)], would have sufficed to prohibit state interference with federal petitions and federal writs.

232. See CROSSKEY, *supra* note 135, at 1129. I reject the state-privilege outcomes for the reasons set forth in *supra* Part IV.A.

233. See *supra* Part III.D (explaining that the PI Clause declares the habeas privilege to be a right of national citizenship).

starting point for interpreting and constructing phenomena touched by the Fourteenth Amendment.<sup>234</sup> The case for this paradigm shift is strongest when the phenomenon at issue—such as the habeas privilege—touches on the basic relationship between federal courts and the states. Even the *Slaughter-House* majority expressed the view that the “privileges or immunities” referenced in the PI Clause required it to look to the features of the pertinent rights during Reconstruction.<sup>235</sup> People with certain interpretive commitments—that the only data pertinent to constitutional interpretation and construction is from 1789—will have no truck with my account.<sup>236</sup> But I want to convince everyone else.

When construing the PI Clause, we tend to focus on only the opening words in the second sentence: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .”<sup>237</sup> The second sentence of Section 1 is a self-contained expression of what I call the “anti-abridgment” function, a limitation on state action. In combination with the first sentence, which provides that all persons born or naturalized in the United States are citizens of the United States, the second sentence also performs a subtle declarative function. The PI Clause declares not only that there are privileges and immunities of national citizenship, but also the fact of national citizenship itself. That particular declaration was extremely significant.

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234. Professor Kurt Lash, for example, has written three articles on what one might call “privileges or immunities originalism.” See Kurt T. Lash, *The Origins of the Privileges or Immunities Cause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 GEO. L.J. 1275, 1281 (2013) [hereinafter Lash, *Origins, Part III*] (arguing that popular rejections of Johnson’s “alternative” amendment replacing the PI Clause with the language of the Comity Clause shows that the set of privileges and immunities contemplated by the PI Clause was more expansive than the set contemplated by the Comity Clause); Lash, *Origins, Part II, supra* note 102, at 337 (arguing that a first draft of the Fourteenth Amendment protecting common-law rights was rejected in favor of the final draft that left common-law rights to the states); Kurt T. Lash, *The Origins of the Privileges or Immunities Cause, Part I: “Privileges and Immunities” as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1243–44 (2010) [hereinafter Lash, *Origins, Part I*] (arguing that the term “privileges or immunities of citizens of the United States” was an Antebellum term of art with meaning separate from state-conferred privileges and immunities).

235. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80 (1872) (explaining the need to look to privileges established by Reconstruction Amendments).

236. Those judges and scholars more popularly coded originalist might disclaim reliance on the status of the right after Fourteenth Amendment ratification, opting instead to assess the scope of the right under the native constitutional provision. See Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 1012 (2012) (arguing that scholars who attempt to understand constitutional rights through the lens of Reconstruction are not usually categorized as “originalists”).

237. U.S. CONST. amend. XIV, § 1.

Before the Civil War and Reconstruction, state citizenship was the atomic unit of political membership;<sup>238</sup> the existence of national citizenship was in doubt.<sup>239</sup> By implication, the rights attached to national citizenship status were also unclear. The Civil War created a national state, and Reconstruction—largely through Section 1 of the Fourteenth Amendment—made national citizenship concrete.<sup>240</sup> In *Dred Scott*, Chief Justice Taney had bottomed the holding that African Americans could not invoke federal diversity jurisdiction on the theory that, whatever the status of their state citizenship, they were not citizens of the United States.<sup>241</sup> He then characterized the right to go to federal court as a “privilege” of citizens.<sup>242</sup> House Republican John Bingham, Senator Jacob Howard, and other pivotal members of the Thirty-Ninth Congress made the connection between *Dred Scott* and the Fourteenth Amendment explicit; they sought, among other things, to declare national citizenship.<sup>243</sup> In a less contentious portion of *Slaughter-House*, Justice Miller recognized the declarative function of the PI Clause, vis-à-vis *Dred Scott*:

[Section 1] opens with a definition of citizenship . . . of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. . . . It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union. . . . Whether this proposition was sound or not had never been judicially decided. But . . . [the Court held, in *Dred Scott v. Sandford*, 60 U.S. 393 (1857)], only a few years before the outbreak of the civil war, that a man of African descent . . . was not and could

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238. See Lash, *Origins, Part I, supra* note 234, at 1259, 1282–83 (illustrating that, under antebellum law, Article IV was interpreted to indicate that the “privileges and immunities” conferred by the Constitution were separate from privileges and immunities (rights) conferred by state law).

239. See Lash, *Origins, Part III, supra* note 234, at 1293 (explaining that Johnson’s veto of the Civil Rights Bill indicated that he believed “Congress lacked constitutional authority to confer the status of national citizenship”); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 335 (2006) (arguing that the Fourteenth Amendment’s Citizenship Clause caused a “fundamental transformation of nationhood”).

240. See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877, at 277 (1988) (“[T]he Civil War created a national state and Reconstruction added the idea of a national citizenry whose common rights no state could abridge . . .”).

241. See *Dred Scott v. Sandford*, 60 U.S. 393, 405 (1856) (“It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States.”).

242. *Id.* at 403.

243. See CONG. GLOBE, 39th Cong., 1st Sess. 430 (1866) (statement of Rep. Bingham) (“[I]t was intended by the framers of the Constitution that the day should Come when the words ‘free person’ in the Constitution would cease to be operative, for the simple reason that all would be free and none bond in the United States.”); *id.* at 2765 (statement of Senator Howard) (arguing on behalf of the Senate drafting committee of the Fourteenth Amendment for the inclusion of the Citizenship Clause); *id.* at 3032 (statement of Senator Henderson) (“The Federal Constitution failed to define United States citizenship and equally failed to declare what classes of persons should be entitled to its privileges.”).



not be a citizen of a State or of the United States. This decision . . . was to be accepted as a constitutional limitation of the right of citizenship . . . To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed.<sup>244</sup>

If the urgent declarative function of the PI Clause was to declare the fact and content of national citizenship,<sup>245</sup> then the urgent anti-abridgment function involved the states. There was no analogous urgency with respect to restrictions on the *federal* government because limits on federal action inhered in the declaration of privileges and immunities incident to national citizenship. If the habeas privilege is a privilege of national citizenship, then the federal government cannot abridge the privilege any more than the states can.

### 3. The Interpretive Significance of Pre-1867 Habeas Law

By 1868, lawmakers had been primed to accept the reality of expanded privilege scope. Even before the Habeas Corpus Act of 1867 (discussed in detail below), the federal privilege had grown beyond the metes and bounds originally set by the Judiciary Act of 1789.<sup>246</sup> During the first half of the nineteenth century, the courts and Congress put to rest the idea that the privilege could not reach custody of state sovereigns. Habeas power could operate *in personam* on state jailors, just like anybody else.

Congress enacted two antebellum privilege expansions vesting federal judges with habeas power to discharge state prisoners. Neither was a generalized habeas power over state detention; each targeted a particular form of state custody. When South Carolina flirted with nullification,<sup>247</sup> Congress passed the pejoratively titled Force Act of

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244. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72–73 (1872). At least insofar as Justice Miller positions the PI Clause as a response to *Dred Scott* and as a means of declaring the fact of national citizenship, he is almost certainly correct. See Crosskey, *supra* note 135, at 4–5 (“[T]he purposes of the initial provision of the amendment defining state and national citizenship seem perfectly clear: the foregoing doctrine of the *Dred Scott Case* was to be nullified . . .”).

245. See Ackerman, *supra* note 224, at 509–10 (describing one of the purposes of the Fourteenth Amendment as defining national citizenship and reversing *Dred Scott*); James E. Pfander, *The Tidewater Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925, 1958 (2004):

The switch to a focus on the rights of national citizenship corresponded to an emphasis on national citizenship in the opening sentence of the Fourteenth Amendment and its declaration that all persons born or naturalized in the United States are citizens of both the United States and the state in which they reside.

246. See Ch. 20, § 14, 1 Stat. 73 (1789).

247. See RICHARD E. ELLIS, *THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES’ RIGHTS, AND THE NULLIFICATION CRISIS* 75–76 (1987) (describing the drafting of the Ordinance of Nullification that would declare the Tariffs of 1828 and 1832 null and void in South Carolina).

1833, which basically extended the privilege to federal officials taken into state custody for doing their jobs.<sup>248</sup> In 1842, Congress again extended the habeas privilege, targeting state custody exercised over foreign nationals acting on official behalf of their home countries.<sup>249</sup>

Neither statute embodied a general habeas power to review state custody, but the 1833 and 1842 Acts established that the habeas privilege could rely on federal judicial power to discharge prisoners from state custody.<sup>250</sup> To be sure, those laws were expressing congressional powers rather than fulfilling constitutional obligations; but they reflect a gradual change in how the privilege helped distribute power between federal and state governments. So, when the Thirty-Ninth Congress went about its work, the country was primed to accept a state-prisoner privilege as an incident of national citizenship.

#### 4. The Habeas Corpus Act of 1867

The Fourteenth Amendment entitles a state prisoner to a federal habeas forum not because the PI Clause “incorporated” the privilege against the states but because the Clause restricted the federal government. I have already discussed some legislative history pertinent to Fourteenth Amendment interpretation,<sup>251</sup> but I want to focus on the coinciding legislative history of the 1867 Habeas Corpus Act.<sup>252</sup> For my purposes, the latter legislative history may provide a

248. See Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634–35:

[A] judge of any district court of the United States . . . shall have power to grant writs of habeas corpus in all cases of a prisoner or prisoners . . . where he or they shall be committed or confined on . . . for any act done, or omitted to be done, in pursuance of a law of the United States . . . .

Federal judges later used Force Act provisions to free federal officials arrested by Northern States for enforcing fugitive slave laws. See, e.g., *Ex parte Robinson*, 20 F. Cas. 965 (S.D. Ohio 1856) (using the Force Act to free a federal marshal who was held in contempt and jailed by a state court).

249. See Act of Aug. 29, 1842, ch. 257, 5 Stat. 539 (1842):

[A] judge of any district court of the United States . . . shall have power to grant writs of habeas corpus in all cases of any prisoner or prisoners in jail or confinement, where he, she, or they, being subjects or citizens of a foreign state, and domiciled therein, shall be committed or confined . . . for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under commission, or order, or sanction, of any foreign State or Sovereignty . . . .

250. See William M. Wiecek, *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, 36 J. S. HIST. 530, 534–35 (1970) (explaining that, until the Force Act of 1833 and Habeas Corpus Act of 1842 increased the habeas jurisdiction of the federal courts, “federal habeas relief was available only when the petitioner had been confined by an order of a federal court and only before trial”).

251. See *infra* Part III.A (discussing the original meaning of the Fourteenth Amendment).

252. See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (1867) (expanding the jurisdiction of federal courts to issue writs of habeas corpus for state prisoners).

window into the contemporaneous understanding of the habeas privilege bound to national citizenship by the PI Clause.

The 1867 Act was a central feature of the Republican Reconstruction plan because it furnished a federal remedy for state violations of newly announced federal rights.<sup>253</sup> Its text and legislative history sound in the same register of federal supremacy as do the other pieces of Reconstruction legislation—specifically, legislation clearing the path to a federal courthouse.<sup>254</sup> The Act moved through exactly the same committees as did all important Thirty-Ninth Congress work product. The prominent Republican lawmakers populating these committees also boasted membership on the all-powerful Joint Committee on Reconstruction.<sup>255</sup> To characterize as coincidental recurring language in the Fourteenth Amendment, the 1867 Habeas Act, and other Reconstruction legislation—or as ornamental textual alterations in those laws—is to ignore the basic structure of Reconstruction lawmaking.<sup>256</sup>

The Habeas Corpus Act of 1867 entitled state prisoners to a federal habeas forum, which dramatically expanded the privilege beyond that provided under 1789 Judiciary Act.<sup>257</sup> The Thirty-Ninth Congress submitted the Fourteenth Amendment to the states on June

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253. See Wiecek, *supra* note 250, at 532, 538 (explaining that the Act changed the nature of the writ of habeas corpus and allowed federal courts to exert their primacy in deciding questions about individual liberties).

254. See James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2064 (1992) (discussing how statutory provision for writs of error and habeas corpus, as well as for removal, clearly shows that Congress wanted to maximize federal court review of state court decisions); see also Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 800–05 (1965) (representing perhaps the most comprehensive work on the centrality of federal habeas and removal jurisdiction).

255. See BENEDICT, *supra* note 97, at 143–44 (detailing membership of Joint Committee).

256. See, e.g., Liebman *supra* note 254, at 2049 (underscoring intended resemblance of Reconstruction habeas and removal legislation); Steiker, *supra* note 4, at 886 (“A ‘contextual’ reading of the habeas statute does not suggest a series of isolated jurisdictional developments. Rather, these statutes reveal Congress’s overall effort—through removal, writ-of-error, and habeas jurisdiction—to enhance opportunities to adjudicate federal questions in the federal courts.”); Wiecek, *supra* note 250, at 531 (drawing parallels between development of habeas and removal jurisdiction during Reconstruction).

257. See *Ex parte Dorr*, 44 U.S. 103, 105 (1844) (holding that the court did not have the authority to issue a writ of habeas corpus for a state prisoner). Between 1789 and 1867, the two intervening provisions reaching state custody were quite limited. When South Carolina moved to nullify federal tax law, Congress passed the Force Act of 1833, which created a habeas remedy for federal officials arrested for enforcing federal law. See Habeas Corpus Act of 1833, ch. 57, § 7, 4 Stat. 634 (1833). Responsive to a diplomatic crisis, the 1842 Force Act created a remedy for foreign representatives acting in their official capacities. Habeas Corpus Act of 1842, ch. 257, 5 Stat. 539 (1842).

13, 1866,<sup>258</sup> and passed the Habeas Corpus Act on February 5, 1867.<sup>259</sup> When the States ratified the Fourteenth Amendment and it went into effect on July 28, 1868,<sup>260</sup> the PI Clause constitutionalized a federal habeas privilege that reached state custody—the very privilege that the Thirty-Ninth Congress had created the year before.

There is little legislative history on the 1867 Habeas Act, a vacuum allowing long-standing dispute over whether the Act was meant to authorize federal habeas review of state criminal convictions.<sup>261</sup> The issue of postconviction review, however, is distinct from the more general issue of whether the Act empowered federal judges to reach state custody generally. (I discuss the postconviction issue in Section IV.C.) The 1867 Habeas Act's plain text clearly establishes a general habeas power over state jailors. One might challenge the broad textual interpretation, however, by arguing that Congress designed the statute with a narrower purpose in mind. The Act was designed, the purposivist might argue, only to secure the liberties of Southern loyalists and freedmen,<sup>262</sup> the latter of which were suffering under the Black Codes proliferating throughout the South.<sup>263</sup> In turn, the more narrow, purposivist interpretation facilitates the conclusion that “there is no foundation for the Court's assertions that the 1867 act was intended to afford a new remedy for state prisoners.”<sup>264</sup>

The narrowing interpretation requires an interpreter not only to ignore text but also to engage in a rather strained reading of the legislative history. Advocates of that interpretation place far too much emphasis on an early resolution initiating the drafting process,<sup>265</sup>

258. CONG. GLOBE, 39th Cong., 1st Sess. 3149 (1866).

259. See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (1867).

260. The last state that needed to ratify the Amendment had actually done so earlier in the month, but July 28 is the day that Secretary of State William Seward declared the Fourteenth Amendment effective. See Sec'y William H. Seward, U.S. Dep't of State, Proclamation No. 13, 15 Stat. 708 (1868).

261. See *supra* note 73 (citing the work of two professors with opposing views on the subject).

262. See, e.g., Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1113 (1995) (“Congress was specifically concerned with freedmen, or their children, held under apprenticeship laws.”). Almost all of these arguments build off an article on the Act's legislative history by Professor Lewis Mayers. See Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 31 (1965).

263. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 48 (1988) (noting the Republican leadership's proposed legislation to override codes that discriminated against former slaves).

264. Mayers, *supra* note 262, at 55–56.

265. See *infra* notes 280–94 and accompanying text (discussing the Habeas Corpus Act of 1867's journey through Congress).

ignore explanations for statutory word choice that are completely consistent with the consensus understanding,<sup>266</sup> and selectively omit important context about pertinent statements made by legislators *after* the Act passed.<sup>267</sup>

On the final day of the Thirty-Eighth Congress—March 3, 1865—President Lincoln signed a joint resolution declaring the freedom of military families.<sup>268</sup> The Thirteenth Amendment had not been ratified, so the resolution was intended to reach persons not covered by the Emancipation Proclamation.<sup>269</sup> A few days into the Thirty-Ninth Congress, on December 19, 1865, Representative Samuel Shellabarger introduced a unanimously-consented-to resolution that

the [Judiciary Committee] be directed to inquire and report . . . what legislation is necessary to enable [federal courts] to enforce the freedom of the wives and children of soldiers of the United States under the joint resolution of Congress of March 3 1865, and also to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery.<sup>270</sup>

At this point, the resolution contemplated that the Judiciary Committee recommend legislation securing the freedom of military

266. See *infra* note 286 and accompanying text (quoting the response to a congressman’s concern about preserving judicial authority to discharge prisoners taken by the military governments).

267. After asserting that various legislative point people misunderstood crucial parts of the legislation that they were drafting, Professor Mayers acerbically observed that they figured out what the legislation meant and expressed that understanding in floor debates two years later. See Mayers, *supra* note 262, at 39, 39–40 n.39 (suggesting Trumbull was ignorant of the bill’s purpose when he reported it and only understood two years later). Mayers does not convey the political context of the subsequent floor debates. Everyone—Democrats and Republicans—had switched positions because of the firefight over the bill repealing Supreme Court jurisdiction over habeas decisions in lower courts. See Wiecek, *supra* note 250, at 540, 542 (“The 1868 debates . . . presented the anomalous spectacle of Republicans depreciating the scope of their 1867 habeas corpus measure, while the Democrats argued for a liberal reading of the act.”). After *Ex parte Milligan*, most lawmakers believed that the Supreme Court was poised to strike down key pieces of Reconstruction. The Republicans were seeking to avert that result through the repealer, and the Democrats were trying to secure it. As a result, the Democrats were giving floor speeches making the repealed jurisdiction sound like the font of universal liberty, and the Republicans were trying to make it sound like no big deal. See *id.* 540–42. The legislators had not come to an authentic understanding of the 1867 Habeas Act; they were engaged in rank political posturing.

268. J. Res. 29, 38th Cong., 2d Sess. (1865).

269. The Emancipation Proclamation, which freed slaves only in slave states that remained in active rebellion, was an exercise of his Executive Authority to Command the Army and the Navy. See Abraham Lincoln, *Final Emancipation Proclamation January 1, 1863*, in LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 424 (Don E. Fehrenbacher ed., 1989).

270. CONG. GLOBE, 39th Cong., 1st Sess. 87 (1865). Much of Mayers’ paper assumes that the Resolution remained the controlling description of legislative purpose throughout the processing of the bill. When subsequent remarks about the purpose or operation of the Act are inconsistent with the joint resolution, Professor Mayers describes the speakers as “ignorant” of the purpose of the Act; the comments were perfectly reasonable because the purpose of the Act had changed. See, e.g., Mayers, *supra* note 262, at 38–39 (analyzing Senator Trumbull’s remarks).

families pursuant to the joint resolution of March 3, 1865, and the “liberty” of all persons pursuant to the Thirteenth Amendment. (The Secretary of State had certified the Thirteenth Amendment the day before Shellabarger’s resolution.)<sup>271</sup> On January 8, 1866, Representative James Wilson, the Republican chairman of the House Judiciary Committee, introduced and referred to his committee a “bill to secure the writ of Habeas Corpus to persons held in slavery or involuntary servitude contrary to the Constitution of the United States.”<sup>272</sup>

If the legislative history ended there, then the narrowing interpretation looks about right. But the Judiciary Committee—along with the Select Committee on Elections, ground zero for Reconstruction policy in the House<sup>273</sup>—dramatically expanded the scope of the bill when Representative William Lawrence reported it out of the committee on July 25, 1866.<sup>274</sup> Lawrence was a conservative Republican<sup>275</sup> and one of the most respected legislators of the Reconstruction era.<sup>276</sup> Legal and historical scholarship favoring the narrow interpretation of the 1867 Act inexplicably treats the later version reported *out* of committee by Lawrence as an aberration while treating the earlier version referred *into* committee by Wilson as indicative of authentic statutory meaning.<sup>277</sup> That scholarship has it exactly backwards. The bill that the House Judiciary Committee produced as output, rather than the one it took as input, is the superior reference point for any interpretive exercise predicated on the Act’s legislative history.

The bill that Representative Lawrence reported out, which eventually became the 1867 Habeas Corpus Act, had two sections. The first provided that “the several justices and judges” of the federal courts “shall have the power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of [federal law.]”<sup>278</sup> So, section 1 of the 1867 Judiciary Act extended federal habeas power to state custody. The second section—

271. Sec’y William H. Seward, U.S. Dep’t of State, Proclamation No. 52, 13 Stat. 774 (1865).

272. Wilson’s Bill was not printed in the *Congressional Globe*, but Professor Mayers unearthed it at the National Archives. See Mayers, *supra* note 262, at 34, 34 n.16 (explaining the original handwritten bill is in the National Archives).

273. See BENEDICT, *supra* note 97, at 96–97 (referring to the House Elections Committee as one of the most conservative committees in Congress).

274. CONG. GLOBE, 39th Cong., 1st Sess. 4150 (1866).

275. BENEDICT, *supra* note 97, at 28.

276. See Wiecek, *supra* note 250, at 538 n.25 (describing Lawrence’s reputation).

277. See, e.g., Forsythe, *supra* note 262 (applying limit from Wilson’s proposed Bill to text of Lawrence’s); Mayers, *supra* note 262, at 37 (same).

278. CONG. GLOBE, 39th Cong., 1st Sess. 4150 (1866).

which some have mistakenly described as “unrelated”—expanded the Supreme Court’s appellate jurisdiction to include, speaking generally, all determinations that state action did not violate the Constitution and all determinations that federal law did.<sup>279</sup> That expanded power necessarily cemented Supreme Court jurisdiction over habeas dispositions in inferior federal courts. “Unrelated” it was not.

There are two important threads of legislative discussion that preceded passage of the 1867 Habeas Act, one from the House and one from the Senate. The House thread developed as Representative Lawrence reported out the Judiciary Committee bill. It contains a snippet of Lawrence’s floor speech, which entered the habeas canon by way of Justice Brennan’s flawed-but-iconic opinion in *Fay v. Noia*.<sup>280</sup> Lawrence conveyed that the House Judiciary Committee had proposed an amendment to section 2 of the Act, which provided that the Act would not apply to any prisoner who “is or may be held in the military custody of the military authority of the United States, charged with any military offense, or having aided or abetted [the rebellion prior to the passage of the Act.]”<sup>281</sup> Some of his House colleagues expressed concern that the Act might deny the privilege to civilians taken into custody by the military.<sup>282</sup> The famous snippet came as a response to Representative Francis Le Blond, an Ohio Democrat concerned with preserving judicial authority to discharge prisoners taken into custody by President Johnson’s military governments.<sup>283</sup> The response seems a non sequitur:

[T]he effect of [this bill] is to enlarge the privilege of the writ of *habeas corpus*, and make the jurisdiction of courts and judges of the United States coextensive with all the powers that can be conferred upon them. It is a bill of the largest liberty, and does not interfere with persons in military custody, or restrain the writ of *habeas corpus* at all.<sup>284</sup>

Lawrence’s remark may have been a weak response to the objection, but the weakness lies in the fit between question and answer. The answer still expresses the thrust of the legislation: the privilege was going to get a lot bigger, and consistent with the text of the statute, it was going to reach all custody in violation of federal

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279. See *id.* at 4150–51 (summarizing section 2 of the Act).

280. See 372 U.S. 391, 417 (1963), *abrogated by* *Coleman v. Thompson*, 501 U.S. 722 (1991) (referring to Rep. Lawrence’s description of the bill).

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

282. *Id.*

283. *Id.*

284. *Id.*

law.<sup>285</sup> Despite the confusion over the meaning of the military-custody exception,<sup>286</sup> the bill passed the House.<sup>287</sup>

When the bill moved to the upper chamber, the confusion over military detention spilled over to the Senate floor. That confusion notwithstanding, no one seemed to doubt that the bill otherwise extended the privilege to reach all unlawful custody.<sup>288</sup> Senator Trumbull reported the House bill out of the Senate Judiciary Committee on July 27, 1866.<sup>289</sup> Trumbull dropped any reference to the Joint Resolution that had marked the beginning of the process, and he made the implications for state custody abundantly clear: “Now, a person might be held under a State law in violation of [federal law], and he ought to have . . . the benefit of the writ, and we agree that he ought to have recourse to [federal courts.]”<sup>290</sup> After the same clarification regarding military custody that was necessary to move the bill through the House, as well as an amendment providing that judges from one judicial district could not issue habeas writs to prisoners in others, the bill passed the Senate.<sup>291</sup>

The Habeas Corpus Act of 1867 became law on February 5. Almost immediately, federal judges—including Chief Justice Salmon P. Chase—began using it to thwart the South’s Black Codes.<sup>292</sup> The Fourteenth Amendment, not coincidentally designed in part to

285. Professor Mayers considers it significant that the statute referenced only “any person restrained of his or her liberty,” and did not mention state “custody” or jail. Mayers, *supra* note 264, at 35 & n.18. Section 14 of the 1789 Judiciary Act, which furnished the original statutory habeas guarantee, had expressly referenced prisoners in jail. The selection of terminology, Professor Mayers believes, shows that the original intent of the statute was to extend the privilege only to freedmen and Southern loyalists. The terminological differences have much better explanations than the ones Professor Mayers provided. First, the term “jail” was used in the 1789 Judiciary Act—the term “gaol,” actually—to carve out an exception to an otherwise global habeas guarantee. Eliminating the reference to the word “jail” was a way of eliminating the exception, not extending it implicitly. Second, the statute does not mention state custody because many of the Southern states were not yet restored. Most of the South was under military control, not control of a state sovereign. Norman W. Spaulding, *Constitution As Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 2044 (2003).

286. Advocates of the narrowing interpretation are fond of pointing out LeBlond’s floor comment that “it is exceedingly difficult for us to determine the scope of the bill.” CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866). That comment was in reference to the military-custody issue, not an expression of confusion over the fact that the grant of habeas power over state custody was a general one.

287. *Id.*

288. *See id.* at 4228–29 (discussing ramifications of the bill in congressional debate).

289. *Id.* at 4228.

290. *Id.* at 4229.

291. CONG. GLOBE, 39th Cong., 2d Sess. 790 (1867); *see also id.* at 903 (1867) (reporting that the House agreed to the amendment).

292. Wiecek, *supra* note 250, at 541 (citing *In re Turner*, 24 F. Cas. 337 (D. Md. 1867)).



neutralize the Codes, was certified by the Secretary of State on July 28, 1868.<sup>293</sup> The habeas privilege, contemporaneously enforced by federal judges and guaranteed in the PI Clause, entitled a state prisoner to a federal habeas forum.<sup>294</sup> The 1867 Habeas Act and the Fourteenth Amendment were mutually reinforcing features of the federal supremacy established through Reconstruction.<sup>295</sup>

### 5. *Slaughter-House* and “Protection”

If the PI Clause referred to anything other than a federal forum, then the reference would have been news to the *Slaughter-House* majority. Per Justice Miller, privileges of national citizenship—such as the habeas guarantee—owe “their existence to the Federal government, its National character, its Constitution, or its laws.”<sup>296</sup> Some consider obvious Justice Miller’s allusion to a federal privilege to contest federal custody,<sup>297</sup> but I struggle to find such clarity. Earlier in the opinion, Justice Miller actually references Chief Justice Chase’s use of the federal habeas power to review *state* custody.<sup>298</sup> Moreover, Justice Miller twice emphasizes that the privileges and immunities of national citizenship include the right to seek “protection” from the

293. 15 Stat. 706 (1868).

294. The idea that the set of “privileges” secured by the Fourteenth Amendment included a right of access to federal courts is not limited to the habeas account I offer here. Professor Pfander has argued that the Fourteenth Amendment created authority for Congress to extend the privilege of a federal diversity forum to American citizens residing in the District of Columbia and in federal territories. See Pfander, *supra* note 245, at 1968. (Such persons were not clearly covered under the original diversity grant because they were not “citizens of a state.” *Id.* at 1925–26.)

295. I want to clear one last objection. Congress did not pass the 1867 Act in anticipation that it would have enforcement power under § 5 of the Fourteenth Amendment. (Section 5 provides that “Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”) Congress already had all the power it needed to pass the Act under Article I, § 8 (power necessary and proper to enumerated authority) or § 2 of the Thirteenth Amendment (power to enforce antislavery content). See U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . [to] make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”); U.S. CONST. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”). Congress passed the 1867 Act because it was one of the two legislative strategies it was using to reconstruct the South and to restore the rebellious states: statute and amendment. If the Fourteenth Amendment had never been ratified, only then would a federal forum for state prisoners be a matter of legislative grace.

296. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872).

297. See, e.g., Amar, *supra* note 35, at 1258 (citing CROSSKEY, *supra* note 136, at 1128–30) (calling the narrow, federal-only application of constitutional habeas principles the “conventional” reading of Miller’s *Slaughter-House* opinion).

298. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 70.

federal government,<sup>299</sup> a characterization consistent with a Type 2 privilege for the reasons explained below.<sup>300</sup> The better reading of *Slaughter-House* would assume reference to the contemporaneous scope of the habeas privilege—one with Type 2 features—absent some clear indication to the contrary. That privilege is access to a federal forum to contest *any* unlawful custody, whether under color of state or federal law.

When Justice Miller twice indicated that privileges and immunities of national citizenship entail the federal government's "protection," he was saying something that probably resonated more in 1873 than it does now.<sup>301</sup> An American citizen enjoys roughly the same relation to the sovereign as did an English subject at common law. As long as the citizen-subject maintained allegiance to the sovereign, there were privileges that corresponded to sovereign duties.<sup>302</sup> The habeas privilege corresponded to a sovereign duty of "protection."<sup>303</sup> The Thirty-Ninth Congress operated with precisely this relationship in mind, which in turn reflected popular understanding of nineteenth-century political membership.<sup>304</sup> And when the Thirty-Ninth Congress talked about the "protection" of law flowing from the habeas privilege, it was talking about a citizen's entitlement to federal protection from unlawful state activity.<sup>305</sup>

### C. *Postconviction Application*

I now attempt the subtle task of separating two issues that are almost always commingled to the detriment of anybody trying to understand either one of them. Whether the Constitution guarantees a federal habeas forum to contest certain forms of custody is a distinct question from whether that guarantee includes a privilege to contest a

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299. *Id.* at 79.

300. *See infra* notes 302–06 and accompanying text.

301. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 79.

302. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866) (statement of Rep. John Broomall) ("Upon whatever square foot of the earth's surface I owe allegiance to my country, there is owes me protection . . ."); *id.* at 2765 (statement of Sen. Jacob Howard) ("They are, by constitutional right, entitled to these privileges and immunities, and may assert this right . . . whenever they go within the limits of the [nation].").

303. *See* Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1836–37, 1902 (2009); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866) (statement of Rep. John Broomall) (connecting right to federal protection with habeas privilege).

304. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. James Wilson) (discussing the meaning of civil rights and immunities).

305. *See id.* at 1263 (statement of Sen. Jacob Howard) (explaining that federal protection was necessary because, among other things, the habeas privilege could not be "safely intrusted to the governments of the several States").

criminal conviction. The constitutional status of the state-prisoner remedy is one that must be resolved before courts can reach other pressing habeas questions.

If federal courts cannot resolve whether the Constitution entitles state prisoners to a federal habeas forum, then those courts avoid second-order questions about whether inmates may collaterally challenge a state criminal conviction. And if there is no clear account on which state inmates can obtain federal habeas review of their convictions, then courts can avoid third-order questions about the permissibility of certain restrictions on the habeas remedy in that context.

The proposition that the PI Clause secures a federal habeas forum for state prisoners therefore has enormous implications for modern postconviction law. The PI Clause did not constitutionalize every jot of the 1867 Habeas Corpus Act. Given that the content of the privilege is defined largely by the set of jailers subject to federal habeas power, however, the PI Clause did constitutionalize the 1867 Act's major feature: the extension of judicial power to custody exercised under color of state law.<sup>306</sup> Such habeas power entails judicial authority to entertain the petition for the writ, send it to any entity over which the United States may exercise personal jurisdiction, and order the prisoner discharged if custody is unlawful.<sup>307</sup> The defining feature of habeas power at common law was that it allocated to judges the authority to determine what it means for custody to be "lawful." Where a judge has habeas power over a custodian, there is judicial authority to say whether the detention is unlawful because the custodian is not authorized to detain the prisoner or because the process underlying the custody order renders it void.<sup>308</sup>

Because a state prisoner's constitutionally mandated habeas privilege corresponds to judicial power over state jailors, legislative restrictions on basic features of that power are unconstitutional.<sup>309</sup> The second half of *Habeas Power* shows that the judicial power corresponding to a federal privilege for federal prisoners should be immune from significant legislative restriction.<sup>310</sup> The basic question I want to answer in this Part is what happens when that proposition combines with the proposition I have developed in this Article: that

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306. *See supra* Part IV.B.4.

307. Kovarsky, *supra* note 8, at 760–64.

308. *Id.* at 765. More precisely, the habeas power includes authority to declare detention unauthorized because of defects in the process producing the custodial order.

309. *Id.* at 803–09.

310. *Id.* at 795–810.

the federal privilege extends to state custody. The short answer is that judicially developed restrictions on a state-prisoner privilege are constitutional; legislative limits are not. Or, to state the conclusion differently, certain legislative restrictions on habeas power unconstitutionally burden the privilege.

In 1996, Congress passed and President Clinton signed AEDPA.<sup>311</sup> AEDPA contained a raft of changes to the federal habeas statute. Two are most important for my purposes. First, AEDPA contained several new rules barring courts from considering the merits of procedurally defective postconviction challenges. Second, AEDPA modified 28 U.S.C. § 2254(d), adding a precondition to federal relief for claims decided on the merits in state court. For such claims, a federal court cannot grant relief before determining that the state decision was either legally or factually defective.<sup>312</sup> Section 2254(d)(1) contains the standard for legal defectiveness, and it is probably the most controversial rule in all of habeas law: the state proceedings must have “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.”<sup>313</sup>

Congress enacted harsh procedural limitations on relief, and § 2254(d) seems to say that federal judges cannot make independent interpretations about what process produces lawful custody. The most basic question is whether AEDPA’s restrictions on federal habeas relief are constitutional. The almost-unanimous judicial consensus is that they are.<sup>314</sup> So little dissent surfaces in part because of the gap that I target here: the absence of a satisfying constitutional account of a state-prisoner privilege. Were the Federal Constitution to require that state prisoners have a federal forum to contest the lawfulness of their custody, then courts would have to answer tough questions about whether AEDPA unconstitutionally restricts the habeas power that corresponds to the privilege.

Any sentence in a habeas opinion that contains the familiar words “it is for the legislature to determine” is probably wrong, at least in part. I express no position on the prudence of habeas restrictions, but *Habeas Power* shows that the contours of those restrictions are to be shaped by judges, not legislators.<sup>315</sup> The precise

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311. Pub. L. No. 104-132, §§ 101–08, 110 Stat. 1214, 1217–26 (1996) (codified in part at 28 U.S.C. §§ 2244–67 (2012)).

312. See 28 U.S.C. § 2254(d)(1) (legal defectiveness); *id.* § 2254(d)(2) (factual defectiveness).

313. *Id.* § 2254(d)(1).

314. See Steiker, *supra* note 4, at 863 (describing the theory as having been “abandoned” by the Supreme Court).

315. Kovarsky, *supra* note 8, at 795–810.

method for identifying “essential” features of habeas power is beyond my ambition here, and I do not proceed systematically through Title 28 in order to assess the constitutionality of every habeas provision. The lattice of modern, statutorily imposed procedural restrictions is properly the subject of another article. Suffice it to say that if the same restrictions were prudential, rather than statutory, then one would be disputing their desirability more than their constitutionality.

I will, however, commit myself to one specific position: if one accepts the view of habeas power detailed in *Habeas Power*, and accepts that it extends to state jailors, then AEDPA’s centerpiece, 28 U.S.C. § 2254(d), is unconstitutional. Section 2254(d)(1) was in many ways a statutory rule designed to mirror the judicial rule announced in *Teague v. Lane*.<sup>316</sup> The “*Teague* bar” prevented convicted inmates from invoking most subsequent Supreme Court decisions to argue that their custody was unlawful.<sup>317</sup> *Teague*’s basic effect was similar to that of § 2254(d)(1),<sup>318</sup> but the fact that *Teague* was a judicially created rule makes all the difference. The Supreme Court can limit basic features of the habeas remedy; Congress cannot.<sup>319</sup> Again, the basic habeas power allowing a judge to decide whether custody is lawful includes determining whether procedural errors preclude a finding of lawfulness.<sup>320</sup> Congress can exert virtually complete control over what qualifies as lawful custody by changing substantive law, but it cannot—absent suspension—cheat the system by tweaking the habeas remedy. It cannot insulate criminal convictions by restricting federal habeas review to “unreasonable” errors. Because § 2254(d) bars a judge from discharging prisoners whose custody the judge might correctly determine to be unlawful, it unconstitutionally restricts the habeas privilege and the power to which it corresponds.

## V. CONCLUSION

I offer a constitutional proof for the proposition that state prisoners are entitled to a federal habeas forum. A survey of pertinent habeas precedent and scholarship might lead one to (fairly)

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316. See 489 U.S. 288, 316 (1989) (holding that habeas corpus cannot be used to create new constitutional rules of criminal procedure, unless such new rules will apply retroactively to all prior defendants on collateral review).

317. See generally Patrick E. Higginbotham, *Notes on Teague*, 66 S. CAL. L. REV. 2433 (1993) (providing overview of pre-AEDPA role of *Teague*).

318. See Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 414–21 (1996) (discussing *Teague*).

319. Kovarsky, *supra* note 8, at 795–810.

320. See *supra* note 308.

characterize my conclusion as idiosyncratic, but oddities and errors are different things. In fact, none of the subsidiary propositions comprising my proof are all that remarkable: the original Constitution guaranteed a habeas privilege, the privilege was yoked to national citizenship by the PI Clause, and that privilege is available to state prisoners.

My previous article explained what habeas power entails, and this Article contends that the habeas power extends to state custody. Combining those two ideas yields the general insight sketched in Section IV.C: that constitutional problems arise when Congress severely restricts the ability of federal courts to review habeas petitions challenging state convictions. This sort of collateral review, however, is the major modern form of federal habeas activity. For that reason alone, broad-stroke decisions invalidating multiple pieces of the modern postconviction regime are unlikely. As a practical matter, change would have to be incremental. I have offered few answers on this front, although I hope to have guided readers to the right two questions: First, what are the best principles for identifying unconstitutional statutory limits on habeas power? And second, and more importantly, under those principles, which modern habeas restrictions make the cut?