11-1-2007

Suspension and the Extrajudicial Constitution

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What happens when Congress suspends the writ of habeas corpus? Everyone agrees that suspending habeas makes that particular—and particularly important—judicial remedy unavailable to those the government detains. But does suspension also affect the underlying legality of the detention? That is, in addition to making the habeas remedy unavailable, does suspension convert an otherwise unlawful detention into a lawful one? Some, including Justice Scalia in the 2004 case *Hamdi v. Rumsfeld* and Professor David Shapiro in an important recent article, answer yes.

This Article answers no. I previously offered that same answer in a symposium essay; this Article develops the position more fully. Drawing on previously unexamined historical evidence, the first half of the Article shows that treating suspension of the writ as legalizing detention is at odds with the dominant historical understanding in both England and the United States. According to that understanding, suspension affects neither the legality of detention nor the availability of post-detention remedies (like money damages) for unlawful detention. Suspension of the writ, post-detention liability, and legality are distinct questions.

My aims go beyond providing a positive account of suspension, however. In the second half of the Article, I examine a set of broader issues that my account of suspension raises but that the current literature almost entirely overlooks. The core question here is this: If suspension does not equal legalization, what are the roles and obligations of the legislative and executive branches when the writ is validly suspended? I suggest ways to think about those branches’ independent obligation to uphold and enforce the Constitution during periods of suspension, especially with regard to constitutional norms that might seem to be associated exclusively with the courts. In that respect, the Article uses suspension as a window into larger issues re-
garding the theory and mechanics of constitutional interpretation and implement-
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INTRODUCTION

Often described as the Constitution's "emergency provision," the Suspension Clause instructs 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." But what, exactly, does the Clause contemplate in the event of an emergency? By its terms, it establishes that habeas corpus may not be suspended except in certain circumstances. Suppose those circumstances exist, and suppose further that Congress enacts legislation validly suspending the writ. What follows?

Part of the answer is clear enough. As used in the Suspension Clause, "the writ of habeas corpus" refers to habeas corpus ad subjiciendum, whose "great object ... is the liberation of those who may be imprisoned without sufficient cause." Although often associated today with collateral review of criminal convictions and sentences, at its "historical core" the writ is concerned with executive detention outside the judicial system, and with providing a means of ordering the detainee's release if the


3. The Suspension Clause addresses the suspension of the "Privilege of the Writ of Habeas Corpus," not the writ itself. As the Supreme Court has explained, "The suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it." Ex parte Milligan, 71 U.S. (4 Wall.) 2, 130–31 (1866). But "suspending the writ" and "suspending habeas" are common shorthands for suspending the privilege of the writ, and I will use them here. For discussion of one short-lived attempt to assign a different meaning to "privilege," see infra text accompanying notes 194–206.

4. The Suspension Clause does not specify which branch or branches of government have the power to suspend the writ. The dominant view is that this power belongs to Congress. See Trevor W. Morrison, Hamdi's Habeas Puzzle: Suspension as Authorization?, 91 Cornell L. Rev. 411, 428–29 (2006). I assume the correctness of that view here.

5. Literally, "that you have the body to submit to." Black's Law Dictionary 715 (8th ed. 2004); see also Preiser v. Rodriguez, 411 U.S. 475, 484 n.2 (1973) ("[W]hen the words 'habeas corpus' are used alone, they have been considered a generic term understood to refer to the common law writ of habeas corpus ad subjiciendum, which was the form termed the 'great writ.'").


7. INS v. St. Cyr, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.").
confinement is unlawful. Habeas corpus is thus a vital remedy against unlawful detention, and all agree that suspending habeas corpus makes that remedy unavailable for those covered by the suspension. In an emergency falling within the Suspension Clause’s ambit, in other words, Congress can insulate the executive’s detention decisions from judicial oversight via habeas corpus while the detention is ongoing.

But does suspension also affect the underlying legality of the detention? That is, in addition to making the habeas remedy unavailable, does suspension convert an otherwise unlawful detention into a lawful one?

Consider a hypothetical. Suppose that, in the wake of another terrorist attack within the United States and on the basis of a well-founded fear that more attacks are imminent, Congress determines that the constitutional predicates for suspension are met and passes legislation suspending the writ.

Ordinarily, the courts would regard such action as presumptively unconstitutional and would uphold it only on a showing that it was the least restrictive means of pursuing a compelling state interest.

Would the fact of suspension displace that


9. By “constitutional predicates,” I mean the requirements of a “Rebellion or Invasion” during which “the public Safety may require” suspension. U.S. Const. art. I, § 9, cl. 2. Congress’s determination that these predicates are met could raise the question whether that determination is justiciable. The Supreme Court has never conclusively answered that question, but the conventional view is that suspension-related decisions are nonjusticiable. See Morrison, supra note 4, at 429–30 (citing adherents to that view). A recent article by Amanda Tyler quite forcefully challenges the conventional wisdom. See Tyler, supra note 1, at 336 (arguing that treating suspension as nonjusticiable “is at odds with the Great Writ’s heritage and place in our constitutional structure and ... would have troubling ramifications for the separation of powers and the institution of judicial review”). I take no position on the issue here. But even if satisfaction of the Suspension Clause’s predicates is itself nonjusticiable, courts would still retain the power to determine whether the writ had in fact been suspended, and whether any such suspension covered the particular detention in question (including whether the detention complied with any substantive, geographic, or other limitations that Congress had imposed on the suspension). Cf. Morrison, supra note 4, at 431 (explaining that “in cases of partial suspension, the Court’s first task is to determine whether the instant detention falls within the scope of the suspension”).

10. A version of this hypothetical, without the suspension, is found in Eugene Kontorovich, Liability Rules for Constitutional Rights: The Case of Mass Detentions, 56 Stan. L. Rev. 755, 757 (2004). I have used it before. See Morrison, supra note 4, at 432, 438.

11. The standard cite is to Korematsu v. United States, which announced that government actions limiting the rights of a particular racial group are “immediately suspect.” 323 U.S. 214, 216 (1944). Of course, Korematsu’s application of that principle was anything but robust. Moreover, Korematsu did not say which constitutional provision governed the inquiry when the government in question is the federal government. Clarification of that point came in Bolling v. Sharpe, which held that the Fourteenth
presumption? If, for example, upon release one of the detainees sues for damages on the ground that the detention violated equal protection, would the fact that the writ had been suspended supply a complete defense?

Or consider an actual case from the Civil War. In 1863, Congress passed legislation authorizing the President to suspend the writ. President Lincoln soon exercised that authority for all cases where, by presidential authority, individuals were held in military custody "as prisoners of war, spies, or aiders or abettors of the enemy." In April 1865, two days after Lincoln's assassination, a union general in California issued an order declaring that those in the region "so utterly infamous as to exult over the assassination of the president" had "become virtually accessories after the fact, and will at once be arrested." Within two weeks, military authorities arrested and detained a man for publicly declaring that he was glad about Lincoln's assassination, that he wished it had happened earlier, and that "if three or four more of the leaders of the abolition party were killed it would be a good thing, as it would be the downfall of that party." At least under modern doctrine, courts would ordinarily hold that detaining someone solely on account of such statements violates the First Amendment. But assuming the detention fell within Lincoln's suspension order, would that fact make the detention lawful for all purposes? Would the President discharge his obligation to

Amendment's equal protection guarantee should be deemed incorporated into the Due Process Clause of the Fifth Amendment. 347 U.S. 497, 499–500 (1954).

12. McCall v. McDowell, 15 F. Cas. 1235 (C.C.D. Cal. 1867) (No. 8,673). For more on this case, see infra text accompanying notes 160–167.

13. Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755 (amended 1866 & 1867). As is well known, President Lincoln had earlier suspended the writ without legislative authority. For a brief discussion of that action, see infra text accompanying notes 109–111. The 1863 Act's provision authorizing the President to suspend the writ raises the question whether the suspension authority is delegable in that manner. The Supreme Court has never conclusively answered that question, but every congressionally authorized suspension in U.S. history has happened pursuant to a delegation rather than a direct suspension by Congress itself. For a discussion of the post-Civil War suspensions, see infra Part II.D.


15. See McCall, 15 F. Cas. at 1237 (quoting April 17, 1865 order).

16. Id.

17. I make no claim here about the state of First Amendment doctrine at the time of the actual case. I use the case only to raise general questions about the effect of a suspension.

18. See, e.g., Rankin v. McPherson, 483 U.S. 378, 378 (1987) (holding that the First Amendment prohibited firing a clerk in a county constable's office for stating to a co-worker, after hearing of an attempt on the President's life, that "if they go for him again, I hope they get him"); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."). There is no indication that the statements in the case described here were either directed at inciting imminent lawlessness or were likely to have that effect. See McCall, 15 F. Cas. at 1237.
uphold the Constitution by pointing to the writ’s suspension as conclusive evidence of the detention’s constitutionality?

This is not a matter of mere hypothetical or historical concern. The government’s ongoing detention of alleged enemy combatants in the “war on terror,” the numerous habeas based challenges to the legality of those detentions, and the passage of recent legislation purporting to remove the federal courts’ habeas jurisdiction to review some of those detentions¹⁹ all combine to raise a number of habeas-related questions, many of which are beyond the scope of this Article.²⁰ But we cannot fully understand what is at stake in those matters without also addressing the fundamental question whether suspension produces legality. And depending on how we answer that question, a number of others follow. If the answer is yes, why? Why should we conclude that suspension of a remedy produces substantive legality? If the answer is no, what then? What other judicial remedies for unlawful detention might still be available? Does a detainee have a constitutional right to any other remedy? And remedies aside, if suspension does not legalize detention, how should the executive branch discharge its independent obligation to uphold the Constitution?

These are important but largely neglected questions. Indeed, until recently, even the threshold question whether suspension legalizes detention had received little modern attention. That changed with the

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¹⁹. See Military Commissions Act (MCA) of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28, 42 U.S.C.). The MCA provides that [n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination. Id. § 7(a) (to be codified at 28 U.S.C. § 2241(e)). The government has defended that provision by arguing that to the extent it is deemed a suspension of the writ, it is a valid suspension. See Respondent-Appellee’s Reply in Support of Motion to Dismiss for Lack of Jurisdiction at 40-41, al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007) (No. 06-7427), available at http://www.brennancenter.org/dynamic/subpages/download_file_47350.pdf (on file with the Columbia Law Review). The Fourth Circuit did not directly address that argument in its recent decision holding the MCA inapplicable to the apprehension and detention of an alleged enemy combatant within the United States. See al-Marri, 487 F.3d at 168 (explaining that court need not reach constitutional issues raised by parties). But litigation in that case is ongoing. It is also possible, though fairly unlikely, that the issue could arise in the set of cases now pending before the Supreme Court involving the application of the MCA to the detention of alleged enemy combatants at Guantánamo Bay. See Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), cert. granted, 127 S. Ct. 3078 (2007).

²⁰. In addition to those flagged above in notes 4, 9, and 13, the questions include whether the Clause implicitly requires that habeas be made available or simply establishes limits on its removal; what the extent of any required availability is; what the difference is between a suspension of the writ and a permissible adjustment of the writ’s reach; whether the guarantee of the writ extends to detentions outside the United States; and whether and how a detainee’s citizenship affects the applicability of the habeas guarantee. See David L. Shapiro, Habeas Corpus, Suspension, and Detention: Another View, 82 Notre Dame L. Rev. 59, 60, 72 n.54 (2006) (identifying these questions).
Supreme Court's 2004 decision in *Hamdi v. Rumsfeld*, especially Justice Scalia's dissenting opinion in the case.\(^\text{21}\) Justice Scalia embraced what I have previously called a model of "suspension as authorization,"\(^\text{22}\) but which might more precisely be called "suspension as legalization." He suggested that although Congress cannot by ordinary legislation authorize the extrajudicial detention of a U.S. citizen alleged to be an enemy combatant, it can do so by suspending the writ.\(^\text{23}\) Moreover, suspension on this view not only provides an affirmative grant of authority to detain, but also displaces any constitutional or other legal objection (due process, equal protection, free speech, and so on) that might be raised against the detention.\(^\text{24}\) Suspension, in other words, is both a necessary and a sufficient condition for conclusively legalizing the detention in question. It creates, with respect to the law of detention, "a lawless void, a legal black hole, in which the state acts unconstrained by law."\(^\text{25}\)

A scholarly debate has emerged in *Hamdi*'s wake. Some, including me, have argued against the suspension-as-legalization model.\(^\text{26}\) I have contended that suspension is not sufficient and should not be necessary to authorize extraordinary executive detention during times of crisis.\(^\text{27}\) As for sufficiency, I have argued that the historic function and basic purpose of suspension is to remove a particular remedy, namely the habeas writ. Suspension does not displace any post-detention remedies, nor does it alter a detention's legality.\(^\text{28}\) As for necessity, I have contended that to the extent Congress is able to grant the executive branch certain extraordinary detention authority in times of national crisis, it should not be required to include in the authorizing statute an additional provision suspending the writ. Otherwise, conferring authority on the executive branch would necessarily come at the expense of excluding the courts from any contemporaneous review of executive action. Permitting Congress some leeway to authorize extraordinary executive detention without suspending the writ, as a majority of Justices did in *Hamdi*, preserves a role for all three branches.\(^\text{29}\)

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22. See Morrison, supra note 4, at 415.
23. *Hamdi*, 542 U.S. at 554, 564, 578 & n.6 (Scalia, J., dissenting).
24. This is evident from Justice Scalia's identification of the Due Process Clause as the principal constitutional barrier to extrajudicial detention of U.S. citizens. See id. at 556–58. Suspension of the writ, on his understanding, removes that ground of unconstitutionality. See id. at 578 n.6 (referring to suspension as "justify[ing] indefinite imprisonment without trial").
26. See Morrison, supra note 4, at 426–42; Dyzenhaus, supra note 25, at 2031–33.
28. Id. at 435–37; see also Dyzenhaus, supra note 25, at 2032 (stating that suspension is not "a total derogation from law, but a temporary denial of access to certain parts of the law").
29. Morrison, supra note 4, at 440–42, 448–51.
More recently, David Shapiro has written an important article defending suspension as legalization. He focuses on the sufficiency question just described, and argues that suspension suffices to legalize detention. Seeking an interpretation of the Suspension Clause that best accords with "the purpose of the Framers, the needs of the government in times of crisis, and the process of law that is due the individual in such times," he places special emphasis on the practical reality of emergencies. Where "Congress has made a valid decision that extreme circumstances warrant denial of the classic remedy for one officially detained," that decision will be "undermined, if not nullified" if those responsible for the detention are "deterred from engaging in the very activity needed, and contemplated, to deal with the crisis by threats of financial liability or by an understandable reluctance to violate their oaths to support the Constitution and laws." The better view, according to Professor Shapiro, is that Congress's decision to suspend the writ "frees the Executive from the legal restraints on detention that would otherwise apply." Put simply, the government cannot adequately respond to the circumstances prompting the writ's suspension unless suspension dispenses with all legal restrictions on detention.

Importantly, this is not simply an argument that acts of suspension should be construed to remove statutory obstacles to detention. Since Congress clearly can repeal statutory constraints, arguments about whether acts of suspension have that effect are arguments about statutory interpretation, and in particular about what sorts of interpretive presumptions are appropriate in this context. But Professor Shapiro's position goes well beyond statutory interpretation. In his view, suspension entails the "implicit withdrawal of any objection, under the Constitution or any other provision of our law, to the lawfulness of a detention." Suspension, in other words, creates what amounts to a "legal black hole" for detention, an area entirely free of legal constraints. Presented by one of the true giants of federal jurisdiction and constitutional law, this position has already gained at least some adherents. Plainly, anyone

30. Shapiro, supra note 20.
31. Id. at 86–88.
32. Id. at 89–90.
33. Id. at 89; see also id. at 86 ("Detention [w]ithin the [s]cope of a [v]alid [s]uspension [i]s [n]ot [u]nlawful.").
34. Id. at 86 (emphasis added).
35. Dyzenhaus, supra note 25, at 2006. Professor Shapiro stresses, however, that his argument applies only to the discrete question of the legality of the detention itself, not to related matters like treatment during detention or military trials. See Shapiro, supra note 20, at 90–95.
36. See Richard H. Fallon, Jr. & Daniel J. Meltzer, Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror, 120 Harv. L. Rev. 2029, 2045 n.53 (2007) ("reject[ing]" in one sentence my argument in Hamdi's Habeas Puzzle, supra note 4, on the ground that it had been "persuasively rebutted" by Professor Shapiro); Tyler, supra note 1, at 387, 408 n.394 (expressing at least qualified agreement with Professor Shapiro’s argument by opining that “core due process rights” are “[i]n effect . . . displaced by the
who would adhere to the view that suspension does not yield legality must confront Professor Shapiro's argument.

One of my aims in this Article is to do just that. Drawing on previously unexamined historical evidence, I show that the suspension-as-legalization model is at odds with the longstanding understanding of suspension in both England and the United States. According to that understanding, suspension affects neither the legality of detention nor the availability of post-detention remedies for unlawful detention. Although different approaches to constitutional interpretation accord different weight to history, it would be difficult to credit an approach that completely ignored this stable historical understanding.\(^3\) Mine embraces it.

Beyond providing a positive account of the meaning of suspension, I also examine a set of broader issues almost entirely overlooked in the current literature concerning the roles of the legislative and executive branches in circumstances when the writ is validly suspended. My treatment of those issues fleshes out my account of suspension, but it also provides an opportunity to use suspension as a window into broader questions of extrajudicial constitutional implementation.

The first two parts of the Article are historical. Part I addresses the historical understanding and practice of suspension in England. I show that, starting in the late seventeenth century, Parliament passed numerous laws temporarily suspending habeas corpus. But the suspension acts themselves did not affect any detention's legality. Instead, when Parliament wanted to insulate responsible officials from subsequent liability for their actions, it passed what were known as "indemnity acts," which granted not just indemnity but immunity.

Part II moves to the historical understanding and practice of suspension in the United States. Drawing especially on evidence from the first century of the Union, I show that members of Congress, treatise authors, and the Supreme Court all followed the English understanding that a decision to suspend the writ did not affect the legality of the detention. Also following the English model, Congress during the Civil War passed "indemnity" legislation immunizing officials for, among other things, acts of unlawful imprisonment while the writ was suspended.

Part III takes stock of the lessons learned in Parts I and II and discusses some of their implications. The overarching lesson from the historical evidence is that suspension, post-detention liability, and legality

\(^3\) Cf. Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1780 n.249 (1991) [hereinafter Fallon & Meltzer, Constitutional Remedies] (proposing an approach to constitutional remedies that, while "not intended to be strictly 'originalist,'" does look to doctrinal evolution from the Founding through the late nineteenth century as evidence of "our early legal or constitutional 'tradition'").
are all distinct questions. Suspending the writ does not affect the availability of post-detention remedies for unlawful detention, nor does it change a detention's legality. Similarly, the legislature's separate decision to remove post-detention remedies via a grant of immunity has no bearing on legality. Moreover, immunity and legality each raise constitutional questions of their own, questions that belong principally to the legislative and executive branches, respectively.

This last point provides the point of departure for the second half of the Article. To prepare the way for the legislative- and executive-focused discussions that follow, Part IV briefly sketches a framework for thinking about constitutional interpretation and implementation by the political branches. The crucial premise of that framework is that the political branches each have a duty to uphold and enforce the Constitution that stands quite apart from judicial enforcement. Part IV situates that premise in the broader scholarly literature on constitutional interpretation outside the courts, but also shows that recognizing an interpretive role for the political branches need not entail abandoning ideas of judicial supremacy.

Against that backdrop, Part V explores in more detail the role of Congress when the writ has been validly suspended, especially with regard to the availability of ex post remedies (money damages, for example) for unlawful detention. I argue that a detainee's interest in some form of judicial redress is of constitutional dimension. But the government may also have salient constitutional arguments in favor of removing such remedies. Striking the balance—i.e., deciding whether to permit any judicial remedies for unlawful detention—is a question of constitutional implementation belonging largely to Congress. This understanding, I show, is consistent with an "institutional-process" model of constitutional implementation during periods of emergency. Moreover, it means that to the extent Congress is worried that the threat of post-detention liability might intolerably interfere with executive officials' response to the national emergency at hand, it may be able to strike the constitutional balance in favor of a grant of immunity. This underscores that suspension itself need not be treated as automatically removing all legal constraints on detention.

If suspension's connection to immunity were the only issue upon which Professor Shapiro and I disagreed, the space between our positions might appear rather modest. He sees suspension itself as immunizing the responsible officers from liability; I say immunity is a separate matter but that Congress has fairly broad (though, as I stress in Part V, not unlimited) authority to provide it. That is not our only point of disagreement, however. Wholly apart from the availability of judicial remedies, we both recognize that executive branch actors have an independent obligation
to uphold the Constitution and laws.\textsuperscript{38} For Professor Shapiro, a valid suspension dispenses with that obligation by rendering all detentions within its ambit conclusively legal. I disagree, and argue instead that suspension alone, and even suspension plus an act of indemnity, does not change a detention's legality. Fundamentally, then, Professor Shapiro and I disagree about whether suspension entails legalization.

Part VI applies my views on the legality question to the executive branch. The basic aim is to explore how executive officials can and should discharge their independent duty of constitutional fidelity when the writ is suspended. In doing so, I draw on a growing literature that divides constitutional doctrine into constitutional \textit{meanings} and constitutional \textit{rules}, and that conceives of the latter as providing a means of determining whether the former have been honored.\textsuperscript{39} This approach helps illuminate what extrajudicial constitutional interpretation and implementation might look like even in extreme circumstances like a suspension. Without adopting a fixed position on the content of any particular constitutional norm, I suggest how we might conceptualize the executive's independent implementation of even such seemingly court-dominated provisions as the guarantee of due process.

\section*{I. Suspension (and Immunity) in England}

This Part surveys the historical understanding and practice of suspension in England, where the writ of habeas corpus originated. I draw on a range of publicly available primary and secondary sources, but not on any original archival research. While the claims made here are thus subject to further historical exploration, I think the available sources are fairly read to support three key points. First, detentions were not deemed lawful simply because they took place during a period of suspension. Second, Parliament often did want to shield officials from liability for their actions during periods of suspension. It did so by passing separate "indemnity acts," which granted immunity to those responsible for the detentions in question. Third, indemnity legislation was typically passed near the end of the period of suspension in question. Thus, Parliament could craft the immunity more or less broadly, depending in part on how abusively the detaining authorities had exercised their powers during the suspension. Together, these three points reveal the historical nature and function of suspension in England, and provide the backdrop against which to grapple (in Part II) with those issues in the American context.

\textsuperscript{38} For Professor Shapiro's recognition of this obligation, see, for example, Shapiro, supra note 20, at 90 (referring to executive officials' "oaths to support the Constitution and laws").

\textsuperscript{39} See generally Mitchell N. Berman, Constitutional Decision Rules, 90 Va. L. Rev. 1 (2004) [hereinafter Berman, Decision Rules]. For further citations to the literature, see infra note 319.
A. Suspension Acts

From the thirteenth through seventeenth centuries, habeas corpus served a number of functions, some rather unconnected to individual liberty.⁴⁰ As Daniel John Meador explained, "The modern notion of habeas corpus as a judicial procedure for testing the legality of a restraint on liberty dates from the constitutional crises between Parliament and the Crown in the first half of the seventeenth century."⁴¹ That function of the writ was solidified, and various procedural and jurisdictional obstacles to its use overcome, in the Habeas Corpus Act of 1679.⁴²

Within a decade of the Habeas Corpus Act's passage, Parliament enacted the first of many suspension measures. The first such act was passed in 1689, and was styled "[a]n Act for Impowering His Majestie to Apprehend and Detaine such Persons as He shall finde just Cause to Suspect are Conspiring against the Government."⁴³ Numerous others followed over the next century.⁴⁴

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⁴⁰. See generally Daniel John Meador, Habeas Corpus and Magna Carta: Dualism of Power and Liberty 3–13 (1966) (discussing early development and uses of writ). Interestingly, as Meador describes, although the origins of habeas corpus are often traced to the Magna Carta, in fact "the two were unrelated in origin." Id. at 5.

⁴¹. Id. at 4; see also Robert S. Walker, The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty 88 (1960) ("In the [sixteenth- and seventeenth-century] battle against royal despotism the [Magna Carta] was adduced as evidence of the illegality of arbitrary executive commitments and the writ of habeas corpus was seized upon as the most likely instrument by which such commitments could be subjected to due process.").


⁴³. 1 W. & M., cc. 2, 7 (1688); see also 1 W. & M., c. 19 ("An Act for Impowering Their Majestyes to Commit without Baile such Persons as They shall finde Just Cause to suspect are Conspiring against the Government"). Although the statute books show these acts as having passed in 1688, and although modern sources often follow suit, see, e.g., Hamdi, 542 U.S. at 562 (Scalia, J., dissenting), Paul Halliday and G. Edward White explain that this is an error, at least according to modern dating methods:

In fact no Parliament sat in 1688, so no act could have passed that year. The error arises from the fact that until 1752, the new year was reckoned in England as beginning on March 25 . . . . Thus items dated 1 January to 24 March 1688, by this "Old Style" mode of dating, belong to 1689 by "New Style" dating.


⁴⁴. See, e.g., 7 & 8 Will. 3, c. 11 (1696) ("An Act for impowering His Majestie to apprehend and detain such persons as hee shall find Cause to suspect are conspiring against His Royal Person or Government"); 1 Geo., stat. 2, c. 8 (1714) ("An Act to impower his Majesty to secure and detain such Persons as his Majesty shall suspect are conspiring against his Person and Government"); 9 Geo., c. 1 (1722) (same); 17 Geo. 2, c. 6 (1744) (same); see also Thoughts on the Suspension of the Habeas Corpus Act 10 (London, J. Debrett 1794) (stating that the suspension then contemplated in Parliament was "the tenth time in a space of little more than an hundred years"). As for the terms of these statutes, a 1794 suspension act is typical:
Although these enactments were not formally entitled “suspension acts,” it is not anachronistic to refer to them as such. From 1689 on, that name was regularly used to describe the acts in parliamentary debates. And their effect was indeed to suspend the benefits of the Habeas Corpus Act. As the English scholars E.C.S. Wade and A.W. Bradley put it, these acts “in effect prevented the use of the writ of habeas corpus for the purpose of insisting upon speedy trial or the right to bail in the case of persons charged with treason or other specified offences.” They generally provided for no more than one year’s suspension, and had to be renewed for the suspension to continue. Thus, for example, in 1777 Parliament responded to the American Revolution by suspending the writ for people suspected of treason or piracy in the American colonies and on the high seas, and renewed the suspension annually through 1782. And it passed a similar series of acts from 1794 to 1801. It was during the late seventeenth and eighteenth centuries that habeas corpus solidified its position as what Blackstone called “the most celebrated writ in English law,” and the removal of that remedy for any length of time was no small matter.

34 Geo. 3, c. 54 (1794). Parliament used similar language in 1 W. & M., cc. 2, 7, 19, and 7 & 8 Will. 3, c. 11.


47. See A.V. Dicey, Introduction to the Study of the Law of the Constitution 230 (10th ed. 1959) (noting that “every ... Habeas Corpus Suspension Act affecting England ... has been an annual Act, and must, therefore, if it is to continue in force, be renewed yearly by year”).

48. See 17 Geo. 3, c. 9 (1777); 18 Geo. 3, c. 1 (1778); 19 Geo. 3, c. 1 (1779); 20 Geo. 3, c. 5 (1780); 21 Geo. 3, c. 2 (1781); 22 Geo. 3, c. 1 (1782).

49. See 34 Geo. 3, c. 54; 35 Geo. 3, c. 3 (1795); 38 Geo. 3, c. 36 (1798); 39 Geo. 3, cc. 15, 44 (1799); 39 & 40 Geo. 3, c. 20 (1800); 41 Geo. 3, c. 32 (1800); 41 Geo. 3, c. 26 (1801).

50. 3 William Blackstone, Commentaries *129.

Suspension did not, however, affect the legality of detention or the availability of post-detention remedies. Although suspension acts typically referred to “impowering” the Crown to arrest and detain certain people, evidence from the acts’ legislative histories confirms that this language was not understood to entail conclusive legalization of the detention. During debate in the House of Lords over the 1794 suspension bill, for example, the Earl of Carnarvon made clear that “even during [a] suspension, parliament leaves responsibility attached to the discretionary power which it entrusts to ministers, and remains herself the watchful and jealous avenger of any injustice; nor is any individual deprived of his remedy at law for any wanton encroachment on his liberty.”

The Lord Chancellor echoed this point the following year during debate over the extension of the suspension:

The sole operation of the bill was, to enable ministers to detain persons in custody who had been apprehended on suspicion of treasonable practices, till a reasonable time should be allowed to prepare the evidence.... In every other respect, ministers were to the full as responsible as before. They had no more authority in consequence of its passing than any other magistrate; they were answerable to parliament for the proper use of this power[;] and they were responsible to the individuals by the law of the country.

No one disputed this point.

The point is confirmed, moreover, by English scholarship on the writ. Perhaps the most complete treatment of the effect of a suspension is found in the work of A.V. Dicey, whose Introduction to the Study of the Law of the Constitution, first published in 1885, is arguably the single most influential study of English constitutional law. In his lengthy discussion

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52. See supra text accompanying notes 43-44.
53. 31 Parl. Hist. Eng. (1794) 595. Similar points were made in the House of Commons during debate on the same bill. See, e.g., id. at 564 (statement of William Pitt, Chancellor of the Exchequer) (explaining that during a suspension, ministers would remain “equally answerable for any abuse of [the] power [to arrest and detain], if they should abuse it, as they were for the abuse of any other discretionary power which was vested in them”).
54. 31 Parl. Hist. Eng. (1795) 1290; see also, e.g., 35 Parl. Hist. Eng. (1801) 1597 (statement of Lord Chancellor) (stating that “the suspension of the Habeas Corpus act did not take away the responsibility of the minister”).
55. This view of suspension also was not something that emerged only at the end of the eighteenth century. The last word in the debate on the very first suspension bill in 1689, for example, went to Sir William Williams, who allowed that “Privy-Counsellors, by this bill, may commit [someone to detention] for suspicion of treason,” but also stressed that “if they commit a person without cause, they must answer it to the law, and the kingdom.” 5 Parl. Hist. Eng. (1689) 276.
56. Dicey, supra note 47.
57. As Charles Fried put it, Dicey’s “seminal work on the British constitution may be seen as the nearest thing to a binding constitutional text Britain has ever had, judging by the ubiquitous citation to it in the constitutional literature.” Charles Fried, Book Review, 2 Int’l J. Const. L. 723, 724 (2004); see also, e.g., Luc B. Tremblay, General Legitimacy of
of suspension acts, Dicey made clear that such legislation "does not legalise any arrest, imprisonment, or punishment which was not lawful before the Suspension Act passed," and thus "does not free any person from civil or criminal liability for a violation of the law." Moreover, this view is not unique to Dicey. Although other scholars have vigorously contested some aspects of Dicey's work, on the effect of a suspension his view is widely shared. Wade and Bradley, for example, agreed that "[s]uspension did not legalise illegal arrest; it merely suspended a particular remedy in respect of particular offences." Thus, "as soon as the period of suspension . . . was passed, anyone who for the time being had been denied the assistance of the writ could seek his remedy in the courts by an action for false imprisonment or malicious prosecution."

Suspension, in sum, did not expand the government's lawful authority to detain, nor did it affect the availability of any post-detention remedy for illegal detention. Thus, although a suspension was "no trifle," Dicey was quite right to stress that it fell "far short of the process known in some countries as 'suspending the constitutional guarantees,' or in France as the 'proclamation of a state of siege.'"

58. Dicey, supra note 47, at 230, 233; see also id. at 233–34 (observing that once suspension expires, detaining officers "are liable to actions or indictments for their illegal conduct, and can derive no defence whatever from the mere fact that, at the time when the unlawful arrest took place, the Habeas Corpus Act was . . . not in force"). Dicey espoused a similar view of the effect of declaring martial law, opining that although the Crown had the prerogative to make such a declaration in extreme circumstances, soldiers and other officials exercising martial powers had "no exemption from liability to the law for [their] conduct in restoring order." Id. at 289. Rather, they were "liable to be called to account before a jury for the use of excessive, that is, of unnecessary force." Id. That said, Dicey did also treat the suspension of the writ and the declaration of martial law as distinct acts. One does not necessarily entail the other, nor does the effect of one dictate the effect of the other.

59. This is true, for example, of Dicey's denial of the existence of administrative law in Anglo-American legal systems. See id. at 330 ("In England, and in countries which, like the United States, derive their civilisation from English sources, the system of administrative law and the very principles on which it rests are in truth unknown."). For a recent critique of Dicey on that point, see Jerry L. Mashaw, Recovering American Administrative Law: Federalist Foundations, 1787–1801, 115 Yale L.J. 1256, 1263 (2006).

60. Wade & Bradley, supra note 46, at 719.

61. Id. at 382–83; see also, e.g., William F. Duker, A Constitutional History of Habeas Corpus 171 n.118 (1980) ("It should be noted that suspension did not legalise arrest and detention. . . . It merely suspended the benefit of a particular remedy in the specified cases."); R.J. Sharpe, The Law of Habeas Corpus 95 (2d ed. 1989) (citing Dicey and noting that "[i]n its face, a suspension act gave no general power to arrest and detain people simply because they were thought to be dangerous").

B. Indemnity Acts

The limited effect of a parliamentary suspension is further confirmed by the prevalence of another kind of legislation, the indemnity act. From the late seventeenth through the early nineteenth centuries, Parliament commonly passed an indemnity act before the expiration of a suspension.63 The basic idea behind such acts, as Lord Hobart explained during debate on an 1801 indemnity bill, was that it was “proper” to protect government officials from liability for taking “such actions as were not warranted by law, but which considerably tended to the suppression of rebellion.”64 Thus, for example, the 1801 Act, passed near the end of a suspension that had lasted since 1794, provided in part that

all [past and future] personal actions, suits, indictments, informations, and prosecutions . . . and all judgments thereupon obtained, if any such there be, and all proceedings whatsoever, against any person or persons, for or on account of any act, matter, or thing by him or them done . . . for apprehending, imprisoning, or detaining in custody any person charged with or suspected of high treason or treasonable practices, shall be discharged and made void, and that every person by whom any such act, matter, or thing shall have been done . . . shall be freed, acquitted, discharged, and indemnified as well against the King’s majesty, his heirs and successors, as against the person and persons so apprehended, imprisoned, or detained in custody, and all and every other person . . . whomsoever.65

Put simply, acts like this “free[d] persons who ha[d] broken the law from responsibility for its breach.”66 In that respect, although called acts of indemnity, they would today be more aptly called acts of immunity. They did not simply indemnify officials for any liability they might incur for acts of unlawful imprisonment; they immunized officials from the im-

63. See id. at 232 (“[T]he best proof of the very limited legal effect of . . . suspension is supplied by the fact that before a Habeas Corpus Suspension Act runs out its effect is, almost invariably, supplemented by legislation of a totally different character, namely, an Act of Indemnity.”); Duker, supra note 61, at 171 n.118 (“The suspension statute was usually accompanied by an act of indemnity.”). Dicey here said “almost invariably” and Duker said “usually,” but elsewhere Dicey was more absolute: “An Act suspending the Habeas Corpus Act, which has been continued for any length of time, has constantly been followed by an Act of Indemnity.” Dicey, supra note 47, at 235. My research reveals no significant departures from the practice, though it is possible there were some short-lived exceptions. Cf. 35 Parl. Hist. Eng. (1801) 1508, 1512, 1524, 1535 (various speakers identifying a total of five precedents, from 1689 to 1780, for the indemnity bill then being considered).

64. 35 Parl. Hist. Eng. (1801) 1535.

65. 41 Geo. 3, c. 66 (1801).

66. Dicey, supra note 47, at 233; see also Wade & Bradley, supra note 46, at 719 (explaining that indemnity acts were passed “in order to protect officials concerned from the consequences of any incidental illegal acts which they might have committed under cover of the suspension of the prerogative writ”).
position of liability in the first place. Obviously, there would have been no need for such legislation if suspension itself legalized detention.

Although indemnity acts were distinct from suspension acts, the former complemented the latter in at least two ways. First, they helped preserve sensitive state secrets. The preamble to the 1801 Indemnity Act stresses this function:

[W]hereas in order to secure the internal peace and tranquility of the country, and to counteract the traitorous designs [in various acts said to have taken place during the period of suspension], it hath been deemed necessary from time to time to apprehend, imprison, and detain in custody, in Great Britain, divers persons suspected of high treason or treasonable practices: and whereas in case the acts and proceedings of the several persons employed or concerned in such apprehending, imprisoning, and detaining in custody, should be called in question, it would be impossible for them to justify or defend the same without an open disclosure of the means by which the said traitorous designs were discovered; and it is necessary, for the further prevention of similar practices, that those means of information should remain secret and undisclosed; be it therefore enacted....

The point here is that even in the case of a detention for which there was lawful cause, the government had a strong interest in not publicly airing its evidence in court. As the nineteenth-century scholar Thomas Erskine May explained, in a suit alleging the unlawful imprisonment of a person previously held on suspicion of treason, the "accused... would be unable to defend [himself], without disclosing secrets dangerous to the lives of individuals, and to the state. Unless the [indemnity] bill were passed, those channels of information would be stopped, on which government relied for guarding the public peace." An act of indemnity solved the problem.

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67. For this reason, although I will follow the convention and refer to these measures as acts of indemnity, I will generally refer to their effect as conferring immunity.
68. 41 Geo. 3, c. 66.
69. 3 Thomas Erskine May, The Constitutional History of England Since the Accession of George the Third, 1760–1860, at 16 (London, Longman, Green & Co., 7th ed. 1882); see also 35 Parl. Hist. Eng. (1801) 1509 (statement of William Pitt, Chancellor of the Exchequer) (describing indemnity acts as designed "to protect persons from punishment who had acted according to the law, and who, if they should be accused, could not defend themselves without disclosing secrets which they could not disclose without the greatest danger to the lives of individuals, and to the state"); id. at 1534–35 (statement of Lord Hobart) (explaining that "[i]f such a bill did not pass, and any action or actions should be brought against ministers for their conduct, it would be impossible for them to justify or defend the same, without an open disclosure of the means by which the said traitorous designs were discovered").
Second, indemnity acts helped ensure that the "main object" of the suspension—protecting the "public safety" in times of national crisis—was not undermined. Dicey stressed this point:

A Suspension Act would . . . fail of its main object, unless officials felt assured that, as long as they bona fide, and uninfluenced by malice or by corrupt motives, carried out the policy of which the Act was the visible sign, they would be protected from penalties for conduct which, though it might be technically a breach of law, was nothing more than the free exertion for the public good of that discretionary power which the suspension of the Habeas Corpus Act was intended to confer upon the executive. This assurance is derived from the expectation that, before the Suspension Act ceases to be in force, Parliament will pass an Act of Indemnity, protecting all persons who have acted, or have intended to act, under the powers given to the government by the statute. This expectation has not been disappointed.

It is inevitable, in other words, that there will be some amount of illegal conduct during a suspension. If those responsible for the detentions could not reliably anticipate immunity for their "bona fide" actions, the suspension itself would "fail of its main object." And although suspension acts might have been intended to facilitate potentially unlawful detentions during periods of crisis, they did not immunize those responsible for such illegality. That was the work of an indemnity act.

The extent to which any particular indemnity act performed either of the functions described above turned entirely on the language of the act. Moreover, because indemnity acts were generally passed at or near the end of the period of suspension, Parliament could tailor its grant of immunity to its sense of how well or poorly the responsible officials had conducted themselves. At one extreme, it could immunize all acts, including those that were malicious, cruel, or otherwise in bad faith. At the other, it could respond to perceived abuses by the detaining officials by keeping the immunity grant very narrow.

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70. Dicey, supra note 47, at 233 (referring to the "arrest and imprison[ment of] a perfectly innocent man without any cause whatever, except . . . the belief that it is conducive to the public safety").
71. Id. at 235.
72. Id. (emphasis omitted).
73. Id. at 236 ("[E]verything depend[ed] on the terms of the Act of Indemnity.").
74. See Sharpe, supra note 61, at 95 ("[T]he minister of state could only hope that indemnity would be given, and perhaps had to guard against arbitrariness lest the legislators be provoked to withhold their protection.").
75. See Dyzenhaus, supra note 25, at 2033 (stressing that the extent of the immunity is "dependent on the terms of the Act of Indemnity," and noting that such an act "could make it clear that any acts, including acts done in bad faith and acts that are recklessly cruel, are covered").
76. See Dicey, supra note 47, at 236 ("Any suspicion on the part of the public, that officials had grossly abused their powers, might make it difficult to obtain a Parliamentary indemnity for things done while the Habeas Corpus Act was suspended.").
To be sure, disagreements could arise over the breadth of any particular grant of immunity. Recall the 1801 Act, which granted complete immunity for all acts undertaken "for apprehending, imprisoning, or detaining in custody any person charged with or suspected of high treason or treasonable practices."77 Prior to its passage, the Earl of Westmorland described the Act somewhat narrowly, claiming "[i]t would hold out no indemnity against acts of cruelty or oppression."78 Dicey later took the same view, depicting the Act as covering "any irregularity or merely formal breach of the law," but not "[r]ecless cruelty," "arbitrary punishment," or other "acts of spite or extortion."79 May, in contrast, lamented that under the Act, "every act of authority, every neglect or abuse, was to be buried in oblivion."80

Such disagreements notwithstanding, the critical point here is that the terms of an indemnity act controlled the extent to which the executive officials involved were exposed to liability for their detention-related actions during periods of suspension. Suspension itself provided no cover for unlawful action. In this way, the very existence of indemnity acts confirms the limited effect of suspending the writ.

* * *

My claim here is not that Parliament was somehow prohibited from passing suspension legislation that also itself legalized the detention in question and therefore shielded the detaining officers. According to the principles of parliamentary supremacy established by the Glorious Revolution and gradually cemented in practice during the decades that followed, Parliament had the power "to make or unmake any law whatever."81 Thus, it was within Parliament's power to enact laws that both removed certain individuals' access to the writ and legalized their detention. More modestly, Parliament could—and undoubtedly did on occasion—respond to periods of unrest by simply expanding the lawful grounds upon which certain individuals could be held. The point here, though, is that Parliament did not understand a suspension of the writ itself to do any of those things. Although Parliament could have assigned a different meaning to suspension, the meaning it actually assigned provided that suspension affected only the availability of the habeas remedy.

77. 41 Geo. 3, c. 66 (1801).
79. Dicey, supra note 47, at 236. Similarly, the American historian J.G. Randall described English indemnity acts in general as "offer[ing] protection only for bona fide acts, done of necessity, and not for excesses of authority." J.G. Randall, Constitutional Problems Under Lincoln 188 n.3 (rev. ed. 1951).
80. May, supra note 69, at 16.
II. Suspendion (and Immunity) in the United States

One might argue that things are different in this country. That is, even accepting that suspension alone did not authorize detention or affect the availability of other remedies in seventeenth- and eighteenth-century England, one might distinguish that history on the ground just adverted to—that Parliament, unlike Congress, was not constitutionally constrained in its power to suspend. Professor Shapiro takes this position. The inclusion of the Suspension Clause in the Constitution, he contends, both limited the circumstances in which Congress could suspend the writ and expanded the meaning of suspension. What had been the mere removal of a particular remedy in England became, under our Constitution, the "implicit withdrawal of any objection, under the Constitution or any other provision of our law, to the lawfulness of a detention pursuant to a valid suspension of the habeas remedy." The Suspension Clause, in other words, changed the meaning of suspension. Call this the "changed-meaning" thesis.

It is certainly possible, in theory, that suspension took on this greater meaning when included in the Suspension Clause. Clearly, Professor Shapiro thinks it should be understood this way. But to succeed, the changed-meaning thesis must be more than a normative claim about what an ideal Suspension Clause should mean. At least in part, it must be a positive claim about what our Suspension Clause does mean. I think it is appropriate to be interpretively eclectic when discerning constitutional meaning—that is, to look to a variety of sources to the extent they are useful in any given context. Here, such eclecticism could well include consideration of "the needs of the government in times of crisis." But surely it should also be attentive to how the constitutional text has been understood over time. We must ask, in other words, whether the changed-meaning thesis fits the available evidence of what suspension has meant since the Founding.

82. See Shapiro, supra note 20, at 83–84 ("[T]here is a critical difference between the context of [the English] experience and our own . . . . [T]he [Parliament] was legally free to suspend the writ whenever it chose to do so . . . .").
83. As Professor Shapiro puts it, I see the guarantee [of habeas corpus implicit in the Suspension Clause], when coupled with the explicit power to suspend, . . . as supporting the conclusion that the presence of the specified justifications for a valid suspension of the writ has more far-reaching consequences under our law than did an analogous suspension in England by an unfettered legislature.
Id. at 84.
84. Id. at 86.
85. For one statement of this approach, see H. Jefferson Powell, A Community Built on Words: The Constitution in History and Politics 208 (2002) ("In constitutional argument it is legitimate to invoke text, constitutional structure, original meaning, original intent, judicial precedent and doctrine, political-branch practice and doctrine, settled expectations, the ethos of American constitutionalism, the traditions of our law and our people, and the consequences of differing interpretations of the Constitution.").
86. See Shapiro, supra note 20, at 86.
As this Part shows, the historical record weighs heavily against the changed-meaning thesis. Making that showing requires a rather slow walk through the evidence, and that is what I undertake here. I focus on evidence from the Founding, from three different nineteenth-century congressional debates, from Civil War era legislation and case law, from post-Civil War suspensions of the writ, and from late nineteenth- and early twentieth-century academic treatises. Collectively, these materials all reveal a "constitutional tradition"87 in which suspension was understood to affect only the habeas remedy itself, with the availability of other remedies controlled by separate acts of indemnity.

A. The Founding

It is sensible to begin with the text of the Suspension Clause, whose most significant word for present purposes is "suspended."88 Like "habeas corpus," "suspended" was a term whose English history would have been familiar to the Framers. The Supreme Court has long affirmed that it is appropriate to look to the English common law when ascertaining the meaning of "habeas corpus."89 It seems equally appropriate to begin with a presumption that the constitutional meaning of "suspended" is consistent with its traditional English meaning, discussed in Part I.90 The burden of the changed-meaning thesis is to rebut that presumption.

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87. See Fallon & Meltzer, Constitutional Remedies, supra note 37, at 1780 n.249 (suggesting that the period from the Founding to the late nineteenth century may provide "a measure of what might . . . loosely be termed our early legal or constitutional 'tradition'").

88. U.S. Const. art. I, § 9, cl. 2.

89. See McNally v. Hill, 293 U.S. 131, 136 (1934) ("To ascertain its meaning and the appropriate use of the writ in the federal courts, recourse must be had to the common law, from which the term was drawn . . . ."), overruled on other grounds by Peyton v. Rowe, 391 U.S. 54 (1968); Ex parte Bollman, 8 U.S. (4 Cranch) 75, 93–94 (1807) ("[F]or the meaning of the term habeas corpus, resort may unquestionably be had to the common law . . . .").

90. As a pamphleteer during the Civil War put it, "Are we not using an English law expression, the 'Writ of Habeas Corpus'? Is there not a known method of getting rid of this Writ—i.e., suspension of the privilege? . . . Have we not taken our idea of suspending the privilege from that?" Presidential Power over Personal Liberty: A Review of Horace Binney's Essay on the Writ of Habeas Corpus 40 (n.p. 1862) (attributed to Isaac Myer); cf. Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.").

Also supporting this presumption is the fact that, at the time the federal Constitution was drafted and ratified, several states already had habeas corpus guarantees in their own constitutions that, by their terms, seem to have conceived of suspension as relating only to the habeas remedy. See, e.g., Mass. Const. pt. 2, ch. 6, art. VII (1780) (providing that the "privilege and benefit of the writ of habeas corpus shall be enjoyed in this commonwealth in the most free, easy, cheap, expeditious and ample manner; and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time not exceeding twelve months"); N.H. Const. pt. 2, art. 91 (1784) (containing provision nearly identical to the Massachusetts provision, except time for suspension was limited to three months); N.C. Const. of 1776 art. XIII, reprinted in 5 The Federal and
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The extratextual evidence from the Founding does not provide much ground for such a rebuttal. The Constitutional Convention of 1787 saw relatively little debate about the Suspension Clause in general and none, it appears, about the meaning of suspension. The first proposal for a habeas-related clause came from Charles Pinckney, who moved the inclusion of a provision stating that "[t]he privileges and benefit of the Writ of Habeas corpus shall be enjoyed in this Government in the most expeditious and ample manner; and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time, not exceeding ___ months." The Committee of Detail omitted any habeas provision from its August 6th draft, leading Pinckney to renew his motion. Madison’s notes show a short debate on the issue, the principal focus of which was whether the Constitution should permit the writ ever to be suspended. There is no indication that this disagreement had anything to do with whether suspension affected the availability of ex post remedies for unlawful detention, much less the legality of the detention itself.

State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 2788 (Francis Newton Thorpe ed., 1909) (providing "[t]hat every freeman, restrained of his liberty, is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same, if unlawful; and that such remedy ought not to be denied or delayed"). The Framers of the Constitution would also have been aware that the writ had been suspended in 1786 in Massachusetts, during Shays’s Rebellion. See Act for Suspending the Privilege of the Writ of Habeas Corpus, ch. 10, 1786 Mass. Acts 510 (covering all persons arrested under warrant "whom the Governour and [Privy] Council, shall deem the safety of the Commonwealth requires should be restrained of their personal liberty, or whose enlargement is dangerous thereto"). I have found no evidence suggesting that this suspension entailed anything other than what the Massachusetts Constitution by its terms appears to have contemplated, namely removal of the habeas remedy.

92. The entirety of the discussion as recorded by Madison is as follows:
Mr. Pinkney, urging the propriety of securing the benefit of the Habeas corpus in the most ample manner, moved "that it should not be suspended but on the most urgent occasions, & then only for a limited time not exceeding twelve months"
Mr. Rutledge was for declaring the Habeas Corpus inviolable—He did [not] conceive that a suspension could ever be necessary at the same time through all the States—
Mr. Govr Morris moved that "The privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it".
Mr. Wilson doubted whether in any case [a suspension] could be necessary, as the discretion now exists with Judges, in most important cases to keep in Gaol or admit to Bail.
The first part of Mr. Govr Morris' [motion], to the word "unless" was agreed to nem: con: —on the remaining part;
Professor Shapiro acknowledges that the Constitutional Convention saw no explicit discussion of suspension’s effect on legality. But he maintains that “the implications of that fact are surely limited,” and analogizes the Convention’s silence on this point to its silence about “whether explicit authorization of suspension of the writ constituted tacit recognition that absent the conditions requisite to suspension, the privilege of the writ was affirmatively guaranteed as a matter of federal law.” Courts and commentators are generally prepared to read the Suspension Clause as requiring that habeas be made generally available even though the text does not say so and the Convention was silent on the point. In Professor Shapiro’s view, the absence of textual and Convention evidence supporting suspension as legalization is also unproblematic.

I find the analogy unpersuasive. Whether the Suspension Clause requires that habeas be generally available is a question about whether the Framers silently assumed something on a point that stands apart from the matters explicitly addressed by the Clause. Whether the Suspension Clause treats the power to suspend as the power to legalize is, in contrast, a question about whether the Clause changed the familiar meaning of a term—“suspended”—without anyone ever saying anything about it during the Convention. It is one thing to conclude that the Framers so readily assumed (and desired) the general availability of habeas that there was no need to discuss it during the Convention. It is quite another to conclude that they collectively agreed to change the meaning of suspension without ever saying so. Indeed, I think the Convention’s silence on this point counts not just as the absence of affirmative evidence to support the changed-meaning thesis, but as evidence pointing in the other direction: that the general understanding of suspension at the time of the Founding was consistent with its historical meaning.

Professor Shapiro separately argues that the debate at the Convention over the appropriate wording of the Suspension Clause supports the argument that “contemporary thinking” about the power to suspend typically equated it with the power to legalize. As he notes, and as I have recounted above, that debate “focused primarily on whether or not any exceptions to the availability of the writ should be recognized.” In Professor Shapiro’s view, “[t]he intensity of this debate makes far less sense if the availability of the writ and the lawfulness of the detention were not regarded as two sides of the same coin.” If suspension did not legalize detention, in other words, why would the Framers have disagreed so vigorously over whether suspension should ever be allowed?

I think this argument overlooks the historical context of the debate. The Framers drafted the Suspension Clause against the backdrop of the

93. See Shapiro, supra note 20, at 84 n.104.
94. Id.
95. See id. at 87.
96. Id.
97. Id.
English practice of frequent suspensions, including during the recent Revolutionary War. 98 It seems likely that the Framers' determination to restrict the suspension power—whether by complete prohibition or, as in the final document, by the imposition of severe limits—was a reaction against Parliament's profligacy in this area. 99 Yet as we have seen, suspension in England did not entail legalization. 100 So the Framers were reacting to a suspension practice that related only to the habeas remedy itself, not to later remedies or underlying legality. It is reasonable, then, to read the Suspension Clause as imposing restrictions on the specific authority the Framers thought had been abused by Parliament: suspension of the writ.

Moreover, even though it did not legalize detention, the suspension power was certainly a matter worthy of close attention. As everyone agrees, habeas was, and is, a critical remedy against ongoing unlawful detention. 101 The power to dispense with that remedy is no small thing. With that in mind, the debate at the Convention reads, quite straightforwardly, as concerned with whether emergency circumstances could ever justify dispensing with this particularly powerful and important remedy. Some thought not. 102 Others, including James Madison, were reluctant to frame any constitutional prohibition in absolute terms, no matter how important the issue. 103 That the Framers divided on this issue does not

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98. See supra text accompanying notes 43–49 (describing frequent British suspensions from time of Habeas Corpus Act’s passage through American Revolution and later).

99. This reading draws support from the fact that the very next clause in the Constitution, the Bill of Attainder and Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3; see also id. art. I, § 10, cl. 1, was also evidently aimed at prohibiting certain abuses that had become common in England. As Justice Chase observed in the early case Calder v. Bull,

The prohibition against . . . making any ex post facto laws was introduced for greater caution, and very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties.


100. See supra Part I.

101. See Story, supra note 8, at 483 (noting that habeas is "justly esteemed the great bulwark of personal liberty").

102. See supra note 92 (recounting remarks of Rutledge and Wilson, as recorded by Madison).

103. Madison expressed this view in an October 17, 1788 letter to Thomas Jefferson: I am inclined to think that absolute restrictions in cases that are doubtful, or where emergencies may overrule them, ought to be avoided. The restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public; and after repeated violations in extraordinary cases, they will lose even their ordinary efficacy. Should a Rebellion or insurrection alarm the people as well as the Government, and a suspension of the Hab. Corp. be dictated by the alarm, no written prohibitions on earth would prevent the measure.
suggest that they must also have divided on the question whether suspension entails legalization.

B. Nineteenth Century Congressional Debates

Although the evidence from the Founding apparently contains no explicit statements about the meaning of suspension, later evidence from Congress certainly does. I focus in this section on three revealing (and heretofore under-appreciated) sets of congressional debates about habeas, suspension, and, in the latter two cases, indemnity. The first took place in 1807, in connection with President Jefferson's request that Congress suspend the writ to help deal with the rebellion led by Aaron Burr. The second happened during the Civil War, as Congress contemplated legislation that would not only authorize President Lincoln to suspend the writ but also grant immunity to those who carried out any act of arrest or imprisonment pursuant to a presidential order. The third came the year after the Civil War ended, as Congress debated whether to extend the immunity it had granted a few years earlier.

1. During the Burr Conspiracy. — Congress first contemplated suspending the writ in 1807, during the Burr conspiracy. President Jefferson requested that Congress pass suspension legislation to help deal with the rebellion, and the Senate quickly passed a three-month suspension for those "charged on oath with treason, misprision of treason, or other high crime or misdemeanor." The bill met with massive resistance in the House, which ultimately rejected it after first reading. Prior to the vote, however, the House had a lively debate on the question, passages from which cut powerfully against the changed-meaning thesis.

Although most of the participants in the House debate opposed Jefferson's request for a suspension in terms too general to be useful for my purposes here, at least one legislator did reveal a clear view on whether suspension entails legalization. It was Representative Randolph,
who emphasized the need to compensate innocent persons wrongly arrested and detained during a suspension:

And, let me ask, what compensation to an innocent man, to a man of honor and feeling, to a man of character, who should be tied neck and heels and sent off to New Orleans, and who should ultimately be proved to be innocent—I ask what compensation it would be to him to bring an action of damages? Against whom? A man without visible property? And what action? An action on the most mercenary principle. To be indemnified in his fame by dollars and cents. The injury would be irreparable. At present, all stand under the law. If any one offend, let him be brought under it. But, in this way, to put a man in an oyster boat, or skipper, and transport him to a distance from the place of his arrest, and then say he shall have a remedy, in case of his innocence, against an inferior officer, is absurd. If we pass such a bill, which God forbid! it should contain a large appropriation, and Government be obliged to make good the injured party—to afford him redress. I say they should grant a large appropriation, for, it is not for men with epaulets and gold buttons to make reparation.\(^{108}\)

The import of Randolph’s remarks should be clear. They proceeded from the premise that a person wrongly detained during a period of suspension could later sue the responsible official for unlawful imprisonment. The problem, in Randolph’s view, was that the officer immediately responsible for the arrest and detention would likely be judgment-proof. Thus, Randolph urged that any act of suspension should also appropriate sufficient funds for the government itself to compensate those unlawfully detained. None of this would have made any sense if detention during a period of suspension was understood to be ipso facto lawful. Yet no one spoke up to question the premise of Randolph’s remarks.

To be sure, there is a limit to how much weight the comments of a single legislator can bear. But because Randolph’s statements echo the historical understanding of suspension in England, they provide at least some evidence that the traditional understanding was carried forward in early Congresses. Moreover, as the discussion below reveals, Randolph’s statements are consistent with the views expressed by congressional leaders decades later, during the Civil War.

2. During the Civil War. — The first well-recognized federal suspension of the writ in U.S. history came early in the Civil War, at the behest of President Lincoln and without authorization from Congress.\(^{109}\) Sitting as

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108. Id. at 420–21.

109. See Daniel Farber, Lincoln’s Constitution 157–63 (2003) (detailing confrontation between Lincoln and Taney over presidential suspension). I say “well-recognized” because some, including Professor Farber, describe Andrew Jackson as having suspended the writ in his capacity as commanding general of New Orleans during the War of 1812. See id. at 160. For more on that episode, see Abraham D. Sofaer, Emergency Power and the Hero of New Orleans, 2 Cardozo L. Rev. 233, 242–49 (1981). As Sofaer’s account reveals, it remains unclear whether Jackson claimed the authority to suspend the
a lower court judge, Chief Justice Taney famously rejected that move as exceeding the President's constitutional authority. Lincoln did not abide by Taney's judgment, however, and in early 1863 Congress finally passed legislation granting Lincoln the power to suspend. I will discuss the actual legislation in Part II.C below, but here I want to focus on some passages in the congressional debates that preceded it.

One part of the legislation that Congress ultimately passed was initially presented as a stand-alone “bill to indemnify the President and other persons for suspending the privilege of the writ of habeas corpus, and acts done in pursuance thereof.” Like the indemnity acts passed by Parliament, the bill actually provided for immunity from liability, not just an indemnity in the case of it. It faced substantial opposition in the Senate, some of which was based on the view that the President lacks the constitutional authority to suspend the writ unilaterally and that Lincoln’s actions were therefore lawless.

Responding to those criticisms, one of the principal sponsors of the legislation, Senator Trumbull of Illinois, articulated a clear understanding of suspension's limited effect and of the function served by indemnity:

[T]his bill does not depend at all upon the power of the President to suspend the writ of habeas corpus. Whether he has the power or not, this bill would be necessary; and it would be just as necessary if he had the power to suspend it as it would be if he had not; because the suspension of the writ of habeas corpus does not of itself justify the arrest of anybody. . . . When a
man is arrested in ordinary times, he may apply for a writ of habeas corpus; and if he can show that his arrest is illegal and improper, he will be discharged; but he does not recover damages in that proceeding. He may then institute his suit for damages; and that is a different matter entirely. So, if the writ of habeas corpus was suspended by act of Congress with the concurrence of the President, both acting together, there would be the same necessity for this act to protect the officers, in case, acting from probable cause and in good faith, they had wrongfully made arrests.\(^{117}\)

Trumbull’s understanding of suspension and indemnity should be familiar: It is the precise understanding that prevailed in seventeenth- and eighteenth-century England. Suspension alone did not affect a detention’s legality, nor did it alter the availability of later remedies for illegal detention. The decision to remove such later remedies was separate from the decision to suspend habeas and was typically the purview of an act of indemnity. Moreover, although Trumbull’s remarks were the most detailed, a number of other Senators echoed the basic point that suspension alone does not affect legality.\(^{118}\) It does not appear that anyone in the Senate disagreed.

3. During Early Reconstruction. — The same basic understanding was voiced again the year after the Civil War ended, during debates over whether to expand the immunity conferred by the 1863 Act. By early 1866, literally thousands of criminal and civil actions—the latter often seeking damages for alleged false imprisonment during the war\(^{119}\)—had been filed against Union officers in the courts of states like Kentucky.\(^{120}\) Many in Congress viewed these suits as nothing more than “instruments for the prosecution of Union officials in the interest of outraged seces-


118. See, e.g., id. at 552 (statement of Sen. Carlile) (“I think that the suspension of the writ of habeas corpus itself does not authorize an arbitrary arrest, nor an arrest made in any other mode than that known to the law—upon oath or affirmation, and by warrant issued by some competent authority.”); id. at 1475 (statement of Sen. Bayard) (“The imprisonment is no less lawless, (whether the writ is suspended or not,) unless there be due process of law . . . .”).

119. See Randall, supra note 79, at 79, at 194.

120. See Cong. Globe, 39th Cong., 1st Sess. 1387 (1866) (statement of Rep. Cook) (“Evidence is before the committee tending to show that in the State of Kentucky alone fifteen hundred suits have been brought against citizens who acted or claimed to act in behalf of the United States, for acts done by command of military officers.”); id. at 1985 (statement of Sen. Trumbull) (“There are at this time, I understand, several thousand suits pending against loyal men who have committed no offense and done no act except in obedience to orders of superior officers. They are now being sued and prosecuted in the courts of Kentucky and other States . . . .”); id. at 2065 (statement of Sen. Doolittle) (noting issue “does not merely concern the States that have been in rebellion, but it concerns our own States, our own provost marshals, and the men who have acted all over our States. I speak now of the States of Iowa, Wisconsin, and all the States of the North”; noting “a great many suits are being instituted” against provost marshals in those states).
To address the problem, Congress in 1866 passed legislation retroactively strengthening and expanding the indemnity provision it had passed in 1863. Like the 1863 Act itself, the substance of the 1866 Act will be taken up in the next section. The focus here, again, is on the legislative history.

Although there was broad agreement to extend the indemnity provision as far as needed to protect Union officers who had simply followed orders and acted in good faith during the war, some in Congress also urged the need to hold accountable those who had abused their positions. In particular, some suggested that the indemnity provision should not extend to those parts of the country where open rebellion and fighting never took place, even though (as noted below) President Lincoln had suspended habeas corpus nationwide in 1863. On that point, Senator Cowan of Pennsylvania—unlike Trumbull, a skeptic of broad immunity—stressed the difference between suspension of the writ and post-detention liability:

Is the suspension of the privilege of the writ of habeas corpus to be taken to mean that the Executive or his officers may arrest everybody, right or wrong? If that is to be the construction put upon it, it is a new construction, and one which has never prevailed. If when the writ of habeas corpus is suspended I am arrested and denied the privilege, I am not thereby debarred of my action for redress. The officer is still responsible, responsible not only for his malice, but for his blunders; and it behooves him, before he exercises this extraordinary power put in the hands of the magistrate under these circumstances, to know well upon whom he exercises it.

I know that an impression prevails in some places that when you suspend the privilege of the habeas corpus, all people, innocent and guilty, without any difference or distinction, may be arrested and may be held until the supposed danger is over, without any remedy on the part of those innocently arrested. Mr. President, I take it, that is not the law...
No one challenged Cowan on this point. To the contrary, the entire debate in both the House and Senate proceeded from the premise that it was the scope of the indemnity provision itself, not the presence or absence of a valid suspension, that determined an officer's exposure to liability.

* * *

Combined, the evidence from the 1807, 1863, and 1866 debates cuts powerfully against the changed-meaning thesis. To be clear, I am not suggesting we should treat the statements of individual congressmen as determinative, by themselves, of suspension's constitutional meaning. Rather, I am suggesting that these statements provide evidence of a remarkably stable view of suspension and its effects—a view that essentially carried forward the earlier English understanding. As the next section shows, further evidence may be found in the text of the suspension- and immunity-related statutes actually passed by Congress during the Civil War, and in Supreme Court cases construing them.

C. Civil War Era Suspension and Indemnity Acts, and Cases Construing Them

The 1863 congressional debate discussed above ultimately yielded legislation entitled "An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases."\(^{124}\) The Act had several components. The first section authorized the President to suspend the writ "throughout the United States, or any part thereof," whenever "during the present rebellion . . . in his judgment, the public safety may require it."\(^{125}\) This was the first congressional authorization of suspension in U.S. history. Exercising that authority, President Lincoln soon suspended the writ nationwide for all cases in which, "by the authority of the President," individuals were held in military custody as, among other things, "prisoners of war, spies, or aiders or abettors of the enemy."\(^{126}\) Numerous arrests and detentions followed, most of short duration. The short duration was due in part to statutory limits contained in the 1863 Act itself. Specifically, the second and third sections of the Act provided, among other things, that non-prisoner-of-war detainees held "by order or authority of the President," in states where the federal courts continued to operate, should be discharged if a grand jury did not indict them in a timely fashion.\(^{127}\)

\(^{125}\) Id. § 1, 12 Stat. at 755.
\(^{126}\) Proclamation No. 7, reprinted in 13 Stat. 734, 734 (1863).
The fourth section of the 1863 Act contained the final version of the indemnity bill earlier debated in the Senate. It provided

[t]hat any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending, or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress, and such defence may be made by special plea, or under the general issue.128

This is the provision that Congress later expanded and strengthened in 1866 (and then again in 1867),129 in response to the flood of lawsuits against former Union officers after the war's end.130 Among other things, the later acts expanded the kind of order pursuant to which an officer could claim immunity—from "any order of the President, or under his authority,131 to "any order, written or verbal, general or special, issued by the President or Secretary of War, or by any military officer of the United States holding the command of the department, district, or place" where the alleged "seizure, search, arrest, or imprisonment" took place.132

A few things about this provision bear emphasizing.133 First, although it is commonly cited as an indemnity provision,134 like the English indemnity acts it actually conferred immunity.135 Second, unlike its English predecessors, as originally enacted in 1863 it was not just a

128. Act of Mar. 3, 1863, § 4, 12 Stat. at 756. Another section of the Act provided for the removal to federal court of any state suit instituted against a federal officer in connection with "any arrest or imprisonment made, or other trespasses or wrongs done or committed . . . at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President . . . , or any act of Congress." Id. § 5, 12 Stat. at 756. For more on federal officer removal provisions of this sort, see Seth P. Waxman & Trevor W. Morrison, What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause, 112 Yale L.J. 2195, 2228-30 (2003).
129. See Act of Mar. 2, 1867, ch. 155, 14 Stat. 432; Act of May 11, 1866, ch. 80, § 1, 14 Stat. at 46.
130. See supra notes 119-120 and accompanying text.
132. Act of May 11, 1866 § 1, 14 Stat. at 46.
133. Except where stated otherwise, I refer here to the 1863 provision as amended by the 1866 and 1867 Acts.
134. See Randall, supra note 79, at 189 n.8 (noting that "contemporary usage" referred to the Act of March 3, 1863 as an "Indemnity Act").
135. See Henry P. Monaghan, The Protective Power of the Presidency, 93 Colum. L. Rev. 1, 26-27 (1993) [hereinafter Monaghan, Protective Power] ("[F]rom their origins in English history, [indemnity acts] were frequently immunity acts. Thus, the Indemnity Act of 1863, as amended in 1866 and 1867, provided retrospective defenses in damage actions brought against federal officials for alleged misconduct based upon presidential directives."). Some in Congress proposed an appropriation of funds to provide for a true indemnity rather than a grant of immunity, but those proposals were defeated. See Randall, supra note 79, at 205-06 (discussing such proposals and their rejection). I discuss this possibility further in Part V.C.6.
retrospective grant of immunity near the end of a long period of suspension. Rather, it applied both retrospectively and prospectively, for as long as "the present rebellion" persisted.\footnote{136. Act of Mar. 3, 1863 § 4, 12 Stat. at 756. The 1866 and 1867 amendments, however, had only retrospective effect, since "the rebellion" had ended by then.}

Third, the indemnity provision did not depend on the actual suspension of the writ. Rather, with or without a suspension, the act made any qualifying order a complete defense to any civil or criminal action "for any search, seizure, arrest, or imprisonment."\footnote{137. Id.; see also Act of May 11, 1866 § 1, 14 Stat. at 46.} Indeed, the indemnity provision was not even limited to acts of detention; it also covered searches and seizures that could not possibly come within the compass of the habeas writ, whether suspended or not. Conceivably, this aspect of the provision might lead one to construe it as not applying to detention during periods of suspension. That is, various contrary statements in the legislative history notwithstanding,\footnote{138. See supra Parts II.B.2 and II.B.3.} one might think that a valid suspension itself immunized the responsible officials from liability for the detentions it covered. On this view, the indemnity provision would apply only in cases where the officials could not take shelter from a suspension—either because the complained-of action did not involve a detention or because the detention was not covered by a valid suspension.

That, however, is not how the indemnity provision was interpreted or applied. As noted above,\footnote{139. See supra notes 119-120 and accompanying text.} in the immediate aftermath of the Civil War, former Union officers faced numerous false imprisonment suits in connection with various arrests and detentions during the war. In such cases, officers' exposure to liability depended on whether they were covered by the indemnity provision, not on whether the detention fell within the scope of the suspension authorized by the 1863 Act. Indeed, and critically for present purposes, there are a number of reported cases in which officers were actually found liable in money damages for detentions that took place during, and at least arguably within the scope of, that suspension.

One such case is \textit{Beckwith v. Bean.}\footnote{140. 98 U.S. 266 (1879).} In November 1864, Bean was arrested by military authorities on suspicion of enticing Union soldiers to desert.\footnote{141. Id. at 268.} He was held on military order, but without warrant or formal charges, until late April 1865.\footnote{142. Id. at 268, 270.} He later sued the military officials responsible for his arrest and detention, alleging false imprisonment as well as assault and battery.\footnote{143. A jury found for Bean and awarded him $15,000 in damages.\footnote{144. Id. at 267.}} The defendants appealed and the case twice reached the...
Supreme Court on evidentiary and other issues.\textsuperscript{145} Both of the Court’s opinions made clear that, at trial, the defendants’ principal argument against liability had been that their actions fell within the 1863 and 1867 indemnity provisions passed by Congress.\textsuperscript{146} Whether the writ had been validly suspended as to Bean was not part of the analysis. Had it been, it would not have been a simple question to answer. At least some substantial portion of the detention surely did fall within the suspension authorized by the 1863 Act.\textsuperscript{147} At some point, however, the government’s failure to present the case to a grand jury might have violated the second and third sections of the Act.\textsuperscript{148} But it might not have, since apparently no federal court was in session during the period of Bean’s military detention, in which case a grand jury might not have been convened during that time.\textsuperscript{149} If suspension had been understood to confer immunity, it would have been important to resolve this issue. But there is no mention of it in the Court’s opinions, and no indication it played any role at all.

In sum, although \textit{Beckwith} did not directly address the effect of a valid suspension, in context it provides powerful evidence against the changed-meaning thesis. Federal officers were held liable for false imprisonment in connection with a detention that was covered at least in part by a valid suspension, yet the suspension had no apparent bearing on the defendants’ liability. Instead, the officers relied on the statutory indemnity provisions, underscoring that those provisions were necessary precisely because suspending the writ did not provide any immunity.

\textsuperscript{145} Id.; Bean v. Beckwith, 85 U.S. (18 Wall.) 510 (1874).
\textsuperscript{146} As the Court described,
\begin{quote}
[The defendants intended by their pleas to rest the justification of their conduct upon the provisions of the [1863 and 1867 Acts] . . . . These statutes were enacted, among other things, to protect parties from liability to prosecution for acts done in the arrest and imprisonment of persons during the existence of the rebellion, under orders or proclamations of the President, or by his authority or approval . . . .
\end{quote}

\textit{Bean}, 85 U.S. (18 Wall.) at 515-16 (footnotes omitted); see also \textit{Beckwith}, 98 U.S. at 283 (describing two acts the same way).
\textsuperscript{147} The detention clearly fell within Lincoln’s suspension proclamation, which, in addition to the grounds quoted supra at text accompanying note 126, covered the detention of individuals “enrolled or drafted or mustered or enlisted in, or belonging to, the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law . . . or for resisting a draft, or for any other offence against the military or naval service.” Proclamation No. 7, reprinted in 13 Stat. 734, 734 (1863). Still, as an exercise of authority conferred by the 1863 Act, Lincoln’s suspension order was subject to the limits contained therein. I discuss those limits in the next two sentences in the text.
\textsuperscript{149} See Brief for Defendant in Error at 2, \textit{Beckwith}, 98 U.S. 266 (No. 294) (“[B]etween the arrest and the time [Bean] was brought before [a United States] Commissioner [on May 1, 1865], there was no term of the United States Circuit Court in Vermont.”).
The landmark case *Ex parte Milligan* confirms the point. *Milligan* did not implicate any of the indemnity acts passed by Congress, but it did articulate a clear and narrow understanding of the effect of a valid suspension. The case arose out of a habeas challenge to Milligan’s detention, trial, and conviction by a military tribunal. The Court first concluded that Milligan did not fall within the terms of the suspension then in effect, and then held that Congress had not, and could not, authorize his trial by military tribunal. In the process, the Court also made clear that the legality of Milligan’s arrest and detention did not depend on whether the writ was validly suspended as to him: “The suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.” The Court underscored this point later in the opinion, explaining that the Framers had “secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus.” This distinction between the suspendibility of habeas and the undisturbability of the other rights and liberties secured by the Constitution would make little sense if the Court understood suspension to remove all constitutional objections to detention.

Professor Shapiro, however, maintains that this reading of *Milligan* rests on a misunderstanding of the case, and especially of the disagreement between the majority and concurring opinions in the case. In his view, the critical disagreement between the majority and concurrence was over “whether there were circumstances in which a valid suspension

150. 71 U.S. (4 Wall.) 2 (1866).
151. Id. at 6–8.
152. The Court relied on the second and third sections of the 1863 Act, which it saw as confirming that Congress had “not contemplated that [non-prisoner-of-war detainees like Milligan] should be detained in custody beyond a certain fixed period, unless certain judicial proceedings, known to the common law, were commenced against him.” Id. at 115. *Milligan’s* allegations (whose “truth [wa]s conceded for purposes of this case,” id. at 131) established that such proceedings had not been initiated in his case, that he therefore fell outside the scope of the suspension authorized by the 1863 Act, and that the federal courts thus had jurisdiction to entertain his habeas petition. See id. at 116.
153. See id. at 121–22.
154. Id. at 115. If a valid suspension does not legalize an otherwise unlawful arrest, it is difficult to see how it could legalize the detention that follows. *Milligan* does not suggest otherwise.
155. Id. at 125. The Court made this point in the course of establishing that suspending the writ does not by itself authorize a detainee’s trial by military tribunal. See id. at 125–26. But in doing so it did not suggest that a valid suspension authorized everything short of trial—that is, arrest and detention. Rather, the Court stressed that suspension affected the right to the habeas remedy and nothing else. See id. at 126 (noting that Framers “limited the suspension to one great right, and left the rest to remain forever inviolable”).
156. Shapiro, supra note 20, at 84.
could be accompanied by a valid authorization to try a detainee before a
military commission."\[157\] Yet that does not change what the majority said
about suspension. Moreover, although the issue highlighted by Professor
Shapiro was one of the points on which the majority and concurrence
disagreed, it was not the only one. The concurrence itself made this

[W]e concur . . . in what is said [by the majority] of the writ of
habeas corpus, and of its suspension, with two reservations: (1.)
That, in our judgment, when the writ is suspended, the Executive
is authorized to arrest as well as to detain; and (2.) that
there are cases in which, the privilege of the writ being sus-
pended, trial and punishment by military commission, in states
where civil courts are open, may be authorized by Congress, as
well as arrest and detention.\[158\]

So the majority and concurrence divided on the precise question
whether a valid suspension legalizes arrests and detentions falling within
its ambit.\[159\] The majority's answer, confirmed by its own words and the
concurrence's reservation, was "no." Admittedly, given the posture of the
case, that answer must be ranked as dictum. But it cannot be deemed
 inadvertent—it was, after all, a point on which the majority and concur-
rence explicitly disagreed. Nor, as I have been endeavoring to show, was
it novel.

The Civil War era cases are not entirely uniform on this point, how-
ever. Although Beckwith and Milligan show the Supreme Court's views at
the time, parts of a little-known lower court opinion arguably point in a
different direction. In McCall v. McDowell\[160\]—the case described in the
Introduction, involving the detention of a man for praising the assassina-
tion of President Lincoln\[161\]—a federal district court in California heard
a false imprisonment action for damages against the federal military offi-
cials responsible for the detention. The defendants claimed immunity
under the 1863 and 1866 Indemnity Acts.\[162\] The plaintiff argued that
those Acts were unconstitutional to the extent they purported to immu-
nize the defendants.\[163\] To address those arguments, the court began by
considering "the purpose and practical effect of suspending the privilege

\[157\] Id. at 85.

\[158\] Milligan, 71 U.S. (4 Wall.) at 137 (Chase, C.J., concurring).

\[159\] Professor Shapiro calls this divide "puzzling." Shapiro, supra note 20, at 85, but I
don't think it is. Deciding whether a valid suspension could ever combine with additional
legislation to authorize trials by military commissions—the question Professor Shapiro says
created the principal divide in the case—can entail taking a position on what, precisely, a
valid suspension achieves.

\[160\] 15 F. Cas. 1235 (C.C.D. Cal. 1867) (No. 8,673).

\[161\] See supra text accompanying notes 12–18.

\[162\] McCall, 15 F. Cas. at 1241.

\[163\] Id.
of the writ." And although Professor Shapiro does not cite the case, on this point the court's reasoning anticipated his argument:

The very limitation in the constitution upon the power of suspension is strong evidence that it was not understood to be a mere form, but something of serious import and effect. . . . Unless the suspension changes the law, so to speak, for the time being, in regard to arrests and imprisonments, I am at a loss to conceive how the republic can be thereby preserved from imminent danger, or the public safety conserved.165

On the question of the precise relationship between suspension and immunity, however, McCall is not so obviously supportive of the suspension-as-legalization model. Parts of the opinion suggest (in tension with the above-quoted language) that an act of indemnity is necessary to protect officers from liability for their actions during a suspension,166 while other passages seem to say that indemnity acts are essentially superfluous.167 It is difficult to know what to make of these internal inconsistencies.

In any event, McCall is an isolated lower court case. To the extent portions of the opinion do seem to embrace suspension as legalization, they are clearly at odds with the dominant understanding of suspension reflected in the 1863 and 1866 statutes and in the Supreme Court case law construing them. During the Civil War and Reconstruction, those materials confirm, Congress and the Court understood suspension as bearing on habeas and habeas alone.

D. Post-Civil War Suspensions

There have been three congressionally authorized suspensions of the writ since the Civil War. In 1871, exercising authority that Congress had granted him earlier that year,168 President Grant suspended the writ in

164. Id. at 1242.
165. Id. at 1243.
166. See id. (stressing necessity of "provid[ing] in some way for the protection of the officers and persons required to make arrests and imprisonments," and opining that "[w]ithout further legislation than the suspension of the privilege of the writ, every person imprisoned without legal cause or warrant, might maintain an action for damages therefor").
167. See id. at 1245 (calling suspension itself "the virtual authorization of arrest without the ordinary legal cause or warrant" and expressing an "inclin[ation]," unsupported by any citation to authority, to regard 1863 and 1866 Indemnity Acts as "merely declaratory of the law" as it stood following writ's suspension). Immediately after expressing that view, however, the court returned to its earlier understanding by describing the controlling question not as whether the detention in that case fell within the scope of the suspension, but as "whether the defendants [were] within the provision of the indemnifying acts." Id. Answering that question in the negative as to one of the defendants, the court found him liable for $635 in damages, plus costs. See id. at 1235.
parts of South Carolina in an effort to quell an uprising involving the Ku Klux Klan. In 1905, the Governor of the Philippines suspended the writ pursuant to that territory's Organic Act. And in 1941, in response to the attacks on Pearl Harbor, the Governor of Hawaii suspended the writ (a move the President later endorsed and ratified) pursuant to Hawaii's Organic Act. On none of these occasions did Congress pass an indemnity act. One might therefore infer that Congress gradually came to see suspension itself as entailing immunity, so that separate legislation was unnecessary. And to support that inference, one could point to the apparent absence of any reported suits for wrongful imprisonment flowing out of the detentions that took place during those periods of suspension. The inference is unwarranted, however.

First, it is worth noting that the statutes authorizing the Philippine and Hawaiian suspensions long predated the suspensions themselves. The 1905 Philippine suspension was imposed pursuant to authority granted in the territory's Organic Act of 1902; the 1941 Hawaiian suspension was imposed pursuant to authority granted in its Organic Act of 1900. It is a fair, and unresolved, question whether such far-in-advance legislative delegations are constitutional at all, especially when enacted well before the emergency giving rise to the suspension. Setting that question aside, the fact that these delegations came so far in advance, in statutes not focused just on emergency matters, provides some explanation for why the Congresses that passed them did not also take up the indemnity question.

Second, there is evidence from the Philippine suspension tending to show that the traditional understanding of suspension was still alive and well at that time. It comes from Barcelon v. Baker, a habeas action in which Barcelon, who had been detained "for a long time" in Batangas

169. See Proclamation No. 4, reprinted in 17 Stat. 951 (1871).
172. See Jaffee v. United States, 663 F.2d 1226, 1261 n.35 (3d Cir. 1981) ("The Civil War was the first and last time that this defense was provided to military personnel. The defense 'expired by its own limitation.'" (quoting Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 254 (1868))).
173. I say "apparent" because although I have found no such suits, I am reluctant to treat this as conclusive proof of their nonexistence.
174. See supra note 170.
175. See supra note 171.
176. Cf. supra note 13 (noting the issue).
province, challenged his detention as unlawful. The Supreme Court of the Philippine Islands did not reach the legality question, concluding instead that the writ had been suspended and thus that the habeas action could not proceed. A concurring opinion stressed, however, that the suspension did not affect the legality of the detention: "The fact that the writ has been suspended can not . . . be used as a pretext for the commission of crimes defined and punished in the Penal Code now in force in these Islands. The application of said code has not been suspended . . . ." Reasoning that the detention violated a criminal prohibition on detention except where specifically authorized by law, the concurrence even went so far as to urge that those responsible for the detention be prosecuted. That advice appears not to have been followed, presumably in part because such a prosecution would have been a dicey proposition politically. It also helped that the suspension was lifted less than three weeks after the court's decision. But the point for present purposes is that the Barcelon concurrence embraced the traditional view of suspension, and that no one on the court voiced any disagreement.

Third, there is similar, though concededly less weighty, evidence from the Hawaiian suspension. In Kahanamoku v. Duncan, the Ninth Circuit distinguished between the "availability of the writ" to persons detained and tried by military courts in Hawaii, and the "legality of the imprisonment" that followed. Admittedly, the significance of this distinction is obscured by the court's conclusion that the military trials were lawful on their own terms, which enabled it to avoid deciding even whether the writ remained suspended, let alone what the effect of a suspension would have been. Similarly, the Supreme Court's decision reversing the Ninth Circuit turned on the fact that the writ had been restored by then, and on its separate conclusion that the military trials were

178. See id. at 97–98 (majority opinion) (summarizing bases for court's holding).
179. Id. at 116 (Torres, J., concurring); see also id. at 117 ("It would not be lawful . . . to violate the provisions of the Penal Code under the pretext that the writ has been suspended.").
180. See id. at 117 (concluding "that the petition for habeas corpus should be denied, and that criminal proceedings should be instituted for the crime of illegal detention . . . and that it is the duty of the [trial] judge . . . to proceed against those responsible for said crime").
181. The court issued its decision on September 30, 1905. See id. at 87. The writ was restored on October 19, 1905. See Fisher, 203 U.S. at 180. It was on that basis that the Supreme Court dismissed the appeal from the Philippine court's decision. See id. at 181–83.
182. 146 F.2d 576, 578 (9th Cir. 1944), rev'd, 327 U.S. 304 (1946).
183. See id. ("[I]n view of the conclusion we have reached in respect of the legality of the imprisonment . . . , it is unnecessary to consider whether the emergency existing in the Territory as of the time of the filing of the petitions was such as to warrant the then suspension of the writ.").
unlawful under Hawaii's Organic Act. Still, both courts' opinions are entirely consistent with the traditional view of habeas elaborated here.

In contrast to the above, I am aware of no affirmative evidence from any of the post-Civil War suspensions demonstrating that Congress (or anyone else) had, in fact, departed from the traditional understanding of suspension. In the absence of any such evidence, we should be reluctant to conclude that the entrenched view was silently abandoned. Thus, although I do not suggest these suspensions provide the strongest free-standing support for the understanding of suspension defended here, I see no basis for concluding that they fundamentally changed suspension's meaning.

E. Early Scholarly Commentary

Finally, it bears emphasizing that the overwhelming majority of late nineteenth- and early twentieth-century scholarship on habeas corpus embraced the traditional view that suspension does not affect legality or later liability. This is true of both general works on constitutional law and those devoted more specifically to habeas corpus.

Although constitutional law generalists typically did not devote much space to the effect of a valid suspension, several did express a specific understanding on this point. Thomas Cooley, for example, explained in his 1880 Principles of Constitutional Law that "suspension does not legalize what is done while it continues; it merely suspends for the time this particular remedy. All other remedies for illegal arrests remain, and may be pursued against the parties making or continuing them." John Innes Clark Hare took the same basic position in his 1889 work, American Constitutional Law. Rejecting what he deemed the Milligan concurrence's attempt to "deduce the right to arrest and execute summarily ... from the authority to ... suspend the writ of habeas corpus," he explained that [t]he suspension of the habeas corpus does not authorize the President to make arrests. His authority in this regard is derived

184. See Duncan v. Kahanamoku, 327 U.S. 304, 312 n.5 (1946) (noting that habeas had been restored); id. at 313 (explaining that legality question turned on construing Organic Act); id. at 314-24 (construing Organic Act not to grant armed forces power to displace civilian courts with military tribunals).

185. John Norton Pomeroy, for example, said little more than that "Congress and President derive no new affirmative power from the habeas corpus clause, but only a negative power of passive resistance." John Norton Pomeroy, An Introduction to the Constitutional Law of the United States 475 (New York, Hurd & Houghton 1868). Pomeroy was a professor of law and later became dean of the law faculty at New York University.


187. J.I. Clark Hare, American Constitutional Law (Boston, Little Brown & Co. 1889). Hare was presiding judge of the Court of Common Pleas in Philadelphia. His treatise is "an embodiment of a course of lectures delivered in the Law School of the University of Pennsylvania." Id. at viii.
from his office as chief magistrate and the obligation to take care that the laws be faithfully executed. From whatever source such an authority may come, it must be exercised in conformity with the Fourth Amendment . . . and the doctrine of the common law that the cause must be set forth in the writ, unless there is the necessity for immediate action which justifies a constable in apprehending without a warrant or a complaint under oath before a magistrate. To contend that the suspension of a single guaranty authorizes a disregard of every other, is an abuse of terms.\textsuperscript{188}

Westel Willoughby expressed the same view two decades later:
[Suspension] enables executive agents to make arrests at will, and, while the suspension is in force, renders it impossible for those apprehended to obtain a judicial judgment upon the legality of such arrests and detention. But it does not operate actually to authorize such arrests, or to deprive the individual of any of the other rights which the law secures him, and, therefore, the persons responsible for the arrests and detention may still be held civilly and criminally responsible for any illegal acts that they may have committed.\textsuperscript{189}

Among works focusing on habeas corpus, the view expressed in the 1876 edition of Rollin Hurd’s influential treatise—a work whose first edition had been called “[t]he only comprehensive treatise on the Writ of Habeas Corpus published in this country”\textsuperscript{190}—is typical:

The suspension of the privilege of the writ does not legalize a wrongful arrest and imprisonment; it only deprives the party thus arrested of the means of procuring his liberty, but does not exempt the person making the illegal arrest from liability to damages, in a civil suit, for such arrest, nor from punishment in a criminal prosecution.\textsuperscript{191}

William Church took the same position in the 1893 edition of his \textit{Treatise on the Writ of Habeas Corpus}:

\textsuperscript{188} Id. at 966 (footnote omitted); see also id. at 506 (stating that constitutional contemplation of suspension “did not justify illegal arrests, and still less the conviction of the accused without a trial in due course of law. Such is the theory and practice of the English government, and the framers of the Constitution certainly did not intend to introduce a new and arbitrary rule.”).

\textsuperscript{189} Westel Woodbury Willoughby, The Constitutional Law of the United States, at 1254–55 (1910) (footnote omitted). Willoughby was the first faculty member of the political science department at Johns Hopkins University.


\textsuperscript{191} Rollin C. Hurd, A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus and the Practice Connected with It 126 n.2 (Albany, W.C. Little & Co., 2d ed. 1876).
A wrongful arrest and imprisonment... can not be legalized by the suspension of the privilege of the writ. The suspension of the privilege of the writ only deprives an individual wrongfully arrested of the means of procuring his liberty; it does not exempt the one making an arrest illegally from liability to damages in a civil action for such arrest. Neither does it exempt him from punishment in a criminal prosecution. \textsuperscript{192}

There was at least one notable, though fleeting, exception. Shortly after Chief Justice Taney in \textit{Ex parte Merryman} held Lincoln's unilateral suspension of the writ to be unconstitutional,\textsuperscript{193} Horace Binney, the eminent leader of the Philadelphia bar, wrote a pamphlet defending Lincoln.\textsuperscript{194} The main thrust of his argument was that the Constitution should be read to give the power of suspension to the President, not Congress.\textsuperscript{195} It quickly met with vigorous opposition,\textsuperscript{196} to which Binney responded in a second pamphlet published later that year.\textsuperscript{197} In both pamphlets, Binney relied in part on the Suspension Clause's reference to suspending the privilege of the writ, not the writ itself. Suspending the writ, he contended, was a legislative act; suspending the privilege of the writ could only be accomplished by the authority ultimately responsible for executing the law—the President.\textsuperscript{198} Critically for present purposes, Binney also asserted that the \textit{effect} of suspending the privilege was far more extensive than the effect of suspending the writ:

The privilege is a subject totally different from the Writ. The repeal, either total or limited, absolute or suspensive, of the judicial power to issue the Writ, would be the denial or loss of the specific remedy to the prisoner, and nothing more. . . . [B]ut the wrong of an arbitrary imprisonment to the prisoner would remain; . . . and the prisoner's remedy by action for the wrong would remain; and the public remedy for the wrong to the country would remain, by indictment for assault and battery, or for conspiracy, or other public offence involved in the lawless

\textsuperscript{192} William S. Church, A Treatise on the Writ of Habeas Corpus 42–43 (San Francisco, Bancroft-Whitney Co., 2d ed. 1893). Similarities in the phrasing of the Hurd and Church passages ("only deprives"; "means of procuring his liberty"; "does not exempt"; "liability to damages"; "punishment in a criminal prosecution") suggests that the latter may have relied on (though he did not cite) the former for this point.\textsuperscript{193} See supra text accompanying note 110.\textsuperscript{194} Horace Binney, The Privilege of the Writ of Habeas Corpus Under the Constitution (Philadelphia, C. Sherman & Son, 2d ed. 1862) [hereinafter Binney, First Part].\textsuperscript{195} See id. at 5–8, 47–48 ("Why claim for Congress the power to suspend, when the actual and efficient power as an Executive act, must be with the President?").\textsuperscript{196} See Sydney G. Fisher, The Suspension of Habeas Corpus During the War of the Rebellion, 3 Pol. Sci. Q. 454, 465 (1888) ("Answers and criticisms [of Binney's argument] came from all sides.").\textsuperscript{197} See Horace Binney, The Privilege of the Writ of Habeas Corpus Under the Constitution, Second Part (Philadelphia, C. Sherman & Son 1862) [hereinafter Binney, Second Part].\textsuperscript{198} See Binney, First Part, supra note 194, at 6–7.
and arbitrary imprisonment. It would not be even an approach to the suspension of the privilege of the Writ of Habeas Corpus, which . . . is the suspension by supreme authority of the right as well as the remedy in time of rebellion or invasion, if the public safety requires it.  

Binney thus understood the "privilege of the writ" to refer to the "privilege" of individual freedom. And while suspending the writ simply made the habeas remedy unavailable, suspending the privilege removed the right to liberty itself.

Binney's particular distinction between the privilege and the writ did not gain widespread acceptance. Indeed, in 1866 the Supreme Court in Milligan made clear that it understood "privilege" to refer to the habeas remedy, not the underlying liberty interest. By then, however, Binney himself had already effectively retracted his argument on this point. In 1865, he published a third pamphlet focusing on "the nature of the [suspension] power, its extent and range." Explaining that his earlier statements on the issue had been "only collateral and brief," he now disavowed any suggestion that all detentions covered by a suspension are ipso facto lawful. As he put it,

[1]he total suppression of the fundamental law of the land, and all laws of the land, at [the government's] election, even in rebellion and invasion, is probably what the people never thought of, and what the Constitution ought to have [stated] more explicitly than it does, to infer such an intention.

Thus, by late 1865—after, to be sure, the crisis prompting Binney's original pamphlet had largely subsided—even this most fervent defender of a robust (and presidential) suspension authority had accepted the prevailing understanding that suspension did not remove all underlying rights.

In sum, the vast majority of late nineteenth and early twentieth century legal scholars understood suspension in this country to mean just what it had meant in England. This understanding is consistent with the
views expressed by leading members of Congress early in the nineteenth century, as well as during and immediately after the Civil War. It is consistent with the structure and substance of the suspension and indemnity legislation actually passed by Congress during and immediately after the Civil War. It is consistent with the Supreme Court's treatment of suspension and indemnity in the aftermath of the Civil War. And it is consistent with the evidence from post-Civil War suspensions as well. On the question of the effect of a valid suspension, then, the "constitutional 'tradition'" in this country accords with English practice.

III. Recapitulation and Elaboration: The Distinctness of Suspension, Immunity, and Legality

There are three key points to take away from the historical evidence surveyed in Parts I and II. Here I reprise those points, note some complications contained within them, and tease out the organizing issues for the balance of the Article.

The first and most obvious lesson to draw from the historical evidence is that suspending the writ does not affect the legality of detention, nor does it change the availability of later remedies for unlawful detention. This is clearly true of the English practice, especially as described by Dicey. And the evidence from this country undermines any notion that the Suspension Clause changed this aspect of suspension's traditional meaning. Indeed, the historical evidence is so strong that, even for one prepared to accept a variety of approaches to constitutional interpretation, it is difficult to see how the suspension-as-legalization model could survive.

There is one wrinkle worth noting here, implicit in my statement above that suspension does not change the availability of later remedies. That wording reflects the need to distinguish between post-detention remedies like civil damages, which suspension does not affect, and injunctive or other remedies aimed at winning the detainee's release, which suspension precludes. When Parliament first began passing suspension acts in the late seventeenth century, it is not clear that there were any other remedies reliably capable of ordering a detainee's release. But if there were, suspending habeas evidently displaced them. Dicey, for example, explained that suspending the writ ensured that "the Ministry may

207. Fallon & Meltzer, Constitutional Remedies, supra note 37, at 1780 n.249.
208. See supra Part I.A.
209. See supra Part II.
210. Blackstone identified and briefly discussed three other "means of removing the actual injury of false imprisonment": the writs of "mainprize," "de odio et atia," and "de homine repregiendo." Blackstone, supra note 50, at *128-129. These were contemporaneous remedies, not ex post means of obtaining damages. But they appear to have been quite limited in substantive scope, and there is no indication that they remained available even when habeas was suspended. Cf. Shapiro, supra note 20, at 87 n.120 (describing these three writs as "of extremely limited value").
for the period during which the Suspension Act continues in force con-
stantly defer the trial of persons imprisoned on the charge of treasonable
practices.\footnote{Put simply, suspension precluded a judicial order of
release.}

That has been the prevailing understanding in this country as well.
Congressional opposition to Jefferson's request for a suspension, for ex-
ample, was based on the assumption that suspending the writ would re-
move the only judicial means of procuring an individual's immediate re-
lease.\footnote{Modern Supreme Court doctrine is consistent with this
understanding. Although the Court has not addressed the precise issue,
treating suspension as removing all means of immediate release accords
with the Court's well-established rule that Congress is not deemed to have
suspended habeas if it substitutes an adequate alternative remedy.\footnote{The
Court's cases powerfully suggest that an alternative remedy is not ade-
quate for Suspension Clause purposes unless it can provide immediate
discharge.\footnote{If Congress could replace habeas with such an alternative
remedy without suspending the writ, then surely a suspension of the writ
should be deemed to suspend not only habeas but also any functional
equivalent. Otherwise, a detainee could circumvent the suspension en-
tirely by seeking the very same relief—discharge—by other means.}} In

\footnote{211. Dicey, supra note 47, at 230.}

\footnote{212. See 16 Annals of Cong. 402-25 (1807). Early treatise writers held the same view.
Sec, e.g., Church, supra note 192, at 42-43 ("The suspension of the privilege of the writ
only deprives an individual wrongfully arrested of the means of procuring his liberty . . . .").}

without raising any constitutional questions, provide an adequate substitute [to habeas-
(stating that "the substitution of a collateral remedy which is neither inadequate nor
ineffective to test the legality of a person's detention" is not a suspension under the
Suspension Clause).}

\footnote{214. See, e.g., \textit{Swain}, 430 U.S. at 381-83 (deeming adequate section 23-110 of District
of Columbia Code, which provides for collateral review of criminal convictions and
sentences that is in all significant respects identical to habeas); United States v. Hayman,
342 U.S. 205, 219-20 (1952) (same for 28 U.S.C. § 2255, the vehicle for collateral federal
review of federal criminal convictions and sentences).}

\footnote{215. Professor Shapiro takes this point further—too far, in my view. As he sees it, "the
sensible rule . . . that an adequate alternative defeats a Suspension Clause claim itself
suggests that a valid suspension defeats the argument for an alternative remedy." Shapiro,
supra note 20, at 89 n.131. Note the change in wording here: "[A]n adequate alternative" to
habeas expands to become \textit{any} "alternative remedy" for unlawful detention. Therein
lies the flaw in the reasoning. Under \textit{Swain} and \textit{Hayman}, the presence of an \textit{adequate}
alternative to habeas defeats a Suspension Clause claim. Why would that suggest that a
valid suspension defeats the argument for \textit{any} other remedy? The better view, I think, is
that a valid suspension removes those remedies, and only those remedies, that would count
as adequate alternatives to habeas if the writ were not suspended. To put the point another
way, just as a post-detention action for damages is not an adequate alternative to habeas in
periods of nonsuspension, a valid suspension does not affect the availability of a damages
action later on. Habeas petitions and damages actions, in short, are neither
interchangeable nor inextricably linked.}
sum, although suspending the writ does not itself affect the legality of the
detention or the availability of later compensatory remedies to redress un-
lawful detention, it does remove all means of obtaining contemporaneous
relief from the detention itself—that is, discharge.

The second lesson of Parts I and II is that legislative action in this
area can have two distinct steps: the decision whether to suspend the
writ, and the decision whether to shield officials from later liability for
detaining people unlawfully. These two steps could, of course, both be
taken in the same legislation, even in the same provision. But the deci-
sion to suspend does not entail the decision to abrogate post-detention
remedies. Moreover, the remedy-abrogating decision appears to be
largely—though not necessarily entirely—a matter of legislative judg-
ment. In England, as Dicey put it, “everything depend[ed] on the terms
of the Act of Indemnity.”216 In this country, the breadth of the indemnity
provisions passed by Congress during the Civil War suggests that it also
has considerable leeway in this area. I examine this point in greater de-
tail in Part V.A, with special reference to the familiar maxim that every
legal right requires a remedy for its violation.

As an historical matter, Congress has not always accompanied a deci-
sion to suspend with a decision to immunize. Without purporting to ex-
plain Congress’s inaction at those times, in Part V.C, I explore some of
the reasons why Congress might not pair a valid suspension with an in-
demnity provision.

The third lesson of Parts I and II is that even in circumstances where
Congress completely shields responsible officers from liability, the lack of
a judicial remedy for unlawful detention does not make the detention
lawful. The texts of the English and American indemnity acts corrobo-
rate this point. Parliament’s Indemnity Act of 1801, for example, pro-
vided that all suits against officers for the covered actions “shall be dis-
charged and made void,” and that the relevant officers “shall be freed,
acquitted, discharged, and indemnified.”217 Similarly, the indemnity pro-
vision passed by Congress in 1863 made “any order of the President, or
under his authority . . . a defence in all courts to any action or prosecu-
tion, civil or criminal.”218 Provisions like these were evidently concerned
with shielding officers from court-imposed liability. They made no pre-
tense of making anything “lawful” in any broader sense.

Admittedly, parts of Dicey’s account of the English history present a
somewhat different view. In places, he depicted indemnity acts as
“free[ing] persons who have broken the law from responsibility for its
breach,” which seems to suggest that they did not affect underlying ques-
tions of legality.219 But he was not entirely consistent on this point, and
elsewhere he described indemnity provisions as “mak[ing] lawful acts

216. Dicey, supra note 47, at 236.
217. 41 Geo. 3, c. 66 (1801).
219. Dicey, supra note 47, at 235.
which when they were committed were unlawful."220 One explanation for the latter statement might be Dicey's conception of law itself. In the course of distinguishing "constitutional law" from what he called "conventions of the constitution" or "constitutional morality," Dicey suggested that only those rules or norms that "are enforced by the courts" qualify as law "in the proper sense of that term."221 Applied to the law governing detention, Dicey's taxonomy produces the view that there is no such thing as unlawful detention for which there is no judicial remedy. If an indemnity act removes all judicial remedies for unlawful detention, the detention itself is no longer contrary to law.

This view seems odd to the modern U.S. reader, for whom the distinction between a right and a judicial remedy is a commonplace.222 True, in recent years, scholars have ably demonstrated the ways in which rights and remedies are interdependent.223 And from a practical standpoint, it is hard to deny Daryl Levinson's point that "the cash value of a right is often nothing more than what the courts (or some other institution with enforcement authority, for example, Congress) will do if the right is violated."224 But as Professor Levinson's own words make clear, even this "pragmatic" view of constitutional law need not focus exclusively on the courts.225

I will elaborate on the point later in the Article,226 but for now it suffices to say that the absence of a judicial remedy for the violation of a legal norm does not extinguish the norm itself. Thus, even if the respon-

220. Id. at 233 (emphasis added).
221. Id. at 23-24.
222. Consider, for example, the doctrine of qualified officer immunity. As the Supreme Court has explained, qualified immunity analysis must address two questions: whether the complaint alleges a violation of the plaintiff's statutory or constitutional rights (the rights question), and whether those rights were clearly established at the time of the defendant's actions (the immunity/remedy question). Courts must analyze these questions separately, and in the order described above. See Saucier v. Katz, 533 U.S. 194, 201 (2001). This analytical order of operations makes it possible for a court to find a constitutional violation but also hold the defendant immune from damages liability. See, e.g., Wilson v. Layne, 526 U.S. 603, 614, 617 (1999) (holding that law enforcement officers violated homeowner's Fourth Amendment rights by bringing press into home while executing warrant, but that right was not clearly established at time of complained-of conduct).
223. See, e.g., Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 Colum. L. Rev. 857, 860 (1999) ("[T]he basic private law insight that rights and remedies are integrally connected...translate[s] to constitutional law in a number of interesting ways that are habitually overlooked or underappreciated.").
224. Id. at 887.
225. See also Roderick M. Hills, Jr., The Pragmatist's View of Constitutional Implementation and Constitutional Meaning, 119 Harv. L. Rev. F. 173, 179 (2006), at http://www.harvardlawreview.org/forum/issues/119/march06/hills.pdf (on file with the Columbia Law Review) ("Pragmatism maintains that there is no constitutional meaning apart from the actions that the relevant institution takes to enforce the Constitution." (emphasis added)).
226. See infra Part VI.
possible officials have absolute immunity for their detention-related actions during a period of suspension, it is still possible that they violated the law. This point places a premium on what the President and the rest of the executive branch do, or fail to do, to discharge their independent obligations of fidelity to the Constitution and laws. More specifically, it commends careful attention to how executive branch actors assign meaning to the legal norms governing detention, and to how they craft rules to implement those meanings. That is the focus of Part VI.

Part VI, then, focuses on the executive’s responsibilities during a suspension. And Part V, as I have suggested, does the same for Congress. Both Parts flow from the common premise that the political branches each have an independent obligation to uphold the Constitution that is not reducible merely to adhering to the constitutional judgments of the courts. Part IV briefly fleshes out that premise in an effort to place the later discussions in better context.

IV. Framing the Extrajudicial Constitution

This Part provides a framework for thinking about the issues of legislative and executive constitutional interpretation and implementation taken up in Parts V and VI. Extrajudicial constitutionalism is a vast topic, and I do not propose to plumb all its intricacies here. Instead,
my goal is to sketch a basic schema within which I will later take up specific issues of legislative and executive constitutional implementation.

My starting point is the familiar, if often overlooked, principle that constitutional interpretation and implementation are not the exclusive province of the courts. The constitutional text requires members of Congress, the President, and all other executive officials to pledge to uphold the Constitution. The duties thus generated do not depend on judicial enforcement. Hence, for example, a judicial conclusion that a particular constitutional provision is nonjusticiable on political question grounds does not free the political branches to do whatever they want in that area. Rather, they must bind themselves to their own best understanding of the constitutional provision, however that understanding is derived.

The same is true of constitutional norms that the courts enforce only weakly or deferentially. The classic example is the "rational basis" test, which courts use to review most government action under the Equal Protection Clause. As numerous commentators have stressed, this test is an instrument of judicial restraint, designed to limit the judiciary's in-

( arguing that Fourteenth Amendment's enforcement powers give Congress power to express "constitutional understandings of the American people"); Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978) [hereinafter Sager, Fair Measure] (arguing that executive and legislature have power to enforce constitutional norms that are underenforced by courts); David Barron, Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power, Law & Contemp. Probs., Winter/Spring 2000, at 61 (analyzing President's power to decline enforcement of law on constitutional grounds); Dawn E. Johnsen, Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?, Law & Contemp. Probs., Summer 2004, at 105, 109 (proposing "functional departmentalism" where authority to act on independent constitutional views is limited by functional considerations).

228. U.S. Const. art. II, § 1, cl. 8 (requiring President, before "enter[ing] on the Execution of his Office," to swear or affirm that he "will faithfully execute the Office of President of the United States, and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States"); id. art. VI, cl. 3 ("The Senators and Representatives . . . and all executive and judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution . . . ").

229. See Pillard, Unfulfilled Promise, supra note 227, at 690 ("[A judicial] decision not to invalidate government action on political question grounds 'is of course very different from [determining] that specific congressional action does not violate the Constitution,' because it leaves open the possibility that the political branches might themselves find a violation." (footnote omitted) (quoting U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 458 (1992))).

230. As Richard Fallon has observed, nonjusticiable and judicially underenforced constitutional provisions exist along the same spectrum. See Richard H. Fallon, Jr., Judicially Manageable Standards and Constitutional Meaning, 119 Harv. L. Rev. 1274, 1306 (2006) [hereinafter Fallon, Judicially Manageable Standards] ("Viewed along a spectrum, a determination of nonjusticiability due to the absence of judicially manageable standards is simply the limiting case of a decision to underenforce constitutional norms.").

231. U.S. Const. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").
trusion into the operations of democratically accountable organs of government.\textsuperscript{232} By that reasoning, the test should not confine other branches' implementation of or compliance with the Equal Protection Clause. The legislative determination whether a particular bill complies with equal protection should go beyond hypothesizing a "rational basis" for it, as should the executive decisions whether to sign the bill into law and, if it is signed, whether and how to implement it. Beyond this particular example, as explained by Larry Sager, is that "[p]ublic officials cannot consider themselves free to act at what they perceive or ought to perceive to be peril to constitutional norms merely because the federal judiciary is unable to enforce these norms at their margins."\textsuperscript{233} Instead, they "have a legal obligation to obey an underenforced constitutional norm which extends beyond its interpretation by the federal judiciary to the full dimensions of the concept which the norm embodies."\textsuperscript{234} In short, judicially underenforced constitutional provisions should be understood to bind the executive branch beyond the point of judicial enforcement.\textsuperscript{235}

\begin{itemize}
  \item \textsuperscript{232} See, e.g., Robert C. Post & Reva B. Siegel, Equal Protection by Law: Federal Antidiscrimination Legislation After \textit{Morrison} and \textit{Kimel}, 110 Yale L.J. 441, 462–67 (2000) ("It is clear... that rational basis review marks the site of a gap between conduct that the Court in principle recognizes might be unconstitutional and conduct that the Court is willing in adjudication to hold unconstitutional.").
  \item \textsuperscript{233} Sager, Fair Measure, supra note 227, at 1227; see also Richard H. Fallon, Jr., Implementing the Constitution 40–41 (2001) [hereinafter Fallon, Implementing] (stressing that "deferral standards of [judicial] review do not give conscientious officials a license to behave as they choose").
  \item \textsuperscript{234} Sager, Fair Measure, supra note 227, at 1227.
  \item \textsuperscript{235} Accepting this point need not entail embracing a thoroughly "departmentalist," as opposed to "judicial supremacist," view of the three branches' relative authority to interpret the Constitution. The ongoing debate between departmentalism and judicial supremacy houses a wide variety of viewpoints. At one pole is a version of departmentalism in which the political branches are empowered to disregard even the Supreme Court's constitutional pronouncements. See, e.g., Paulsen, supra note 227, at 222 (arguing President "may refuse to execute (or, where directed specifically to him, refuse to obey) judicial decrees that he concludes are contrary to law"). At the other is an aggressive version of judicial supremacism in which the Court's answer to a constitutional question effectively merges with and becomes the Constitution itself. See, e.g., Cooper v. Aaron, 358 U.S. 1, 18 (1958) (holding Supreme Court's interpretation of Fourteenth Amendment to be "the supreme law of the land" because "the federal judiciary is supreme in the exposition of the law of the Constitution"). But the disagreement between the two camps is sharpest in circumstances where the courts are prepared to enforce a particular constitutional norm more robustly than is the legislative or executive branch. It is much less pronounced in the opposite situation, where one or the other political branch is inclined to read the Constitution more stringently than the courts. Judicial supremacists typically would not regard it as disobedience for the political branches to determine that the Constitution requires them to undertake or abandon a particular course of action, though the Court had earlier found no such constitutional requirement. See Barron, supra note 227, at 69 ("Even if the President were to consider himself bound to obey a judicial determination that a statute is unconstitutional,... it would not follow that he should understand himself to be similarly bound by a judicial determination that a statute is constitutional."). Thus, for example, President Jackson's famous veto, on constitutional
Still, our constitutional traditions do call for preserving some central role for the judiciary in constitutional interpretation. Recognizing that, courts and scholars commonly regard constitutional interpretation as “a collaborative enterprise in which each branch . . . recognize[s] its own limitations and the relative strengths and functions of the other coordinate branches,” but still accord the Supreme Court the final say in the constitutional disputes that come before it. Embracing that general approach here, I proceed on the view that legislative and executive branch fidelity to the Constitution includes, but is not limited to, complying with judicial determinations of unconstitutionality and, more generally, that the political branches should take some account of judge-made constitutional doctrine when construing the Constitution themselves.

The position sketched out in this Part situates, but does not resolve, the truly difficult questions, which go to how, precisely, the political branches should construe and apply particular constitutional provisions in the absence of judicial supervision. I take up questions of that sort in Parts V and VI.

V. SUSPENSION, IMMUNITY, AND CONGRESSIONAL CHOICE

This Part focuses on the role of Congress during a suspension. Accepting the conventional view that only Congress has the authority to sus...

grounds, of the bill extending the charter of the Bank of the United States, see Andrew Jackson, Veto Message (July 10, 1832), in 2 A Compilation of the Messages and Papers of the Presidents 576, 576-89 (James D. Richardson ed., Washington, Gov’t Printing Office 1897), did not violate the Supreme Court’s earlier decision upholding the Bank’s constitutionality in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 326 (1819). Indeed, if the Court’s refusal to find any particular law or action unconstitutional flows from the underenforcing nature of the judicial doctrine in the area (and especially if that underenforcement bespeaks deference to executive prerogatives), then the executive’s more robust enforcement is precisely what is called for by the principle that executive actors “have a legal obligation to obey [a judicially] underenforced constitutional norm . . . to the full dimensions of the concept which the norm embodies.” Sager, Fair Measure, supra note 227, at 1227. That principle can coexist comfortably with the judicial supremacists’ core tenet that judicial determinations of unconstitutionality are binding on the other branches.

236. The standard citation, of course, is to Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

237. See Johnsen, supra note 227, at 109, 126 (stating that while constitutional interpretation is collaborative in nature, presidential noncompliance with direct orders from Supreme Court “typically should be considered unconstitutional”); see also Dorf & Friedman, supra note 227, at 62, 63 n.10 (characterizing constitutional interpretation as a “shared institutional process” but distinguishing that position from arguments that “sweep[ ] too far in denying the Court’s supremacy with regard to constitutional interpretation”). Even the late Rehnquist Court, hardly modest in its assertions of primacy over the political branches, acknowledged the role of those branches in implementing the Constitution—though it did so while reserving for itself ultimate authority in that area. See United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) (“No doubt the political branches have a role in interpreting and applying the Constitution, but ever since Marbury this Court has remained the ultimate expositor of the constitutional text.”).
pend the writ (whether directly or by delegation\textsuperscript{238}), I focus not on when Congress should suspend the writ, but on how to think about the further legislative choices it has when the writ is suspended. The key issue here is indemnity, which, as I have noted, can in reality mean immunity.\textsuperscript{239} That is, when and to what extent may Congress immunize officials for detaining people unlawfully during a valid suspension?

I approach the immunity question in three steps. First, I discuss in Part V.A some general principles bearing on the extent to which a detainee held unlawfully during a valid suspension might be able to claim a constitutional interest in at least some ex post remedy. I show that although it would go too far to say that the Constitution invariably requires a judicial remedy for every case of unlawful detention, the detainee’s interest in some meaningful remedy is of constitutional dimension. Second, I consider in Part V.B the extent to which a detainee’s claim of constitutional entitlement to an ex post remedy is, or should be, judicially enforceable. I show there that although the issue is justiciable, in the main the courts should defer to Congress’s decisions in this area. Third, having established that whether to allow ex post remedies for unlawful detention is a constitutional decision largely within Congress’s control, I identify in Part V.C some of the factors that Congress might rationally take into account when making that decision.

A word of clarification before proceeding. In considering whether and when Congress may grant immunity for unlawful detentions during a suspension, I focus on \textit{unconstitutional} detentions, not detentions whose infirmity rests on some other ground. There are, of course, a variety of ways a detention might be unlawful. The general habeas statute provides a remedy for detentions that violate “the Constitution or laws or treaties of the United States,”\textsuperscript{240} and each of those grounds of illegality could exist during a suspension. The issue of immunity, however, is not the same across those areas. In particular, Congress’s power to immunize officers for detaining people contrary to statute may well be unlimited, especially when the immunity is prospective.\textsuperscript{241} Having enacted the law in the first place, Congress can decide whether, how, and to what extent the law is judicially enforceable.\textsuperscript{242} Similarly, the “last-in-time” rule likely

\textsuperscript{238}See supra note 13 (noting the delegability issue).
\textsuperscript{239}See supra text accompanying notes 66–67, 135.
\textsuperscript{241}For discussion of retrospective versus prospective immunity, see infra text accompanying notes 311–313.
\textsuperscript{242}There is a further wrinkle here. Often, cases challenging the legality of executive detention center on the claim that the government simply lacks the affirmative authority to detain—that it is acting ultra vires. See, e.g., al-Marri v. Wright, 487 F.3d 160, 174–95 (4th Cir. 2007) (holding that neither Authorization for Use of Military Force passed by Congress in September 2001 nor Constitution itself authorized detention at issue). Detentions fitting this description are plainly contrary to law and thus are ordinarily eligible for habeas relief in times of nonsuspension; whether they are also \textit{unconstitutional} is less clear. On one hand, detention in excess of lawful authority might seem to present a
leaves Congress broad discretion to decide whether to remove judicially enforceable remedies for treaty violations. At the very least, and without reaching any definitive conclusion on those matters, it is safe to say that the statutory and treaty domains present added obstacles for any argument in favor of a constitutional limit on Congress's immunity power. Thus, I focus here on cases of unconstitutional detention, which is where the argument in favor of such a limit is surely strongest.

A. Constitutional Remedies for Unconstitutional Detention: General Principles

If Congress's decision to suspend the writ brings with it the separate decision whether to immunize the relevant officials, it first demands attention to whether the Constitution even allows Congress to grant immunity at all. This section takes up that question. It proceeds by discussing three arguments in favor of a constitutional prohibition on grants of immunity, one specific and two more general.

1. The Suspension Clause. — The more specific basis is the Suspension Clause itself. Ultimately, I think this Clause does not support a constitutional right to an ex post remedy. But it is important to see why. And to see that, it helps to start with what the Clause does protect. In ordinary times when the writ has not been suspended, denying an individual the right to challenge his executive detention by means of either a habeas petition or a comparable alternative could violate the Suspension Clause.

quintessential due process violation: It is in a literal sense the deprivation of liberty without due process of law. On the other hand, the Supreme Court has rejected "the proposition that every action by . . . [an] executive official, in excess of his statutory authority is ipso facto in violation of the Constitution," and has "often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority." Dalton v. Specter, 511 U.S. 462, 472 (1994); see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396-97 (1971) (distinguishing between "actions contrary to [a] constitutional prohibition" and those "merely said to be in excess of the authority delegated . . . by the Congress"). It is beyond the scope of this Article to determine whether detention for which there is no lawful authority might be deemed unconstitutional in a way that other ultra vires government action generally is not. But if the answer to that question is yes, then such cases are covered by the discussion in Part V.

243. See Reid v. Covert, 354 U.S. 1, 18 (1957) ("This Court has also repeatedly taken the position that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."); Thomas v. Gay, 169 U.S. 264, 271 (1898) ("A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.").

244. I would also note that this discussion of Congress's immunization power applies to both state and federal judicial remedies. Congress, I will argue in this Part, has broad authority to immunize federal officials from liability at both the state and federal level. But I will also suggest that there are limits on that authority. Critically, to conclude that a particular grant of immunity would transgress those limits is not necessarily to conclude that a judicial remedy must be available in federal court under federal law. Instead, the remedy could potentially be found in state court under the state tort law of battery, false imprisonment, and so on. That is, state courts and state tort law could provide a remedy for unconstitutional action by federal officers.
Clause.\textsuperscript{245} And although Congress may replace habeas with an alternative mode of review without running afoul of the Suspension Clause, no such alternative is likely to suffice unless it includes the key remedial feature of habeas review, namely the power to order the immediate release of those held unlawfully.\textsuperscript{246} Thus, Congress could not replace habeas with a regime of ex post review and money damages without violating the Suspension Clause.

At the same time, a detainee’s claim that he is entitled to seek money damages to redress his unlawful detention would ordinarily draw no support from the Suspension Clause. In this respect, it is important not to overstate the nature of the remedy protected by the Clause. All agree with Justice Story’s celebration of habeas as “the great bulwark of personal liberty,”\textsuperscript{247} and modern commentators like Amanda Tyler might even be right to call it “the only meaningful judicial remedy for unconstitutional deprivations of liberty.”\textsuperscript{248} But it bears emphasizing that habeas is not a \textit{complete} remedy. Although it can secure discharge of those held unlawfully, by itself it provides no compensation for the time already spent in captivity.\textsuperscript{249} Habeas is a forward-looking remedy only. And just as habeas is a particular kind of remedy, the Suspension Clause speaks only to that particular kind of remedy and its functional equivalents. Fundamentally, the Clause safeguards the right to a judicial order of discharge from unlawful confinement. It simply does not speak to post-detention review or remedies.

If the Suspension Clause does not speak to ex post remedies during periods of nonsuspension, I see no basis for thinking it does once the writ is suspended. The Clause is not concerned with securing some overall set of remedies, or even the “best” remedy available in given circumstances. It is concerned with securing a particular remedy (or its functional equivalent). When a detainee’s access to that remedy has been validly suspended, the Suspension Clause is best understood to have nothing further to say about the detainee’s remedial entitlements.

\textsuperscript{245} I say “could” and not “would” here because it also depends on what kind of challenge to the detention (asserting constitutional error, statutory error, abuse of discretion, etc.) is at issue. See INS v. St. Cyr, 533 U.S. 289, 300–05 (2001) (discussing the scope of review issue). It might also turn on the citizenship of the detainee, the location of his apprehension, and the location of his detention, among other things. See supra note 20 (identifying these and other important Suspension Clause-related questions and setting them aside for purposes of this Article).

\textsuperscript{246} See supra text accompanying notes 214–215.

\textsuperscript{247} Story, supra note 8, at 483.

\textsuperscript{248} Tyler, supra note 1, at 338.

\textsuperscript{249} And in that respect, there must surely be some contexts in which habeas is far from the “only meaningful” remedy for unlawful detention. A person held unlawfully for a year who wins his freedom via habeas the day before the government would have released him anyway will surely cherish the return of his liberty, but he is unlikely to regard habeas as a meaningful form of redress for his year of lost freedom.
2. The Marbury Dictum. — The first more general basis for the argument in favor of a constitutional entitlement to ex post remedies is the familiar dictum from Marbury v. Madison: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." In terms of its legal source, Richard Fallon and Daniel Meltzer stress that Marbury's "assertion about a remedy for every violation . . . was a claim not peculiarly about the Constitution, but about the wider legal system in which the Constitution was located." Within our constitutional system, the idea is probably best housed in the Due Process Clause.

If understood to require a remedy for literally every violation of a constitutional right, however, the Marbury dictum simply does not describe reality. Rather, a variety of doctrines have long combined to create a persistent "right-remedy gap" in constitutional law. These include the doctrine of qualified immunity, which limits the availability of money damages in constitutional tort suits, and justiciability rules like the requirement of ripeness, which constrains the provision of forward-looking injunctive relief in such cases. Given these and other barriers,

250. 5 U.S. (1 Cranch) 137, 163 (1803).
251. Fallon & Meltzer, Constitutional Remedies, supra note 37, at 1779.
253. See id. at 313 ("[M]odern doctrine clearly refutes the notion that there is a constitutional right to a remedy for every constitutional violation."); Fallon & Meltzer, Constitutional Remedies, supra note 37, at 1778 ("[T]he principle of a remedy for every rights violation cannot plausibly claim status as an unyielding imperative.").
256. See, e.g., City of Los Angeles v. Lyons, 461 U.S. 95, 105-07 (1983) (finding victim of excessive police force could not seek injunction because of uncertainty of future harm to him). Another factor complicating Marbury's "for every right, a remedy" maxim is that rights and remedies are often intertwined in practice. Courts' assessments of the costliness of a particular remedy, for example, may affect their willingness to recognize the existence of a right in the first place. For perhaps the leading account of this and other forms of right-remedy interpenetration, see Levinson, supra note 223, at 873-89 (arguing that "the threat of undesirable remedial consequences motivate[s] courts to construct the right in such a way as to avoid those consequences"). Moreover, Professor Fallon's recent work shows that decisions about justiciability also affect, and are affected by, decisions about remedies and substantive rights. See Richard H. Fallon, Jr., The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights, 92 Va. L. Rev. 633 (2006). On the other hand, few would deny the possibility or utility of retaining some meaningful distinctions among these concepts. See John C. Jeffries, Jr., Disaggregating
Professors Fallon and Meltzer are clearly right to say that that the ideal of a complete remedy for every deprivation of a constitutional right operates as a "principle, not an ironclad rule." This does not deny constitutional status to the injured party's remedial interest, but it does reflect a tradition of permitting limitations on remedies in the service of other constitutionally salient values.

3. Constitutional Structure. — The last and strongest basis for the remedial entitlement argument is what Professors Fallon and Meltzer call the "more structural" requirement of "a system of constitutional remedies adequate to keep government generally within the bounds of law." The norm here is concerned not with the provision of a meaningful remedy in every case but with the existence of a remedial apparatus that, on the whole, adequately enforces constitutional rights and obligations. This structural requirement, deriving from the constitutional separation of powers and the basic norm of government under law, is ordinarily "more absolute" than Marbury's norm of an effective remedy for every constitutional violation.

Importantly, this structural remedial norm can be satisfied in a variety of different ways, and courts often grant the government (especially Congress) substantial leeway to decide what kind of remedial scheme to adopt. Still, certain kinds of remedial schemes tend to be preferred for the protection of certain kinds of rights. Thus, particularly where constitutional liberty interests are at stake, modern judicial doctrine has a fairly strong preference for injunctive remedies to abate ongoing harms.
Ordinarily, therefore, a regime providing for ex post damages alone is insufficient to safeguard the liberty interests implicated by executive detention. This is true as a matter of the general norm favoring a structurally adequate remedial regime, but it also dovetails with the Suspension Clause's specific mandate, discussed above, that the habeas writ or its functional equivalent be preserved in ordinary times. As also discussed above, the protections of the Suspension Clause effectively disappear when the writ is validly suspended. The question here is whether suspension similarly removes the broader structural norm in favor of a remedial regime adequate to keep the government within the bounds of the law.

The best answer, I think, is that suspension does not remove that broader structural norm, but that it, like virtually all other constitutional norms, may sometimes be overridden by countervailing considerations. The first part of this answer flows from the point, established in Parts I to III and explored in greater detail in Part VI, that suspension of the writ does not suspend the Constitution itself. Rather, the Constitution continues in force even when the powerful remedy of habeas is unavailable. And if the Constitution continues in force, so too must the constitutional interest in "preserv[ing] separation-of-powers values and a regime of government under law." That is not to say that suspension changes nothing on this point. Most notably, once the writ is validly suspended, Congress must be permitted to replace the ordinary habeas-based remedial regime with an ex post, compensation-based regime. Otherwise, the suspension power itself would be defeated. Thus, although a regime confined to ex post remedies would normally be inadequate to safeguard the liberty interest against unlawful detention, such a regime must be adequate during a period of valid suspension.

263. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 404 (1971) (Harlan, J., concurring in the judgment) (noting "the presumed availability of federal equitable relief against threatened invasions of constitutional interests"); Ashutosh Bhagwat, Hard Cases and the (D)Evolution of Constitutional Doctrine, 30 Conn. L. Rev. 961, 1008 (1998) ("In constitutional law... equitable relief has become the standard remedy for most constitutional violations, and one which is available essentially as a matter of right."); Fallon, Some Confusions, supra note 252, at 370 ("Remedies directed to confine or stop ongoing wrongdoing are the most basic in the constitutional scheme... ").

264. Eugene Kontorovich has proposed the adoption of "liability rules"—that is, post-deprivation money damages—for constitutional violations in certain extreme circumstances such as mass detentions following a terrorist attack, rather than "property rules" such as immediate injunctive relief from the violation. See Kontorovich, supra note 10. He acknowledges, however, that his proposal is contrary to the current state of constitutional law. See id. at 770–71.

265. See supra text accompanying notes 214–215.

266. See supra text accompanying notes 249–251.

267. Fallon & Meltzer, Constitutional Remedies, supra note 37, at 1790.
The second part of my view here, however, is that the Constitution should not be construed to demand a regime of ex post remedies every time the writ is suspended. This is because the structural norm in favor of an adequate remedial regime may itself be overridden in extreme circumstances. Even if in ordinary times that norm is relatively "unyielding," the circumstances of national emergency prompting a valid suspension might provide sufficient grounds for overcoming it.

This conclusion is consistent with historical practice, in particular the indemnity acts passed by Congress during and just after the Civil War. The 1863, 1866, and 1867 indemnity provisions gradually expanded the scope of covered activities, but under each provision the immunity for the covered activities was complete. Congress undoubtedly deemed such legislation constitutional.

To be clear, I am not suggesting that past congressional practice in this area is beyond constitutional reproach. It is certainly possible that in the midst of the Civil War, Congress made immunity-related decisions that we would now say are inconsistent with our best understanding of the Constitution. But it is also possible to see Congress's actions during that period (actions that, as I note in the next section, the Supreme Court endorsed as reflecting a permissible balancing of constitutional interests during a national security crisis. Henry Monaghan has warned that "[a] bloody Civil War, an event wholly unforeseen by the founding generation, may not be a fruitful source for deriving constitutional lessons." That is surely right when the constitutional lessons are meant to apply in ordinary times. But by the same token, Civil War precedents may be a fruitful source of constitutional lessons for other emergency circumstances. In particular, they may help us see that national emergencies can warrant certain constitutional arrangements we would not otherwise tolerate. That is manifestly so for the suspension of the writ itself, a move the Constitution expressly forbids except in very limited situations amounting to national emergencies. In such situations, it should also be permissible for Congress to weigh the norm in favor of an adequate reme-

268. Id. at 1789.

269. See supra text accompanying notes 124–132. As discussed in Part I.B, Parliament invariably passed acts of indemnity whenever it suspended the writ, and it appears to have had complete discretion to decide how broadly to craft the indemnity. That history is less useful in this precise context, however, since the system of parliamentary supremacy meant that Parliament had virtually complete discretion in all its legislative decisions.

270. See Act of Mar. 2, 1867, ch. 155, 14 Stat. 432, 432–33 (validating all acts, proclamations, and orders of President or acts done by his authority between March 4, 1861 and July 1, 1866 respecting, inter alia, arrests and imprisonments); Act of May 11, 1866, ch. 80, § 1, 14 Stat. 46, 46 (declaring any order by President, Secretary of War, or any commanding U.S. military officer to be defense against any action for illegal search, seizure, arrest, or imprisonment committed before May 11, 1866); Act of Mar. 3, 1863, ch. 81, § 4, 12 Stat. 755, 756 (amended 1866 & 1867) (declaring any order of President to be defense against any action for illegal search, seizure, arrest, or imprisonment).

271. See infra text accompanying notes 273–281.

dial scheme against the needs of national security and, in at least some circumstances, to strike a balance in favor of immunity.

Ultimately, then, the interest in ex post remedies for unconstitutional detention is properly viewed as constitutional in stature, but subject to infringement when national security requires. Precisely when Congress might appropriately conclude that national security requires full immunity is a question I will take up in Part V.C. First, though, it is worth considering what, if any, role the courts have in overseeing Congress’s decisions in this area.

B. Judicial Review

The previous section established that there is a constitutional norm favoring some regime of judicial redress for unconstitutional detention during a period of suspension, but that Congress may override that interest when national security requires it. Suppose Congress does override that interest by pairing a valid suspension with an indemnity provision granting complete immunity to the relevant officials. Is that decision subject to judicial review? If so, how searching should the review be?

In part because there is so little practice and precedent in this area, these questions are not easily answered. The limited precedent does suggest, however, that congressional grants of immunity are justiciable. The key case here is *Mitchell v. Clark*, an 1884 case involving the 1863 and 1866 Indemnity Acts. Admittedly, the case was not about detention. It arose, somewhat indirectly, out of the military’s confiscation of certain private property in St. Louis while the city was “under military law.”

But the Civil War indemnity provisions, recall, were not limited to cases of false imprisonment while habeas was suspended. Instead, they shielded officers from liability for any duly ordered search, seizure, arrest, or imprisonment, without regard to whether habeas had been suspended. So the indemnity provisions were relevant in *Mitchell*, and the Court expressed its basic approval of them:

It is not at all difficult to discover the purpose of all this legislation.

Throughout a large part of the theatre of the civil war the officers of the army, as well as many civil officers, were engaged in the discharge of very delicate duties among a class of people who, while asserting themselves to be citizens of the United States, were intensely hostile to the government, and were ready and anxious at all times, though professing to be non-combatants, to render every aid in their power to those engaged in active efforts to overthrow the government and destroy the Union.

For this state of things Congress had provided no adequate legislation . . . .

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273. 110 U.S. 633 (1884).
274. Id. at 634.
275. See supra text accompanying notes 124–132.
... [M]any acts had probably been done by these officers in
defence of the life of the nation for which no authority of law
could be found, though the purpose was good and the act a
necessity.

For most of these acts there was constitutional power in
Congress to have authorized them if it had acted in the matter
in advance. It is possible that in a few cases, for acts performed
in haste and in the presence of an overpowering emergency,
there was no constitutional power anywhere to make them
good.

But who was to determine this question? and for service so
rendered to the government by its own officers and by men act-
ing under the compulsory power of these officers could Con-
gress grant no relief?

That an act passed after the event, which in effect ratifies
what has been done, and declares that no suit shall be sustained
against the party acting under color of authority, is valid, so far
as Congress could have conferred such authority before, admits
of no reasonable doubt. These are ordinary acts of indemnity
passed by all governments when the occasion requires it.276

Two points emerge from this passage. First, the Court identified a
basic standard by which grants of immunity could be judged: A grant of
immunity is valid as applied to actions that, though unlawful when com-
mitted, could have been made legal had Congress “acted . . . in advance”
and authorized them.277 The Court did not declare that all actions cov-
ered by the 1863 and 1866 indemnity provisions necessarily met that stan-
dard; it allowed that there might have been “a few cases” involving “acts
performed in haste and in the presence of an overpowering emergency,
[for which] there was no constitutional power anywhere to make them
good.”278 The Court appears to have conceded—though it did not ex-
pressly hold—that those acts went beyond what Congress could immu-
nize. At least implicitly, then, the Mitchell Court approved a standard ac-
cording to which Congress may not immunize ex post what it could not
have authorized ex ante.279

276. Mitchell, 110 U.S. at 639–40; see also Bean v. Beckwith, 85 U.S. (18 Wall.) 510,
516 (1874) (assuming arguendo that 1863 and 1867 Indemnity Acts were constitutional).
278. Id.
279. Mitchell was not the first case to identify this standard. In Ex parte Milligan, the
four-Justice concurrence suggested the possibility of inferring the same standard from the
majority opinion in that case. After describing the majority’s conclusion that “it was not in
the power of Congress” to authorize Lambdin Milligan’s trial by military commission, the
concurrence suggested that it “may be thought to follow” from that conclusion “that
Congress has no power to indemnify the officers who composed the commission against
liability in civil courts for acting as members of it.” 71 U.S. (4 Wall.) 2, 136 (1866) (Chase,
C.J., concurring). The standard reappeared when, after being released from military
custody, Milligan filed a civil suit for false arrest and imprisonment against those
responsible for his detention. See Milligan v. Hovey, 17 F. Cas. 380, 380 (G.C.D. Ind. 1871)
(No. 9,605). One of the questions in the trial court was whether the defendants could
That leads to the second key point in the *Mitchell* passage. After acknowledging that some of the conduct covered by the 1863 and 1866 Acts might have gone beyond what Congress could authorize (and hence immunize), the Court asked, "But who was to determine this question?" The implied answer is "not the courts," or at least not principally. Rather than imposing close judicial scrutiny in this area, the Court deferred to the government's legislative decision to grant relief to "its own officers." *Mitchell*, in other words, suggests that although there is a constitutional limit on legislative grants of official immunity, the courts should substantially defer to Congress's judgments about the location of the limit.

Although *Mitchell* appears to be the Court's only meaningful word on this precise topic, its approach accords well with the way courts typically treat government claims of extraordinary authority in times of heightened national security risk. As Samuel Issacharoff and Richard Pildes have shown, courts in such periods have tended to balance the competing interests of national security and individual civil liberties by adopting a "process-based, institutionally-oriented (as opposed to rights-oriented) framework" for assessing the lawfulness of governmental action. That is, rather than deferring to broad claims of unilateral executive power or invalidating executive actions in the name of an expansive view of civil liberties, in times of national emergency courts have generally preferred a middle ground that encourages the legislative and executive branches to work together and that substantially defers to the joint product of their cooperative efforts. As Professors Issacharoff and Pildes put it, in such cases "[t]he judicial role has centered on the second-order question of whether the right institutional processes have been used to make the de-

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claim the protections of the various indemnity provisions Congress had passed. See id. at 380–81. The trial court concluded they could not, on the ground that the Court in *Milligan* had deemed the detention and military trial beyond the power of Congress to authorize:

A majority of the court held that even congress could not authorize the act. If an act is prohibited by the constitution, and it is beyond the power of congress to authorize it, then it may be said the wrong done by the act is not subject to complete indemnity by congress, because then the prohibition of the constitution to protect private rights would be without effect.

Id. at 381. Although the trial court purported to reserve final judgment on the issue, preferring instead to embrace the standard only "for the purposes of th[at] trial," id., it at least tentatively embraced the very standard later implicitly approved in *Mitchell*: Congress could not immunize what it could not have authorized.


281. Id.

cisions at issue, rather than on what the content of the underlying rights ought to be.”

The Mitchell Court’s deferential stance towards immunity is in keeping with this broader institutional-process approach. At its core, the approach described by Proffessors Issacharoff and Pildes privileges actions that enjoy the “bilateral institutional endorsement” of both the legislative and executive branches. So too with judicial deference on the immunity question, which privileges the political branches’ effective agreement about what conduct is appropriate during a suspension.

But “deference does not mean abdication.” It would overstate things to say that courts during times of national security crisis consider only second-order questions of institutional process and ignore entirely first-order constitutional limits. Consider here Justice Jackson’s concurring opinion in the Youngstown Sheet & Tube Co. v. Sawyer, perhaps the most famous exemplar of the approach Professors Issacharoff and Pildes describe. Justice Jackson divided questions of executive power into three tiers, based on the presence or absence of congressional authorization or prohibition. As he explained, “when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum.” With that maximum power comes judicial deference: Presidential actions authorized by Congress are entitled to “the strongest of presumptions and the widest latitude of judicial interpretation.” Yet Justice Jackson allowed that it might still be appropriate for a court to declare some congressionally authorized presidential actions unconstitutional, in particular where “the Federal Government as an undivided whole lacks [the asserted] power.”

To be sure, Justice Jackson did not say precisely how courts should apply first-order constitutional limits in those circumstances. It would be consistent with the tenor of his opinion, though, for courts to apply those limits more leniently when the executive acts pursuant to congressional authorization. Courts might conclude, for example, that certain things that would violate the First Amendment if done by the executive unilaterally are constitutionally permissible when authorized by Congress in the face of a national security crisis. But even then, congressional authorization would not completely remove all constitutional constraints. Under Justice Jackson’s framework, the role of the courts is not only to protect against executive unilateralism by encouraging Congress and the

284. Id.
285. Rostker v. Goldberg, 453 U.S. 57, 70 (1981); see also id. at 67 (noting that even in the area of “military affairs,” the Court “of course do[es] not abdicate [its] ultimate responsibility to decide the constitutional question”).
286. 343 U.S. 579 (1952).
287. Id. at 635 (Jackson, J., concurring).
288. Id. at 637.
289. Id. at 636–37.
President to act together, but also to enforce at least some minimum constitutional limits on even congressionally authorized executive action. As Justice O'Connor put it in her *Hamdi v. Rumsfeld* plurality opinion, "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."290

Applied to the immunity context, the point here is that deference should not entail complete judicial disengagement with first-order constitutional constraints. *Mitchell* suggests that the judicially enforced test for immunity legislation is whether Congress could have authorized in advance the conduct it is immunizing. Although a court reviewing a particular grant of immunity owes it "the strongest of presumptions and the widest latitude of judicial interpretation,"291 in extreme cases it might nevertheless be compelled to conclude that the underlying executive conduct exceeds what the Constitution can tolerate even in times of national emergency.292

It is beyond the scope of this Article to reach any firm conclusions about what particular kinds of detentions courts should conclude go beyond Congress's power to immunize. In situations of national emergency, determining the precise scope of Congress's substantive legislative

291. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).
292. Separate from—and, pursuant to principles of constitutional avoidance, prior to—the question whether particular immunity legislation complies with the Constitution is the question whether the legislation covers the detention in question. That might be a hard question in some cases. The immunity statute might not clearly define its outer boundary, and the specific facts of the detention might make it unclear on which side of the boundary it falls. Recent work by Professors Levinson and Pildes identifies an approach that courts could follow in such circumstances. Drawing on a close rereading of Justice Jackson's *Youngstown* opinion, they suggest that the judicial resolution of statutory authority questions should be attentive to party politics. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2352-56 (2006). Specifically, they find in Justice Jackson's opinion a concern that in times of unified government (when the executive and the legislature are controlled by the same political party), Congress may be overeager to provide the President with whatever statutory authority he asks for, thus undermining the system of checks and balances that James Madison envisioned for our constitutional system. See id. at 2351. Accordingly, they suggest that "[w]hen it is not clear whether congressional statutes prohibit the executive action at issue or simply do not address it, and Congress is controlled by the President's political party, perhaps courts should . . . tilt[] toward prohibiting presidential action." Id. at 2354. This would amount to an interpretive presumption against authorization, which "could be an action-forcing mechanism to press a reluctant, but not ideologically recalcitrant, Congress to share responsibility for th[e] difficult choices [entailed in matters of national security]—or at least give them a serious airing." Id. at 2356. Applied to the immunity context, this approach suggests that courts should construe ambiguous grants of immunity narrowly when passed during periods of unified government. Admittedly, it may be unrealistic to expect courts ever explicitly to adopt a test so openly tied to considerations of partisan politics. See id. at 2355. But the approach does seem normatively attractive and in keeping with the core assumptions underlying Justice Jackson's *Youngstown* framework.
authority (and thus, under Mitchell, the scope of its immunizing authority) will often require sensitivity to the specific facts on the ground. In the main, though, it seems safe to say that courts will (and should) place Congress's immunity authority at its lowest ebb with respect to detentions that seem categorically to exceed its Article I legislative authority. In contrast, courts will (and probably should) be more deferential with respect to immunity for detentions that raise constitutional concerns under rights-oriented provisions whose protections courts tend to apply by means of some sort of balancing test.

In any event, my principal aim in this section has been to identify the general framework within which a reviewing court should approach these issues. Having done that, I turn now to examining in more detail the factors Congress should consider when deciding whether to confer immunity in the first place.

C. Immunity and Congressional Choice

So far, my argument in this Part has made four points: (1) There is a constitutional norm favoring judicial redress for unconstitutional detention during a suspension; (2) the norm may sometimes be outweighed by countervailing considerations during national emergencies; (3) the basic constitutional limit on Congress's authority to displace judicial remedies with a grant of immunity is whether it could have authorized the detention in advance; and (4) the courts appropriately accord substantial, but not complete, deference to Congress's decisions in this area. Of course, to say that the courts defer to Congress on this point is not to say that immunity is a mere policy question that Congress can answer however it wishes. Rather, it is to say that it is a constitutional question committed principally to Congress. The decision whether to grant immunity must, therefore, reflect Congress's own best judgment about what the Constitution permits and requires. In this section, I discuss some of the factors that might (or, in the case of the first factor, must) affect how Congress resolves that issue. The goal here is not to argue for or against immunity, but to identify legitimate considerations pointing in each direction.293

1. The Mitchell Standard. — As discussed above, in Mitchell the Court suggested that Congress can immunize conduct that it could have authorized had it seen fit to do so in advance.294 Applying that standard to grants of immunity for unconstitutional detention, the question is whether the detention could have been made constitutional had Congress passed legislation authorizing it. That is, the question is whether Congress could have concluded, given the national emergency at hand, that the constitutional norm violated by the detention in ques-

293. The discussion is illustrative, not exhaustive; there are undoubtedly many additional factors that Congress could appropriately consider in some cases.
294. See supra text accompanying notes 277–278.
tion could have been made to yield to countervailing constitutional interests.

A Congress that takes this standard seriously may find it difficult to pass prospective grants of immunity, at least in the absence of some fairly specific statutory limits on the grant. Without knowing precisely how the executive branch will act going forward, Congress may lack a solid basis for determining whether it could have authorized those actions in advance. Thus, the Mitchell standard may favor retrospective over prospective grants of immunity.\textsuperscript{295}

Yet it would go too far to say that the Mitchell standard prohibits prospective immunity altogether. After all, one of the acts endorsed in Mitchell was itself prospective as well as retrospective.\textsuperscript{296} What this does mean, though, is that in deciding to enact a forward-looking grant of immunity, Congress at the very least should assume and expect that the executive will take its own obligation of constitutional fidelity seriously.\textsuperscript{297}

Assuming Congress concludes that the immunity it is contemplating meets the Mitchell standard, that is hardly the end of the matter. As discussed in Part V.A, there is a powerful constitutional norm in favor of at least some structure of judicial remedies for constitutional violations. That norm does not disappear simply because Congress concludes that, given the emergency situation, it could have authorized (and thus removed the constitutional infirmity in) those actions. Rather, the norm remains to be weighed against other constitutionally salient considerations, including those surveyed in the balance of this section.

2. Existing Detention Authority. — Distinct from the question whether Congress could have extended the executive's detention authority to cover the detention in question, Congress might also consider the scope of the executive's existing authority to detain. If Congress has enacted legislation granting the President the power to deal with the emergency, the detention authority question may be answered principally by reference to that legislation.\textsuperscript{298} In the absence of legislation, the question may

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\item Cf. Sharpe, supra note 61, at 95 ("It is quite a different matter to legitimate, ex post facto, acts which appear to have been necessary for reasons of state, than to give at the outset, unlimited powers in the fear that they may become necessary.").
\item I discuss that obligation in greater detail in Part VI.
\item Such was the case in Hamdi v. Rumsfeld, 542 U.S. 507 (2004), where a majority of the Court upheld the executive's claim of authority to detain U.S. citizens alleged to be enemy combatants not on the ground that the President possesses the inherent constitutional authority to do so, but on the ground that Congress granted the requisite authority when it passed the September 2001 Authorization for Use of Military Force (AUMF). See Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001), reprinted in 50 U.S.C. § 1541 note (Supp. I 2003) (authorizing President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons"); Hamdi, 542 U.S. at 516-18 (plurality opinion)
\end{enumerate}
\end{footnotesize}
turn on the extent of the President's inherent constitutional authority under the Commander-in-Chief Clause and other provisions of Article II.\textsuperscript{299} In either scenario, Congress's decision whether to confer immunity may depend in part on its sense of whether the relevant sources of the executive authority are clear enough to provide the detention power that Congress thinks the executive branch needs to address the national emergency at hand. If, for example, Congress believes that a particular statute provides the necessary and appropriate detention authority, it might be inclined not to grant any immunity for unlawful detention. Such a decision would encourage executive officials to stay within the bounds of the authority conferred by Congress by leaving the courts open to police those bounds.\textsuperscript{300}

Of course, even if Congress grants no special immunity from post-detention liability, the suspension itself excuses executive officials from the burdens of time-consuming and potentially security-compromising litigation while the detention is ongoing. The national security benefits of delaying the litigation in this manner should be obvious. The government clearly has an interest in being assured of its ability to detain those it deems dangerous to national security, especially during an emergency so dire as to warrant the writ's suspension.\textsuperscript{301} It also has an interest in not having to air in court its reasons for suspecting individual detainees, for fear that doing so could compromise sensitive national security information.\textsuperscript{302} In addition, the government has an interest in simply avoiding the time-consuming distractions of habeas litigation during a national emergency. A valid suspension serves that interest as well.

Moreover, a decision not to grant any special immunity is not, by itself, a decision to expose executive officials to strict liability. If, for example, an executive official is sued for detaining someone in alleged vio-

\textsuperscript{299} See U.S. Const. art. II, § 2, cl. 1.

\textsuperscript{300} The nature of such judicial policing would depend, of course, on whether and how the statute in question is judicially enforceable. For criminal statutes such as the Non-Detention Act, 18 U.S.C. § 4001(a) (2000) (providing that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress"), the only enforcement option might be a federal prosecution, which, since the defendants would be current or former federal officers, could face obvious political and practical obstacles. See Morrison, supra note 4, at 435–36 (noting that prosecution of officials for actions during suspension may be driven by motives of administration in power).

\textsuperscript{301} The Court made this precise point in \textit{Ex parte Milligan}: "In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large." 71 U.S. (4 Wall.) 2, 125–26 (1866).

\textsuperscript{302} As I discuss below, concerns of this sort could lead Congress to extend a broad grant of immunity so that the executive \textit{never} has to air such information in court, even after the detention has ended. See infra Part V.C.4.
lation of the Due Process Clause, the official will be able to invoke the doctrine of qualified immunity to the extent his actions were not clearly unconstitutional at the time. Thus, the omission of any special grant of immunity does not expose executive officials to the full costs of their unconstitutional conduct.

Congress might, however, grant at least some measure of additional immunity in circumstances where it is less certain whether current law provides the executive branch the detention authority it needs, and where Congress is reluctant to address the problem by passing additional authorizing legislation. Congress might determine that, given the emergency facing the nation, the executive branch needs maximum flexibility to decide whom to arrest and detain, when to do so, and for what reasons. Although it could try to provide such flexibility by enacting a broad grant of executive authority to detain (and although, as noted in the previous subsection, it must conclude that the detention in question fell within what it could have authorized), Congress might doubt its ability to craft that legislation in a way that would serve all the government’s needs. If so, it might prefer instead to provide a forward-looking grant of immunity.

3. Comparative Institutional Competence. — In addition, Congress might consider the respective institutional competence and reliability of the executive and judicial branches. Congress might, for example, be inclined to trust that the executive branch will exercise its detention power according to a good faith and reasonable understanding of the limits of its authority. And Congress might further conclude that although, in its view, the executive has broad detention authority during the present emergency (whether directly under the Constitution or under some statute), the courts are likely to read that authority too narrowly and punish executive officials too harshly. In that circumstance, it might want to shield the executive branch from the chilling effects of judicial meddling. Suspending the writ protects against such interference for the period of the detention; a broad grant of immunity could provide similar protection in the longer term.

Moreover, some individual detentions might last for only a small portion of the overall period of suspension. That was the case during the Civil War. Without a comprehensive, forward-looking grant of immunity in those circumstances, the courts could end up hearing suits seeking compensation for unlawful detention while the “rebellion or invasion” is

303. See Davis v. Passman, 442 U.S. 228, 248–49 (1979) (holding that Bivens actions are available to remedy Fifth Amendment violations).

304. For a brief description of qualified immunity doctrine, see supra note 222.

305. Such concerns were one reason why Congress expanded its 1863 grant of immunity in 1866. And a very specific mistrust of state courts led Congress to include in the 1863 legislation a provision permitting federal officers to remove certain state actions brought against them to federal court. See Randall, supra note 79, at 189–205.

306. See id. at 194–95 (citing cases).
still threatening the nation and the writ is still suspended. The more Congress harbors concerns about vexatious litigation and undue judicial interference, the more it may be inclined to provide a very broad grant of immunity—the more, that is, Congress might subordinate the liberty interests of those wrongly detained to the needs of national security.

4. Information Sensitivity. — Relatedly, Congress might take account of the sensitivity of the information upon which the executive branch will rely when deciding to detain particular individuals. As described in Part I, concerns along these lines were one reason why Parliament passed indemnity acts whenever it suspended the writ. The fear was that any litigation over claims of unlawful detention could expose sensitive government secrets about the basis for the government's suspicion of the detainee.

It is easy to imagine Congress harboring similar concerns today. The detention of certain “high value” individuals in the war on terror, for example, could be based on information so sensitive that Congress might never want it to be aired in court. True, the disclosure of such information would be most worrisome during the national emergency that triggered the writ’s suspension, and Congress’s suspension of the writ would excuse the government from having to disclose information in answer to a habeas petition while the emergency persisted. But one can imagine Congress rationally worrying that even after the worst of the crisis has passed and the detainee is released, an officer’s attempts to justify the detention could involve the disclosure of information vital to the government’s ongoing national security efforts. Concerns of this sort could weigh heavily in favor of some kind of immunity. Depending on the circumstances, Congress might tailor the immunity to certain classes of cases implicating the most sensitive state secrets. But where such distinctions are difficult to draw legislatively, Congress might instead err on the side of national security by enacting a very broad immunity.

On the other hand, and relating back to the second consideration noted above, a Congress inclined to trust the competence and good faith of the judiciary might not see the need for an immunity grant on these grounds. The federal courts have a variety of mechanisms at their disposal for preserving the secrecy of sensitive information: holding in camera hearings, ordering the redaction of parts of certain documents, limiting even the parties’ access to extremely sensitive materials, and so on.

307. See supra text accompanying notes 68–69.
308. See May, supra note 69, at 16 (noting that the 1801 Indemnity Act “was defended . . . on the ground that persons accused of abuses would be unable to defend themselves, without disclosing secrets dangerous to the lives of individuals, and to the state”).
Thus, if Congress is inclined to believe that the courts are willing and able to protect sensitive government secrets in post-detention litigation, concerns along these lines may not play much of a role in the immunity decision.

5. Risk of Abuse. — Congress might also consider the risk that some executive officials could abuse or grossly exceed their detention authority while the writ is suspended. Concerns of this sort might lead Congress to enact no special immunity at all, leaving in place the background doctrine of qualified immunity to protect those officers who behave reasonably and in good faith while exposing the others to liability. In some cases, however, Congress might worry that qualified immunity—notorious for its susceptibility to inconsistent, ad hoc application—is insufficiently protective of “good faith” officials. Thus, it may want to provide “good faith” officers with an absolute grant of immunity while still exposing “bad faith” officials to liability. Such considerations could produce a variety of different arrangements. Congress might tailor the substantive scope of the immunity in an effort to distinguish between good faith and abusive executive officials. Alternatively, to the extent that Congress feels ill-equipped to draw such distinctions in advance, it might revive the old parliamentary practice of waiting to see how the executive branch performs during the suspension and then deciding, near the suspension’s end, how much immunity to grant.

Of course, waiting to confer immunity would mean that executive officials would have no assurance of immunity at the time of their actions. In England, the parliamentary practice of ex post immunity became so consistent that those responsible for arresting and detaining probably came to expect immunity. In the United States, however, suspension has been sufficiently rare (and indemnity acts even rarer) that such an expectation seems less likely to arise. Depending on the incentives Congress wants to create, this point could cut for or against the delayed immunity approach.

have to make appointments to review them and are not allowed to keep copies,” and that “[j]udges have even been instructed to use computers provided by the Justice Department to compose their decisions”).


311. There are, of course, a variety of different meanings Congress might ascribe to “good faith” and “bad faith.” I take no position on that here.

312. See Dicey, supra note 47, at 235 (noting prevalent “expectation that, before the Suspension Act ceases to be in force, Parliament will pass an Act of Indemnity,” and that “[t]his expectation has not been disappointed”).

313. This option would also be complicated if, as suggested above, some of the suspension-era detentions did not last as long as the suspension itself. See supra text accompanying note 306. If Congress waited until near the end of the suspension to decide whether to confer immunity, it might be too late to affect at least some litigation challenging the legality of detentions that had already ended.
6. Comparative Remedial Efficacy. — Finally, Congress might consider how effective the threat of personal liability would be as a means of affecting individual officers' behavior. As Cornelia Pillard points out, when individual officers are sued under the Bivens constitutional tort regime, the government "ensur[es] that [they] are covered by indemnification, government representation, government-subsidized insurance, and the like, thereby creating a regime of de facto government liability."314 If an officer's claim of qualified immunity prevails, then no liability obtains. If that defense fails, then government-subsidized insurance and indemnification agreements shift the cost of the judgment from the officer to the government. And in either case, the government covers the cost of the defense. In such circumstances, the abstract threat of liability might not do much to change individual officers' behavior.

The reality of de facto government liability might lead Congress to consider adopting a more comprehensive system of indemnification. It might, for example, decide to privilege the Marbury dictum demanding a remedy for every rights violation, and might thus displace qualified immunity doctrine with a comprehensive regime of true indemnification. Under such a regime, defendants could not defend on the basis of qualified immunity, but the government would assume responsibility for any award of damages. Such a regime might not appreciably change individual officers' incentives compared with the current regime of qualified immunity plus insurance and indemnity, but it would dramatically change things for the victims of unlawful detention. Whereas the current regime forces victims to bear the full cost of constitutional harms covered by qualified immunity, an across-the-board indemnification regime would provide some measure of compensation in virtually all cases of unlawful detention.

* * *

There are, then, a variety of factors Congress might legitimately take into account (and one, the Mitchell standard, it must confront) when striking the constitutional balance between remedy and immunity. Depending on the weight of those factors in any given case, Congress might choose any of a range of outcomes. Among other things, this variability reveals that a Congress determined to suspend the writ will not necessarily want to immunize from judicial scrutiny all detentions covered by the suspension. Thus, above and beyond the point that suspension itself does not entail legality, the existence of a suspension does not command any single answer to the immunity question.

Armed with this insight, we can see at least part of Professor Shapiro's argument in a different light. His principal concern lies with

the “practical consequences” of not treating a valid suspension as automatically legalizing all detentions falling within its ambit:

Congress has determined that emergency conditions justify extraordinary action, in particular, permitting detentions that would otherwise be subject to challenge in habeas corpus proceedings. Nevertheless, the executive, or those exercising delegated authority under him, might well be deterred from engaging in the very activity needed, and contemplated, to deal with the crisis by threats of financial liability or by an understandable reluctance to violate their oaths to support the Constitution and laws.\textsuperscript{315}

Some might be willing to ignore the substantial historical evidence cutting against suspension as legalization if the consequences of not doing so were truly as dire as Professor Shapiro suggests. But as this Part has shown, they are not that dire. Many of Shapiro’s concerns could be addressed by a congressional grant of immunity. In that sense, his concerns about the chilling effect of potential liability are not so much wrong as misdirected. They bear not on the proper understanding of suspension but on whether Congress, considering the separate question of ex post remedies versus immunity, should strike the constitutional balance in favor of immunity. And Congress might well take that course, especially if it shared Professor Shapiro’s concerns about the cost to national security of not doing so.

Professor Shapiro is also concerned that if suspension does not legalize all detentions within its scope, executive officials might be constrained by “an understandable reluctance to violate their oaths to support the Constitution and laws.”\textsuperscript{316} An act of immunity would not address this worry: Immunity does not equal legality. The next Part explores some of the implications of that point.

\section*{VI. Suspension and Executive Branch Constitutional Implementation}

As should be obvious by now, one of the overarching themes of this Article is that suspension, immunity, and legality are distinct issues. Part V focused on Congress’s substantial control over immunity; this Part focuses on the executive’s relationship to legality, especially constitutionality. I begin by showing how the issues of constitutional interpretation and implementation facing executive actors can be illuminated by dividing judicial constitutional doctrine into statements of meaning and rules of decision. Having introduced that framework, I use it to examine how the executive branch itself might adhere to and implement certain constitutional norms governing detention, in particular the guarantee of due process. In so doing, I assume, for purposes of isolating the legality question,

\textsuperscript{315} Shapiro, supra note 20, at 90.
\textsuperscript{316} Id.
that Congress has both suspended the writ and granted executive officials broad immunity from post-detention liability. I show that even in those circumstances, it is possible and appropriate for the executive to implement at least some parts of the core values we associate with due process.

A. Operative Propositions, Decision Rules, and Executive Implementation

As discussed in Part IV, executive branch actors have an independent duty of constitutional fidelity that "extends beyond its interpretation by the federal judiciary to the full dimensions of the concept which the norm embodies." For the executive branch actor concerned with honoring that duty, the challenge is to identify the "full dimensions" of the constitutional provision in question. Yet constitutional provisions are rarely, if ever, self-defining. To be meaningful and applicable, they must be translated into doctrine. And judge-made doctrine may underenforce constitutional provisions for institutionally specific reasons—as is the case, for example, with the rational basis test in equal protection doctrine. Thus, it becomes critical to disaggregate judicial doctrine into statements of constitutional meaning and statements about how the courts will enforce that meaning.

That distinction is the preoccupation of the "taxonomic" model of constitutional theory. Elaborated most systematically by Mitchell

317. Sager, Fair Measure, supra note 227, at 1227.
318. See supra text accompanying notes 231–233.
319. The term is Mitchell Berman’s. See Berman, Decision Rules, supra note 39, at 50 (summarizing methodological debate between "'Taxonomists' . . . who advocate something like the 'complex' model of constitutional adjudication against 'Pragmatists' . . . who insist that constitutional adjudication is instrumental 'all the way up' "). In addition to Professor Berman’s own work, there have been a number of other important contributions to the taxonomic literature in recent years. See, e.g., Fallon, Implementing, supra note 233, at 5 (arguing Court’s interpretive role is best characterized as “implementation,” including both determinations of constitutional meaning and formulation of practical tests); Fallon, Judicially Manageable Standards, supra note 230, at 1276 (asserting that “disparities between constitutional meaning and judicial doctrine arise frequently in constitutional adjudication as the result of the demand for judicially manageable standards”); Richard H. Fallon, Jr., The Supreme Court, 1996 Term—Foreword: Implementing the Constitution, 111 Harv. L. Rev. 54, 60 (1997) [hereinafter Fallon, Foreword] (postulating that “a gap frequently . . . exists between the meaning of constitutional norms and the tests by which those are implemented”); Kermit Roosevelt III, Constitutional Calcification: How the Law Becomes What the Court Does, 91 Va. L. Rev. 1649, 1651 (2005) [hereinafter Roosevelt, Constitutional Calcification] (noting divide between constitutional meaning and judicially adopted rules). These works build on earlier scholarship by, among others, Henry Monaghan, Larry Sager, and, much earlier, James Bradley Thayer. See Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 2-3 (1975) [hereinafter Monaghan, Constitutional Common Law] (describing Court’s constitutional review as "a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions"); Sager, Fair Measure, supra note 227, at 1214 (describing “judicial constructs” used in analysis that result in underenforcement of constitutional norms); James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 151 (1893).
Berman, the taxonomic model distinguishes "constitutional doctrines that are simply judicial determinations of what the Constitution means from those conceptually distinct doctrinal rules that direct how courts—faced, as they inevitably are, with epistemic uncertainty—are to determine whether the constitutional meaning has been complied with."\textsuperscript{320} Professor Berman has proposed a terminology to track this distinction: "constitutional operative propositions" are judicial statements of "the proper meaning of a constitutional power, right, duty, or other sort of provision," while "constitutional decision rules" are judge-made "doctrines that direct courts how to decide whether a constitutional operative proposition is satisfied."\textsuperscript{321}

Start with constitutional operative propositions. In some cases, as with the requirement that the President be at least thirty-five years old,\textsuperscript{322} the operative proposition is obvious from the text of the relevant provision. But in others, the text itself does not state a proposition susceptible of application. The Equal Protection Clause, for example, does not tell us precisely what it means to prohibit states from "deny[ing] to any person . . . the equal protection of the laws."\textsuperscript{323} The generation of constitutional doctrine is in part an exercise in identifying operative propositions in such cases. For equal protection, there are a variety of roughly similar candidates. The operative proposition might be that government "may treat persons differently only when it is fair to do so,"\textsuperscript{324} that "government may not classify individuals in ways not reasonably designed to promote a legitimate state interest,"\textsuperscript{325} or that "government may not treat some people worse than others without adequate justification."\textsuperscript{326}

Note that each of these candidates comes not from a court but from a legal scholar. That is no coincidence. Judges do not always stop to articulate the basic meaning of the constitutional provisions they apply. Instead, they often simply apply the tried-and-true decision rules handed down by previous decisions. But that does not mean judge-made constitutional doctrine contains no organizing sense of constitutional meaning. To the contrary, some idea of operative constitutional meaning, however implicit, is surely essential to the enterprise.

\textsuperscript{320} Berman, Decision Rules, supra note 39, at 9.
\textsuperscript{321} Id. Although these terms are Professor Berman's, he acknowledges their similarity to a comparable distinction stressed in the earlier work of Henry Monaghan, Larry Sager, and Richard Fallon. See id. at 36–38 & n.128 (citing Fallon, Foreword, supra note 319; Monaghan, Constitutional Common Law, supra note 319; Lawrence Gene Sager, Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law, 63 Tex. L. Rev. 959 (1985)).
\textsuperscript{322} U.S. Const. art. II, § 1, cl. 5.
\textsuperscript{323} Id. amend. XIV, § 1.
\textsuperscript{324} Sager, Fair Measure, supra note 227, at 1215.
\textsuperscript{325} Berman, Decision Rules, supra note 39, at 9.
\textsuperscript{326} Roosevelt, Constitutional Calcification, supra note 319, at 1657; see also id. at 1657 n.24 (noting Berman's and Sager's different formulations).
Essential, but not sufficient. The courts also need some means of knowing whether the operative proposition has been honored in any given case. Decision rules serve that need. But decision rules do not perfectly reflect constitutional meaning. Instead, they incorporate a variety of practical, institutional, and other considerations about how the courts should determine whether a constitutional norm has been violated. And they take a variety of forms, including “[t]he default, generally invisible . . . more-likely-than-not standard of proof,” rules with “heightened (or reduced) proof standards,” and rules employing various conclusive presumptions.\(^{327}\)

To see decision rules at work, consider again the Equal Protection Clause. Assume for these purposes that the operative proposition of the Clause is the one offered by Kermit Roosevelt: “[G]overnment may not treat some people worse than others without adequate justification.”\(^{328}\) In most cases, the courts determine whether that proposition has been violated by applying the rational basis test. Under that test, courts will not strike down government action if, on any reasonably conceivable set of facts, it could be seen as rationally related to a legitimate government interest.\(^{329}\) As discussed above,\(^{330}\) the rational basis test was crafted, among other reasons, to facilitate judicial restraint and to respect the constitutional judgments of the other branches of government. Certainly, the test does not precisely reflect the actual meaning of the Equal Protection Clause—that is, its operative proposition. Indeed, one can easily conceive of government action that would run afoul of the Clause’s meaning but that would survive rational basis review.\(^{331}\) The rational ba-
sis test, in short, is a decision rule that often causes the courts to under-enforce the equal protection norm.

Of course, that test is not the decision rule for all equal protection cases. In some cases, including where the government treats people differently on account of race, the courts apply "strict scrutiny." Under that standard, the government's action is treated as presumptively unconstitutional unless shown to be necessary to further a compelling state interest. Among other things, strict scrutiny reflects the judgments that "the aim of racial classifications is frequently illegitimate, and, if legitimate, can likely be served by drawing a different line"; that it is difficult for courts to assess government actors' true aims; and that it is preferable to err in favor of protecting the individual right. In these respects, strict scrutiny also does not track equal protection's actual meaning with any great precision. It is conceivable that in some limited circumstances, the government could have an adequate, noninvidious justification for classifying people on the basis of race, but that it could not show the classification to be strictly necessary to further a compelling government interest. In such circumstances, strict scrutiny would overenforce the equal protection norm.

What does all this mean for the executive's interpretation and implementation of the Constitution? Perhaps most importantly, it gives executive actors a way of disaggregating judge-made constitutional doctrine, of separating its under- or overenforcing tests from its statements of constitutional meaning. That, in turn, provides a way to concretize the "shared institutional process" view of constitutional interpretation. Executive actors can follow judicial understandings of constitutional mean-

334. See id. ("[S]trict scrutiny overprotects."). As an example, consider the Supreme Court's treatment of affirmative action. In Gratz, the Court struck down the University of Michigan's method for considering race in undergraduate admissions on the ground that it was not narrowly tailored to the compelling government interest in creating a racially diverse student body. See 539 U.S. at 275. Yet it is possible to conclude that race-based government action aimed at benefiting historically disfavored racial minorities does not flow from an invidious purpose and thus does not violate the basic norm of equal protection. See id. at 301 (Ginsburg, J., dissenting) ("The Constitution instructs all who act for the government that they may not 'deny to any person . . . the equal protection of the laws.' In implementing this equality instruction, as I see it, government decisionmakers may properly distinguish between policies of exclusion and inclusion.” (citation omitted)). The point here is not to argue the correctness of Justice Ginsburg's view. Rather, the point is that if one reads the Equal Protection Clause as she does, subjecting affirmative action to strict judicial scrutiny is likely to overenforce the norm.
335. See Berman, Decision Rules, supra note 39, at 15–16 ("[I]ntelligent extra-judicial discussions about constitutional governance will be much advanced by separating out from the great complex mass of judge-announced constitutional doctrine those doctrines—that embody what the courts think the Constitution means.").
336. See supra text accompanying note 237.
ing without limiting themselves to the outcomes produced by judicial decision rules.\textsuperscript{337} Thus, the basic point made in Part IV—that executive actors' obligation to the Constitution extends beyond the limits of underenforcing judicial doctrine—is no longer an open-ended exhortation simply to "do better" than the courts. It is a statement that executive actors should respect the operative propositions contained within judicial doctrine, but not the decision rules.

Significantly, this point applies regardless of whether the judiciary's decision rules cause it to under- or overenforce the constitutional norm. Consider again the equal protection example. Just as the executive's independent duty of constitutional fidelity requires it to follow equal protection's operative norm even when particular violations of the norm would survive rational basis review, it does not require the executive to refrain from acting in ways that are consistent with the operative norm but that would fail strict scrutiny.

There are complications here, however. Even if executive actors would fully discharge their own duty of constitutional fidelity by acting in this manner, a court applying strict scrutiny would nevertheless hold the executive to have acted unconstitutionally. And unless the executive is going to assert the power to disregard the judiciary's constitutional judgments even in cases to which the executive is a party—an assertion that few would endorse today, as it would directly challenge the judiciary's \textit{Marbury} power—the executive will have to abide by this overenforcement of the equal protection norm.\textsuperscript{338} This is simply the consequence of the courts having the last say in constitutional matters that come before them. Knowing this in advance, the executive might well (indeed, often will) choose to abide by the judiciary's overenforcing decision rules without waiting for the courts to require it.

The other side of that coin is that executive actors are not bound by judicial overenforcement in circumstances where the courts have generated constitutional doctrine in an area but are not in a position to implement it. That is precisely the state of things during a valid suspension of the writ accompanied by a broad grant of immunity. In those circumstances, executive branch actors can honor their oaths to uphold the Constitution by attending to judge-determined constitutional meaning while setting aside over- and underenforcing judicial decision rules.

\textsuperscript{337} See Berman, Decision Rules, supra note 39, at 88 (suggesting that to extent government agents' duty to uphold Constitution includes any duty of obedience to judicial doctrine, "that obligation extends only to judge-determined constitutional meaning, i.e., constitutional operative propositions, and not to those aspects of constitutional doctrine that are properly understood as decision rules").

\textsuperscript{338} See Roosevelt, Constitutional Calcification, supra note 319, at 1681 ("Generally speaking, then, underenforcing rules give nonjudicial actors greater latitude (which they should in good conscience decline), and overenforcing rules give them lesser (which they must grudgingly accept).")
Of course, the relevant executive branch actors will still need to devise some method for testing whether constitutional meaning is honored in any particular case. That is, they will need to craft their own decision rules. Because they are not confined to purely adjudicative postures, because their factfinding capacities are often far more extensive than the courts', and because in some circumstances they may have more direct access to the true purpose behind particular executive actions, their decision rules are likely to look quite different from judge-made decision rules. When the operative proposition relates to the regulated actor's mental state, for example, executive branch actors may have no need for the kinds of proxies employed by courts.339

That will not always be the case, however. The executive branch is vast and varied, and sometimes the principal responsibility for a particular action or program lies in one component while the ultimate judgment about the program's constitutionality lies elsewhere. For example, officials within the Defense Department might ask the Justice Department's Office of Legal Counsel (OLC) for an opinion on the constitutionality of a particular detention program that relies in part on classifications based on race, religion, or citizenship. To the extent OLC is inclined to think that compliance with equal protection's operative proposition requires knowing the true purpose of the classification, it will not be able to answer the question itself. Knowledge of the true purpose of the classification will reside in the minds of the Defense Department officials, not their constitutional advisors in OLC. In that sense, compliance with the operative proposition is not within the control of the executive actor charged with resolving the constitutional question. Entities like OLC might therefore end up fashioning intent-related decision rules that resemble the rules employed by courts.340

This all goes to show that the development of decision rules within the executive branch is, and should be, a context-sensitive undertaking.341 Ultimately, though, there is no reason to think executive officials cannot fashion the decision rules they need.

Once the relevant officials have done that, they will be in a position to determine, for example, the constitutionality of a proposed presidential order, during a period of suspension, to detain all U.S. residents of

339. See Kermit Roosevelt III, Aspiration and Underenforcement, 119 Harv. L. Rev. F. 193, 198 (2006), at http://www.harvardlawreview.org/forum/issues/119/march06/roosevelt.pdf (on file with the Columbia Law Review) ("When operative propositions relate to mental states, courts frequently underenforce them or employ objective tests as substitutes. But . . . the rationale offers no support for nonjudicial underenforcement, since compliance in such cases is perfectly within the nonjudicial actor's ability." (footnote omitted)).

340. For an overview of constitutional interpretation in OLC, see Pillard, Unfulfilled Promise, supra note 227, at 710–17.

341. In a future project tentatively entitled "Extrajudicially Manageable Standards," I plan to examine in more detail (both descriptive and normative) the generation of constitutional doctrine within the executive branch.
the same racial background as a group of terrorists suspected of planning an imminent attack.\textsuperscript{342} In resolving questions of "adequate justification" within the meaning of the operative proposition posited above,\textsuperscript{345} the executive decisionmaker might consider, among other things, the weightiness of the national security interest at stake, the reliability of the government's information, and the availability of equally effective but more targeted detention criteria. On the spare facts of the hypothetical as I have presented it, and without knowing more about the considerations embedded in the particular decision rules the executive decides to employ, I cannot definitively say how a conscientious executive actor would resolve the issue. But as I have described in this section, the executive's approach will be aided by dividing judge-made constitutional doctrine into operative propositions and decision rules, and incorporating the former but not necessarily the latter into its own constitutional doctrine.

B. Due Process During Suspension

In the previous section I outlined a general structure of executive branch constitutional interpretation and implementation, and suggested how it might be applied during periods of suspension. In this section, I apply that structure to a set of constitutional values that are often deemed "inseparable" from the habeas writ itself.\textsuperscript{344} These values typically travel under the heading "due process," though, as I will show, that single term obscures a number of different elements. My basic claim here is that once the different elements are distinguished, and once certain of those elements are divided into operative propositions and decision rules, it becomes clear that the executive can (and should) implement core facets of due process even during a period of suspension. My goal, then, is to show that habeas and due process are not literally inseparable, and that suspension need not be viewed as shutting off due process.

Habeas corpus and due process clearly do share a deep bond. The latter means different things in different circumstances, but Professor Tyler is surely right that "at its most fundamental and as it relates to the Great Writ, the guarantee of due process promises that the Executive must answer to an impartial body with a valid cause for depriving one of his or her liberty."\textsuperscript{345} It is no stretch to say that habeas is generally the most important and most effective means of enforcing that promise—even if, as noted earlier, it provides no redress for past wrongs.\textsuperscript{346} When detention is ongoing, habeas enables a court to demand justification for the detention and then to evaluate the sufficiency of that justification, aided by the contrary arguments of the person committed. And where

\textsuperscript{342} See supra text accompanying notes 9–11 (introducing this hypothetical).
\textsuperscript{343} See supra text accompanying notes 324–326 and 328.
\textsuperscript{344} See Meador, supra note 40, at 37; Shapiro, supra note 20, at 88.
\textsuperscript{345} Tyler, supra note 1, at 384.
\textsuperscript{346} See supra note 249 and accompanying text.
the government's asserted justification is insufficient, the writ provides a means of ordering the detainee's immediate release.

The vital importance of habeas to the enforcement of due process has led Professor Tyler to conclude that the writ's "suspension operates as an 'on/off' switch" for such "core due process safeguards" as the "right to impartial review of the cause of one's detention."\textsuperscript{347} Similarly, Professor Shapiro "equate[s] the right to be free from unlawful detention with the role of habeas corpus in guaranteeing that right."\textsuperscript{348} The claim here is not just that habeas is the most important means of effectuating the guarantees of due process, but that suspension of the former extinguishes the latter.

Evaluating claims of this sort requires specifying what "due process" means in this context. The Due Process Clause is the source of numerous constitutional protections, some substantive and some procedural. Although executive detention certainly implicates the substantive dimensions of due process, I focus here on the procedural dimensions because it is in that area that due process may seem most intimately tied to the courts. In doing so, I begin with Richard Fallon's helpful differentiation among three different procedural due process rights: to judicial review, to judicial remedies, and to fair process.\textsuperscript{349} These rights overlap, but they are also distinct in important ways. And when applied to the deprivation of liberty imposed by executive detention, they intersect the habeas remedy in different ways. Most obviously, the availability of habeas-based review to test the legality of detention may itself be the means by which the first two rights—to judicial review and to a judicial remedy—are satisfied. I concede that those rights may be displaced by a valid suspension accompanied by a grant of immunity. But that is merely to say that suspension and indemnity provisions together remove detainees' access to judicial redress. It tells us nothing about the status of the separate due process interest in fair process. That right need not be displaced by a valid suspension. Fairness is not an exclusively judicial virtue, and judicial process is not coextensive with fair process. Indeed, much of the corpus of administrative law proceeds from the premise that, "[a]s a 'guarantee of fair procedure,' due process speaks to both judicial and administrative proceedings."\textsuperscript{350}

The taxonomists' framework of operative propositions and decision rules can help clarify the possibility of fair process without the courts.\textsuperscript{351} Consider first an operative proposition for fair process. Fair process is both a means and an end. It is a means of "protect[ing] persons . . . from

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\item \textsuperscript{347} Tyler, supra note 1, at 386–87.
\item \textsuperscript{348} Shapiro, supra note 20, at 87.
\item \textsuperscript{349} Fallon, Some Confusions, supra note 252, at 329–39.
\item \textsuperscript{350} Peter L. Strauss, Todd D. Rakoff & Cynthia R. Farina, Gellhorn and Byse's Administrative Law 767 (10th ed. 2003).
\item \textsuperscript{351} See supra text accompanying notes 319–321.
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the mistaken or unjustified deprivation of life, liberty, or property."\textsuperscript{352} It is an end in that it applies even to deprivations that are accurate and substantively justified.\textsuperscript{353} These two concerns are melded in the Supreme Court's explanation that "[a]n essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'"\textsuperscript{354} In addition, the Court has stressed the need for the hearing to take place before a neutral decisionmaker.\textsuperscript{355} Putting these elements together, we have the makings of a reasonably concrete operative proposition. In fact, the plurality in \textit{Hamdi v. Rumsfeld} embraced all these elements in its statement of the core meaning of due process for a citizen held as an alleged enemy combatant: "[A] citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. . . . These essential constitutional promises may not be eroded."\textsuperscript{356}

The question then becomes one of application by means of decision rules that, here as elsewhere, may be under- or overenforcing. The judge-made rules for measuring compliance with fair process often employ conclusive presumptions. Thus, for example, in cases involving such serious liberty deprivations as criminal incarceration, courts require notice and an opportunity to be heard in the context of a criminal trial, and that the neutral decisionmaker be a judge (or jury, in a proceeding presided over by a judge).\textsuperscript{357} But in so doing, courts are not saying that the only meaning of "notice and opportunity to be heard" is a judicial hearing, nor that the only meaning of "neutral decisionmaker" is a judge. Rather, courts are saying that in light of the weightiness of the liberty interest involved, the availability of a familiar judicial process for handling such matters, and the various structural safeguards of judicial independence, they will \textit{deem} anything less than a full hearing before a judge to violate the fair

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\item \textsuperscript{352} Carey v. Piphus, 435 U.S. 247, 259 (1978).
\item \textsuperscript{353} See id. at 266 ("[T]he right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions . . . .").
\item \textsuperscript{354} Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)); see also Fuentes v. Shevin, 407 U.S. 67, 80 (1972) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" (quoting Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1864))).
\item \textsuperscript{355} See, e.g., Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 617 (1993) (noting that "due process requires a 'neutral and detached judge in the first instance'" (quoting Ward v. Monroeville, 409 U.S. 57, 61-62 (1972))).
\item \textsuperscript{356} 542 U.S. 507, 533 (2004) (plurality opinion).
\item \textsuperscript{357} See Fallon, Some Confusions, supra note 252, at 330 ("When some kinds of liberty and property interests are involved—the right to freedom from criminal incarceration, for example—the Due Process Clause requires a judicial hearing.").
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process rights of the criminally accused. In short, this is an area where the judiciary's decision rule overenforces the right.\textsuperscript{358}

In other areas, the judiciary does not require liberty-depriving decisions to take place before a judge. In the immigration context, for example, an administrative official called an immigration judge is responsible for determining in the first instance that an alien is removable from the country.\textsuperscript{359} To be sure, courts strain to preserve some measure of review of those decisions, especially where the decision is challenged on constitutional or other legal (as opposed to purely factual) grounds.\textsuperscript{360} But maintaining such review serves the separate due process interests in judicial review and a judicial remedy—interests protected in liberty deprivation cases not only by the Due Process Clause but also by the Suspension Clause itself. It does not establish that nonjudicial proceedings can never be fair. Indeed, judicial review in these contexts typically seeks to ensure that the administrative or other nonjudicial decisionmaker observes the demands of fair process, not to deliver that fair process in the first instance.

Hamdi nicely illustrates the point. There, the plurality concluded that "due process demands some system for a citizen-detainee to refute his [enemy combatant] classification" before a neutral decisionmaker, but that "the standards we have articulated [for such review] could be met by an appropriately authorized and properly constituted military tribunal."\textsuperscript{361} The plurality's due process analysis was thus primarily aimed at defining the contours of a process that could be provided outside the courts. In cases where that sort of process is provided, the plurality suggested that the courts would uphold the decision to detain as long as the government adduced "some evidence" to support the decision. That standard, however, assumes certain facts about the initial decisionmaking process:

\textsuperscript{358} Of course, the Due Process Clause is not the only provision requiring that criminal charges generally be tried in courts as part of the ordinary criminal justice system. See, e.g., U.S. Const. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . "); id. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . "). When viewed in light of these provisions, the judicial doctrine may not appear to be particularly overenforcing in the aggregate. My claim here is simply that judicial doctrine sometimes overenforces the specific due process right to fair process.


\textsuperscript{361} Hamdi, 542 U.S. at 537–38.
We have utilized the “some evidence” standard . . . as a standard of review, not . . . a standard of proof. That is, it primarily has been employed by courts in examining an administrative record developed after an adversarial proceeding—one with process at least of the sort that we today hold is constitutionally mandated in the citizen enemy-combatant setting. This standard therefore is ill suited to the situation in which a habeas petitioner has received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive’s factual assertions before a neutral decisionmaker.\(^\text{362}\)

The “some evidence” standard, in other words, is a judicial decision rule.\(^\text{363}\) It is “distinct from the constitutional norms it is crafted to enforce” and “largely trusts administrative officials to follow the Constitution.”\(^\text{364}\) To be sure, the standard does not apply if, as in Hamdi, the initial administrative or other executive decisionmaking process lacks certain basic characteristics. But the standard could not exist at all were it not for a judicial assumption that, in the main, fair process can be provided by nonjudicial decisionmakers.\(^\text{365}\)

What all this shows is that fair process is not confined to judicial process. Fair process does mean the involvement of an impartial decisionmaker, but such decisionmakers can be found outside the courts. A military or executive tribunal sufficiently removed from supervisory or other executive-favoring pressures, for example, can at least potentially lay claim to impartiality even in cases dealing with such weighty matters as the deprivation of individual liberty. To be clear, I am not denying the general superiority of Article III courts over military or other executive tribunals when it comes to independence and other key ingredients of impartiality. On the whole, life-tenured federal judges are undoubtedly more reliably impartial than employees of the branch whose actions they are reviewing.\(^\text{366}\) But the question for present purposes is not whether federal courts are preferable to executive tribunals, but whether, in cases involving serious liberty deprivations, the due process requirement of an impartial decisionmaker means the requirement of an Article III judge. The best answer, I have been trying to show, is no.

\(^{362}\) Id. at 537 (citations omitted).

\(^{363}\) See Berman, Decision Rules, supra note 39, at 64–65 (describing standard this way).

\(^{364}\) Fallon, Implementing, supra note 233, at 6, 38.

\(^{365}\) Of course, as the Hamdi plurality pointed out, habeas had not been suspended in that case. See 542 U.S. at 525 (“All agree suspension of the writ has not occurred here.”). But the plurality did not say that the requirements of fair process would disappear with the writ’s suspension. While a valid suspension would disable the courts from reviewing the executive’s actions via habeas, the plurality did not suggest that suspension would change the executive’s own due process obligations.

The implications for the executive branch during a suspension should be clear. Fair process requires the government to provide detainees with notice of its reasons for holding them and a fair opportunity to challenge those reasons before a neutral decisionmaker. To assess whether those requirements have been met in any given context, the relevant executive actors will need to construct their own decision rules. As suggested above, those rules may look quite different from judge-made decision rules (and may even vary across the executive branch), since they need to be workable not just in discrete adjudications but also for broader purposes like constructing and implementing an overall system of review. But once the executive branch has devised some means of implementing the right to fair process, it must subject its detention decisions—indeed, all its liberty-implicating decisions and actions—to that constitutional demand. It must, in short, ensure that the due process right of fair process is respected.

To be sure, and as the plurality showed in *Hamdi*, decision rules in this area can be flexible enough to accommodate the nature of the national emergency at hand. For that and other reasons, it may well be that the executive will underenforce the right. Any decision rule, executive or judicial, has the potential to under- or overenforce the norm it implements. Indeed, to the extent the full sweep of the due process right in this area includes a right to judicial review and a judicial remedy in addition to a fair process, the executive will necessarily underenforce due process during a period of suspension. But the impossibility of full enforcement should not lead us to abandon the constraints of the Constitution altogether.

My goal here has not been to specify any necessary outcome of the executive’s implementation of the fair process right. Rather, it has been to show that this aspect of due process does not depend on habeas corpus for its existence. It is possible for the executive branch to implement the fair process right even in the total absence of judicial review, and even when that absence is occasioned by a national emergency so grave that Congress suspends the writ. I hope to have shown in this section how the executive might go about doing so.

367. See supra text accompanying notes 339–341.
368. See 542 U.S. at 533–34 (allowing government to introduce hearsay evidence in support of its detention decisions and suggesting that evidentiary burden could be shifted to detainee challenging his designation once government puts forth credible evidence supporting it).
369. See supra text accompanying note 349.
370. In this respect, my goal has been to take up Richard Fallon’s call for “enriched accounts of the nature of constitutional rights, such that they can tolerate limits on judicial enforcement without altogether forfeiting their status as rights.” Fallon, Judicially Manageable Standards, supra note 230, at 1331.
CONCLUSION

At bottom, the question of the effect of a valid suspension is the question whether our Constitution contemplates the suspension of law during emergencies. The idea that a state of emergency suspends the rule of law is not new. Carl Schmitt, for example, famously proclaimed that “[t]here exists no norm that is applicable to chaos.”371 On this view, national emergencies create “a lawless void, a legal black hole, in which the state acts unconstrained by law.”372 Does a valid suspension have that effect on the law governing detention? Does it “free[e] the Executive from the legal restraints on detention that would otherwise apply”?373

As I have explained, according to the prevailing historical understanding in both England and the United States, the answer is no. Given that, the suspension-as-legalization model is left to rely on assertions of practical necessity. The first such argument is that executive branch officials would be unduly deterred from doing what is necessary if they knew they could later be held liable for their actions.374 As I have shown, however, Congress has the authority—subject to its own best understanding of the Constitution—to decide whether, when, and how much to immunize executive branch actors from later liability for their actions. Suspension does not automatically immunize the detaining officials, but Congress, depending on how it assesses the circumstances of national emergency that warranted the suspension, may separately determine that the balance of constitutional interests weighs in favor of immunity.

That leaves suspension as legalization to rely on a second argument from necessity, this one focusing on the executive’s duty of fidelity to the Constitution. The argument here is that executive actors might be “deterred from engaging in the very activity needed, and contemplated, to deal with the crisis by . . . an understandable reluctance to violate their oaths to support the Constitution.”375 In one sense, this argument may well be right: Executive actors might abstain from certain detention-related actions out of fidelity to the Constitution. The question is whether such abstention is desirable.

In every other area of government conduct, constitutional law’s answer is a resounding yes. The perils of national crisis have not been thought sufficient to create a “legal black hole” with respect, for example, to the use of interrogation and torture, or with respect to the surveillance of the citizenry. If the government is permitted to undertake such actions, it is because it can point to an authority in law. To be sure, periods of extreme national crisis may warrant construing certain constitutional norms in a more flexible mode, thus affording the government a broader

373. Shapiro, supra note 20, at 89.
374. See id. at 90.
375. Id.
range of action in the service of the compelling interest in national security. But they do not create grounds for simply ignoring those constitutional norms altogether. Constitutional law's response to emergency is from within the law, not without it.

Why should detention be any different? It does not suffice to point to the Suspension Clause as creating a special exception for detention, as may sometimes be implied when the Clause is held up as an "emergency provision." As I have shown, the longstanding historical understanding of the Clause does not regard it as creating any special exception from what would otherwise be the bounds of legality. So we are left with an argument of unique necessity—that there is a need, unfamiliar to the rest of constitutional law, to depart from centuries of practice and treat a valid suspension as dispensing with the law governing detention.

I am unconvinced. The Constitution can and does apply in times of strife as well as peace, when the courts are open and when they are not. I have shown in this Article how, during periods of suspension, executive actors can implement constitutional norms outside the courts. We should require them to do so, or at least recognize that not doing so entails acting unconstitutionally.

376. See supra note 1 and accompanying text.