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Article

State Habeas Relief for Federal Extrajudicial Detainees

Todd E. Pettys†

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Once regarded as the increasingly obscure specialty of only a handful of litigators and law professors, the writ of habeas corpus has risen to renewed prominence in the years since President George W. Bush announced that the United States was launching a war on terror.[1] The President's aggressive prosecution of that campaign has led to the incarceration of hundreds of individuals, many of whom have not been formally charged with any crime and face seemingly indefinite extra-judicial detention—detention without the review, approval, or participation of any court.[2] Hoping to win either their freedom or an appearance before a judge, many of those detainees have tried to secure the remedy that individuals have sought for centuries in the United States and Great Britain when facing extrajudicial confinement—the Great Writ.[3] The detainees' petitions for habeas relief have, in turn, forced courts, legislators, and scholars to wrestle with profoundly difficult questions concerning the rights of citizens and noncitizens detained by American forces at home and abroad[4] and the political

1. Marc Sandalow & Carolyn Lochhead, *President Asks Congress for Sweeping War Powers*, S.F. CHRON., Sept. 14, 2001, at A1 ("President Bush declared winning the war on terrorism the central focus of his presidency yesterday as his administration laid the groundwork for a sweeping military campaign.").

2. Charles Babington & Jonathan Weisman, *Senate Approves Detainee Bill Backed by Bush; Constitutional Challenges Predicted*, WASH. POST, Sept. 29, 2006, at A1 ("Hundreds of . . . detainees have been held for several years without trial at the U.S. military base at Guantanamo Bay, Cuba, while others were held at secret prisons overseas."); Carl Tobias, Editorial, *Overreaching on "Enemy Combatants,"* BALT. SUN, Jan. 1, 2006, at A15, *available at* 2006 WLNR 107922 (stating that, for several years, the federal government held Jose Padilla, a U.S. citizen, at a navy brig in South Carolina without charging him with any crime).

3. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 12–63 (1980) (discussing the evolution of the writ at English common law from a restrictive instrument compelling appearance to a device for securing a person's release from unlawful confinement); *see also* Stone v. Powell, 428 U.S. 465, 474 n.6 (1976) ("It is now well established that the phrase 'habeas corpus' used alone refers to the common-law writ of habeas corpus *ad subjiciendum*, known as the 'Great Writ.'" (quoting *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807))).

4. *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2764–69 (2006) (holding that § 1005(e)(1) of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2680, 2742 (2005), which purported to strip the federal courts of power to entertain habeas petitions filed by persons held at the Guantanamo Naval Base in Cuba, did not apply to petitions pending at

branches' ability to strip the federal courts of jurisdiction to provide the detainees with meaningful relief.[5]

While others have grappled with the legality of federal extrajudicial confinement, state courts have sat quietly on the sidelines. The Supreme Court forced state judges into the role of idle spectators nearly 150 years ago, in a pair of cases dealing with efforts by the Wisconsin Supreme Court to free an abolitionist and an unhappy teenaged soldier from federal custody. *Ableman v. Booth*[6] and *Tarble's Case*[7] together stand for the proposition that state courts cannot grant habeas relief to fed-

the time of the statute's enactment); *id.* at 2786–98 (holding that a system of military commissions established to try detainees at Guantanamo Bay violated the Uniform Code of Military Justice and various Geneva Conventions); Hamdi v. Rumsfeld, 542 U.S. 507, 516–39 (2004) (O'Connor, J., plurality opinion) (finding that citizens may be held as "enemy combatants" but must be given an opportunity to contest that designation before an impartial tribunal); Rasul v. Bush, 542 U.S. 466, 473–84 (2004) (holding that, when an alien is not a citizen of a country with whom the United States is at war, and that alien is extrajudicially held within the United States' territorial jurisdiction, a federal district court can adjudicate the alien's habeas petition so long as it has jurisdiction over the alien's custodian); Rumsfeld v. Padilla, 542 U.S. 426, 434–42 (2004) (holding that, when a citizen is detained by American armed forces and desires habeas relief, he or she must file the petition in a district having jurisdiction over the petitioner's immediate custodian, not with the Secretary of Defense); Al-Marri v. Wright, 487 F.3d 160, 174–95 (4th Cir. 2007) (holding that it is unconstitutional for the President and the military to indefinitely detain, without trial, alien civilians who have lawfully entered the United States), *reh'g en banc granted*, No. 06-7427 (4th Cir. Aug. 22, 2007).

5. *See, e.g.*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, 42 U.S.C.) (establishing a system of military commissions and declaring that no court shall have jurisdiction over a habeas petition filed by an alien detainee who has been properly detained by the United States as an "enemy combatant"); *Al-Marri*, 487 F.3d at 166–73 (stating in dictum that the jurisdiction-stripping provision of the Military Commissions Act of 2006 might be unconstitutional, but holding that the provision did not apply in the case at hand because there had been no determination by the United States that the President's detention of Al-Marri as an "enemy combatant" was "proper"); Boumediene v. Bush, 476 F.3d 981, 988–94 (D.C. Cir.) (holding that the jurisdiction-stripping provision of the Military Commissions Act of 2006 does not violate the Constitution), *cert. granted*, 127 S. Ct. 3078 (2007); Janet Cooper Alexander, *Jurisdiction-Stripping in the War on Terrorism*, 2 STAN. J. C.R. & C.L. 259, 260–67 (2006) (examining the jurisdiction-stripping provisions of recent antiterrorism legislation).

6. 62 U.S. (21 How.) 506, 516 (1859) (holding that state courts lack jurisdiction to hear the habeas petition of a person convicted of a federal crime).

7. 80 U.S. (13 Wall.) 397, 411–12 (1872) (holding that state courts lack jurisdiction to issue a writ of habeas corpus for the discharge of a person in federal custody).

eral prisoners, regardless of whether those prisoners have been given the benefit of federal judicial proceedings.[8]

Although many take issue with the arguments that the Court marshaled in support of that proposition,[9] the proposition itself is generally regarded as too widely accepted to be seriously questioned. Gerald Neuman contends, for example, that changes in federal-state relationships in the wake of the Civil War, coupled with "the Supreme Court's limited capacity to correct erroneous state court interpretations of federal law, both counsel against reviving state habeas remedies for federal prisoners, so long as federal courts stand open to them."[10] Recognizing the forces weighing against it, William Duker suggests that the possibility of state habeas relief for federal detainees might be a question "reserved for the antiquarian."[11]

If the actions of the Wisconsin Supreme Court in *Ableman* and *Tarble's Case* had been entirely the product of one state's misguided judiciary, if Congress had granted the federal courts exclusive jurisdiction over federal prisoners' habeas claims, or if the Constitution made it clear that federal prisoners were entirely beyond state judges' reach, then the possibility of state habeas relief for federal extrajudicial detainees might indeed stir the imagination of only the most ardent antiquarian. In reality, however, the state courts routinely granted habeas relief to federal extrajudicial detainees for half a century.[12] The his-

8. *See* LARRY W. YACKLE, FEDERAL COURTS 134–35 (2d ed. 2003) (explaining that, under *Ableman* and *Tarble's Case*, state courts cannot issue "habeas corpus relief to prisoners in the custody of federal officers" (citing *Ableman*, 62 U.S. (21 How.) at 516; *Tarble's Case*, 80 U.S. (13 Wall.) at 397)).

9. *See* DUKER, *supra* note 3, at 154–55 (arguing that the supremacy of the Federal Constitution should not prohibit state court judges from hearing the habeas petitions of federal prisoners because state court judges, like federal judges, must support the Constitution); YACKLE, *supra* note 8, at 135–36 (arguing that the *Tarble* Court ignored "the conventional understanding that Congress might never have created the lower federal courts and might have relied, instead, on state courts to police the system"); Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 101–02 (noting that if the *Tarble* Court correctly held that the Constitution forbade state court jurisdiction in habeas cases involving federal prisoners and Congress had not created the lower federal courts, there would be no forum for federal prisoners to seek redress for illegal detention).

10. Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 COLUM. HUM. RTS. L. REV. 555, 597 (2002).

11. DUKER, *supra* note 3, at 155.

12. *E.g.*, Commonwealth v. Downes, 41 Mass. (24 Pick.) 227, 227 (1836); State v. Dimick, 12 N.H. 194, 196 (1841); United States v. Wyngall, 5 Hill 16, 18 (N.Y. Sup. Ct. 1843); Commonwealth *ex rel.* Webster v. Fox, 7 Pa. 336, 337–38 (1847).

torical record provides no convincing evidence that Congress ever rejected the strong presumption of concurrent state and federal jurisdiction over those detainees' habeas claims.[13] Moreover, the Constitution not only addresses the matter of state habeas relief for federal extrajudicial detainees, but guarantees that Congress cannot suspend state courts' power to grant those detainees the appropriate relief except in the most extraordinary of circumstances.[14] This Article contends that it is time to allow state judges to leave their seats on the sidelines and take their constitutionally assured role as a primary protector of individuals' freedom.

To demonstrate that *Ableman* and *Tarble's Case* were not provoked merely by a few renegade judges in Wisconsin, Part I of this Article tells the story of a long-forgotten time when state courts frequently granted habeas relief to individuals being held by federal officials without judicial process. In *Ableman*, the Wisconsin Supreme Court admittedly ventured into troublesome territory when it tried to free a man who had already been tried, convicted, and sentenced by a federal court.[15] But when the Wisconsin high court retreated to more familiar ground a few years later in *Tarble's Case*, attempting to provide relief to a boy being extrajudicially detained by federal military officials, the United States Supreme Court sweepingly declared that state judges should regard federal prisoners as entirely off limits.[16]

Part II begins by noting the prevailing criticism of the argument that the Court advanced in support of its conclusions in *Ableman* and *Tarble's Case*. It then rejects the substitute argument around which scholars have coalesced in their effort to rationalize the Court's holdings in those two cases—namely, that when Congress authorized federal courts to hear federal

13. *See* 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 457–508 (1971) (detailing the passage of the Judiciary Act of 1789 and making no mention of debates on whether to make federal jurisdiction over habeas cases exclusive); WILFRED J. RITZ, REWRITING THE HISTORY OF THE FEDERAL JUDICIARY ACT OF 1789 *passim* (1990) (same).

14. *See* DUKER, *supra* note 3, at 135 ("[T]he debates in the federal and state conventions, the location of the habeas clause, and the contemporary commentary support the thesis that the habeas clause was designed to restrict Congressional power to suspend state habeas for federal prisoners.").

15. Ableman v. Booth, 62 U.S. (21 How.) 506, 510 (1859).

16. Tarble's Case, 80 U.S. (13 Wall.) 397, 410–11 (1872).

prisoners' habeas claims in the Judiciary Act of 1789, it implicitly preempted state courts' jurisdiction.

Drawing from the work of William Duker and others, Part III contends that the Constitution's Suspension Clause was intended to guarantee both individuals and the states that, absent extraordinary circumstances, federal leaders could not strip state courts of their power to provide habeas relief to persons being extrajudicially detained by federal authorities. Part III concludes by arguing that it is not too late to honor the Constitution's promise.

I. THE RISE AND FALL OF STATE HABEAS RELIEF FOR FEDERAL PRISONERS

Throughout the first half of the nineteenth century, it was widely believed—among state courts, federal officials, and legal commentators alike—that state courts had the power to provide relief to individuals being extrajudicially detained, regardless of whether the federal government was the sovereign responsible for the confinement.[17] State judges believed that their power to provide such relief was an indispensable feature of the states' sovereignty.[18] The Supreme Court abruptly rejected that conception of state courts' power in 1872.[19] Rather than distinguish between judicial and extrajudicial federal detentions and declare that state courts can intervene only in instances of the latter—the distinction that most state courts had made for half a century—the Court declared that state courts can *never* award habeas relief to individuals in federal custody, no matter what the circumstances.[20]

A. FROM THE NATION'S BIRTH TO THE WISCONSIN REBELLION: THE ASCENDANCY OF STATE COURTS' POWERS

In section 14 of the Judiciary Act of 1789, Congress authorized federal courts and judges to award habeas relief to federal prisoners.[21] In the eyes of many early Americans, however, the

17. *Downes*, 41 Mass. (24 Pick.) at 227; *Dimick*, 12 N.H. at 196; *Wyngall*, 5 Hill at 18; *Fox*, 7 Pa. at 337–38; ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS 166 (Albany, W.C. Little & Co. 1858).

18. *E.g.*, State v. Brearly, 5 N.J.L. 639, 643–44 (N.J. 1819); Olmsted's Case, Brightly 9, 15 (Pa. Ct. Nisi Prius 1809).

19. *Tarble's Case*, 80 U.S. (13 Wall.) at 411.

20. *Id.*

21. *See* Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (authorizing

federal government was not the primary protector of citizens' freedom.[22] Before the federal courts arrived on the scene, state courts had long exercised their common-law power to issue the Great Writ in cases of unlawful confinement.[23] In this and other areas, citizens principally looked to the states, and not the fledgling federal government, when they needed a sovereign's help.[24] After all, between the late 1700s and the mid-1800s, most government services of any significance were provided by state and local officials,[25] while citizens' relationships with federal officials were often "characterized by distance and distrust."[26] When suffering restraints at the hands of federal authorities, therefore, citizens often turned not to the courts of the new and unfamiliar sovereign—a sovereign that many feared would abuse its power in oppressive ways[27]—but rather

federal courts and judges to award habeas relief to federal prisoners "for the purpose of an inquiry into the cause of commitment"). The 1789 Act did not authorize federal courts to grant habeas relief to *state* prisoners. *See Ex parte* Dorr, 44 U.S. (3 How.) 103, 105 (1845). Congress lifted that limitation in the wake of the Civil War. *See* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385–86.

22. *See In re* Stacy, 10 Johns. 328, 333 (N.Y. Sup. Ct. 1813) (arguing that the state court has an "indispensable duty" to protect the liberty of its citizens from illegal confinement); *In re* Bryan, 60 N.C. (Win.) 1, 28 (1863) (stating that a state has no higher duty than "protecting all her citizens in the full and free enjoyment of life, liberty, and private property").

23. *See* Marc M. Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners*, 70 TUL. L. REV. 1, 7 (1995) ("At the very beginning of the nineteenth century, most state courts continued to draw their authority to issue the writ from their common-law powers which preceded independence."); Dallin H. Oaks, *Habeas Corpus in the States—1776–1865*, 32 U. CHI. L. REV. 243, 251–55 (1965) (describing early state courts' common-law and statutory habeas powers).

24. *See* Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 349 (2003) (stating that, in the nation's first decades, "responsibility for securing the public good [fell] primarily on the states' shoulders").

25. *See* ROBERT H. WIEBE, THE OPENING OF AMERICAN SOCIETY: FROM THE ADOPTION OF THE CONSTITUTION TO THE EVE OF DISUNION 354 (1984) ("[Americans'] firm loyalties began at home and extended from the community through its surrounding area no farther than the state, the most distant unit that actually fed their enterprises and influenced their local environments."); Todd E. Pettys, *Our Anticompetitive Patriotism*, 39 U.C. DAVIS L. REV. 1353, 1383 (2006) ("In the early and mid[-]1800s, the federal government struck the smallest of profiles in citizens' daily lives . . . .").

26. MELINDA LAWSON, PATRIOT FIRES: FORGING A NEW AMERICAN NATIONALISM IN THE CIVIL WAR NORTH 10 (2002).

27. *See* JACKSON TURNER MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781–1788, at 255–56 (1961) (noting that many agreed to support the Constitution only when promised that the new national government's

to the courts of the sovereign that had already earned the people's confidence and loyalty.

Two of the earliest reported cases involving federal detainees seeking state habeas relief, both decided in 1809, illustrate the state courts' willingness to take jurisdiction of such claims. In *In re Roberts*,[28] the father of sixteen-year-old Emanuel Roberts filed a habeas petition with Chief Judge Joseph Nicholson, of Maryland's Sixth Judicial District.[29] Roberts's father alleged that his son "had been seized, and forcibly carried on board the brig Syren," a United States naval vessel that had been sent to Baltimore to recruit crew members.[30] Chief Judge Nicholson wrote that, when he first read the petition, he felt "no hesitation . . . in granting a writ which every citizen illegally held in custody has a right to demand."[31] He pointed out that, in two prior cases, he had readily granted habeas relief to private citizens who had been arrested by federal military officials on suspicion of treason; after determining that "there was not a shadow of proof against them," the chief judge had ordered them discharged.[32] In Roberts's case, however, he concluded that the young man had voluntarily enlisted in the navy and had accepted payment for his first three months of service.[33] Although Chief Judge Nicholson acknowledged that state law generally did not recognize contracts made by minors, he denied the request for habeas relief, concluding that Roberts was old enough to serve in the navy: "The history of our own times has taught us that young men under twenty-one years of age, if not the best, are certainly not inferior to any other soldiers in the world."[34]

powers would be reined in by a series of amendments); DAVID J. SIEMERS, THE ANTIFEDERALISTS: MEN OF GREAT FAITH AND FORBEARANCE 223–25 (2003) (explaining that, although the Antifederalists ultimately accepted the Constitution, they worked hard to ensure that the national government's powers remained limited).

28. 2 AM. L.J. 192 (Md. Dist. Ct. 1809).

29. *Id.* at 192–93.

30. *Id.* at 193–94.

31. *Id.* at 193.

32. *Id.* at 195–96. The two cases to which Chief Judge Nicholson referred are unreported.

33. *Id.* at 193.

34. *Id.* at 195; *accord* Commonwealth v. Murray, 4 Binn. 487, 492 (Pa. 1812) (Tilghman, C.J.) (voting to deny relief to a seventeen-year-old boy seeking release from the navy, because, *inter alia*, boys under the age of twenty-one not only could be of great service to their country, but also could benefit from acquiring "practical knowledge of sea affairs").

In *Olmsted's Case*,[35] decided in Pennsylvania the same year, the courts were faced with a dispute between claimants to a monetary award for capturing the *Active*, an enemy British vessel. Gideon Olmsted claimed that he and his friends were entitled to the prize: after having been taken onboard the *Active* as prisoners of war, they had overpowered the British crew, locked them in a cabin, and set sail for Philadelphia.[36] The state of Pennsylvania, however, claimed that it was entitled to a portion of the prize because the crew of a Pennsylvania-owned ship had escorted the *Active* into port.[37] A state jury divided the prize between the claimants,[38] and a portion of Pennsylvania's share of the proceeds soon found its way into the hands of two women named Elizabeth Sergeant and Esther Waters.[39] A federal admiralty panel later overturned the jury's verdict and ordered all of the proceeds paid to Olmsted and his companions.[40] When Sergeant and Waters refused to pay, a federal district court ordered federal officials to take them into custody.[41] The United States Marshalls were able to capture Sergeant but not Waters.[42] Once imprisoned, Sergeant sought habeas relief from Chief Justice William Tilghman, of the Pennsylvania Supreme Court, arguing that the federal panel had lacked jurisdiction.[43] Chief Justice Tilghman made it clear that, in the appropriate circumstances, he would not hesitate to issue the writ on behalf of a person in federal custody.[44] When the federal government exceeds its powers, he reasoned,

> the independence of the states, and the peace of the union demand that the state courts should . . . give redress. There is no law which forbids it; their oath of office exacts it, and, if they do not, what course is to be taken? We must be reduced to the miserable extremity of opposing force to force, and arraying citizen against citizen; for it is in vain to expect that the states will submit to manifest and flagrant

35. Brightly 9 (Pa. Ct. Nisi Prius 1809).

36. *Id.* at 19–20.

37. *Id.*

38. *Id.* at 11, 20.

39. *Id.* at 12, 18, 20. Sergeant and Waters were the daughters of David Rittenhouse, Pennsylvania's treasurer. The state had placed the funds in Rittenhouse's hands for safekeeping. After Rittenhouse died, the funds passed to Sergeant and Waters, his heirs, and the administrators of his estate. *Id.* at 20.

40. *Id.* at 11.

41. *Id.* at 14.

42. *Id.*

43. *Id.*

44. *Id.* at 15.

> usurpations of power by the United States, if (which God forbid) they should ever attempt them.[45]

On the merits, however, Chief Justice Tilghman denied Sergeant's petition, concluding that the federal admiralty panel had jurisdiction to overrule the state jury's verdict.[46]

One of the few state judges to express any initial doubts about state courts' power to award habeas relief to persons in federal custody was New York's Chief Justice James Kent. In 1812, the father of seventeen-year-old Jeremiah Ferguson filed a habeas petition with the New York Supreme Court of Judicature, alleging that Ferguson had enlisted in the United States Army without his father's consent and that Ferguson was thus entitled to be discharged.[47] All five of the court's justices voted to deny the petition. Writing solely for himself, Chief Justice Kent concluded that the court lacked jurisdiction.[48] In his view, forcing a minor to remain in the army was a matter over which the federal courts possessed exclusive jurisdiction:

> An abuse of the authority of the *United States* is an offense against the *United States*, and exclusively cognizable in their courts. When the state courts have not jurisdiction over the whole subject matter of the imprisonment, and when the federal courts have such jurisdiction, by indictment, as well as by *habeas corpus*, there appears to me to be a manifest want of jurisdiction in the case.[49]

The chief justice's colleagues were unwilling to concede exclusive jurisdiction to the federal bench. Declaring himself torn between Chief Judge Nicholson's endorsement of state jurisdiction in *In re Roberts* and Chief Justice Kent's opposition to jurisdiction in the present case, Justice Smith Thompson concluded that Ferguson's petition should be rejected on the merits, making it unnecessary to "disclaim having jurisdiction, in any case, where the imprisonment or restraint is under color of the authority of the *United States*."[50] Justices Ambrose Spencer, William Van Ness, and Joseph Yates similarly voted

45. *Id.*

46. *Id.* at 19.

47. *In re* Ferguson, 9 Johns. 239, 239 (N.Y. Sup. Ct. 1812). This was not the first time that the New York Supreme Court of Judicature was confronted with such a petition. In *In re Husted*, 1 Johns. Cas. 136, 136 (N.Y. Sup. Ct. 1799), the court issued elliptical opinions revealing little in the way of facts and reasoning. Two justices (including then Justice Kent) voted against granting habeas relief on the merits; two justices would have granted habeas relief; and one justice concluded (on unstated grounds) that the court lacked jurisdiction. *See id.*

48. *In re Ferguson*, 9 Johns. at 242.

49. *Id.* at 240.

50. *Id.* at 241–42 (Thompson, J., concurring).

to reject Ferguson's petition on the merits, "expressly reserving themselves as to the question of jurisdiction."[51]

Chief Justice Kent's misgivings about coming to the aid of federal detainees were short lived. The very next year, officials under the command of United States Army General Morgan Lewis arrested Samuel Stacy, a private citizen, on suspicion of treason.[52] When a New York court commissioner issued a habeas writ, instructing General Lewis to bring Stacy to court and provide a justification for his detention, General Lewis disingenuously responded by stating that Stacy was not in his custody—Stacy was actually under the control of one of General Lewis's subordinate officers.[53] Stacy thus sought an order of attachment, by which General Lewis himself would be taken into custody if he did not either discharge Stacy or bring him to court to justify his continued incarceration.[54] Chief Justice Kent revealed no hesitation in bringing the state's habeas machinery to bear on federal military officials. General Lewis was "assuming criminal jurisdiction over a private citizen, holding him in the closest confinement, and contemning the civil authority of the state."[55] The chief justice accordingly granted Stacy's request for an order of attachment.[56] By the time the first edition of his landmark *Commentaries on American Law* was published in 1826, Chief Justice Kent was ready to declare that, at least when dealing with habeas petitioners in military custody, it was "settled" that the state and federal courts had concurrent jurisdiction.[57]

51. *Id.* at 242 (Spencer, Van Ness, & Yates, JJ., concurring).

52. *In re* Stacy, 10 Johns. 328, 329 (N.Y. Sup. Ct. 1813).

53. *Id.* at 329–30.

54. *Id.* at 330.

55. *Id.* at 334.

56. *Id.*

57. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 375–76 (New York, O. Halsted 1826) (noting the uncertainty expressed in *Ferguson* and the subsequent taking of jurisdiction in *In re Stacy*, and asserting that "[t]he question was, therefore, settled in favor of a concurrent jurisdiction in [*In re Stacy*], and there has been a similar decision by the courts of other states"); *see also* Oaks, *supra* note 23, at 275 (stating that, with the exception of Chief Justice Kent's opinion in *In re Stacy*, "state court opinions and judgments seem to have been unanimous in favor of" state courts' jurisdiction over habeas petitions filed by persons in federal custody).

Throughout the first half of the nineteenth century, such cases were commonplace.[58] In 1814, for example, a member of the South Carolina Supreme Court ordered a man discharged from the army, concluding that bounty officers working for the army had engaged in objectionable enlistment tactics.[59] That same year, the Massachusetts Supreme Judicial Court ordered a Russian boy released from the army, concluding that the child was too young to enlist and was not sufficiently fluent in English to understand the oath that army officials had administered to him.[60] During the same term, the Massachusetts high court ordered another minor discharged from the military on the grounds that he was too young to enter a valid enlistment contract.[61] In 1819, the New Jersey Supreme Court took jurisdiction of a habeas petition seeking the release of a minor from the army,[62] and, in 1824, the Pennsylvania Supreme Court similarly took jurisdiction of a petition seeking the release of a minor from the marines.[63] In 1827, New York's Chief Justice John Savage ordered a twenty-one-year-old man discharged from the army after concluding that he had not been of age at the time he enlisted.[64] In 1836, the Massachusetts Supreme Judicial Court ordered a minor released from the navy after finding that the minor's guardian had not consented to the enlistment.[65] In 1841, the New Hampshire Supreme Court took jurisdiction of a habeas petition filed by a soldier seeking a discharge from the army on the grounds that he had been a minor at the time he enlisted.[66] In 1843, Justice Esek Cowen, of

58. *Cf.* HURD, *supra* note 17, at 166 ("It may be considered settled that state courts may grant the writ in all cases of illegal confinement under the authority of the United States.").

59. *In re* Merritt, 5 AM. L.J. 497, 501 (S.C. 1814) (Nott, J.). Bounty officers working for the army had handed Ephraim Merritt money as payment for his enlistment, but Merritt promptly threw the money on the floor. *Id.* at 499. The bounty officers argued that Merritt had held the money in his hands just long enough to constitute agreement to enlist. *Id.*

60. *See* Commonwealth v. Harrison, 11 Mass. (10 Tyng) 63, 63–66 (1814). The court stressed that it had the authority "to inquire into the circumstances, under which any person brought before them by writ of *habeas corpus* is confined or restrained of his liberty." *Id.* at 65.

61. Commonwealth v. Cushing, 11 Mass. (10 Tyng) 67, 70–71 (1814).

62. State v. Brearly, 5 N.J.L. 639, 643 (1819).

63. Commonwealth v. Gamble, 11 Serg. & Rawle 93 (Pa. 1824).

64. *In re* Carlton, 7 Cow. 471, 471 (N.Y. Sup. Ct. 1827).

65. Commonwealth v. Downes, 41 Mass. (24 Pick.) 227, 231–32 (1836).

66. State v. Dimick, 12 N.H. 194, 197 (1841). The court stressed that it did not "make any difference that the illegal imprisonment, if there be one, is by an officer of the U.S. army. The courts of the United States have no exclu-

the New York Supreme Court of Judicature, took jurisdiction of a habeas petition filed by a man seeking a discharge from the army on the grounds that he was not an American citizen.[67] In 1847, the Pennsylvania Supreme Court ordered yet another minor released from the army, finding that the child's parents had not consented to the enlistment.[68]

In the eyes of the state judges who decided these cases, and apparently in the eyes of the federal officials who complied with the state judges' orders,[69] state courts' intervention was easily justified. In short, the states were obliged to safeguard individuals' freedom, no matter what the source of the threat.[70] In 1813, Chief Justice Kent declared the guiding principle: "It is the indispensable duty of this court, and one to which every inferior consideration must be sacrificed, to act as a faithful guardian of the personal liberty of the citizen, and to give ready and effectual aid to the means provided by law for its security."[71] The Pennsylvania Supreme Court reiterated that same rationale more than thirty years later:

> [T]he writ of *habeas corpus ad subjiciendum* is the prerogative of the citizen; the safeguard of his person, and the security of liberty—no matter where or how the chains of his captivity were forged—the power of the judiciary in this state is adequate to crumble them to dust, if an individual is deprived of his liberty contrary to the law of the land.[72]

The state courts recognized that ordering a person released from federal confinement was a matter of potentially national

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sive jurisdiction over those officers." *Id.* at 197. On the merits, however, the court rejected the petition, finding that the soldier had ratified his enlistment contract by remaining in the army after reaching the age of twenty-one. *Id.* at 199.

67. United States v. Wyngall, 5 Hill 16, 17–27 (N.Y. Sup. Ct. 1843) (concluding that noncitizens could enter valid enlistment contracts, and rejecting the petition on the merits).

68. Commonwealth *ex rel.* Webster v. Fox, 7 Pa. 336, 337–40 (1847).

69. *See In re* Reynolds, 20 F. Cas. 592, 596 (N.D.N.Y. 1867) (No. 11,721) (stating that such cases were common and that there is no evidence "that any officer of the United States ever disregarded a discharge made by a state court or judge, on the ground that it was utterly void" for lack of jurisdiction).

70. *See* HURD, *supra* note 17, at 201 ("A sovereign state has a right to be informed why any of her citizens are imprisoned, simply because it is her duty to set them free from all illegal imprisonment.").

71. *In re* Stacy, 10 Johns. 328, 333 (N.Y. Sup. Ct. 1813); *accord In re* Bryan, 60 N.C. (2 Win.) 1, 28–31 (1863) (Battle, J.) (declaring that a state has no higher obligation "than that of protecting all her citizens" from unlawful restraint, even when held by persons acting under federal authority).

72. *Webster*, 7 Pa. at 338.

significance, and one to be treated with corresponding care.[73] But they took comfort in the knowledge that, if they did ever erroneously conclude that federal officials had behaved unlawfully, the United States Supreme Court could simply correct the mistake through an exercise of its appellate jurisdiction.[74]

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73. *See, e.g.*, Olmsted's Case, Brightly 9, 15 (Pa. Ct. Nisi Prius 1809) (cautioning that state courts must be "deeply sensible of the necessity of exercising [their power to release federal prisoners] with the greatest discretion").

74. *See, e.g.*, Commonwealth *ex rel.* M'Lain v. Wright, 3 Grant 437, 444 (Pa. 1863). Under the Judiciary Act of 1789, the Supreme Court had the power to review the final judgment of a state's highest court if, inter alia, the state court declared invalid a federal statute, a federal treaty, or "an authority exercised under the United States." Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85. Consequently, if a state court determined that federal officials behaved unlawfully and thus ordered a federal detainee released, the Supreme Court could review the state court's ruling and, if necessary, reverse. *See* David E. Engdahl, *Federal Question Jurisdiction Under the 1789 Judiciary Act*, 14 OKLA. CITY U. L. REV. 521, 531 n.52 (1989). The 1789 Act also gave the Supreme Court jurisdiction to review the final judgment of a state's highest court if the state court rejected a federal claim of "title, right, privilege or exemption." § 25, 1 Stat. at 85–86. That statute would appear to have given the Court the power to review a state court's ruling on a habeas petition if the state court rejected a prisoner's claim that his or her detention violated federal law. Without elaboration, however, at least one modern-day commentator has rejected that reading of the 1789 Act. Engdahl, *supra*, at 531 n.52 ("The Judiciary Act failed to provide for any federal court review if the state court denied [a federal prisoner's habeas] petition."). The confusion appears to be traceable to a decision rendered in 1813 by Chief Justice William Tilghman, of the Pennsylvania Supreme Court. In that case, Chief Justice Tilghman stated in dictum: "[I]t seems to be the general opinion, that from a decision on a *habeas corpus*, no appeal or writ of error lies; and, thus, points of vital importance to the *United States*, may be determined by state judges, without an opportunity of revision." *In re* Lockington, 5 AM. L.J. 92, 96 (1813). (Note that Chief Justice Tilghman would foreclose Supreme Court jurisdiction in *all* habeas cases arising out of the state courts, not merely those cases in which state courts rejected claims of federally unlawful detention.) Almost twenty years later, a commentator cited Chief Justice Tilghman's opinion as the lone authority for the same proposition. *See* THOMAS SERGEANT, CONSTITUTIONAL LAW 287 (Philadelphia, P.H. Nicklin & T. Johnson 1830). Another nineteenth-century commentator, in turn, cited Sergeant's treatise mid-century as the lone authority for the same proposition. *See* HURD, *supra* note 17, at 165. Closing the loop, Sergeant was the lone authority cited by Engdahl in 1989. Engdahl, *supra*, at 531 n.52. Chief Justice Tilghman, whose assertion seems plainly in tension with the language of the 1789 Act, almost certainly sent these scholars down the wrong track. Section 25 of the 1789 Act—the principal section governing the Supreme Court's appellate jurisdiction—was not substantially changed until 1914. *See* Act of Dec. 23, 1914, ch. 2, 38 Stat. 790 (broadening the Supreme Court's appellate jurisdiction); 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 400.06[3] (2d ed. 1995) (discussing the 1914 Act). *See generally* REYNOLDS ROBERTSON & FRANCIS R. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 851–55 (1936) (describing the amendments to the 1789 Act). As explained below, the Supreme Court

The states could find no evidence that they had surrendered this critical feature of their sovereignty when they ratified the Constitution.[75] Justice Samuel Southard, of the New Jersey Supreme Court, expressed the prevailing sentiment in 1819, in a case involving a minor who had enlisted in the army:

> I think it will require, in me, a great struggle both of feeling and judgment, ever to arrive at the point, where I shall be prepared to deny the jurisdiction of the state, and say, that she has surrendered her independence, on questions like this; that her highest judicial tribunals, for such purposes, is [sic] incapable of inquiring into the imprisonment of her citizens, no matter how gross or illegal it may be, provided it be by agents of the *United States*, and under colour of their laws. . . .
>
> It is a right of judgment upon *habeas corpus*; it is a question of imprisonment or release of the citizen. When and how were that right and question, the dearest to the citizen; relating to the highest duty of a government, to the proudest attribute of sovereignty; given up and surrendered? . . . The power of this court, in rescuing the citizens from unlawful imprisonment, is without limit from [any apparent source]; and I do not see how it can be otherwise, so long as any portion of sovereignty remains in the state.[76]

State judges did not believe, however, that their power to release federal prisoners was unlimited. In particular, the state courts in the early 1800s were reticent to try to free people from federal confinement when that confinement was backed by federal judicial process. The Virginia Supreme Court declared in 1821, for example, that state and federal courts enjoyed concurrent jurisdiction "in all cases of illegal confinement under colour of the authority of the United States, *when that confinement is not the consequence of a suit or prosecution pend-*

began taking jurisdiction of states' habeas cases long before the substantive changes of 1914. *See infra* notes 87–110, 129–66 and accompanying text (discussing Ableman v. Booth, 62 U.S. (21 How.) 506 (1859), and Tarble's Case, 80 U.S. (13 Wall.) 397 (1872)). Of course, even if there was uncertainty about whether Congress had actually given the Court the power to review state courts' habeas rulings, no one doubted that Congress could confer such appellate jurisdiction if it so desired.

75. *See, e.g.*, *In re Bryan*, 60 N.C. at 30–31 ("A jurisdiction so essential to the great privilege of going where one may please—a privilege which every citizen of the State would wish to enjoy as freely as the air he breathed—the State courts would hardly have parted with, except upon the most urgent necessity.").

76. State v. Brearly, 5 N.J.L. 639, 643–44 (1819); *accord Olmsted's Case*, Brightly at 14–15 (stating that the Constitution "leaves to the several states absolute supremacy in all cases in which it is not yielded to the United States" and that no source of law suggests that states surrendered their power to grant habeas relief to persons in federal custody).

ing in the Courts of the United States."[77] When ordering a minor released from the army in 1847, the Pennsylvania Supreme Court noted, in a similar vein, that the minor had not been court-martialed for desertion, and stated that, "if he was in process of trial, this court would, perhaps, not look beyond or behind the proceedings which were to bring him before even a military court."[78]

In the 1850s, the state courts grew more ambitious. The Massachusetts Supreme Court signaled the change in 1851, when it stated, in dictum, that it possessed the power to grant habeas relief to persons "held under color of process from the courts of the United States."[79] It was not long before such language moved from dictum to operative text. In 1853, United States Attorney General Caleb Cushing was asked to provide advice to federal officials after a state court ordered a federally indicted prisoner set free.[80] James Collier had been indicted by a federal grand jury for embezzling $300,000 in federal funds and, on the order of the District Court for the Northern District of California, had been taken into custody by federal law enforcement officers in Ohio.[81] Collier petitioned an Ohio judge for habeas relief, alleging that the district court in California lacked jurisdiction.[82] The Ohio judge ordered federal authorities to bring Collier to the state courthouse for a hearing.[83] When the federal authorities complied, the state court ordered Collier released on bail pending its consideration of the merits of the habeas petition at the beginning of the court's next term.[84] The baffled federal authorities asked Cushing for his views concerning the legality of the state court's actions.[85] Cushing firmly replied that state courts lacked jurisdiction to

77. *Ex parte* Pool, 4 Va. (2 Va. Cas.) 276, 278 (1821) (emphasis added).

78. Commonwealth *ex rel.* Webster v. Fox, 7 Pa. 336, 340 (1847).

79. *In re* Sims, 61 Mass. (7 Cush.) 285, 309 (1851). The court conceded, however, that "it is manifest that this ought to be done only in a clear case, and in a case where it is necessary to the security of personal liberty from illegal restraint." *Id.* In the case before it, concerning a fugitive slave who had been taken into federal custody, the court declined to take jurisdiction, stating that "it is quite competent for the judges of the United States courts to bring the petitioner before them by *habeas corpus*." *Id.*

80. *See* Collier's Case.—Jurisdiction of Federal and State Courts, 6 Op. Att'y Gen. 103 (1853).

81. *Id.* at 104.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 105.

grant habeas relief to individuals who had been indicted by a federal grand jury and were being held pending trial, and he stated that, to the best of his knowledge, no one had ever argued to the contrary.[86]

If Attorney General Cushing and his colleagues were surprised by the Ohio court's actions in Collier's case, they were surely alarmed by the actions of the Wisconsin Supreme Court shortly thereafter—actions that dramatically drew the attention of the United States Supreme Court and that marked the beginning of the end for state courts' power to come to the aid of persons being unlawfully detained by federal officials.

B. THE WISCONSIN REBELLION: *ABLEMAN V. BOOTH*

In the spring of 1854, federal authorities arrested Sherman Booth on suspicion of violating the Fugitive Slave Act of 1850 by helping a slave named Joshua Glover escape to Canada.[87] While being held in Milwaukee by Stephen Ableman, the United States Marshal for the District of Wisconsin, Booth sought habeas relief from Justice Abram Smith, of the Wisconsin Supreme Court, arguing that the 1850 Act was unconstitutional.[88] Justice Smith agreed that the statute was unconstitutional and ordered Booth released.[89] He vehemently rejected the "degrading insinuation" that state judges cannot be trusted to interpret and apply the Constitution in cases involving federal detai-

86. *Id.* at 108.

87. *In re* Booth, 3 Wis. 1, 2–4 (1854) (Smith, J.), *rev'd*, 62 U.S. (21 How.) 506 (1859); *see* Act of Sept. 18, 1850, ch. 60, §§ 6–10, 9 Stat. 462, 463–65 (establishing a system for the capture and return of fugitive slaves), *repealed by* Act of June 28, 1864, ch. 166, 13 Stat. 200. For an excellent discussion of Booth's life and legal battles—from his rise to prominence as an abolitionist, to his litigation in the Wisconsin and federal courts, to his fall from grace for alleged sexual intimacies with a young girl—see FREDERICK J. BLUE, NO TAINT OF COMPROMISE: CRUSADERS IN ANTISLAVERY POLITICS 117–37 (2005). For a discussion of state officials' resistance to the 1850 Act, see ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 175–91 (1975).

88. *In re Booth*, 3 Wis. at 7–8 (Smith, J.).

89. *Id.* at 47–49; *see also id.* at 36–37 (concluding that the U.S. Supreme Court erred when it struck down a Pennsylvania law aimed at protecting fugitive slaves in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842)). In *Prigg*, the Court held that Pennsylvania's slave-shielding law violated the Constitution's Fugitive Slave Clause. *See Prigg*, 41 U.S. (16 Pet.) at 625–26; *see also* U.S. CONST. art. IV ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall . . . be discharged from such Service or Labor, but shall be delivered up on Claim of the Party to whom such Service or Labor may be due.").

nees.[90] He insisted that he had an obligation "to interpose a resistance, to the extent of his power, to every assumption of power on the part of the general government, which is not expressly granted or necessarily implied in the federal constitution."[91]

The en banc Wisconsin Supreme Court upheld Justice Smith's ruling. Writing for the court, Chief Justice Edward Whiton agreed that the 1850 Act was unconstitutional and that Booth was entitled to be released.[92] The court indicated that, if the federal courts had taken jurisdiction of Booth's case, the state courts would have declined jurisdiction in deference to the federal judiciary.[93] In the court's view, however, no case was yet pending before a federal district court—Booth had not yet been indicted, but rather had merely been taken into custody.[94]

The federal government appealed to the United States Supreme Court. In early 1855, while the government's appeal was pending, Booth was indicted by a federal grand jury for violating the 1850 Act.[95] Booth was tried, convicted, fined $1000, and sentenced to one month in prison.[96]

Three days later, Booth returned to the Wisconsin Supreme Court, again seeking habeas relief.[97] Still convinced that the 1850 Act was unconstitutional, and seemingly untroubled by the fact that Booth was now under the sentence of a federal court, the Wisconsin high court granted Booth the relief he sought.[98] Chief Justice Whiton declared that, without the power to order its citizens released from unlawful custody, "the state would be stripped of one of the most essential attributes of sovereignty, and would present the spectacle of a state claiming the allegiance of its citizens, without the power to protect them in the enjoyment of their personal liberty upon its own soil."[99] The chief justice stated that, in his view, "the state governments and state courts are not reduced to this humiliating condition," but rather possess "the power to grant that relief

90. *In re Booth*, 3 Wis. at 35 (Smith, J.).
91. *Id*. at 23 (Smith, J.).
92. *Id*. at 58–66 (Whiton, C.J.).
93. *Id.* at 52–57 (Smith, J.).
94. *Id.* at 55–57 (Smith, J.).
95. Ableman v. Booth, 62 U.S. (21 How.) 506, 509–10 (1859).
96. *Id.* at 510.
97. *Id.*
98. *In re* Booth & Rycraft, 3 Wis. 157, 175–218 (1854) (Whiton, C.J.).
99. *Id.* at 176 (Whiton, C.J.).

which all governments owe to those from whom they claim obedience."[100] Justice Smith agreed, writing that "[t]he states never yielded to the federal government the guardianship of the liberties of their people."[101] If the federal courts were free to imprison citizens in violation of the Constitution and the states could do nothing about it, a state's citizens could be confined behind "prison doors no earthly power could unlock. Such doctrine is monstrous. We have not yet reached the point of submission."[102]

The federal government again appealed to the United States Supreme Court. When the Court asked Wisconsin officials to send it the case record so that it could process the appeal, the Wisconsin Supreme Court defiantly ordered state officials to ignore the request.[103] The Court nevertheless took jurisdiction of the case and consolidated it with the appeal that was already pending concerning the preindictment phase of Booth's case.[104]

In *Ableman v. Booth*, the Supreme Court unanimously reversed. Writing for the Court, Chief Justice Roger Taney noted with alarm that the Wisconsin Supreme Court had attempted to free a federal prisoner who had been convicted of a federal crime, and then had tried to insulate its ruling from review by refusing to send the Court the necessary paperwork.[105] The Court was not pleased:

> These propositions are new in the jurisprudence of the United States, as well as of the States; and the supremacy of the State courts over the courts of the United States, in cases arising under the Constitution and laws of the United States, is now for the first time asserted and acted upon in the Supreme Court of a State.[106]

When explaining the reasons why the actions of the Wisconsin Supreme Court were unacceptable, the Court made no

100. *Id.* (Whiton, C.J.).

101. *Id.* at 204 (Smith, J.).

102. *Id.* at 217 (Smith, J.).

103. Ableman v. Booth, 62 U.S. (21 How.) 506, 512 (1859). A newspaper reporter wrote in 1904 that, at the time of the Wisconsin Supreme Court's actions, the fledgling Republican Party in Wisconsin had adopted John C. Calhoun as their exemplar, they "only differed with Jeff[erson] Davis as to the doctrine of state rights in that he was too conservative," and they often viewed federal officials as people with "horns and hoofs and a full Mephistophelion [sic] equipment." *Sherman Booth's Trial Recalled*, JANESVILLE GAZETTE (Wis.), Sept. 22, 1904, at 2 (on file with author).

104. *Ableman*, 62 U.S. (21 How.) at 506–15.

105. *Id.* at 513–14.

106. *Id.* at 514.

effort to distinguish the long line of cases in which state courts had adjudicated the habeas claims of persons being extrajudicially held in federal custody.[107] Indeed, the Court did not even allude to those cases. Instead, the Court appeared to conclude that state courts could *never* order a person released from federal confinement, no matter what the circumstances.[108] The Court declared that the state and federal governments must operate

> within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the naked eye.[109]

State court jurisdiction over federal prisoners' habeas claims, in other words, is constitutionally proscribed. When presented with a habeas petition filed by a person within its borders, a state court may demand a response from the custodian, so that the court can determine whether the custodian is acting under federal authority. But once

> the State judge or court [has been] judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another Government, and that neither the writ of *habeas corpus*, nor any other process issued under State authority, can pass over the line of division between the two sovereignties.[110]

In the years immediately following *Ableman*, state courts debated the scope of the Court's holding. Had the Court held that state courts can *never* grant habeas relief to persons in federal custody? Or, had it instead held that state courts lack the power to award habeas relief only in circumstances such as those present in *Ableman* itself, where the prisoner has been the subject of federal judicial proceedings? A small number of jurists took the former, broader view. When three conscripted men sought release from the confederate army on grounds of physical disability, for example, Chief Justice A.J. Walker, of the Alabama Supreme Court, held that, under *Ableman*, "a State court or officer has no right of control over the conduct of

107. *See supra* notes 28–78 and accompanying text (discussing these cases).

108. *Ableman*, 62 U.S. (21 How.) at 524–25.

109. *Id.* at 516.

110. *Id.* at 523. During the lame-duck period following his failed reelection bid for the presidency in 1860, President James Buchanan pardoned Booth for his actions. *Sherman Booth's Trial Recalled*, *supra* note 103.

the officers of the general government, in the exercise of an authority bestowed by its law."[111] Two justices of the Michigan Supreme Court reached the same conclusion when they voted to deny habeas relief to a federal soldier who argued that he was not obliged to serve because his name had been misspelled on his draft notice.[112]

Most state courts read *Ableman*'s holding narrowly, however, concluding that they continued to possess the power to adjudicate habeas petitions filed by persons being held by federal officers without the backing of federal judicial process.[113] State courts pointed out that, in *Ableman*, Sherman Booth had been convicted and imprisoned under federal judicial authority.[114] In the eyes of these courts, the portions of Chief Justice

111. *Ex parte* Hill, 38 Ala. 429, 437 (1863) (Walker, C.J.).

112. *See In re* Spangler, 11 Mich. 298, 304 (1863) (Martin, C.J.) (stating that state courts lack jurisdiction to proceed once they have determined that a petitioner is being held under federal authority); *id.* at 310 (Manning, J.) (concluding that state and federal courts each have exclusive jurisdiction in habeas cases involving their own prisoners, such that state courts cannot grant habeas relief to federal prisoners and federal courts cannot grant habeas relief to state prisoners).

113. *See, e.g.*, Lanahan v. Birge, 30 Conn. 438, 438–49 (1862) (adjudicating the habeas claim of a minor seeking release from military service); Wantlan v. White, 19 Ind. 470, 472–73 (1862) (granting habeas relief to a minor seeking release from military service); *Ex parte* Anderson, 16 Iowa 595, 598–99 (1864) (holding that state courts have the power to order minors released from invalid enlistment contracts, but declining to grant Anderson's petition because he had been arrested for desertion and was "awaiting his trial before a court martial"); McConologue's Case, 107 Mass. 154, 160–70 (1871) (granting habeas relief to a minor seeking release from military service); *Ex parte* Hill, 5 Nev. 154, 158 (1869) ("[*Ableman* held] that in every case where process, regular on its face, has been issued from a court of the United States having power to issue process of such a nature, the officer acting thereunder is fully protected against any interference from a State court . . . ."); *In re* Disinger, 12 Ohio St. 256, 257–63 (1861) (adjudicating the habeas claim of a minor seeking release from military service); Shirk's Case, 3 Grant 460, 461–64 (Pa. 1863) (holding that state courts generally "have power to discharge, on habeas corpus, minors who are held to service under invalid contracts of enlistment," but declining to grant Shirk's petition because federal judicial processes were underway); Commonwealth *ex rel.* Bressler v. Gane, 3 Grant 447, 456–57 (Pa. 1863) (narrowly construing *Ableman* as holding only "that when a person is held to appear and answer before a United States court, or when a person has been convicted before a court of the United States . . . , the judgment cannot be reviewed and revised by a State court"); Mann v. Parke, 57 Va. (16 Gratt.) 443, 452 (1864) (granting habeas relief to a person seeking release from the Confederate army on the grounds of a statutory exemption); *In re* Gregg, 15 Wis. 479, 479–81 (1862) (adjudicating the habeas claim of a minor seeking release from military service).

114. *See, e.g.*, Mims v. Wimberly, 33 Ga. 587, 596 (1863) ("[I]t must be borne in mind that the question of imprisonment, by authority other than

Taney's opinion that extended beyond the facts of Booth's case were merely dictum.[115] Moreover, these courts believed that, if the Court had intended to denounce the states' longstanding practice of adjudicating habeas petitions filed by federal extra-judicial detainees, the Court would at least have acknowledged that practice's existence. Chief Justice Walter Lowrie, of the Pennsylvania Supreme Court, observed that "[c]ases abound where the State judges have . . . interfered by habeas corpus with the acts of Federal officers,"[116] and stated that he had no doubt "that the records of the State courts here (Pittsburg) would show hundreds of such cases."[117] Justice Joseph Beck, of the Iowa Supreme Court, noted that state courts had long taken jurisdiction of habeas petitions filed by persons held in federal custody: "I find that the jurisdiction has been exercised by State courts and judges in *fifteen* States, and in more than seventy reported cases, and doubtless in many other cases that have not been reported, and of which no mention has been made in the law journals and newspapers."[118] If the *Ableman* Court had intended to reject this well-established line of cases, state judges reasoned, Chief Justice Taney surely would have made reference to them and explained why their reasoning was flawed.

State judges were not alone in concluding that *Ableman*'s holding was narrower than its language suggested. Judge Nathan Hall, of the Northern District of New York, for example, stated that during his tenure as a state judge, he "repeated[ly]" exercised his power to discharge minors from the federal military, that his colleagues on the state bench "frequently" exercised the same power, and that "it is not doubted that many

judicial, was not in that case."); *McConologue's Case*, 107 Mass. at 167 ("[In *Ableman*,] no question arose . . . of the effect, as against a writ of *habeas corpus* from a state court, of the detention of a citizen by a mere executive officer, civil or military, of the United States, without color of judicial process or proceeding of any kind.").

115. *See, e.g.*, *In re* Bryan, 60 N.C. (Win.) 1, 23–24 (1863) (Pearson, C.J.); Commonwealth *ex rel.* M'Lain v. Wright, 3 Grant 437, 440 (Pa. 1863) (stating that, if Chief Justice Taney meant to deny state courts the power to grant habeas relief to *all* persons held in federal custody, "he meant more than the case called for, and all beyond is mere *obiter dictum*").

116. *M'Lain*, 3 Grant at 442.

117. *Id.* at 444; *accord Bressler*, 3 Grant at 455 ("[T]he right of State courts to try the legality of the imprisonment under color of authority of the United States . . . has been exercised almost daily by the State courts within the last two years . . . .").

118. *Ex parte* Holman, 28 Iowa 88, 175 (1869) (Beck, J., dissenting).

hundreds of minors were discharged from the army under every administration of the war department, and during every year from 1814 to 1860."[119] Judge Hall remarked that, if the Court had intended

> to strike down by a single blow a jurisdiction which had been uninterruptedly exercised by state courts and judges for more than thirty years, the chief justice would have expressed that intention in distinct terms, and would have given these cases a passing notice, and expressly disapproved their doctrines, if he had not attempted to maintain their unsoundness by opposing arguments.[120]

At least two United States Attorneys General agreed. In 1861, a district attorney in Pennsylvania sent a letter to United States Attorney General Edward Bates, asking for advice about how to respond when minors applied to state courts for discharge from the federal military.[121] Bates replied that "[i]t is not a part of the official duties of district attorneys to resist applications of this kind in the State courts."[122] He stated that, when minors enlisted without the consent of their parents or guardians and then subsequently applied for state habeas relief, such applications could not "be successfully resisted under existing laws."[123]

Six years later, after a Pennsylvania court ordered the navy to bring a minor named Charles Gormley to court for a hearing about whether Gormley should be released from the military, navy officials asked United States Attorney General Henry Stanbery how they should respond.[124] Stanbery examined *Ableman* and concluded that he could not "understand the language of the court . . . , in reference to the exclusive jurisdiction of the United States, as applicable to any other jurisdiction over persons restrained of their liberty than that which depends upon jurisdiction acquired under process of the courts of the United States."[125] It was possible, Stanbery believed, that the Supreme Court might, in a future case, strip state courts of *all* power to order persons released from federal cus-

119. *In re* Reynolds, 20 F. Cas. 592, 595–96 (N.D.N.Y. 1867) (No. 11,721).

120. *Id*. at 604.

121. *See* Duty of District Attorneys, 10 Op. Att'y Gen. 146, 146 (1861).

122. *Id.*

123. *Id.* Due to the frequency with which such cases arose, however, Bates observed that it might be wise for the district attorney to attend the hearings and ensure that the applicants were entitled to release. *Id.*

124. *See* Gormley's Case—Habeas Corpus, 12 Op. Att'y Gen. 258, 259–60 (1867).

125. *Id.* at 273–74.

tody, even in cases lacking federal judicial process.[126] But he believed that, in the meantime, federal military officials should continue to submit to the jurisdiction of the state courts.[127] Stanbery declared that he had no doubt that the Pennsylvania court would make the proper decision regarding Gormley's discharge.[128]

Attorney General Stanbery's prediction of future Supreme Court involvement proved correct, and it was once again the Wisconsin Supreme Court that provided the occasion.

C. THE WISCONSIN REBELLION REDUX: *TARBLE'S CASE*

On July 27, 1869, Edward Tarble went to the United States Army's recruiting station in Madison, Wisconsin, and enlisted for a five-year tour of duty.[129] He enlisted under the name "Frank Brown" and, although he was under the age of eighteen, he told army officials that he was twenty-one.[130] Within days of enlisting, Tarble had a change of heart; he initially fled, but then quickly turned himself in to his enlisting officer, Lieutenant H.A. Stone.[131] Stone placed Tarble under arrest for desertion.[132] Abijah Tarble, Edward's father, then petitioned a county commissioner for habeas relief on behalf of his son, arguing that the enlistment was invalid.[133] After the commissioner granted the request and ordered Tarble discharged, Stone appealed to the Wisconsin Supreme Court.[134]

Joined by Justice Orsamus Cole, Justice Byron Paine began the court's opinion innocently enough. He accurately noted that, "[w]ith few exceptions, jurisdiction in this class of cases has been asserted and exercised by state judicial officers, and sustained by the highest state courts from the beginning of the

126. *See id.* at 275 (stating that, if a state court ordered Gormley released, federal officials could determine at that time whether it would be "expedient to carry the question to the Supreme Court of the United States for final decision").

127. *Id.* at 274 (instructing navy officials to produce Gormley's body in compliance with the state court's order).

128. *Id.* at 275.

129. *In re* Tarble, 25 Wis. 390, 391 (1870), *rev'd*, 80 U.S. (13 Wall.) 397 (1872).

130. *Id.* at 392.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

government down to the present day."[135] Nothing in the Federal Constitution, he determined, "abridg[ed] the well-settled power of the state courts over the writ, or exempt[ed] federal officers from its operation."[136] Justice Paine observed that Tarble was under the age of eighteen and that, under federal law, his enlistment was thus invalid.[137] Moreover, although Tarble had been arrested for desertion, court-martial proceedings had not yet begun, and so "no question arises in respect to taking a prisoner from the custody of such a court."[138] The Wisconsin Supreme Court thus appeared poised to join the many state courts that had read *Ableman* narrowly by concluding that state courts lacked jurisdiction in cases of federal detention only when the habeas applicant had been the subject of federal judicial process.[139]

It seems, however, that the court was still stinging from the rebuke it had suffered in *Ableman*. Unfortunately for young Edward Tarble, this would mean that his plea to be discharged from the military would get swept up in what was, in significant part, a rehashing of Sherman Booth's case.

Going out of his way to criticize the United States Supreme Court, Justice Paine said that it was important to remember that, while fugitive American slaves were finding relief in Canada, the American high court in *Dred Scott* "was denying to one of an oppressed race born on our soil the poor privilege of even suing for his rights in a federal court."[140] The only reason that the Supreme Court's members had gotten involved in Booth's case, Justice Paine asserted, was that they were "shocked" when the Wisconsin Supreme Court "decided against the validity of a law passed to sustain the institution of slavery."[141] Because *Ableman* was a pro-slavery ruling, Justice Paine implied, it was entitled to little regard.[142]

135. *Id.* at 394; *see supra* notes 28–78 and accompanying text (discussing these cases).

136. *In re Tarble*, 25 Wis. at 394.

137. *Id.* at 412.

138. *Id.* at 413.

139. *See, e.g.*, Lanahan v. Birge, 30 Conn. 438, 438–49 (1862) (construing *Ableman* narrowly); *see supra* notes 113–18 and accompanying text (discussing these cases).

140. *In re Tarble*, 25 Wis. at 394–95 (alluding to Scott v. Sandford, 60 U.S. (19 How.) 393 (1856)).

141. *Id.* at 407.

142. *See id.* Justice Paine was not alone in casting *Ableman* in this unflattering light. In *Ex parte Holman*, 28 Iowa 88 (1869), Judge Joseph Beck wrote that *Ableman* "was decided when the institution of slavery controlled this gov-

Justice Paine pressed still further, accusing the *Ableman* Court of confusion. The Supreme Court in *Ableman*—and, indeed, the many state courts that subsequently read the rule under *Ableman* as turning on whether federal judicial proceedings had commenced[143]—simply failed to understand what was really at issue. When deciding whether a state court had the power to order a person released from federal custody, Justice Paine wrote, the existence of federal judicial process was not dispositive.[144] A state judge could order a person released from federal confinement—notwithstanding the fact that the person was detained under color of federal judicial authority—if the state judge determined that the federal court lacked jurisdiction.[145] In Sherman Booth's case, Justice Paine explained, the Wisconsin Supreme Court had held that the Fugitive Slave Act of 1850 was unconstitutional, and that the district court thus lacked jurisdiction over Booth's prosecution.[146] In its eagerness to sustain the Fugitive Slave Act, the Supreme Court had failed to see that the Wisconsin court had not claimed the power to review and revise federal courts' judgments.[147] "It has never been claimed by any one," Justice Paine stressed, "that the state courts had any right to discharge a person *legally* held in custody under the authority of the United States, either with or without process."[148]

Justice Paine acknowledged that the Wisconsin Supreme Court behaved inappropriately when it tried to thwart the Supreme Court's review in *Ableman* by withholding the case record.[149] He further acknowledged that, if Congress had not given the Supreme Court the power to review state courts' rul-

ernment" and was just one part of a larger federal effort "to nationalize and propagate the institution." *Id.* at 141 (Beck, J., dissenting). He predicted that *Ableman* would be overruled and stated that he was not aware of any legal principle that required him to obey it. *Id.* at 148–49. *See generally* COVER, *supra* note 87, at 187 n.* (suggesting that the Court in *Tarble's Case* was forced to reiterate the principles it declared in *Ableman v. Booth* because some state judges believed "the unambiguous language [in *Ableman*] could not be trusted because of its intimate connection with slavery").

143. *See, e.g.*, *Lanahan*, 30 Conn. at 438–49 (construing *Ableman* narrowly); *see supra* notes 113–18 and accompanying text (discussing these cases).

144. *See In re Tarble*, 25 Wis. at 395–96, 403 (noting the importance attached by other state courts to the question of federal judicial process).

145. *Id.* at 396–400.

146. *Id.* at 402.

147. *Id.* at 396–400, 403, 407–08.

148. *Id.* at 408 (emphasis added).

149. *Id.* at 407 (stating that the Wisconsin court's actions were, "in truth, contrary to the entire current of authority").

ings in cases involving federal prisoners, the argument that federal courts should have exclusive jurisdiction in such cases "would be very strong."[150] But the Supreme Court *did* have the power to review state courts' habeas rulings in cases declaring federal actions invalid, as in the present case.[151] Consequently, the state courts could take jurisdiction of Tarble's petition and order him discharged.[152] If the Supreme Court disagreed with that ruling, it could simply reverse.

The United States Supreme Court did precisely that. Noting that the Wisconsin Supreme Court had claimed for itself the power to set free even those federal prisoners who had been convicted of federal crimes, the Court framed the issue presented in sweeping terms:

> Whether any judicial officer of a State has jurisdiction to issue a writ of *habeas corpus*, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of authority, of the United States, by an officer of that government.[153]

The Court answered that question resoundingly in the negative. As it had in *Ableman*,[154] the Court insisted that the state and federal governments must remain confined to "their respective spheres" and that "[n]either government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other."[155] Observing that the Constitution gave Congress the power to "raise and support armies" and to "provide and maintain a Navy," the Court concluded that the states must not be permitted to interfere with the exercise of those powers.[156] The fact that the government could appeal to the Supreme Court whenever a soldier was improperly discharged did not provide the federal government with an adequate safeguard against state interference:

> Proceedings on *habeas corpus* are summary, and the delay incident to bringing the decision of a State officer, through the highest tribunal

150. *Id.* at 403.

151. *Id.* at 404.

152. *Id.* at 412–13 (affirming the county commissioner's grant of habeas relief). Chief Justice Luther Dixon filed a one-sentence dissent, concluding "that jurisdiction of the writ of *habeas corpus*, in cases of this nature, is vested exclusively in the courts of the United States." *Id.* at 413 (Dixon, C.J., dissenting).

153. Tarble's Case, 80 U.S. (13 Wall.) 397, 402 (1872).

154. Ableman v. Booth, 62 U.S. (21 How.) 506, 516 (1859) (using comparable reasoning).

155. *Tarble's Case*, 80 U.S. (13 Wall.) at 406.

156. *Id.* at 408 (citing U.S. CONST. art. I, § 8).

> of the State, to this court for review, would necessarily occupy years, and in the meantime, where the soldier was discharged, the mischief would be accomplished. It is manifest that the powers of the National government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty.[157]

Noting that Congress had long ago given the federal courts the authority to issue writs of habeas corpus in cases involving federal prisoners, the Court declared that, if a person is being held illegally by federal officials, "it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release."[158] Justice Field asserted that federal judges are just as likely as state judges to provide the appropriate relief when federal officials confine a person unlawfully: "Certainly there can be no ground for supposing that [federal judges'] action will be less prompt and efficient in such cases than would be that of State tribunals and State officers."[159]

Based on those rationales, the Court imposed firm limits on state courts' powers. When presented with a habeas petition, the state court must examine its contents to determine whether the petitioner is "confined under the authority, or claim and color of the authority, of the United States, by an officer of that government."[160] If the petition makes it clear that the prisoner is indeed so held, the state court must refuse to issue the writ.[161] If the petition does not indicate the nature of the prisoner's confinement, then the state court has the power to demand that the prisoner's custodian provide a return, giving sufficient factual details "to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part."[162] At that point, the state proceedings must come to an end.[163] Because Tarble's petition made it apparent that the young man was being held by federal authorities "under claim and color of the authority of the United States, as an enlisted soldier mustered into the military ser-

157. *Id.* at 409.

158. *Id.* at 411; *see also* Act of Sept. 24, 1789, ch. 20., § 14, 1 Stat. 73, 81–82 (granting federal jurisdiction over habeas claims brought by federal prisoners).

159. *Tarble's Case*, 80 U.S. (13 Wall.) at 411.

160. *Id.* at 409.

161. *Id.*

162. *Id.* at 409–10.

163. *Id.* at 410.

vice of the National government," the Wisconsin courts lacked jurisdiction to grant him relief.[164]

Unlike its ruling in *Ableman*, the Court's ruling in *Tarble's Case* was not unanimous. Chief Justice Salmon Chase dissented, arguing that he could find no evidence that the Constitution stripped the state courts of the power to protect their citizens from unlawful confinement at the hands of federal officials.[165] He was of the same view as the Wisconsin Supreme Court:

> I have no doubt of the right of a State court to inquire into the jurisdiction of a Federal court upon *habeas corpus*, and to discharge when satisfied that the petitioner for the writ is restrained of liberty by the sentence of a court without jurisdiction. If it errs in deciding the question of jurisdiction, the error must be corrected [by the Supreme Court on appeal]. I have still less doubt, if possible, that a writ of *habeas corpus* may issue from a State court to inquire into the validity of imprisonment or detention, without the sentence of any court whatever, by an officer of the United States.[166]

Notwithstanding Chief Justice Chase's dissent, the debate about the scope of state courts' power to come to the aid of federal prisoners was over. Quickly falling into line, the state courts conceded that they could no longer order persons released from federal custody, no matter what the circumstances.[167] Commentators endorsed the Supreme Court's ac-

164. *Id.* at 411–12.

165. *Id.* at 412–13 (Chase, C.J., dissenting). Indeed, he found contrary authority in the Suspension Clause. *See id.* at 413; *see also infra* notes 226–79 and accompanying text (discussing the Suspension Clause).

166. *Tarble's Case*, 80 U.S. (13 Wall.) at 412 (Chase, C.J., dissenting).

167. *See, e.g.*, Copenhaver v. Stewart, 24 S.W. 161, 163 (Mo. 1893) ("[I]t must be taken as now well-established law that state courts and the judges thereof have no jurisdiction or power to discharge persons who are held in custody by authority of the federal courts . . . or by officers of the United States acting under the laws thereof . . . ."); Commonwealth *ex rel.* Smith v. Butler, 19 Pa. Super. 626, 634 (Super. Ct. 1902) (stating that "there is now no room for controversy" regarding state courts' power to release unlawfully enlisted minors from federal military obligations). Shortly after *Tarble's Case* was decided, commentator Rollin Hurd predicted that this would be the states' reaction:

> However much the weight of state decision may be against the doctrine of the *Tarble* case, and however much the pride of a state may be offended by being compelled to submit to the imprisonment of its citizens, without power to inquire into the cause of their detention, still the peace and harmony of the whole people require that the state courts should conform their practice to the decision of the Supreme Court of the United States.

ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS 198 (Leonard W. Levy ed., Da Capo Press 1972) (2d ed. 1876).

tions.[168] Seymour Thompson wrote in 1884, for example, that state courts' assertion of power to grant habeas relief to federal prisoners had been based upon an "extravagant" perception of states' rights and had "present[ed] the spectacle of the courts of one sovereign controlling the officers and agents of another sovereign."[169] In *Tarble's Case*, Thompson declared, the Court finally "swept into the limbo of vanities nearly a hundred reported decisions of the State courts in which such a jurisdiction had been asserted and exercised."[170]

II. THE FUTILITY OF EFFORTS TO RATIONALIZE *ABLEMAN* AND *TARBLE'S CASE*

While condemning the constitutional rationale on which the Court based its rulings in *Ableman* and *Tarble's Case*, scholars today attempt to justify those holdings on grounds of implied preemption and the Judiciary Act of 1789. Yet neither the text nor the legislative history of the 1789 Act indicates that Congress objected to concurrent state and federal jurisdiction for habeas claims brought by federal extrajudicial detainees. Any conflicts between state-court jurisdiction and federal interests are not of sufficient magnitude to warrant concluding that Congress wants federal courts' jurisdiction to be exclusive. Moreover, under the removal statutes that have been on the books since the mid-1900s, the federal custodian in any particular case could easily remove a federal prisoner's state habeas petition to federal court if the custodian preferred to litigate in a federal forum.

A. THE CONVENTIONAL WISDOM: IMPLIED PREEMPTION, NOT CONSTITUTIONAL PROSCRIPTION

The Court's conclusion in *Ableman* and *Tarble's Case*—that state courts lack jurisdiction to award habeas relief to persons in federal custody, regardless of whether there have been federal judicial proceedings—has remained largely unquestioned

168. *See, e.g.*, Charles Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 353 (1930) (stating that state courts' assertion of jurisdiction over federal prisoners' habeas claims was "an exercise of power entirely incompatible with the constitutional relations of the Federal and State Governments").

169. Seymour D. Thompson, *Abuses of the Writ of Habeas Corpus*, 18 AM. L. REV. 1, 3–4 (1884).

170. *Id.* at 5.

since it was announced well over a century ago.[171] Modern scholars do, however, justifiably condemn the central argument that the Court marshaled in support of that conclusion. Gerald Neuman, for example, has characterized the Court's analysis as "embarrassingly absolute,"[172] while Professor Akhil Reed Amar has described it as "shaky, and its language quite sloppy."[173] The core problem is easily described. By rigidly declaring that state courts are barred from interfering with the federal government's actions and must remain confined to their assigned "sphere," the Court paid little heed to the conventional view that, under the plan devised by the Constitution's framers, the creation of lower federal courts lay entirely within Congress's discretion.[174] If Congress opted not to create a lower federal ju-

171. *Cf.* DUKER, *supra* note 3, at 155 ("In recent years [*Ableman* and *Tarble's Case* have] gone unquestioned.").

172. Neuman, *supra* note 10, at 596.

173. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1509 (1987).

174. *See* YACKLE, *supra* note 8, at 135–36 ("[The *Tarble* Court] neglected the conventional understanding that Congress might never have created the lower federal courts and might have relied, instead, on state courts to police the system, subject to appellate review by the Supreme Court."); Collins, *supra* note 9, at 101–02 (arguing that, if *Tarble's Case* is understood to rest on a constitutional foundation, it "runs headlong into the traditional understanding that Congress was under no obligation to create lower federal courts"); Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1205 (1988) ("*Tarble's Case*, if read literally as founded on propositions of constitutional law, strikes directly at one of the foundation stones of the Federalist model: the proposition that state courts enjoy constitutional parity with federal courts."); Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2225–26 (2003) (stating that, if *Tarble's Case* holds "that the Constitution prohibits the States from subjecting federal officials to habeas corpus jurisdiction, . . . [then the case] seems inconsistent with the Madisonian Compromise during the framing of the Constitution, which produced the Article III provision that authorizes, but does not require, Congress to establish lower federal courts"); *see also* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 4 (3d ed. 1999) (discussing the compromise of leaving it to Congress to decide whether to create inferior federal courts); Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1463 (discussing the acceptance at the Constitutional Convention of the proposal to leave it to Congress to decide whether to create inferior federal courts); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 62 (1923) (discussing the debate within the Senate Special Judiciary Committee of 1789 regarding original jurisdiction in federal courts). Some scholars believe that, in fact, the Constitution obliged Congress to create lower federal courts with at least limited powers. *See generally* RI-

diciary, the duty of providing relief when federal officials exceeded their powers would fall squarely on state courts' shoulders. State courts could hardly be charged with that vital task if, as *Ableman* and *Tarble's Case* would have it, the Constitution required state courts to remain safely tucked away in a separate, designated domain.[175]

Rather than reject the Court's conclusion, however, scholars have hastened to justify it on other grounds. The conventional view today is that the rule announced in *Ableman* and *Tarble's Case* should be viewed not as constitutionally mandated, but rather as congressionally prescribed. Although none of them has probed the matter with any depth, scholars generally believe that, when Congress granted federal courts the power to award habeas relief to federal prisoners in the Judiciary Act of 1789,[176] Congress intended federal courts' jurisdiction to be exclusive.[177] On this view, the Constitution does not

CHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 330–34 (5th ed. 2003) (briefly recounting some of the leading arguments in this ongoing scholarly debate).

175. Moreover, if the rule announced in *Ableman* and *Tarble's Case* were constitutionally mandated and state courts were thus powerless to come to the aid of federal prisoners, serious due process problems would arise if Congress chose not to establish *any* lower federal courts. *See* Collins, *supra* note 9, at 102; Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 34, 51 (1975); *see also* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."). As Waxman and Morrison point out, the possibility of filing an original petition for the writ in the United States Supreme Court might fall short of resolving the due process problem. *See* Waxman & Morrison, *supra* note 174, at 2226 n.130.

176. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82.

177. *See, e.g.*, Amar, *supra* note 173, at 1510 ("*Ableman* and *Tarble's Case* can be justified only if they are understood simply as attributing to Congress a desire for exclusive federal court jurisdiction in habeas proceedings against federal officers."); Collins, *supra* note 9, at 102–03 ("[I]t is possible to read *Tarble* . . . not as about constitutionally exclusive jurisdiction, but as merely expressing an implicit congressional preference for federal statutory exclusivity in federal officer habeas cases . . . ."); Richard H. Fallon, Jr., *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068, 1074 n.31 (1998) (stating that, while the Court in *Tarble's Case* appeared to perceive a constitutional basis for its holding, the holding "can be rationalized more plausibly on the ground that federal statutes" implicitly created an exclusive federal remedy for federal prisoners); Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1174 n.114 (1984) ("Tarble's Case should be read to rest upon an implied congressional intent that habeas actions to release enlisted soldiers from the military be restricted to federal court."); Neuman, *supra* note 10, at 596 ("[M]odern commentators . . . re-rationalize [*Ableman* and *Tarble's Case*] as

prevent the states from providing habeas relief to persons being detained by federal officials without judicial authority.[178] Because Congress has opted to give the federal courts exclusive jurisdiction over such cases, however, state courts' jurisdiction has been statutorily preempted, and the bar recognized in *Ableman* and *Tarble's Case* remains in place.

That argument has the virtue of acknowledging that the Constitution's framers were willing to permit state courts to play the leading role in ensuring that federal officials behaved within the limits of the law. In the end, however, the effort to shore up *Ableman* and *Tarble's Case* with an implied-preemption rationale is unpersuasive.

B. THE FAILURE OF THE IMPLIED-PREEMPTION RATIONALE

The state and federal courts have long been understood to share concurrent jurisdiction over claims arising under federal law, unless Congress otherwise provides.[179] State judges, after

resting on an implied preemption of state court remedies for federal prisoners by the provision of constitutionally adequate remedies in federal court."); Redish & Woods, *supra* note 175, at 101 (stating that *Tarble's Case* establishes a presumption against state-court jurisdiction in habeas cases involving federal prisoners—a presumption that "can be overcome only by a carefully considered, conscious decision by Congress"); Margaret G. Stewart, *Federalism and Supremacy: Control of State Judicial Decision-Making*, 68 CHI.-KENT L. REV. 431, 432 n.7 (1992) (suggesting that a congressional preference for exclusive federal jurisdiction "may explain the result in cases preventing state courts from . . . granting habeas corpus to one in federal custody"); Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 400 (2006) ("[T]he most defensible reading of *Tarble's Case* is that the Court interpreted Congress's provision for federal court habeas jurisdiction with respect to federal petitioners as impliedly exclusive of state courts."); Waxman & Morrison, *supra* note 174, at 2227 (arguing that *Tarble's Case* is best understood as resting upon a determination that "the pertinent statutes reflected an implicit congressional determination that state jurisdiction was not appropriate").

178. Some scholars have argued that the Constitution *does* bar the states from granting habeas relief to federal prisoners who are confined pursuant to federal judicial process. *See, e.g.*, James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 808–09 & n.535 (1998) (arguing that Article III "creates a *constitutional* prohibition, evidently beyond Congress's power to alter, against state court interference with or revision of [a] federal court's judgment," but that "Congress could permissibly authorize state courts to determine the legality of federal executive detention, with the absence of any such authorization explaining *Tarble's* holding (but not its language)").

179. *See* Tafflin v. Levitt, 493 U.S. 455, 458 (1990) ("Under [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States."); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507–08 (1962) ("[E]xclusive federal court jurisdiction over cases aris-

all, are ordinarily presumed to be fully competent to interpret and apply federal law.[180] As the Supreme Court has pointed out, "[s]tate judges as well as federal judges swear allegiance to the Constitution of the United States," and even when they disagree with one another about how the Constitution should be interpreted, "there is no reason to think that . . . all are not doing their mortal best to discharge their oath of office."[181] When state courts *do* go astray and interpret federal law inappropriately, the ordinary remedy is the same remedy that applies when the lower *federal* courts go astray: the Supreme Court can take the case on direct review and correct the error.[182]

The presumption of concurrent jurisdiction is "deeply rooted" and can be overcome only "if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim."[183] Congress can "confine jurisdiction [over claims arising under federal law] to the federal courts either explicitly or implicitly."[184] That is, "the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."[185] As applied to the Judiciary Act of 1789 and state

ing under federal law has been the exception rather than the rule."); Claflin v. Houseman, 93 U.S. 130, 136 (1876) ("[I]f exclusive jurisdiction [over claims arising under federal law] be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it."); *see also* THE FEDERALIST NO. 82, at 461 (Alexander Hamilton) (Clinton Rossiter ed., 1999) ("When . . . we consider the State governments and the national governments . . . as parts of ONE WHOLE, the inference seems to be conclusive that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union where it was not expressly prohibited.").

180. *See* Nevada v. Hicks, 533 U.S. 353, 366–67 (2001) ("[T]hat state courts could enforce federal law is presumed by Article III of the Constitution, which leaves to Congress the decision whether to create lower federal courts at all.").

181. Sumner v. Mata, 449 U.S. 539, 549 (1981); *see also* U.S. CONST. art. VI ("[J]udicial officers . . . of the several states shall be bound by Oath or Affirmation, to support this Constitution.").

182. *See* 28 U.S.C. § 1257(a) (2000) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court . . . ."); *Tafflin*, 493 U.S. at 465 (holding that state courts have concurrent jurisdiction to adjudicate federal civil RICO claims because, inter alia, if state courts handle such claims improperly, the Court can correct the errors on direct review).

183. *Tafflin*, 493 U.S. at 459.

184. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981).

185. *Id.*; *see also* Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 508

courts' jurisdiction to adjudicate federal extrajudicial detainees' habeas claims, none of those three possibilities survives close examination.

1. The Absence of "an Explicit Statutory Directive"

When it gave federal courts the power to award habeas relief to federal prisoners, Congress did not state that it wanted federal courts' jurisdiction to be exclusive. In section 14 of the Judiciary Act of 1789, Congress simply declared that federal courts and judges "shall have power to grant writs of *habeas corpus* [to federal prisoners] for the purpose of an inquiry into the cause of commitment."[186] As the Supreme Court has explained, "[i]t is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action."[187] There is nothing in the 1789 Act that expressly indicates that Congress was doing anything more than merely conferring concurrent jurisdiction upon the federal courts.

Moreover, the first Congress plainly knew how to create exclusive federal jurisdiction when it wished to do so. In section 9 of the 1789 Act, for example, Congress declared that "the district courts shall have, *exclusively of the courts of the several States*, cognizance of [specified federal] crimes and offences."[188] In section 11 of the 1789 Act, Congress similarly granted the circuit courts "*exclusive* cognizance of [specified federal] crimes and offences."[189] If Congress had intended to reject the ordinary presumption of concurrent jurisdiction when drafting section 14's habeas provisions, it presumably would have used the

(1962) (stating that these principles have "remained unmodified through the years").

186. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 82. The corresponding statute today similarly contains no indication that the federal courts' jurisdiction over federal prisoners' habeas claims is exclusive. *See* 28 U.S.C.A. § 2241 (West 2006 & Supp. 2007) ("Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.").

187. *Gulf Offshore Co.*, 453 U.S. at 479. For example, when Congress granted broad federal-question jurisdiction to the federal courts in 1875, Congress certainly did not strip the state courts of their power to adjudicate federal-question claims. *See* Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (2000)).

188. Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (emphasis added). Section 9 expressly specifies other classes of exclusive and concurrent jurisdiction, as well. *See id.*

189. *Id.* § 11, 1 Stat. at 78–79 (emphasis added).

same language of exclusivity that it saw fit to use elsewhere in the statute.

2. The Absence of an "Unmistakable Implication from Legislative History"

The 1789 Act's legislative history does not provide any basis for drawing an "unmistakable implication"[190] that Congress wanted federal courts' jurisdiction over federal prisoners' habeas claims to be exclusive. The leading histories of the 1789 Act contain no indication that Congress even discussed the possibility of giving the federal courts exclusive jurisdiction in such cases.[191] The Court has made it clear that, when the historical record provides no evidence that Congress considered the issue, one is foreclosed from arguing "that Congress unmistakably intended to divest state courts of concurrent jurisdiction."[192] In the face of such historical silence, one is not free to speculate about what Congress *would* have done *if* it had contemplated the matter.[193]

Far from suggesting that Congress wanted to impose limits on state courts' habeas jurisdiction, the historical record makes it clear that Congress was at pains to ensure that state courts retained a great measure of their power. As is well known, the creation of lower federal courts was an issue that deeply divided the delegates to the 1787 Convention in Philadelphia; some believed that numerous federal courts would be needed to carry out the national government's judicial business, while others were convinced that such courts were unnecessary because state courts were fully up to the task.[194] Ultimately, of course, the Constitution's framers chose to require the creation of one federal court—the Supreme Court—and to leave the establishment of additional, "inferior" federal courts to Congress's discretion.[195] After the Constitution was ratified, deep concerns persisted concerning the implications of creating a large and

190. *Gulf Offshore Co.*, 453 U.S. at 478.

191. *See* GOEBEL, *supra* note 13, at 457–508; RITZ, *supra* note 13, *passim*; Holt, *supra* note 174, at 1478–1517; Warren, *supra* note 174, *passim*.

192. Tafflin v. Levitt, 493 U.S. 455, 461–62 (1990).

193. *See id.* at 462 ("[E]ven if we could reliably discern what Congress' intent might have been had it considered the question, we are not at liberty to so speculate . . . .").

194. *See* CHEMERINSKY, *supra* note 174, at 3–4 (recounting this familiar history).

195. *See* U.S. CONST. art. III, § 1.

powerful federal judiciary.[196] Indeed, there were many who had readily supported the Constitution who believed that state courts should be principally responsible for adjudicating disputes arising under federal law, subject to the Supreme Court's review on appeal.[197] As a result, when Congress sat down to draft the Judiciary Act of 1789, it was forced to write the statute in a manner calculated "to secure the votes of those who, while willing to see the experiment of a Federal Constitution tried, were insistent that the Federal Courts should be given the minimum powers and jurisdiction. Its provisions completely satisfied no one, though they pleased the Anti-Federalists more than the Federalists."[198]

In light of those political dynamics, it is exceedingly difficult to imagine that the first Congress would have wished to limit one of the state courts' most venerable powers—the power to issue the writ of habeas corpus in cases of unlawful detention. It is frankly impossible to imagine that Congress would have wished to strip the state courts of that power when the person seeking relief was being extrajudicially detained by officials representing the new and unproven government about which so many felt profound trepidations.

3. The Absence of a "Clear Incompatibility Between State-Court Jurisdiction and Federal Interests"

If there is any hope of justifying the rule declared in *Ableman* and *Tarble's Case* on grounds of implied preemption, it is here, in the consideration of whether allowing state courts to award habeas relief to federal prisoners would present a "clear incompatibility between state-court jurisdiction and federal interests."[199] In its 1981 ruling in *Gulf Offshore Co. v. Mobil Oil*

196. *See* RITZ, *supra* note 13, at 5.

197. *See* Warren, *supra* note 174, at 65–66 (providing numerous examples of state courts adjudicating disputes under federal law).

198. *Id.* at 53; *see* Holt, *supra* note 174, at 1485–87, 1496–97 (noting ways in which state courts retained a great deal of power under the 1789 Act).

199. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981). The Court in *Tarble's Case* itself asserted that such an incompatibility existed, stating that it would undermine the federal government "if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty." Tarble's Case, 80 U.S. (13 Wall.) 397, 409 (1872); *see id.* at 408–09 (discussing the incompatibility between the federal power to raise armies and the ability of state courts to discharge soldiers). In *Ableman*, the Court also stated that, if the interpretation and enforcement of federal law were left entirely to the state courts, "conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from

Corp.,[200] the Court explained that, when determining whether such a "clear incompatibility" exists, "[t]he factors generally recommending exclusive federal-court jurisdiction . . . include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims."[201] When one considers those factors—and when one takes into account federal officers' broad power to remove federal prisoners' state habeas petitions to federal court when they deem a state forum inadequate—it is apparent that there is no incompatibility sufficient to warrant concluding that state courts' jurisdiction over federal prisoners' habeas claims has been entirely preempted.

a. The Federal Government's Confidence in State Courts' Ability to Adjudicate Federal Constitutional Claims

State courts routinely adjudicate federal constitutional issues in the cases that come before them. Moreover, as any student of the law governing *federal* habeas relief for *state* prisoners can attest, both the Court and Congress today have a high degree of confidence in state judges' ability to resolve the federal constitutional disputes that ordinarily arise when a person claims he or she is being unlawfully detained. The Court has "repeatedly and emphatically rejected" the notion that state courts are "not competent to adjudicate federal constitutional claims."[202] Consider *Stone v. Powell*, for example, in which the Court held that a state prisoner cannot argue, in federal habeas proceedings, that his or her Fourth Amendment rights were violated when the trial court allowed prosecutors to present illegally seized evidence to the jury.[203] The Court underscored its confidence in state courts' ability to adjudicate Fourth Amendment claims properly:

> The policy arguments that respondents marshal in support of the view that federal habeas corpus review is necessary to effectuate the

. . . local influences." Ableman v. Booth, 62 U.S. (21 How.) 506, 517–18 (1859); *see also* Tafflin v. Levitt, 493 U.S. 455, 465 (1990) (citing this passage for the proposition that, when deciding whether state law has been implicitly preempted in favor of a federal criminal statute, it is appropriate to consider "the need for uniformity and consistency of federal criminal law").

200. 453 U.S. 473 (1981).

201. *Id.* at 483–84.

202. Moore v. Sims, 442 U.S. 415, 430 (1979); *accord* Swain v. Pressley, 430 U.S. 372, 383 (1977) (asserting that state courts "must be presumed competent to decide all issues, including constitutional issues, that routinely arise in the trial of criminal cases").

203. Stone v. Powell, 428 U.S. 465, 493–95 (1976).

> Fourth Amendment stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights. . . . Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. . . . In sum, there is "no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the [consideration of Fourth Amendment claims] than his neighbor in the state courthouse."[204]

Congress, too, has manifested a strong measure of confidence in state judges. It has declared, for example, that federal courts cannot grant habeas relief to a state prisoner whose claims have been "adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . was contrary to, or an unreasonable application of, clearly established [Supreme Court precedent] or . . . was based on an unreasonable determination of the facts."[205] In the ordinary course of events, in other words, Congress believes that state courts' rulings on questions of federal constitutional law are sufficiently competent to preclude federal habeas review.

To a significant extent, therefore, the Court and Congress have set aside any misgivings they may once have had about state courts' ability to adjudicate federal constitutional issues. There is thus good reason to believe that allowing state judges to adjudicate federal prisoners' claims of unlawful detention would not raise any greater concerns about the uniformity of federal law, about state judges' expertise, or about state judges' hospitality to federal law than already arise when state courts adjudicate their own prisoners' federal constitutional claims.[206]

Let us suppose, however, that in a particular prisoner's case, the federal custodian would prefer to litigate in a federal forum. Perhaps the custodian does not share the Court's and Congress's faith in state judges' abilities. Or perhaps the custo-

204. *Id.* at 493 n.35 (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 509 (1963)).

205. 28 U.S.C. § 2254(d) (2000).

206. The rights the Constitution confers upon a prisoner do not generally depend on whether the prisoner is being held by state or federal officials. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 503–05 (3d ed. 2006) (explaining that nearly all of the Bill of Rights' provisions have been deemed applicable to the states through the Fourteenth Amendment).

dian favors a federal forum because the prisoner's case raises especially difficult constitutional issues that state judges do not routinely confront. If a person is being extrajudicially detained as part of the war on terror, for example, the case likely presents complex and rarely adjudicated issues involving presidential powers and the rights of "enemy combatants"—issues that one might believe federal judges are best suited to address.[207] Might there then be a "clear incompatibility between state-court jurisdiction and federal interests," such that state courts' jurisdiction should be deemed implicitly preempted?[208] In short, no. Any concerns about such an incompatibility are satisfactorily addressed by federal officers' ability to remove state habeas actions to federal court.

b. Federal Officers' Removal Power

Throughout most of the nineteenth century—and at the time of the Supreme Court's decisions in *Ableman* and *Tarble's Case*—federal officers had only a limited ability to remove civil actions brought against them from state to federal court. Early Congresses had enacted federal-officer removal legislation on several occasions, beginning in 1815, but it had limited those statutes' benefits to federal officials responsible for executing the nation's customs and revenue laws.[209] As a result, when a federal prisoner filed a habeas action in state court, the federal defendant ordinarily had no choice but to litigate in that forum, absent the sort of jurisdictional bar that the Court erected when Sherman Booth and Edward Tarble tried to secure their own freedom.

It was not until 1887 that Congress gave all defendants the right to remove a civil action from state to federal court on the ground that the plaintiff's claim arose under federal law.[210] It was not until 1916 that Congress gave members of the federal armed forces the power to remove actions brought against them

207. *Cf. supra* notes 4–5 and accompanying text (noting some of the difficult issues that the federal courts have adjudicated in recent terrorism-related cases).

208. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981).

209. *See* Willingham v. Morgan, 395 U.S. 402, 405–06 (1969) (tracing the history of federal-officer removal legislation); FALLON ET AL., *supra* note 174, at 908–09 & n.8 (same).

210. *See* Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, 553. Congress enacted a precursor to the 1887 law in 1875. *See* Act of Mar. 3, 1875, ch. 137, 18 Stat. 470, 470–71 (granting removal jurisdiction in a wide range of cases, so long as the amount in controversy exceeded $500).

for acts they performed "under color" of their military authority.[211] And, it was not until 1948 that Congress finally granted *all* federal officers the power to remove actions brought against them for acts they performed "under color" of their respective offices.[212] Today, 28 U.S.C. § 1441 provides that, in any civil action "of which the district courts of the United States have original jurisdiction," the defendant may remove the action to the district court for the district in which the state action is pending.[213] Section 1442a provides that, when an action is brought in state court against "a member of the armed forces of the United States on account of an act done under color of his office or status," the defendant can remove the action to the federal district court for the district where the state action is pending.[214] Section 1442 grants the same broad removal power to "any officer (or person acting under that officer) of the United States" who is sued for acts performed "under color of such office."[215]

The plain, overarching purpose of § 1442 and § 1442a is to ensure that, when federal officers and members of the military find themselves sued in state court for actions performed in the course of their official duties, they are able to secure "the protection of a federal forum."[216] To satisfy the "under color of office" requirement, the defendant must simply "show a nexus, a 'causal connection between the charged [or challenged] conduct and asserted official authority.'"[217] Moreover, unlike defendants seeking to remove pursuant to § 1441—under which actions between nondiverse parties are removable only if a federal issue provides an essential element of the plaintiff's well-pleaded complaint[218]—federal officers and members of the military can

211. Act of Aug. 29, 1916, ch. 418, 39 Stat. 619, 669.

212. Act of June 25, 1948, ch. 646, § 1442, 62 Stat. 869, 938.

213. 28 U.S.C. § 1441 (2000) (stating that, when the district court's original jurisdiction is founded upon the presence of a federal question in the plaintiff's claims, the action is removable regardless of the place of the defendant's residence, but that diversity cases can only be removed if the defendant is not a citizen of the state in which the action was filed). A case can be removed on federal question grounds under § 1441 only if federal law provides an essential element of the plaintiff's cause of action. Rivet v. Regions Bank of La., 522 U.S. 470, 475 (1998).

214. 28 U.S.C. § 1442a (2000).

215. *Id.* § 1442(a)(1).

216. Willingham v. Morgan, 395 U.S. 402, 407 (1969).

217. Jefferson County v. Acker, 527 U.S. 423, 431 (1999) (quoting *Willingham*, 395 U.S. at 409).

218. *See* 28 U.S.C. § 1441(a). *See generally* Louisville & Nashville R.R. Co.

remove nondiverse actions to federal court even if the federal issue appears only as an element of their defense.[219]

Let us return, then, to the case in which federal authorities believe that a particular prisoner's state habeas petition would best be litigated in a federal forum. There is no doubt that the custodian could remove the action to federal court. If concerns about "the desirability of uniform interpretation, the expertise of federal judges in federal law, [or] the assumed greater hospitality of federal courts to peculiarly federal claims"[220] cause federal authorities to prefer to litigate in a federal forum, they may easily secure one. Moreover, the Supreme Court has recognized that, when a defendant possesses the power to remove an action from state to federal court, "[e]xclusive federal-court jurisdiction over [the plaintiff's] cause of action generally is unnecessary to protect the parties."[221] Consequently, under the usual terms of analysis, there is little reason to conclude that Congress has implicitly stripped the state courts of all power to hear federal prisoners' habeas claims.

The only remaining ground for contending that there is a "clear incompatibility" between state-court jurisdiction and federal interests arises from the *very existence* of the state habeas remedy. If a federal custodian removed a state habeas action to federal court, he or she would secure all of the benefits that flow from having a federal judge decide the case. But *the case itself* would continue to exist—the only thing that would change would be the forum in which it was adjudicated.[222] As Professor Amar has noted with respect to this very scenario, the federal court "would be obliged to enforce the vertically-

v. Mottley, 211 U.S. 149, 152 (1908) (holding that an action arises under federal law within the meaning of federal jurisdictional legislation "only when the plaintiff's statement of his own cause of action shows that it is based upon those laws").

219. *See Jefferson County*, 527 U.S. at 431 ("Under the federal[-]officer removal statute, suits against federal officers may be removed despite the nonfederal cast of the complaint; the federal question element is met if the defense depends on federal law."); Mesa v. California, 489 U.S. 121, 136 (1989) ("[I]t is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action . . . arises for Art. III purposes.").

220. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483–84 (1981).

221. *Id.* at 483 n.12.

222. *See* 28 U.S.C. § 1446(a) (2000) (stating that the defendant must provide the federal court "with a copy of all process, pleadings, and orders served upon such defendant"); YACKLE, *supra* note 8, at 138 (noting that removal involves merely the "transfer" of a case from state to federal court).

pendent state law habeas remedy."[223] Would the states' provision of a habeas remedy be so incompatible with federal interests that Congress should be deemed to want federal remedies to be exclusive?

Presumably, no such incompatibility would exist if the state and federal writs were available to federal prisoners in a coextensive range of circumstances. If a prisoner chose to seek the state remedy rather than the federal counterpart, the custodian could remove the case to federal court and proceed with litigation that was identical—in both forum and substance—to the litigation that would have ensued if the prisoner had sought the federal remedy. One can easily imagine, however, that state and federal lawmakers might have very different ideas about when the habeas remedy should be available to federal detainees. In the Military Commissions Act of 2006, for example, Congress has purported to strip courts of the power to adjudicate federal habeas petitions filed by aliens whom the government has designated "enemy combatants."[224] There might be other situations, too, in which Congress wishes to restrict the federal writ's availability for federal detainees. Suppose that, in contrast, state judges and lawmakers remain more generous. Wouldn't there then be an incompatibility between the state habeas remedy, on the one hand, and the federal interests that prompted Congress to reduce the availability of the federal writ, on the other?

There would indeed be an incompatibility in that circumstance—an incompatibility that the Constitution's framers foresaw and addressed. Through the Constitution's Suspension Clause,[225] the founding generation tried to ensure that Congress could not prevent the states from providing the habeas remedy to federal extrajudicial detainees.

223. Amar, *supra* note 173, at 1510; *cf.* Alexander, *supra* note 5, at 277 (stating that, while the Constitution and federal law provide the governing law, the writ of habeas corpus provides the cause of action that serves as "the vehicle for getting into court").

224. Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2636 (to be codified at 28 U.S.C. § 2241(e)) (establishing a system of military commissions and declaring that no court shall have jurisdiction over a habeas petition filed by an alien being held by the United States as an "enemy combatant").

225. U.S. CONST. art. I, § 9, cl. 2.

III. RESTORING THE SUSPENSION CLAUSE TO ITS ROOTS

Recognizing that there might be occasions when federal leaders would find state habeas remedies inconvenient, and wishing to ensure that federal leaders could not easily sweep those remedies aside, the founding generation ratified the Suspension Clause. The Suspension Clause was aimed at guaranteeing citizens and state officials alike that, absent extraordinary circumstances, federal leaders could not strip the states of their power to provide habeas relief to persons being extrajudicially detained by federal authorities.

A. PROTECTING THE WRIT "AS IT EXISTED IN 1789"

Article I, Section 9 of the Constitution states: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[226] Like so many other seemingly straightforward constitutional texts, the Suspension Clause has long been regarded as a provision "fraught with confusion."[227] The Supreme Court and scholars have largely agreed, however, on at least one important premise: "[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'"[228] When determining the scope of the clause's protections, therefore, the core inquiry is decidedly historical in nature.[229] Although such matters can perhaps never be resolved beyond all possible dispute, the historical record provides strong support

226. *Id.*

227. Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1263 (1970).

228. INS v. St. Cyr, 533 U.S. 289, 301 (2001) (quoting Felker v. Turpin, 518 U.S. 651, 664 (1996)).

229. *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 170 (1970) ("It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers . . . ."); David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 65 (2006) ("At the very least, the term ['habeas corpus' in the Suspension Clause] appears to carry with it whatever comprised the general understanding of the writ at the time the Suspension Clause was adopted."). Justices Scalia and Thomas disagree, believing that the clause "does not guarantee any content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in cases of rebellion or invasion) be suspended." *St. Cyr*, 533 U.S. at 337 (Scalia, J., dissenting). They concede, however, that if the clause *does* serve "as a guarantee of habeas relief," what it guarantees is "the common-law right of habeas corpus, as it was understood when the Constitution was ratified." *Id.* at 341–42.

for three propositions that are particularly relevant here. First, the framers believed the Suspension Clause would safeguard state courts' ability to provide habeas relief to federal detainees. Second, the framers believed that the primary beneficiaries of that relief would be individuals detained by federal executive officials without judicial authority. Third, the framers believed that, when appropriate, state courts would provide the writ to citizens and noncitizens alike. The historical record also provides moderate support for a fourth proposition—namely, that the common law in 1789 authorized a state court to issue the writ even when the petitioner was detained outside of the court's territorial jurisdiction, so long as the court could reach the petitioner's custodian with service of process.

1. State Habeas Relief for Federal Detainees

In his groundbreaking examination of the writ of habeas corpus in early American history, William Duker convincingly argues that

> the debates in the federal and state conventions, the location of the habeas clause [in Section 9 of Article I, which in several instances imposes limits on Congress's power with respect to the states], and the contemporary commentary support the thesis that the habeas clause was designed to restrict Congressional power to suspend state habeas [relief] for federal prisoners.[230]

Proponents of the Suspension Clause were greatly concerned about the possibility that leaders of the new national government would violate individuals' liberties and then try to block state courts' efforts to do something about it.[231] By limiting Congress's ability to suspend state courts' power to award the writ to federal detainees, the Suspension Clause was intended to place an important check on federal officials' ability to imprison individuals unlawfully.

Numerous scholars agree that the framers' primary objective was to protect state courts' ability to come to the aid of federal prisoners. Professor Amar concludes, for example, that Duker "has established that the very purpose of the habeas non-suspension clause . . . was to protect the remedy of *state*

230. DUKER, *supra* note 3, at 135. Duker points out, for example, that Alexander Hamilton assured the people of New York that the "habeas corpus act" would serve as an important safeguard of individual liberties under the new government—an apparent reference to New York's recently enacted habeas statute. *See id.* at 132–33; THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 179, at 467.

231. *See* DUKER, *supra* note 3, at 129.

habeas from being abrogated by the federal government; the language of non-*suspension* obviously presupposes a pre-existing (state) common law habeas remedy."[232] Eric Freedman writes that "it would be anachronistic to assume that the [participants in the ratification debates] shared the view of the nineteenth-century Supreme Court that state courts could not issue the writ to federal prisoners."[233] Rex Collings posits that the reason the delegates to the 1787 Convention did not affirmatively grant federal courts the power to issue the writ of habeas corpus—but rather limited the occasions on which Congress could suspend it—was that "the states had sufficiently provided for the writ [and so] protection would be unnecessary in the new Constitution other than against arbitrary suspension."[234] Daniel Meador similarly argues that, in the eyes of the Constitution's framers, it was unnecessary to draft a provision granting federal courts the power to issue habeas relief to federal prisoners, because the states already afforded that protection to "any person imprisoned anywhere within the States of the Union."[235] Gerald Neuman notes that, for those who would interpret the Constitution in accordance with its likely original intent, "the U.S. constitutional system has been in flagrant violation of the Suspension Clause for more than two-thirds of its history,"[236] ever since the Supreme Court dubiously declared in *Ableman*[237] and *Tarble's Case*[238] that state courts are constitutionally barred from ordering a federal prisoner released.[239]

232. Amar, *supra* note 173, at 1509. As Professor Amar reads the framers' intentions, "[t]he common law would furnish the cause of action that assured judicial review; the Constitution would furnish the test on the legal merits of confinement." *Id.* at 1510.

233. Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451, 458 (1996).

234. Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 345 (1952).

235. DANIEL J. MEADOR, HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY 33 (1966). Meador writes that political leaders in 1787 had "little reason" to suspect that the Court would one day declare that state courts lacked jurisdiction to award habeas relief to federal detainees. *See id.*

236. Neuman, *supra* note 10, at 596.

237. Ableman v. Booth, 62 U.S. (21 How.) 506, 523 (1859) (acknowledging a state court's authority to issue the writ of habeas corpus within its territorial limits, but declaring that once "the State judge or court [is] judicially apprised that the party is in custody under the authority of the United States, they can proceed no further").

238. Tarble's Case, 80 U.S. (13 Wall.) 397, 410–11 (1872).

239. *See supra* notes 87–110, 129–66 and accompanying text.

Much of the confusion surrounding the Suspension Clause today stems from the very fact that in *Ableman* and *Tarble's Case* the Court severed the clause from its original meaning, thereby making the text that much more difficult to interpret.[240] Proving that even our most revered jurists sometimes point the law in unfortunate directions, Chief Justice John Marshall abetted the Court's eventual abandonment of the Suspension Clause's roots. Writing for the Court in *Ex parte Bollman*,[241] Chief Justice Marshall sought to explain section 14 of the Judiciary Act of 1789, which gave federal courts the power to award habeas relief to federal prisoners.[242] He stated that, in light of the "injunction" laid down in the Suspension Clause, the first Congress "must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted."[243] Chief Justice Marshall said nothing about the fact that state courts already held the power to award the writ and that federal legislation was thus not necessary to give the Suspension Clause meaning. Perhaps the staunch Federalist was reluctant to acknowledge one of the important ways in which those fearful of the new national government had hoped to keep that government in check.

Regardless of the impetus underlying Chief Justice Marshall's ill-advised lead, courts and scholars ever since have almost invariably assumed that the Suspension Clause's chief function is to place limits on Congress's ability to suspend the *federal* writ—a focus that the Court locked firmly into place (at least with respect to federal prisoners) when it forced state courts entirely off the playing field in *Ableman* and *Tarble's Case*.[244] The fact remains, however, that many in the founding generation believed the Suspension Clause's primary purpose was to ensure that—absent a "Rebellion" or "Invasion" necessitating its suspension[245]—the state habeas remedy would remain available to persons unlawfully held in federal custody.

240. *See supra* notes 87–166 and accompanying text.

241. 8 U.S. (4 Cranch) 75 (1807).

242. *See id.* at 94–95.

243. *Id.* at 95.

244. *See* DUKER, *supra* note 3, at 126 ("Since *Ex parte Bollman*, it has generally been accepted that the intent of the habeas clause was somehow to guarantee a federal writ of habeas corpus.").

245. U.S. CONST. art. I, § 9, cl. 2.

2. State Habeas Relief for Persons Being Extrajudicially Detained

Americans today are most familiar with the writ of habeas corpus as a device by which individuals can collaterally challenge their criminal convictions.[246] Habeas's use as a means of providing postconviction relief, however, is a comparatively modern phenomenon, set in motion by Congress's decision to broaden the federal writ's availability in the wake of the Civil War.[247] The primary historic purpose of the habeas writ was "to test the legality of executive detention not authorized by any court"[248]—or, as one scholar puts it, "to ensure that executive officials will not be left to determine the scope of their own authority to arrest and detain individuals."[249] Daniel Meador explains the concern:

> Detention by executive authority . . . poses the oldest and perhaps the greatest threat to liberty under law. For, by hypothesis, there is incarceration with no judicial determination of anything. Since the deprivation of liberty has not been subjected to the scrutiny of a court, it lacks that assurance of legality which has come to be thought of as integral to government under law.[250]

246. *See, e.g.*, CHEMERINSKY, *supra* note 174, at 838 ("[F]ederal courts have the authority to review state court criminal convictions pursuant to writs of habeas corpus.").

247. *See* Collings, *supra* note 234, at 353. In 1867, Congress gave federal courts the broad power to award habeas relief to all persons held in custody in violation of federal law. *See* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385–86. Prior to that time, courts generally followed the common-law rule that "a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that confinement was legal. Such a judgment prevented issuance of the writ without more." United States v. Hayman, 342 U.S. 205, 211 (1952); *accord Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 207 (1830) ("The judgment of the circuit court in a criminal case is of itself evidence of its own legality, and requires for its support no inspection of the indictments on which it is founded."). The 1867 Act changed the law, allowing federal courts to award habeas relief to persons whose criminal convictions had become final. *See* Felker v. Turpin, 518 U.S. 651, 663 (1996) ("[I]t was not until well into [the twentieth] century that this Court interpreted [the 1867 Act] to allow a final judgment of conviction in a state court to be collaterally attacked on habeas."); *see also* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 982–85 (1998) (discussing the Court's shift from *Ex parte Watkins* to the modern era).

248. FALLON ET AL., *supra* note 174, at 1290; *accord* Brown v. Allen, 344 U.S. 443, 533 (1953) (Jackson, J., concurring) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.").

249. Neuman, *supra* note 247, at 1022.

250. MEADOR, *supra* note 235, at 38.

The Supreme Court has strongly acknowledged habeas's role as the primary remedy for extrajudicial confinement: "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."[251]

The writ of habeas corpus was assigned this critical function long before the delegates to the 1787 Convention drafted a new national charter. England's landmark Habeas Corpus Act of 1679[252] focused almost entirely on the need to provide relief to those individuals who were being held on criminal charges indefinitely, without judicial process.[253] The remedy provided by the Act was either bail (if the crime charged was a misdemeanor) or an order that the person be brought quickly to trial (if the crime charged was a felony).[254] Once a prisoner had finally become the object of judicial proceedings, English courts generally refused to issue the writ.[255]

The 1679 Act, with its strong focus on extrajudicial detentions, provided the blueprint for nearly all of the states' early habeas laws, both before and after 1789.[256] By the time the ear-

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251. INS v. St. Cyr, 533 U.S. 289, 301 (2001); *cf.* THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 179, at 480 (praising the writ of habeas corpus for providing relief from the "fatal evil" of "arbitrary imprisonments"); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1779 n.244 (1991) (stating that the Suspension Clause "is most plausibly understood as extending only to cases of extrajudicial detention by federal authority, and thus does not guarantee a post-conviction remedy for state prisoners").

252. Habeas Corpus Act, 1679, 31 Car. 2, ch. 2 (Eng.).

253. *See* MEADOR, *supra* note 235, at 26–27 (explaining that the 1679 Act was primarily concerned with pretrial extrajudicial detentions and that such detentions "had been the burning issue for over half a century").

254. *See* Collings, *supra* note 234, at 337 (explaining the various remedies). Dallin Oaks explains:

> At common law and under the famous Habeas Corpus Act of 1679 the use of the Great Writ against official restraints was simply to ensure that a person was not held without formal charges and that once charged he was either bailed or brought to trial within a specified time. If a prisoner was held by a valid warrant or pursuant to the execution or judgment of a proper court, he could not obtain release by habeas corpus.

Oaks, *supra* note 23, at 244–45.

255. *See* Collings, *supra* note 234, at 337 ("In practice the writ was generally not granted where the party was in execution on a criminal charge after indictment according to the course of the common law.").

256. *See id.* at 338 ("State legislatures before and after the 1789 constitutional convention copied the Act of 1679 as their basic habeas corpus statute."); Oaks, *supra* note 23, at 252–53 (stating that, with the lone exception of Connecticut, all of the early states patterned their habeas legislation after the

ly Americans ratified their new Constitution, therefore, the writ of habeas corpus had been firmly assigned its central task: to provide relief to those being detained by the executive without judicial process. In the eyes of many of those who ratified it in 1789, the Suspension Clause guaranteed that, absent extraordinary circumstances, Congress could not terminate state courts' ability to bring individuals' extrajudicial detention to an end.[257]

3. State Habeas Relief for Citizens and Noncitizens Alike

Both prior to and after the Constitution's ratification in 1789, the common-law writ of habeas corpus was widely understood to be available to citizens and noncitizens alike.[258] As Gerald Neuman observes, "[i]n England [the writ] was not limited to subjects, and in the United States it was not limited to citizens."[259] As Part I indicates, for example, the Massachusetts Supreme Judicial Court ordered a Russian boy released from the army after concluding that the child was too young to enlist and was not sufficiently fluent in English to understand the oath that army officials had administered to him.[260] A member of the New York Supreme Court of Judicature similarly took jurisdiction of a habeas petition filed by a man seeking a discharge from the army on the grounds that he was not an American citizen.[261] During wartime, noncitizens within the United States admittedly have been granted fewer habeas privileges than American citizens if the aliens' citizenship rests with the nation with which the United States is at war.[262] But even

1679 Act); *id.* at 258–62 (elaborating on the 1679 Act's use as the early states' primary model).

257. *See* Collings, *supra* note 234, at 337–45 (arguing that the right protected by the Suspension Clause is the right to be either brought to trial or set free); *cf. Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 96 (1869) (noting that the 1679 Act provided the framework for the framers' understanding of the writ protected by the Suspension Clause).

258. *See* INS v. St. Cyr, 533 U.S. 289, 301 (2001) ("In England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citizens.").

259. Neuman, *supra* note 247, at 989; *see also id.* at 989–1020 (thoroughly canvassing federal cases illustrating this principle); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1966 (2000) (making the same point even concerning enemy aliens).

260. *See* Commonwealth v. Harrison, 11 Mass. (10 Tyng) 63, 63–66 (1814).

261. United States v. Wyngall, 5 Hill 16, 17 (N.Y. Sup. Ct. 1843).

262. *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 775 (1950) (stating that, when a "resident enemy alien" is seized by the Executive during a de-

those resident enemy aliens have been deemed to possess at least a limited right of access to the writ.[263]

4. State Habeas Relief for Detainees Held Beyond the Court's Territorial Jurisdiction

Ordinarily, a prisoner and his or her custodian reside within the same locale, and so a court need not wrestle with the question of whether it can issue the writ when one of the parties is located beyond the court's jurisdictional reach.[264] When the federal government extrajudicially confines individuals within the United States, for example—as when it recently held Jose Padilla at a navy brig in South Carolina for several years[265]—both the prisoner and the custodian are likely to be within the territorial jurisdiction of the same state court. A

clared war and is held for deportation pursuant to the Alien Enemy Act, a court will consider "his plea for freedom . . . only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act"); Ludecke v. Watkins, 335 U.S. 160, 171 (1948) (using the same standard as *Eisentrager*). Under the Alien Enemy Act, the president has the authority, when the United States is in the midst of a declared war or when it has been invaded by a foreign government, to deport individuals fourteen-years of age and older who are citizens of the hostile nation. *See* Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577 (codified as amended at 50 U.S.C. § 21 (2000)).

263. *See supra* note 262. Enemy aliens who have never entered the United States, however, might not have any constitutional claim of entitlement to the habeas writ. In 1950, the Court wrote:

> We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.

Eisentrager, 339 U.S. at 768. In 2004, the Supreme Court held, as a matter of federal statutory interpretation, that nonresident enemy aliens can invoke a federal court's habeas jurisdiction, so long as the court can reach the federal custodian with service of process. *See* Rasul v. Bush, 542 U.S. 466, 478–84 (2004) (recognizing at least limited statutory habeas rights for detainees held by federal military authorities at the Guantanamo Naval Base in Cuba). It is not clear whether, absent such legislation, nonresident enemy aliens could claim a constitutional entitlement to the writ. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2818 (2006) (Scalia, J., dissenting) (reaching a constitutional issue not addressed by the majority and concluding that, under *Eisentrager*, "petitioner, an enemy alien detained abroad, has no rights under the Suspension Clause").

264. *Cf.* Rumsfeld v. Padilla, 542 U.S. 426, 444 (2004) ("In habeas challenges to present physical confinement . . . the district of confinement is synonymous with the district court that has territorial jurisdiction over the proper respondent. . . . By definition, the immediate custodian and the prisoner reside in the same district.") (emphasis omitted).

265. *Id.* at 430–32.

more difficult scenario arises, however, when the federal government detains individuals outside the fifty states, whether at the Guantanamo Naval Base or elsewhere.[266] Under the law governing the habeas writ in 1789, could a person confined beyond the nation's borders nevertheless seek habeas relief from a state court, so long as the court could reach the detainee's custodian with service of process? Answering that question is difficult because that rare circumstance did not frequently arise in the eighteenth and nineteenth centuries.[267] However, it seems likely that one should answer it in the affirmative.

In *Ex parte Graham*, decided in 1818, the Circuit Court for the Eastern District of Pennsylvania stated that it is "essential to the exercise of . . . jurisdiction by any particular court, that the person or thing *against* whom or which the court proceeds, should be within the local jurisdiction of such court."[268] Twenty-two years later, in *United States v. Davis*, the Circuit Court for the District of Columbia held that, so long as the custodian was within its jurisdiction, it could issue the writ on behalf of persons located elsewhere.[269] That court issued the writ against Thomas Davis, a slaveholder, commanding him to bring three slaves to court for a hearing concerning their freedom. Davis argued that the court lacked jurisdiction because the three slaves were being held in other parts of the country.[270] The court rejected that argument, concluding that Davis was obliged to obey the writ so long as he held the power to produce

266. As a matter of statutory interpretation concerning the *federal* writ, the Court has said that the prisoner need not be present in the jurisdiction of the court issuing the writ—all that is essential is that the court be able to reach the prisoner's custodian with service of process. *See* Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 494–500 (1973). Citing statutory developments, *Braden* rejected the course charted in *Ahrens v. Clark*, 335 U.S. 188 (1948), in which the Court had held that, under the governing federal statute, the petitioner had to be located within the jurisdiction of the federal court issuing the writ. *Braden*, 410 U.S. at 495–99; *see also Ahrens*, 335 U.S. at 191 ("It would take compelling reasons to conclude that Congress contemplated the production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ.").

267. *See* Boumediene v. Bush, 476 F.3d 981, 1000–01 (D.C. Cir.) (Rogers, J., dissenting) (noting "[t]he paucity of direct [historical] precedent" in this area), *cert. granted*, 127 S. Ct. 3078 (2007).

268. *Ex parte* Graham, 10 F. Cas. 911, 913 (C.C.E.D. Pa. 1818) (No. 5657) (emphasis added).

269. United States v. Davis, 25 F. Cas. 775, 775–76 (C.C.D.C. 1840) (No. 14,926).

270. *Id.* at 775.

the slaves, regardless of where they were located.[271] Taken together, *Graham* and *Davis* indicate that it is only the location of the custodian—and not the location of the prisoner—that matters when determining a court's common-law jurisdiction to issue the writ.

The issue arose again in 1867, in a case brought before the Supreme Court of Michigan. In *In re Jackson*, guardians sought the writ on behalf of a boy who had been temporarily deposited across state lines.[272] Justice James Campbell argued that Michigan's habeas statute did not grant the court the power to act when a prisoner was located outside the court's territorial jurisdiction.[273] Justice Thomas Cooley construed the Michigan statute differently, arguing that it left room for the case to be governed by common-law principles.[274] With respect to the content of that common law, he acknowledged that some cases contained language indicating that the petitioner had to be confined within the court's territorial jurisdiction, but he said that those remarks were "of no significance" because none of those cases squarely presented the issue for resolution.[275] In his judgment, only the custodian's location mattered:

> The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailor. It does not reach the former except through the latter. . . . The whole force of the writ is spent upon the [jailor] . . . .[276]

Citing Justice Cooley's opinion, the Supreme Court of Iowa reached the same conclusion when it confronted the issue in 1881, reasoning that, if a custodian had earlier removed a prisoner from a state court's jurisdiction, he or she could just as easily bring the prisoner back in compliance with the writ.[277] The United States Supreme Court later cited Justice Cooley's reasoning with approval.[278]

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271. *Id.* at 775–76.

272. *In re* Jackson, 15 Mich. 417, 420 (1867).

273. *See id.* at 422 (Campbell, J.).

274. *See id.* at 438–39 (Cooley, J.).

275. *Id.* at 441 (Cooley, J.).

276. *Id.* at 439–40 (Cooley, J.); *cf.* JAMES A. SCOTT & CHARLES C. ROE, THE LAW OF HABEAS CORPUS 129 (1923) (citing English precedent and stating "[n]o court has any authority to issue a writ of habeas corpus directed to a person outside of its territorial jurisdiction").

277. *See* Rivers v. Mitchell, 10 N.W. 626, 627–28 (Iowa 1881) (adopting the reasoning of the *Davis* court and of Justice Cooley in *Jackson*).

278. *See Ex parte* Endo, 323 U.S. 283, 306 (1944).

There is thus good reason to believe that the state-court power protected by the Suspension Clause is the power to issue the writ on behalf of any extrajudicial detainee—regardless of where he or she is located—so long as the prisoner's custodian is within the court's jurisdictional reach.[279] If the custodian responsible for the detainees at the Guantanamo Naval Base returned home for a visit, for example, he or she could find a state court's service of process following not far behind.

B. REDISCOVERING THE ROLE OF THE STATES

If one ignores the Suspension Clause's original purpose, one can perhaps be forgiven for declaring that state courts' practice of granting habeas relief to federal extrajudicial detainees throughout the first half of the nineteenth century was based upon an "extravagant" notion of states' rights.[280] But that characterization cannot be reconciled with the founding generation's understanding of the Constitution's text. Indeed, the original understanding of the Suspension Clause is manifested by the very fact that, for half a century, state courts routinely took jurisdiction of habeas petitions filed by persons being extrajudicially detained by federal authorities, and federal officials readily obeyed the state courts' orders.[281] State courts were doing nothing more than what the Suspension Clause preserved for them the right to do.

For the state judges who exercised it, the power protected by the Suspension Clause was far from superfluous. The states' ability to come to the aid of a person illegally and extrajudicially detained lay at the very heart of what it meant to be a sovereign. No less an authority than Chief Justice Kent insisted in 1813 that it was his court's "indispensable duty . . . and one to which every inferior consideration must be sacrificed, to act as a faithful guardian of the personal liberty of the citizen," even when the citizen was in federal custody.[282] Justice Southard, of the New Jersey Supreme Court, declared in 1819 that a state

279. *But cf.* Boumediene v. Bush, 476 F.3d 981, 990–91 (D.C. Cir.) ("[W]e are convinced that the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government."), *cert. granted*, 127 S. Ct. 3078 (2007).

280. *See* Thompson, *supra* note 169, at 3–5 (characterizing the practice in disparaging terms).

281. *E.g.*, State v. Dimick, 12 N.H. 194, 197 (1841) ("The courts of the United States have no exclusive jurisdiction over [federal] officers [who unlawfully confine citizens].").

282. *In re* Stacy, 10 Johns. 328, 333 (N.Y. Sup. Ct. 1813).

court's ability to provide relief in such cases was "relat[ed] to the highest duty of a government, to the proudest attribute of sovereignty."[283] The Pennsylvania Supreme Court wrote in 1847 that "the power of the judiciary in this state is adequate to crumble . . . to dust" the chains of a citizen's captivity, "no matter where or how the chains . . . were forged."[284] Rollin Hurd, one of the leading nineteenth-century commentators on the habeas remedy,[285] insisted that "[a] sovereign state has a right to be informed why any of her citizens are imprisoned, simply because it is her duty to set them free from all illegal imprisonment."[286]

Although it ventured into troublesome territory when it issued the writ for a person who had already been tried, convicted, and sentenced in a federal court, the Wisconsin Supreme Court in *Ableman* was thus drawing inspiration from a venerable tradition.[287] That court explained that, if it could not order a person within its jurisdiction released from unlawful federal custody, "the state would be stripped of one of the most essential attributes of sovereignty, and would present the spectacle of a state claiming the allegiance of its citizens, without the power to protect them in the enjoyment of their personal liberty upon its own soil."[288] In the eyes of the Wisconsin Supreme Court, it was crucial that the state judiciary hold "the power to grant that relief which all governments owe to those from whom they claim obedience."[289] Although likely misapplied when used to justify freeing a man who was incarcerated pursuant to the judgment of a federal court, the argument itself was deeply rooted.

It was an argument, moreover, that the framers would have readily appreciated. The framers believed there was a direct correlation between a sovereign's ability to serve its constituents and its ability to retain those constituents' trust, loyalty,

283. State v. Brearly, 5 N.J.L. 639, 644 (1819).

284. Commonwealth *ex rel.* Webster v. Fox, 7 Pa. 336, 338 (1847).

285. Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1097 (1995) (identifying Hurd as "one of the most prominent habeas treatise authors of the nineteenth century").

286. HURD, *supra* note 17, at 201.

287. *See supra* notes 87–110 and accompanying text (discussing the state and federal litigation in *Ableman*).

288. *In re* Booth & Rycraft, 3 Wis. 157, 176 (1855) (Whiton, C.J.).

289. *Id.*

and obedience.[290] Alexander Hamilton argued, for example, that the state and federal governments could each instill in citizens an "habitual sense of obligation" only if they were each able to govern in a manner calculated to earn citizens' "affection, esteem, and reverence."[291] It was by "attract[ing] to its support those passions which have the strongest influence upon the human heart," Hamilton believed, that a government could secure the people's compliance with its laws without resort to force.[292] Arguing in a similar vein, James Madison predicted that the states would retain a powerful claim to citizens' loyalty because the states' powers would "extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people."[293]

The Wisconsin Supreme Court, like so many courts before it, believed that the states' credibility as a sovereign was perhaps nowhere more publicly tested than when asked to free a citizen from unlawful confinement. These courts feared that, if the states were powerless to provide relief from illegal extrajudicial detention, citizens would grow to feel less attached to their states, would grow to feel less respect for state authorities, and would eventually allow power to be concentrated in the hands of the government they deemed more powerful and better able to serve them.[294]

Viewed from that perspective, the presumption in favor of concurrent state and federal jurisdiction over claims arising under federal law takes on special importance.[295] Unless Congress clearly expresses its desire to make federal jurisdiction exclusive, it is vital that the state courts, like their federal

290. *See generally* Pettys, *supra* note 24, at 338–44 (discussing the framers' vision concerning ways in which the state and federal governments would compete for citizens' loyalty and affection); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1042 (1997) (same).

291. THE FEDERALIST NO. 17 (Alexander Hamilton), *supra* note 179, at 115–16.

292. THE FEDERALIST NO. 16 (Alexander Hamilton), *supra* note 179, at 84; *cf.* SIEMERS, *supra* note 27, at 13 (stating that many in the founding generation believed that, if the people did not consider a government "theirs," that government's "laws would have to be forced on the people rather than be willingly obeyed").

293. THE FEDERALIST NO. 45 (James Madison), *supra* note 179, at 261.

294. *See* Pettys, *supra* note 24, at 340–44 (describing the framers' vision of competition between the state and federal governments for citizens' affection and for the regulatory power which that affection often yields).

295. *See supra* notes 179–85 and accompanying text (discussing the strong presumption in favor of concurrent jurisdiction).

counterparts, remain able to provide citizens with the appropriate remedies when their rights are violated. Handling the people's judicial business is one of the ways in which the states are able to ensure that citizens continue to perceive them as viable sovereigns. To infer too quickly that Congress has pushed the states aside would thus undermine the states' effort to retain a meaningful place in the dual-sovereign system of government that the Constitution's framers devised.[296]

When it comes to providing habeas relief for federal extrajudicial detainees, therefore, it is not sufficient to say that, because Congress has authorized the federal courts to adjudicate federal prisoners' habeas claims,[297] there is no need to enlist the aid of the state courts. It is not a matter merely of distributing the workload, nor is it a matter merely of ensuring that at least one sovereign's courts are authorized to issue the writ. It is a matter of giving both state and federal judges an opportunity to earn the people's loyalty and trust by providing individuals with assistance when they are most profoundly in need of a court's help. The Suspension Clause guaranteed the states that they would not be stripped of that power except in the direst of circumstances. It is not too late to honor the Constitution's promise.

CONCLUSION

Many today may find it difficult to contemplate a world in which state courts could grant habeas relief to individuals being detained by the federal government without judicial authority.[298] Therein lies an irony. In the nineteenth century, state courts believed that, in order to maintain the trust and respect of the citizenry, it was essential that they remain able to come to the aid of individuals being extrajudicially imprisoned by federal authorities. It has been nearly a century and a half since the Supreme Court put the state courts out of the business of adjudicating federal detainees' habeas petitions,

296. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.").

297. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (authorizing federal courts to grant habeas relief to federal prisoners).

298. *See* DUKER, *supra* note 3, at 155 ("The exposition given by the Court in *Booth* and *Tarble* is now the accepted view. In recent years it has gone unquestioned. Perhaps it is a question already reserved for the antiquarian."); Neuman, *supra* note 10, at 597 (expressing comparable sentiments).

and so it has been a very long time indeed since Americans have looked to the state courts as the primary protector of their freedom. We thus now find ourselves struggling to imagine state courts doing the very thing that state courts once believed they must be able to do in order to maintain our trust.

For more than half a century, however, state courts wielded the power to free individuals from federal extrajudicial confinement. With few exceptions, it was a power that state courts exercised to the apparent satisfaction of citizens and federal officials alike.[299] When it stripped state courts of that power, the Supreme Court offered a dubious constitutional rationale that scholars today discredit with apparent unanimity.[300] Yet the implied-preemption argument that scholars have used to rationalize the Court's actions does not fare any better.[301] Congress has not taken any steps to reject the presumption that state and federal courts are equally competent to take jurisdiction of individuals' claims that they are being extrajudicially confined by federal authorities in violation of federal law.[302] Moreover, for those occasions when federal custodians would prefer to litigate such claims in a federal forum, the removal statutes that have been on the books since the mid-1900s give federal officials ample power to remove the detainees' claims from state to federal court.[303] Finally, and most significantly, the Constitution's Suspension Clause assures citizens and the states that Congress cannot strip state courts of their power to adjudicate federal extrajudicial detainees' habeas claims except "when in Cases of Rebellion or Invasion the public Safety may require it."[304]

At its core, the Suspension Clause assures the states that they will remain a primary guardian of individuals' freedom, even when federal authorities are the ones posing the threat.[305] Neither the Court nor scholars have identified any persuasive rationale for concluding that the Constitution's promise is one we may ignore. It is time to allow state courts to leave their seats on the sidelines and get back into the game.

299. *See supra* notes 28–78 and accompanying text.
300. *See supra* notes 171–75 and accompanying text.
301. *See supra* notes 176–224 and accompanying text.
302. *See supra* notes 186–208 and accompanying text.
303. *See supra* notes 209–21 and accompanying text.
304. U.S. CONST. art. I, § 9, cl. 2.
305. *See supra* notes 230–79 and accompanying text.