HABEAS CORPUS, DUE PROCESS AND THE SUSPENSION
CLAUSE: A STUDY IN THE FOUNDATIONS OF
AMERICAN CONSTITUTIONALISM

Martin H. Redish* and Colleen McNamara**

INTRODUCTION................................................................. 1362

I. THE WRIT OF HABEAS CORPUS AND THE SUSPENSION
CLAUSE: A BRIEF HISTORICAL REVIEW ............................. 1367
   A. British Origins of the Writ of Habeas Corpus .............. 1367
   B. Incorporation of the Great Writ into the American
      Legal System ................................................................. 1369

II. THE IMPACT OF THE DUE PROCESS CLAUSE ON THE
SUSPENSION CLAUSE ......................................................... 1375
   A. The Implications of Textual Interpretation .................. 1375
      1. Constitutional Baseline for Procedural Due Process .... 1376
      2. Implications of the Exercise of the Suspension Power
         for Due Process ......................................................... 1381
      3. The Impact of a Constitutional Amendment on
         Inconsistent Text in the Body of the Constitution ... 1383
   B. Foundational Precepts of American Constitutionalism... 1387
   C. Anticipating Counterarguments ................................. 1391
      1. The Argument From Originality .............................. 1391
      2. The Implications of the Requirement of
         Congressional Authorization ...................................... 1392
      3. Due Process, Suspension, and the Needs of
         National Security ......................................................... 1394

III. PROCEDURAL DUE PROCESS DURING AN ATTEMPTED
SUSPENSION: WHAT IS THE PROPER JUDICIAL ROLE? ............ 1395
   A. Suspension of Habeas Corpus Absent Provision of
      Executive Due Process ............................................... 1396
   B. Type and Scope of Procedures Required to Satisfy
      Due Process .................................................................... 1397

* Louis & Harriet Ancel Professor of Law and Public Policy, Northwestern University
  School of Law.
** Candidate for Juris Doctor degree, Northwestern University 2011.
ARTICLE I, Section 9 of the United States Constitution guarantees the availability of the writ of habeas corpus. The “Great Writ,” as it has come to be called, serves as the primary procedural vehicle through which those detained by the government may challenge the legality of their detentions. Put simply, habeas corpus restricts government’s ability to imprison its citizens for any reason it wants—or for no reason at all.

Famously described as the Constitution’s only “express provision for exercise of extraordinary authority” in times of crisis, the writ of habeas is subject to one significant qualification. Article I, Section 9, Clause 2 gives the federal government the power to suspend the writ of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it.” Suspension of the writ effectively insulates the government’s power to imprison its citizens for any reason it wants—or for no reason at all.

2 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).
3 U.S. Const. art. I, § 9, cl. 2. The text of the Clause does not specify which branch or branches holds the power to suspend the writ. The Supreme Court has generally reasoned that the Clause’s placement in Article I implies that the power rests solely with Congress. See Hamdi v. Rumsfeld, 542 U.S. 507, 537 (2004) (alluding to Congress’s power to suspend the writ); see also Ex Parte Merryman, 17 F. Cas. 144, 148–49 (Taney, Circuit Justice, C.C.D. Md. 1861) (No. 9,487). President Lincoln, however, asserted and maintained the writ as an executive function. Youngstown, 343 U.S. at 637 n.3. For a general discussion of the locus of the authority to suspend the writ, see David L. Shapiro, Habeas Corpus, Suspension, and Detention: Another View, 82 Notre Dame L. Rev. 59, 70–73 (2006).
from any and all meaningful judicial oversight. The potentially dramatic consequences of such a suspension on the protection of civil liberties during times of emergencies are almost unfathomable. For example, during a suspension, there would seem to be absolutely no way, either legally or practically, to stop the President from throwing all Jews, all Irish-Americans, or all Democrats in jail. Because the legal mechanism by which they could challenge the lawfulness of their detentions would have been revoked, there would be no way for these individuals to obtain their release or even challenge the lawfulness of their confinement until the suspension of habeas was lifted.

One might be tempted to dismiss these frightening hypotheticals as highly improbable. After all, the suspension power has been invoked only four times in our nation’s history, and only once on a national scale. But as the attacks of September 11, 2001 so forcefully demonstrated, given the mercurial nature of world conditions the unexpected can quickly become stark reality. The subsequent “war on terror” stirred considerable political interest in the suspension power.

This renewed interest in turn ignited an intense scholarly debate as to whether a suspension of habeas corpus should be construed to authorize executive detentions that would otherwise

---


5 Various sources suggest that the original draft of the Patriot Act included a provision calling for the suspension of habeas corpus. See, e.g., Jonathan Alter, Keeping Order in the Courts, Newsweek, Dec. 10, 2001, at 48. See also Tyler, supra note 4, at 603 n.7 (collecting citations to additional sources).
be deemed unlawful or unconstitutional. As scholars involved in this debate have all correctly recognized, it is unwise to view the Suspension Clause as a constitutional dinosaur whose predicate conditions of a finding of a “[r]ebellion or [i]nvasion” render it irrelevant in the context of modern warfare. Rather, a panicked or politically ambitious president, in the aftermath of a national crisis, might well be able to convince Congress that an attack on the United States satisfies the constitutional prerequisites of the Suspension Clause, and that the interests of “public safety” require that he be provided with virtually unlimited authority to combat the crisis at hand. It is for this reason that it is important to establish the boundaries of the suspension power now, before another unexpected crisis strikes, so that political leaders will be prevented from using it as a blunt weapon against unpopular minority groups, political opponents, or our constitutional system itself.

On the level of constitutional theory, neither court nor scholar has ever seriously explored the potential tension between the Suspension Clause and the Fifth Amendment’s guarantee that life, liberty, or property may not be deprived by the federal government without due process of law. Not surprisingly, then, the relationship between the Suspension and Due Process Clauses remains completely unsettled. Two highly respected scholars have argued that the suspension of habeas corpus “shuts off . . . those rights that find

---

4 Compare Shapiro, supra note 3, at 90 (arguing that the “very purpose of the suspension” would be undermined if the executive was deterred from authorizing detentions that might subsequently lead to financial liability or an alleged violation of the presidential oath), and Tyler, supra note 4, at 682 (arguing that a valid suspension “does in fact expand the scope of executive power to arrest and detain”), with Morrison, supra note 4, at 1541 (arguing that suspension does not affect the legality of the detention or the availability of post-detention remedies).

5 Both history and psychology clearly demonstrate that this is a likely consequence of a national crisis. In his recent historical analysis of American responses to past crises, Geoffrey Stone describes our historical tendency to exercise extreme deference to executive measures purportedly designed to further national security interests when we are in the midst of a national emergency. Geoffrey R. Stone, War and Liberty 167 (2007). He also notes that such measures are almost universally viewed as regrettable and unjustified after the fact. Id.; see also Cass R. Sunstein, Minimalism at War, 2004 Sup. Ct. Rev. 47, 73 (2004) (suggesting that when people are afraid, they are less offended by detentions that involve a politically marginalized group).
protection and meaning in the Great Writ. Another highly respected scholar has argued that a suspension of the writ does not displace individuals’ underlying substantive constitutional rights, but rather shifts the sole responsibility for their enforcement to the executive. All three scholars, however, have missed the mark on this vital constitutional question. They have done so because they either ignore or misunderstand the textually unambiguous and inescapable impact of the Fifth Amendment’s Due Process Clause on the federal government’s ability to invoke the Suspension Clause. The thesis of this Article, simply put, is that because the Due Process and Suspension Clauses are irreconcilable, and because the due process dictate is embodied in an amendment that supersedes anything in the body of the text with which it is inherently inconsistent, it is the due process right that must prevail.

It is true, of course, that the terms of the Due Process Clause do not expressly and affirmatively invalidate the Suspension Clause. In this sense, it might be argued, its preempting impact is by no means as clear as, say, the Twenty-First Amendment’s preempting impact on the Eighteenth. But it is surely true that two provisions may be wholly irreconcilable without one expressly repealing the other—a precept long understood by the Supreme Court in judging the impact of a constitutional amendment on preexisting constitutional provisions.

In the case of the Due Process and Suspension Clauses, the first point to note is the unambiguously unrestricted reach of the constitutional right guaranteed by the former provision. By its terms, the Due Process Clause is unlimited in its applicability: it applies in all contexts, without exception. While the provision most assuredly fails to elaborate on how exactly a court is to determine what process is “due” when the federal government threatens life, liberty, or property, it is unambiguous that, whatever that protection is, it is triggered in every such instance. Courts and scholars have long de-

---

1 Tyler, supra note 4, at 609; see also Shapiro, supra note 3, at 88 (describing the due process right to challenge executive detention and the remedy of habeas corpus as, in a practical sense, “not just interdependent but inseparable”).
2 See Morrison, supra note 4, at 1609 (arguing that “the executive can (and should) implement core facets of due process even during a period of suspension”).
3 See infra Part II.
4 See U.S. Const. amend. XXI (repealing U.S. Const. amend. XVIII).
5 See infra Section II.A.
bated the frontiers of the concepts of “liberty”\(^{13}\) and “property,”\(^{14}\) as well as the nature of the procedures required when those interests are threatened.\(^{15}\) But what cannot be disputed is that the summary imprisonment of an individual by the executive authority without any hearing before a fair and neutral adjudicator fails to satisfy the constitutional dictate of due process.\(^{16}\) Any other conclusion would render the due process guarantee a cynical, Orwellian sham. Yet it is equally clear that once the authority of the Suspension Clause has been invoked, this very conduct by the executive necessarily becomes insulated from any constitutional scrutiny or remedy. Thus, solely because of the exercise of federal authority under the Suspension Clause, the detained individual has inescapably been denied the due process that the Fifth Amendment expressly provides to him.

While we believe that this argument, grounded in indisputable precepts of textual interpretation, should be deemed dispositive, we also find strong support for our position in core notions of American political theory. We believe that foundational notions of American constitutionalism provide a strong normative basis for our thesis. Absent the availability of the writ of habeas corpus (or its procedural equivalent), there would be no means of preventing the majoritarian branches of the federal government from assuming the equivalent of dictatorial power. Were the independent judiciary to be unavailable as a check, there is nothing to prevent the executive—authorized by a sympathetic or intimidated legislative branch—from arresting whomever it wants, for whatever reason it wants, for however long it wants. To permit the executive branch to exercise such unrestrained coercive power is consistent with neither due process nor the foundational precepts of American constitutional democracy.

This Article proceeds in four parts. Initially, it briefly surveys the historical origins of the writ of habeas corpus and the Suspension Clause. In the next part, it establishes the inescapable conflict between the Suspension and Due Process Clauses and explains why the latter provision must be found to supersede the earlier one, in-

\(^{13}\) U.S. Const. amend. V.

\(^{14}\) Id.

\(^{15}\) See infra Part III.

\(^{16}\) See infra Section III.A.
so far as the two conflict. Once it is established that the Due Process Clause trumps the Suspension Clause, it is of course necessary to determine exactly what sort of limits the dictates of due process impose in such a context. Part III therefore considers how the Due Process Clause might be interpreted in various permutations of attempted suspension. In Part IV, we address current scholarly counterarguments, demonstrating their inadequacy due to their failure to come to terms with both the textual and political difficulties necessarily brought on by rejection of our approach.

I. THE WRIT OF HABEAS CORPUS AND THE SUSPENSION CLAUSE: A BRIEF HISTORICAL REVIEW

Within the American legal system, the writ of habeas corpus now functions as the primary mechanism for the enforcement of the Fifth Amendment due process guarantee against extra-judicial coercive action by the executive. In this Part we survey the historical origins of the writ of habeas corpus, beginning with its foundational role in the development of England’s constitutional monarchy. We then describe the events and debates that shaped the Framers’ decision to protect the writ in the Constitution and their debate over whether to recognize a power to suspend the writ.

A. British Origins of the Writ of Habeas Corpus

Habeas corpus emerged as the English writ of liberty during the constitutional struggles of the seventeenth century, when it was used as a remedy against political arrest by King Charles and his privy council. The writ authorized a court to require the King’s ministers to produce a person in their custody and explain the basis for the detention so that the court could determine whether the imprisonment was lawful. Sir Edward Coke famously described habeas corpus as inextricably linked with the legem terrae provision

---


of the Magna Carta, which he translated as “no man [shall] be
taken . . . without [due] proces[s] of the Law.”
Parliament codified the common law procedures in the Habeas Corpus Act of 1679, which ensured that the writ itself would be continually available, that relief sought under it would not be obstructed or delayed, and that the King could not recommit a person released on habeas corpus for the same cause or any pretended variations thereof.

Despite the “spiritual” importance of both the Magna Carta and the writ of habeas corpus to the foundations of the unwritten British constitution, the documents’ mandates (as well as the rest of that constitution) were never deemed legally binding on Parliament.

Rather, in accordance with the English system of legislative supremacy, Parliament had the power to suspend the protections of the writ at will. Any constraints on its power to do so were based on custom and tradition, rather than on law.

Parliament suspended the writ on numerous occasions during the late seventeenth and early eighteenth centuries, usually with respect to a limited class of persons who were suspected of treason. During a

---

19 Sir Edward Coke, The Second Part of the Institutes of the Laws of England 50 (5th ed. 1671). Modern scholars have noted that Coke dramatically overstated, if not invented, the historical link between the writ and the Magna Carta. See, e.g., Meador, supra note 1, at 21–24. Nevertheless, William Blackstone later invoked Coke’s ideas in his own Commentaries and described the writ of habeas corpus as the “great bulwark” of the British Constitution. 4 William Blackstone, Commentaries *438. This statement by Blackstone was later quoted by Alexander Hamilton in The Federalist No. 84, at 512 (Clinton Rossiter ed., 1961).

20 31 Car. 2, c.2 (1679) (Eng).

21 See Meador, supra note 1, at 4; Walker, supra note 18, at 107 (noting that while “England had supremely important legal documents” like the Magna Carta and the Habeas Corpus Act, its system did not “point to a single, supreme originating instrument” that could impose constraints on Parliament).


23 Shapiro, supra note 3, at 83.

24 Parliament passed suspension legislation in 1688, 1696, 1714, 1722, 1744, and 1777, the last of which was renewed annually through the end of the American Revolution. Collings, supra note 22, at 339; Amanda L. Tyler, Is Suspension a Political Question?, 59 Stan. L. Rev. 333, 344 (2006).

25 The suspensions during the American Revolution, for example, only applied to persons detained on charges of high treason, suspicion of high treason, or piracy. See 17 Geo. 3, c. 9 (1777) (Eng.); see also Gerald L. Neuman, The Habeas Corpus Suspension Clause After INS v. St. Cyr, 33 Colum. Hum. Rts. L. Rev. 555, 563–64 (2002) (emphasizing that the characteristic form of parliamentary suspension was not a total suspension, but rather suspension for a designated category of detentions).
suspension, courts were still able to issue the writ of habeas corpus to determine whether the imprisoned individual fell within the bounds of the legislation.\footnote{Tor Ekeland, Note, Suspending Habeas Corpus: Article I, Section 9, Clause 2, of the United States Constitution and the War on Terror, 74 Fordham L. Rev. 1475, 1482 (2005).} If the court determined that the petitioner had been detained pursuant to the terms of the suspension, however, it possessed no further authority to remedy the detention while the suspension legislation remained in force.\footnote{Professor Shapiro suggests that habeas corpus was, in fact, the only remedy for detention, as his research uncovered no cases in which a plaintiff used a different procedural vehicle to obtain his release. See Shapiro, supra note 3, at 84.}

\subsection*{B. Incorporation of the Great Writ into the American Legal System}

Like the British, the Framers of the American Constitution recognized that the writ of habeas corpus represented an essential check on executive power. The historical role of habeas corpus within the English system, as well as the important scholarly works emphasizing its role in the preservation of the rule of law, undoubtedly influenced the Framers’ decision to guarantee the writ in the body of the new federal Constitution.\footnote{In The Federalist No. 84, for example, Alexander Hamilton invoked Blackstone to support his argument that the availability of the writ of habeas corpus rendered an enumerated Bill of Rights unnecessary: “[A]s a remedy for this fatal evil [of arbitrary imprisonment, Blackstone] is everywhere peculiarly emphatical in his encomiums on the habeas corpus act, which in one place he calls ‘the BULWARK of the British Constitution.’” The Federalist No. 84 (Alexander Hamilton), supra note 19, at 512. Blackstone’s Commentaries were immensely influential on American law during the nation’s formative years. Within a few years of its original publication, a thousand copies of the Commentaries had been shipped across the Atlantic. Americans purchased 1400 advance copies of the first domestic edition, which was published in 1771–1772. Meador, supra note 1, at 28. Likewise, virtually anyone who studied law during the period had read Coke’s Institutes. Id. at 23. John Rutledge noted that the Institutes “seem to be almost the foundation of our law,” while John Adams was told as a beginning law student that he “must conquer the Institutes.” Id.} The common-law writ of habeas corpus had also been employed by courts in all thirteen colonies prior to the American Revolution.\footnote{William F. Duker, A Constitutional History of Habeas Corpus 115 (1980).} Moreover, five fledgling states had incorporated habeas corpus guarantees into their state constitutions around the time the nation won its independence.\footnote{The North Carolina, Georgia, Massachusetts, New Hampshire, and Pennsylvania constitutions contained provisions explicitly guaranteeing the privilege of habeas cor-
model for the clause included in the first draft of the federal Constitution,\textsuperscript{31} provided:

The privilege and benefit of the writ of habeas corpus shall be enjoyed in this commonwealth in the most free, easy, cheap, expeditious and ample manner; and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time not exceeding twelve months.\textsuperscript{32}

This Clause, enacted in 1780, essentially codified English practice by providing for the availability of the writ, subject to a narrow exception for emergencies, which delegated the decision to suspend the writ to the legislature and limited the duration of the suspension.\textsuperscript{33}

The Framers’ decision to protect the writ of habeas corpus in the new Constitution was relatively uncontroversial. Participants in the Convention debates seemed unanimous in their belief that the maintenance of a strong writ of habeas corpus was essential to the preservation of individual liberty.\textsuperscript{34} Indeed, the fact that the writ was one of the very few individual rights that the Framers chose to mention explicitly in the original Constitution underscores its foundational role within the new constitutional democracy.\textsuperscript{35}

The delegates at the Philadelphia Convention disagreed, however, over whether and under what circumstances the Constitution should recognize a federal power to suspend the writ.\textsuperscript{36} Parliament\textsuperscript{37}...
and at least five colonies\textsuperscript{38} had suspended the writ during the
American Revolution, so it seems likely that a number of the
Framers had experienced the benefits and drawbacks of a suspen-
sion. On one hand, it was thought that a suspension of habeas cor-
pus allowed an executive to react quickly and decisively in re-
sponding to a crisis. Massachusetts, for example, suspended the
writ in response to Shays’s Rebellion, authorizing the governor to
“command, and cause to be apprehended, and committed . . . any
person or persons whatsoever, whom the Governour . . . shall deem
the safety of the Commonwealth requires should be restrained of
their personal liberty . . . .”\textsuperscript{39} The act allowed the governor immedi-
ately to order the arrest of seve ral individuals whom he suspected
of inciting the riots.\textsuperscript{40} On the other hand, removal of the traditional
judicial remedy of release from unlawful executive detention nec-
essarily imperils individual liberty. In fact, the response to Shays’s
Rebellion also reveals the darker element of the suspension power
because the suspension enabled the governor to detain suspects
“incommunicado” for over seven months after their initial arrests
without affording them any opportunity to rebut the charges.\textsuperscript{41} It is
thus unsurprising that a proposal to recognize a suspension power
in the federal Constitution engendered an intense, albeit brief, de-
bate among the delegates to the Constitutional Convention.

The initial draft of the Suspension Clause, proposed by Charles
Pinckney, granted to the legislative branch the exclusive power to
suspend the writ but limited the duration of any suspension to no
more than twelve months.\textsuperscript{42} According to James Madison’s notes

\textsuperscript{38} These acts generally empowered the governor and his officials to arrest and detain
suspected Crown sympathizers. See Tyler, supra note 4, at 622–28 (discussing pre-
Convention American suspensions).

\textsuperscript{39} Commonwealth of Massachusetts, An Act for Suspending the Privilege of the
Writ of Habeas Corpus, ch. X (1786), in Acts and Laws Passed by the General Court
of Massachusetts 510, 510 (Boston, Course & Adams 1786).

\textsuperscript{40} Tyler, supra note 4, at 626.

\textsuperscript{41} See Leonard L. Richards, Shays’s Rebellion: The American Revolution’s Final
Battle 19–21 (2002).

\textsuperscript{42} The original text of the Suspension Clause provided that “[t]he privileges and
benefit of the writ of habeas corpus shall be enjoyed in this government in the most
expeditious and ample manner: and shall not be suspended by the Legislature except
upon the most urgent and pressing occasions, and for a limited time not exceeding [X]
months.” 2 The Records of the Federal Convention of 1787, at 334 (Max Farrand ed.,
rev. ed. 1966) [hereinafter Farrand’s Records]. Pinckney offered this proposal in con-
from the Philadelphia Convention, John Rutledge argued that habeas corpus should be declared inviolable because he could not conceive of any circumstance that would justify a nationwide suspension. Additionally, James Wilson contended that a suspension power was not necessary to provide executive authority in times of crisis because the judiciary possessed the power to respond flexibly to an emergency while still providing individual due process. He noted that judges could simply retain their customary discretion as to whether to retain or grant bail in “important cases.” In his protest against inclusion of a suspension power, Wilson seemed to recognize the need to provide an individual with at least some opportunity to contest the underlying basis for his detention, even if an emergency rendered a full trial temporarily impracticable. A judge, he argued, could assess the grounds for the detention within the context of a preliminary, but still adversarial, bail hearing. Despite these protests, however, a vote was called to cut off further debate, and the delegates passed the clause.

Other opponents of the Suspension Clause feared that the federal government was likely to use this power to oppress states and state officials who disagreed with its policies. During the ratification debates, for example, Luther Martin argued that:

[I]f we gave this power to the general government, it would be an engine of oppression in its hands, since whenever a State should oppose its views, however arbitrary and unconstitutional, and refuse submission to them, the general government may declare it to be an act of rebellion, and suspending the habeas corpus act, may seize upon the persons of those advocates of freedom . . .

junction with an amendment requiring a trial by jury, another highly esteemed English tradition already used by several states. Duker, supra note 29, at 128.

2 Farrand's Records, supra note 42, at 438. The states all recognized a power to suspend, either in their own constitutions or under the common law. Rutledge seemed to be suggesting that if an emergency arose, the states could individually react to it by suspending the writ within their own territories, much as the colonies did during the American Revolution. Duker, supra note 29, at 130.

44 2 Farrand's Records, supra note 42, at 438.

45 Duker, supra note 29, at 131.

46 Id.
and may imprison them during its pleasure in the remotest part of the union . . . .

Thomas Jefferson agreed and privately urged Madison to remove the Suspension Clause from the Constitution and replace it with a clause rendering the writ of habeas corpus inviolable. Martin’s criticism reflected the pervasive fear of tyranny that underscored the Framers’ decision to build the Constitution around an elaborate system of prophylactic checks and balances. A federal power to suspend habeas corpus would concentrate power in the hands of the federal government by enabling Congress and the President to

---

47 15 The Documentary History of the Ratification of the Constitution 433–34 (John P. Kaminski & Gaspare J. Saladino eds., 1984) (original italics removed). One scholar notes that more contemporaries of the constitutional debates might have shared the same fears but were likely mollified by their assumption that state courts could still issue writs of habeas corpus to release those in federal custody. Duker, supra note 29, at 126–35. This practice was not prohibited until Abelman v. Booth, 62 U.S. (21 How.) 506, 523 (1858).

48 See Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 12 The Papers of Thomas Jefferson 438, 440 (Julian P. Boyd ed., 1955) (expressing opposition to the omission of a bill of rights “providing clearly and without the aid of sophisms for . . . the eternal and unremitting force of the habeas corpus laws”); Letter from Thomas Jefferson to James Madison (July 31, 1788), in 13 The Papers of Thomas Jefferson 440, 442 (Julian P. Boyd ed., 1956) (arguing that a suspension power was unnecessary and undesirable because “for the few cases wherein the suspension of the hab. corp. has done real good, that operation is now become habitual, and the minds of the nation almost prepared to live under it’s [sic] constant suspension”); see also Letter from Thomas Jefferson to Alexander Donald (Feb. 7, 1788), in 8 The Documentary History of the Ratification of the Constitution 353, 353–54 (John P. Kaminski & Gaspare J. Saladino eds., 1988) (stating that Jefferson hoped that the Constitution would be amended with a Bill of Rights containing a provision that barred any suspension of habeas corpus). Ironically, Jefferson himself later requested that Congress suspend the writ after a federal habeas court released one of the Burr conspirators. After a closed-door session, the Senate quickly passed a three-month suspension applicable to “‘any person or persons, charged on oath with treason, misprision of treason, or other high crime or misdemeanor . . . ’ who had been or ‘shall be arrested or imprisoned, by virtue of any warrant or authority of the President of the United States’ or other executive official.” Tyler, supra note 4, at 630–31. The bill died in the House of Representatives, in part because some members of that body concluded that the conspiracy did not constitute a “Rebellion or Invasion” sufficient to trigger the Suspension Clause. Id. at 631. Perhaps Jefferson’s ideological turnabout on the wisdom of a suspension of habeas corpus is best viewed as an illustration of Madison’s argument about the encroaching nature of power and the need for multiple interbranch checks to allow “[a]mbition . . . to counteract ambition.” See The Federalist No. 51 (James Madison), supra note 19, at 322.

49 See The Federalist No. 47 (James Madison), supra note 19, at 301 (defining “tyranny” as the concentration of power within one person or branch).
suspend the writ under the pretext of an “emergency” in order to imprison their political opponents. Martin also wisely, if unintentionally, highlighted a potentially fatal flaw in the proposed constitution’s ability to protect individual liberty: its lack of a structural safeguard to ensure that any suspension satisfied the constitutional prerequisites.\(^50\)

Despite these protestations at both the Convention and state ratification levels, the Framers ultimately decided to append the Suspension Clause to the habeas guarantee in the body of the Constitution.\(^51\) The Convention eventually adopted Gouverneur Morris’s proposal, which narrowed the criteria for suspension to the two-prong test of the existence of a “Rebellion or invasion” and a finding that “the public safety may require it.”\(^52\) During the evolution of the proposal, Pinckney’s express guarantee of the privilege of the writ, as well as the proposed restriction on the duration of the suspension, were removed.\(^53\) The Suspension Clause was originally placed in the judiciary article, after a provision guaranteeing a jury trial in criminal cases.\(^54\) The Committee on Style later moved it to Article I, Section 9, which contains the limitations on the powers of Congress.\(^55\) The proposed constitution of the new federal government recognized the foundational nature of the right to be free from arbitrary imprisonment by ensuring the availability of the writ of habeas corpus. The Clause also imposed restrictions on the legislative power to suspend the writ, which represented a marked de-

---

\(^{50}\) At the time of the ratification debates, the role of the courts within the new federal system had not been fully articulated. The available records of the Convention debates contain little reference to a discussion of judicial review in general, so the Framers likely did not ascertain the possibility of providing for judicial review of a suspension. The institution of judicial review would not officially emerge for another sixteen years, when Chief Justice Marshall issued his seminal opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

\(^{51}\) Three state delegations dissented from permitting Congress ever to suspend the writ. Neuman, supra note 25, at 566.

\(^{52}\) See 2 Farrand’s Records, supra note 42, at 438 (citing the original proposal, the text of which was eventually ratified in Article I, Section 9 of the U.S. Constitution). Neuman notes that the reasons for the disappearance of Pinckney’s proposal to guarantee the writ “in the most expeditious and ample manner” are uncertain, but he suggests that the wording might have been “too indeterminate to be effective and too difficult to make precise.” Neuman, supra note 25, at 566.

\(^{53}\) Id. at 566–67.

\(^{54}\) 2 Farrand’s Records, supra note 42, at 576.

\(^{55}\) It also changed the word “where” to “when.” Id. at 596.
parture from the English practice. In the next Part, however, we will demonstrate that the core due process requirements of the Fifth Amendment irreconcilably conflict with the outer bounds of the suspension power. As a result, we will argue, the Due Process Clause supersedes the Suspension Clause.

II. THE IMPACT OF THE DUE PROCESS CLAUSE ON THE SUSPENSION CLAUSE

A. The Implications of Textual Interpretation

While the Suspension Clause’s history is instructive, it plays no direct role in support of our argument that the Suspension Clause is no longer valid. Our argument turns not on an interpretation of the Suspension Clause itself, but rather on construction of the text and values of the Fifth Amendment’s Due Process Clause. In this discussion we fashion an argument grounded in textual interpretation, while in the discussion that follows we explore the normative implications of the Due Process Clause for the foundations of American political and constitutional theory.

Our textual argument proceeds in three steps. First, the Supreme Court’s due process jurisprudence, however confusing its contours might be at the margins, has always embraced two core principles which have served as a baseline for the constitutional guarantee: that freedom from coercive government custody is a protected “liberty” interest, and that “due process of law” requires, at minimum, provision of notice and hearing before a neutral adjudicator to determine the lawfulness of the detention. Second, exercise of the suspension power necessarily enables the executive to behave in a manner inherently inconsistent with these fundamental dictates of due process. Finally, in light of this inherent inconsistency, the Due Process Clause must be deemed to supersede any conflicting exercise of the suspension power, by virtue of its location in an amendment to the body of the Constitution.
I. Constitutional Baseline for Procedural Due Process

Scholars have often lamented that procedural due process doctrine is confusing, \footnote{Richard H. Fallon, Jr., Some Confusions About Due Process, Judicial Review, and Constitutional Remedies, 93 Colum. L. Rev. 309, 309 (1993) (“Due process doctrine subsists in confusion.”).} unpredictable, \footnote{Cynthia R. Farina, Conceiving Due Process, 3 Yale J.L. & Feminism 189, 189 (1991) (arguing that beneath the “smooth, plausible skin of the doctrine . . . lies turmoil, contradiction, and . . . destructiveness”).} and even incoherent. \footnote{Edward L. Rubin, Due Process and the Administrative State, 72 Cal. L. Rev. 1044, 1046 (1984) (arguing that the Supreme Court has “clearly fail[ed] to . . . provide a coherent, realistic doctrine for applying our notion of procedural due process to the recently developed features of the administrative state”).} This frustration, however, applies solely to controversial issues on the outer frontiers of due process—for example, when the Court must determine whether a statutorily created entitlement constitutes a “property” interest protected by the Clause \footnote{See, e.g., Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 578 (1972) (holding that an assistant professor with no tenure rights had no property interest in continued employment at a university); Perry v. Sindermann, 408 U.S. 593, 601–03 (1972) (holding that an implied tenure system does create a constitutionally protected property interest in ongoing employment).} or whether “due process of law” mandates that an individual receive a specific type of procedure before being deprived of a constitutionally protected interest. \footnote{See, e.g., Goldberg v. Kelly, 397 U.S. 254, 260 (1970) (defining the constitutional issue to be decided as “whether the Due Process Clause requires that the recipient [of welfare benefits] be afforded an evidentiary hearing before the termination of benefits”).} Despite this uncertainty at the margins, however, the Supreme Court has clearly and consistently articulated two fundamental baseline tenets of procedural due process: (1) that an individual’s interest in avoiding imprisonment by the government is a fundamental “liberty” interest that triggers the protections of the Clause, \footnote{See infra notes 69–71 and accompanying text.} and (2) that “due process of law” requires, at a minimum, that an individual receive notice and a hearing before a neutral adjudicator to determine the lawfulness of the individual’s detention. \footnote{See infra notes 78–84 and accompanying text.} Put bluntly, it is indisputable that the executive violates the Fifth Amendment guarantee that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of...
law,” when it locks someone up and throws away the key, without providing her with any fair and orderly process by which to challenge her detention before a neutral adjudicator.

Before we delve into the particulars of due process doctrine, we must first articulate the provision’s core operational principle: that a deprivation of “liberty” entitles a person to “due process of law.” This statement is so simple and indisputable that the Court’s due process analyses often seem to take it for granted. Nevertheless, it requires elaboration in two respects. First, this constitutional directive necessarily bars anyone charged with the power of constitutional interpretation from concluding that what is acknowledged to be a constitutionally protected liberty interest is not entitled to “due process of law.” Second, it makes clear that temporary, as well as permanent, deprivations of recognized interests trigger the protections of the Clause. The Fourteenth Amendment, the Court has held, “draws no bright lines around three-day, 10-day or 50-day deprivations . . . .” Thus, it is no answer to an individual imprisoned unlawfully for one week without a hearing that he regained her freedom at the end of that week. The Fifth Amendment prohibits the deprivation of liberty without due process and nowhere

---

63 U.S. Const. amend. V.
64 The Court most clearly articulated this operational principle in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985), in which it stated that “the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.” See also Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (proceeding directly from the recognition of a “property” interest to a determination of what procedures are required); Bd. of Regents, 408 U.S. at 569–70 (“When protected interests are implicated, the right to some kind of prior hearing is paramount.”); Bell v. Burson, 402 U.S. 535, 542 (1971) (“While ‘[m]any controversies have raged about . . . the Due Process Clause,’ . . . it is fundamental that . . . when a State seeks to terminate [a protected] interest . . . , it must afford ‘notice and opportunity for hearing appropriate to the nature of the case’ before the termination becomes effective.”) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)).
65 See, e.g., Zinermon v. Burch, 494 U.S. 113, 125 (1990) (“In procedural due process claims, the deprivation by state action of a constitutionally protected interest in ‘life, liberty, or property’ is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law.”).
66 See, e.g., Connecticut v. Doehr, 501 U.S. 1, 12 (1991) (concluding that a temporary lien on real property merits due process protection); Fusari v. Steinberg, 419 U.S. 379, 387–89 (1975) (noting that the length of the deprivation is relevant in the determination of how much process is “due” in a given case).
refers to satisfaction of a minimum period of restraint. To be sure, neither “life, liberty, or property” nor “due process of law” are self-defining terms. But it is important to make clear at the outset that establishing a deprivation of the former necessarily triggers the procedural protections of the latter.

While it is true that establishing this fact does not automatically tell us what “due process” necessarily entails, it is not all that difficult to discern a consensus as to the procedural core of the concept. The Supreme Court and scholars have always agreed that an individual’s interest in avoiding wrongful confinement is a “liberty” interest protected by the Clause. The Court has described freedom from executive detention as the “most elemental of liberty interests,” emphasizing that it has “always been careful not to ‘minimize the importance and fundamental nature’ of the individual’s right to liberty . . . .” Scholars have described this interest as so ingrained in our legal tradition that it creates a “rebuttable presumption” that executive detention is impermissible. Even proponents of a rigid historical conception of “liberty” agree that an individual’s interest in freedom from physical constraint is protected by the Clause. The Supreme Court has previously granted constitutional

---

68 See Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.”); Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”); United States v. Salerno, 481 U.S. 739, 755 (1987) (“In our society liberty is the norm, and detention . . . without trial is a carefully limited exception.”); Jones v. United States, 463 U.S. 354, 361 (1983) (“It is clear that ‘commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.’”); Parham v. J.R., 442 U.S. 584, 600 (1979) (finding a “substantial liberty interest in not being confined unnecessarily”); O’Connor v. Donaldson, 422 U.S. 563, 576 (1975) (concluding that the state’s confinement of a nondangerous individual violated his “constitutional right to freedom”); see also Heller v. Doe, 509 U.S. 312, 330–31 (1993) (noting the individual’s “liberty interest” in avoiding civil commitment); Fallon, supra note 56, at 370 (remarking that “‘old’ property and traditional liberty interests often receive special solicitude under the Due Process Clause”).


71 See, e.g., Frank H. Easterbrook, Substance and Due Process, 1982 Sup. Ct. Rev. 85, 87–100 (discussing the historical connection between the phrase “due process of law” and the individual’s “liberty” interest in remaining free from imprisonment).
protection to wages,\textsuperscript{72} bank accounts,\textsuperscript{73} welfare benefits,\textsuperscript{74} and even gas stoves purchased through conditional sales contracts.\textsuperscript{75} A fortiori, even relatively limited physical detentions must trigger the Clause’s protections. Thus, requiring some level of “due process” before an individual can be imprisoned by the government should be—and indeed is—an absolutely uncontroversial assertion.

Once it is established that the protections of the Due Process Clause are triggered by governmental detention, it is necessary to determine what procedures are dictated by that concept. Currently, the Court determines the type and amount of process due in a given case by applying the three-part balancing test established in \textit{Mathews v. Eldridge}.	extsuperscript{76} This test does not, a priori, mandate any specific procedures. Nonetheless, the Court has established three “essential principle[s]” of due process: “notice and opportunity for hearing appropriate to the nature of the case,”\textsuperscript{77} which must be conducted by a neutral adjudicator.\textsuperscript{78} In the Court’s words, “For

\textsuperscript{75} Fuentes v. Shevin, 407 U.S. 67, 70, 84, 89–90 (1972).
\textsuperscript{76} 424 U.S. 319, 335 (1976). See infra Part III for our discussion of how a court might weigh these factors in the context of various permutations of the suspension power.
\textsuperscript{77} Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)); see also \textit{Mathews}, 424 U.S. at 333 (“This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.”); \textit{Fuentes}, 407 U.S. at 80; Armstrong v. Manzo, 380 U.S. 545, 550 (1965) (holding that lack of notice “violated the most rudimentary demands of due process of law”); Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863); Morrison, supra note 4, at 1611 (describing the three core requirements of notice, hearing, and a neutral adjudicator as a “reasonably concrete operative proposition”); Rubin, supra note 58, at 1173 (arguing that a hearing is a necessary component of due process of law and that it should be provided before a deprivation of liberty except “when the purpose of institutionalizing the individual was to remove an immediate, demonstrable danger. . . . The government would be obligated, however, to hold a subsequent hearing as soon as possible after the institutionalization.”).
\textsuperscript{78} See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004) (holding that an individual detained by the government was entitled to a neutral adjudicator “as a matter of due process of law”); Ward v. Vill. of Monroeville, 409 U.S. 57, 61–62 (1972) (concluding that due process requires “a neutral and detached judge in the first instance”); Bell v. Burson, 402 U.S. 535, 542 (1971) (“While [m]any controversies have raged about . . . the Due Process Clause,’ . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate [a protected] interest . . . , it must afford ‘notice and opportunity for hearing ap-
more than a century the central meaning of procedural due process has been clear: “Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.” In order to give these rights meaning, “[o]ne is also entitled as a matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true.” While exigent circumstances might require the court to forego some other procedures, these three core elements may not be displaced. To be sure, the form and timing of the required notice and hearing will vary on a case-by-case basis, and we devote the following Part to a discussion of how these terms should be defined in the context of an attempted suspension of habeas corpus. For present purposes, we need establish merely that the Court has consistently held that aggrieved individuals must receive some meaningful opportunity to challenge the deprivation of a constitutionally protected life, liberty, or property interest.

---

79 Fuentes, 407 U.S. at 80 (quoting Baldwin, 68 U.S. at 233).
81 Hamdi, 542 U.S. at 533 (“At the same time, the exigencies of the circumstances may demand that, aside from these core elements [notice, hearing, and neutral adjudicator], enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”) (emphasis added).
82 See infra Part III.
83 Compare, e.g., Goldberg v. Kelly, 397 U.S. 254, 266–68 (1970) (prescribing a full hearing, which included the opportunity to present and cross-examine witnesses, prior to the termination of welfare benefits), with Mathews v. Eldridge, 424 U.S. 319, 340 (1976) (holding that an oral evidentiary hearing was not required prior to discontinuation of social security disability benefits). A reviewing court makes this determination by applying a three-part balancing framework in which it weighs the private interest at stake against the government’s interest in denying the procedure and the effect of
2. Implications of the Exercise of the Suspension Power for Due Process

As we did in our discussion of the baseline of procedural due process, we must begin our analysis of the operation of the Suspension Clause with a few basic statements about how exercise of the suspension power would function in practice. First, a suspension of habeas corpus necessarily revokes the authority of the judiciary to order the release of any individual detained by the executive pursuant to the suspension. In other words, suspension of habeas corpus effectively operates as a bar to the detainees’ ability to obtain their release from government custody. Second, the removal of the remedy of habeas corpus precludes the judiciary from conducting a hearing to analyze the lawfulness of the detention. Several prominent scholars readily acknowledge that a suspension of habeas corpus “shut[s] off” an individual’s due process rights. Yet absent an individual right to such a hearing, one cannot be assured that an imprisoned individual will be afforded due process during a suspension.

the additional procedures on reducing the likelihood of wrongful deprivations. We speculate about the appropriate procedures for a hearing conducted during a suspension in Part III.

See Hamdi, 542 U.S. at 563–64 (Scalia, J., dissenting); Morrison, supra note 4, at 1577 (acknowledging that suspension “does remove all means of obtaining contemporaneous relief from the detention itself—that is, discharge”); Shapiro, supra note 3, at 80 (“No one would doubt that the effect of the suspension is, at a minimum, to require dismissal of a habeas petition if the return establishes that the particular custody is within the scope of the statute.”); Tyler, supra note 4, at 609 (arguing that the “purpose and ‘immediate effect of a suspension is the facilitation of detaining individuals during times of crisis,’” and that allowing judicial remedies would “undercut ‘the underlying premise of the legislative decision’ to suspend”).

See Hamdi, 542 U.S. at 563–64 (Scalia, J., dissenting) (“When the writ is suspended, the Government is entirely free from judicial oversight.”); Morrison, supra note 4, at 1578–79; Tyler, supra note 24, at 386.

Tyler, supra note 24, at 386–87; see also Shapiro, supra note 3, at 86–87 (“[I]t seems more than likely that contemporary thinking [at the time the Suspension Clause was adopted] tended to equate the right to be free from unlawful detention with the role of habeas corpus in guaranteeing that right.”).

Professor Morrison argues that during a suspension, responsibility for enforcing individual due process rights falls to the executive branch. See Morrison, supra note 4, at 1602–15 (describing executive branch implementation of the Due Process Clause during a suspension). Absent supervision from a coordinate branch, however, there is no guarantee that the executive will make a good-faith effort to provide detainees with constitutionally adequate procedure. While the executive branch might, as Mor-
It is true that, within our modern legal system, the writ of habeas corpus is not the only procedural vehicle through which a person imprisoned by the government is able to challenge the merits of her detention before a court. As Professor Morrison has pointed out, a prisoner detained pursuant to a valid suspension could theoretically file suit in an Article III court under one of any number of writs, including a writ of injunction or mandamus. If a court were to provide a detainee with a hearing under one of these writs, and were deemed to possess the power to order the detainee’s release if convinced that the detention was unlawful, then our argument would end here because the requirements of due process of law would then be satisfied. But under such an approach, the impact of the exercise of the suspension power would, as a practical matter, be meaningless. Thus, it seems more likely that a judge would view the suit as an “attempted end-run” around the suspension of habeas and would likely dismiss it out of hand.

If one were to consider the potential impact of a suspension, its potential irreconcilability with even the most basic notion of due process becomes readily apparent. Imagine, for example, that a large terrorist cell with the avowed goal of overthrowing the United States government launches a coordinated attack on multiple American cities. To resist this “invasion,” Congress authorizes a nationwide suspension of the writ of habeas corpus for any individual who, in the view of the executive, has participated in the attacks, is suspected of participating in the attacks, or has obstructed the government’s investigation of the attacks. The minority political party, skeptical of this drastic measure, holds protest rallies on Capitol Hill and urges local officials to refrain from enforcing the law. In response, the President arrests these lawmakers and pro-
testers, and orders his subordinates to identify and arrest any other citizens who could conceivably threaten to undermine her policy.  

If a suspension has the effect of removing all judicial avenues by which a detainee could obtain release, as it must to be effective, then it necessarily removes all judicial power to correct any executive abuse of the suspension power. As a result, the President would be free to imprison whomever she wants for the duration of the suspension—and there is no constitutional requirement that a suspension be time-limited. Thus, the President would be free to use that power to ensure that the suspension persists indefinitely. More importantly for present purposes, the President need not (and in our scenario, does not) provide the detainees with any procedural protections whatsoever. There exists absolutely no basis on which to suggest that, once the suspension power has been exercised, a court would possess any legal authority to terminate such a frightening constitutional travesty. There is similarly no reasonable basis on which to argue that such a scenario satisfies even the most minimalist version of due process. Thus, in this situation the exercise of the suspension power would directly conflict with the Fifth Amendment’s guarantee that any individual imprisoned by the government is entitled, at minimum, to notice and a hearing before a neutral adjudicator.

3. The Impact of a Constitutional Amendment on Inconsistent Text in the Body of the Constitution

Our textual argument rests on a fundamental—and, we believe, uncontroversial—rule of textual interpretation that predates the framing of the Constitution and has been repeatedly affirmed by the Supreme Court. Where the reconciliation of two conflicting laws (when those laws possess the same legal status) is legally or physically impossible or even merely “impracticable,” “[t]he rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the

---

91 For a fictional description of a scenario ominously reminiscent of this hypothetical situation, see generally Sinclair Lewis, It Can’t Happen Here (1935).
92 Thus, we do not in any way mean to suggest that a subsequently enacted statute supersedes a prior constitutional provision.
first."\textsuperscript{93} Justice Story, for example, reasoned that when there is a "positive repugnancy" between two laws, "the old law is repealed by implication only pro tanto, to the extent of the repugnancy."\textsuperscript{94} The Court more recently noted this general rule in \textit{Watt v. Alaska}, where it recognized that the "more recent of two irreconcilably conflicting statutes governs."\textsuperscript{95}

This interpretive principle applies with even more force in the context of a constitutional amendment, which, by definition, is designed to make a "formal revision" to the original document.\textsuperscript{96} To determine whether two constitutional provisions irreconcilably conflict, the Supreme Court first ascertains each provision's constitutional function.\textsuperscript{97} While, of course, explicit repeal or indisputable evidence of the drafters' intent to repeal would be probative, it is important to emphasize that neither serves as a necessary condition. Rather, the Court requires only that the principles embodied by the provisions be fundamentally irreconcilable.\textsuperscript{98} If the two constitutional provisions directly conflict, then the directives of the

\textsuperscript{93} The Federalist No. 78 (Alexander Hamilton), supra note 19, at 468 (emphasis added).

\textsuperscript{94} Wood v. United States, 41 U.S. (16 Pet.) 342, 363 (1842).

\textsuperscript{95} 451 U.S. 259, 266 (1981); see Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 565 (1963) (noting that a later statute can implicitly repeal an earlier statute in cases of "manifest inconsistency" or "positive repugnance" between the two laws); Georgia v. Pa. R.R. Co., 324 U.S. 439, 457 (1945) ("Only a clear repugnancy between the old law and the new results in the former giving way and then only \textit{pro tanto} to the extent of the repugnancy.") (citing United States v. Borden Co., 308 U.S. 188, 199 (1939)).

\textsuperscript{96} Black's Law Dictionary 89 (8th ed. 2004).

\textsuperscript{97} For example, before holding that the Eleventh Amendment superseded Congress's power to authorize suits by private parties against unconsenting states, the Court noted that the Eleventh Amendment "stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III." Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 64 (1996).

\textsuperscript{98} In this sense, cases of constitutional implied repeal are fundamentally different from cases of implied statutory repeal. Although the same general rule—that a later provision implicitly repeals an earlier one in cases of "manifest inconsistency"—governs both cases, the Court often declines "to read the statutes as being in irreconcilable conflict without seeking to ascertain the actual intent of Congress." \textit{Watt}, 451 U.S. at 266. By contrast, the Court did not consult any legislative history to determine whether the Eleventh and Fourteenth Amendments conflicted in \textit{Fitzpatrick v. Bitzer}, 427 U.S. 445, 456 (1976), or whether Congress's Article I powers conflicted with the Eleventh Amendment in \textit{Seminole Tribe}, 517 U.S. at 66–67. The difference is most likely attributable to the fact that the designation of a provision as an amendment in itself indicates an intent to modify all earlier provisions.
earlier provision are necessarily limited or revoked by the Amendment.\textsuperscript{99}

A classic illustration of this interpretive trumping process is the Supreme Court’s conclusion in \textit{Seminole Tribe of Florida v. Florida}\textsuperscript{100} that the Eleventh Amendment, which limits the jurisdiction of the federal judiciary to adjudicate claims against states,\textsuperscript{101} supersedes Congress’s power under a synthesis of the Commerce\textsuperscript{102} and Necessary and Proper Clauses\textsuperscript{103} (both contained in the body of the text) to authorize suits against states.\textsuperscript{104} The Court reached this conclusion despite the fact that the Eleventh Amendment includes no express repeal of the otherwise plenary power contained in the original text.

Another example of an amendment superseding a provision in the original constitutional text is the implied repeal of the Fugitive Slave Clause by the Thirteenth Amendment. The Fugitive Slave Clause of Article IV, Section 2 provides that:

\begin{quote}
No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.\textsuperscript{105}
\end{quote}

Note that the text of the Clause does not state that holding a person to service is lawful. Rather, it implicitly sanctioned that conduct by establishing a legal power enabling slave owners to recover slaves who attempted to escape. The Thirteenth Amendment, however, subsequently stated that “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States,\textsuperscript{105}

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Fitzpatrick}, 427 U.S. at 456 (holding that principle of state sovereignty embodied by the Eleventh Amendment is limited by the enforcement provisions of § 5 of the Fourteenth Amendment).
\item 517 U.S. 44 (1996).
\item U.S. Const. amend. XI.
\item U.S. Const. art. I, § 8, cl. 3.
\item U.S. Const. art. I, § 8, cl. 18.
\item U.S. Const. art. IV, § 2, cl. 3.
\end{enumerate}
\end{footnotesize}
or any place subject to their jurisdiction." 106 The Thirteenth Amendment does not expressly repeal Article IV, Section 2. Indeed, the conduct it prohibits—"slavery"—is never even explicitly mentioned in the earlier provision. Yet no one could argue with an assertion that the Thirteenth Amendment repeals the Fugitive Slave Clause. The logic behind the implied constitutional repeal in this context mirrors the approach employed by the Court in Seminole Tribe. Although Article IV, Section 2 does not invoke "slavery" by name, the Clause's tacit recognition of the legality of holding a person to service undoubtedly authorizes it. The Thirteenth Amendment unequivocally prohibits slavery. Because the two provisions are functionally incompatible, and because the Thirteenth Amendment was enacted subsequent to adoption of the original Constitution, the Thirteenth Amendment necessarily trumps the Fugitive Slave Clause.

We point to these examples in order to demonstrate that the logic underlying our argument that the Due Process Clause repeals the Suspension Clause, to the extent they are in conflict, does not depend on the acceptance of some obscure canon of statutory interpretation. Rather, it mirrors the way in which scholars and judges have always resolved cases of irreconcilable conflict between constitutional provisions. If the Eleventh Amendment trumps Article I and the Thirteenth Amendment trumps the Fugitive Slave Clause, then it is also reasonable to conclude that the Due Process Clause of the Fifth Amendment trumps the Suspension Clause of Article I, Section 9, to the extent the two are in incapable conflict.

This is precisely the situation that we have shown to exist with regard to the Suspension and Due Process Clauses. The Suspension Clause establishes a power that authorizes the executive to imprison individuals without providing them any procedural rights, for indefinite periods. The Due Process Clause, however, subsequently imposed an unequivocal limit on the federal government's power to detain individuals summarily by guaranteeing, without exception or limitation, that "no person shall . . . be deprived of life, liberty, or property, without due process of law." 107

106 U.S. Const. amend. XIII.
107 U.S. Const. amend. V.
American Constitutionalism

The dictates of textual interpretation described in the prior discussion, standing alone, provide sufficient support for our contention that the Due Process Clause supersedes the Suspension Clause, to the extent the two are inconsistent (which they most assuredly are). However, there exists an equally powerful alternative foundation for our argument: the foundational precepts of American constitutionalism. By this phrase, we refer to what we believe is a core precept of American political theory: the preeminence of the rule of law through a process of checking of both government’s unlimited power over the individual and the majority’s unlimited power over the minority. While the inherently adversary nature of our form of political interaction is well established in American history, the essential premise of our system is that whoever gains political power may not suppress the minority for no reason other than ideological disagreement or the desire to gain a competitive advantage. It is no secret that the Framers were centrally concerned with the dangers of tyranny. The mere fact that those exercising political power acquired that power lawfully will not necessarily validate the unlawful or tyrannical exercise of that power.

If we were to recognize power in the majoritarian branches of the federal government to suspend the writ of habeas corpus, we would necessarily be accepting the possibility that at some time in the future, a president of the United States will imprison all of her

109 See, e.g., The Federalist No. 41 (James Madison), supra note 19.
political opponents, for no reason other than that they oppose her rule. Similarly, once the Suspension Clause has been invoked, a president could employ this unrestrained power to suppress or arrest unpopular racial or religious minorities. With habeas corpus suspended, the judiciary will be powerless to prevent such blatant violation of fundamental constitutional rights. We must accept that, in the aftermath of a “[r]ebellion or [i]nvasion,” a president would be empowered to employ the suspension power to effectively transform the nation into a dictatorship. And under the inherent logic of the Suspension Clause, we must accept that the judiciary would be absolutely powerless to stop such invidious—and blatantly unconstitutional—action.

We should recall the Supreme Court’s eloquent warning in *Ex parte Milligan*:

This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power,

---

110 Professor Morrison has suggested that substantive constitutional rights continue to exist during a suspension, even though they may not be enforced at the time. He asserts, however, that once the suspension has been revoked the victim may sue for damages in order to vindicate his constitutional rights. See Morrison, supra note 4, at 1588 (“[O]nce the writ is validly suspended, Congress must be permitted to replace the ordinary habeas-based remedial regime with an ex post, compensation-based regime.”). This ex post remedy, however, would hardly deter, prevent, or stop blatant executive violation of constitutional rights and cannot be considered an adequate solution to these severe constitutional problems, particularly since, under Professor Morrison’s theory, Congress could choose to confer immunity on executive officials. See id. at 1595–602 (discussing the factors to be considered in the congressional choice of whether to grant immunity for actions taken during a suspension).
wherever lodged at such a time, was especially hazardous to freemen.\footnote{71 U.S. (4 Wall.) 2, 125 (1866). To be clear, we are of the opinion that Milligan's dictum that this analysis would be inapplicable during a suspension should be rejected because it ignores the very same threat of tyranny which the Court fears. We invoke this opinion, however, for its vivid depiction of the stakes of accepting an unfettered executive power to arrest and detain citizens during a national crisis.}

As the \textit{Milligan} court recognized, the nation cannot stake its constitutional system on a mere hope that future presidents will decline to view national crises as an opportunity to aggrandize their own power. Nor can we ever really know how a president or her advisors will respond to an emergency.

It is important to recognize that once the power of the judiciary to issue the writ of habeas corpus is revoked, all other constitutionally protected liberties are, as a practical matter, revoked as well. For example, were the executive to summarily arrest individuals for exercising their right of free expression, there would be no opportunity for the judiciary to provide meaningful protection of that right. Were the executive to arrest individuals without satisfying the requirements of the Fourth Amendment, the courts would be unable to enforce that constitutional right. Thus, suspension of habeas corpus would have the effect of revoking not only the due process right to a hearing; it also effectively revokes all other constitutional rights that a court would enforce through resort to the procedural vehicle of habeas corpus.

It should also be emphasized that there exists no constitutional requirement that a suspension be time-limited. It lasts, rather, for the period of the rebellion or invasion. Indeed, once the Suspension Clause has been invoked, it is by no means clear that either the judiciary or Congress would have constitutional authority to overrule the executive's continuing decision that the circumstances originally justifying that invocation no longer exist. In any event, such a situation could conceivably continue for extended periods. Thus, had Congress suspended the writ after the attacks of September 11, 2001, the continued presence of terrorist cells within the borders of the United States would likely have justified extension of the suspension indefinitely.
One could reasonably ask why, if the availability of the writ of habeas corpus is so foundational an element of American constitutionalism, the very Framers who drafted a document so sensitive to the dangers of tyranny failed to recognize that fact. To the contrary, it could be argued, they are the ones who inserted the Suspension Clause into the body of the Constitution in the first place. The flaw in such an argument, however, should be obvious: it proves far too much, for much the same argument could be made with regard to the First Amendment right of free expression, the Fifth Amendment right against self-incrimination, and all of the other provisions of the Bill of Rights—none of them was included in the original document. Yet it would be difficult to deny that most or all of these provisions are today widely thought to serve as core elements of American political theory and the modern tradition of American constitutionalism. These facts give rise to an important insight: the core concepts of our political theory were a work in progress at the time of the framing. Thus, the Framers of the Constitution were themselves merely groping towards an understanding of the central premises of American constitutionalism, a concept that has evolved and gained force and refinement over the years.

The other insight to be drawn from the Framers’ failure to include a Bill of Rights in the original document is that core precepts of American constitutionalism derive not only from those who framed the original document, but include those who ratified it, as well. It is those individuals who demanded enactment of a Bill of Rights as a condition for their ratification. Indeed, it is by no means clear that those who drafted the document recognized the full implications of the independence guarantees for federal judges included in Article III for the principle of judicial review. Core precepts of the modern version of American constitutionalism, then, derive in significant part from adoption of the Bill of Rights in general and the Due Process Clause in particular, as well as from

112 See Leonard W. Levy, Bill of Rights, in Essays on the Making of the Constitution 258, 275–78 (Leonard W. Levy ed., 2d ed. 1987) (noting that “the Constitution was ratified only because crucial states, where ratification had been in doubt, were willing to accept the promise of a bill of rights in the form of subsequent amendments to the Constitution”).

113 See U.S. Const. art. III, § 1.
certain provisions of the original document. As Professor Chafee has written, “[w]hen imprisonment is possible without explanation or redress, every form of liberty is impaired.”

C. Anticipating Counterarguments

The arguments in support of our contention that the Due Process Clause supersedes the Suspension Clause are, we believe, compelling. Puzzlingly, however, the argument appears never to have been suggested by scholars, much less judicially accepted. The argument is therefore likely to be counterintuitive to many and to engender (perhaps reflexively) considerable scholarly opposition. It is appropriate, then, for us to do our best to anticipate and respond to the plausible arguments that could be raised against our theory.

We foresee three such arguments: (1) the fact that our argument has never been suggested before demonstrates its inconsistency with the historical understandings of the relationship between the two constitutional provisions; (2) the widely accepted construction of the Suspension Clause as requiring congressional authorization, rather than merely unilateral executive action, provides a sufficient check on the exercise of arbitrary executive power, rendering a further judicial check unnecessary; and (3) in times of national crisis, such as invasion or rebellion, the executive needs unfettered discretion to act in the national interest, and the exercise of judicial review under such circumstances would therefore present a serious threat to national security. None of these arguments, however, justifies rejection of our theory.

1. The Argument From Originality

Normally, the originality of a scholarly argument is thought to reflect positively on the scholars who fashioned it. In the present context, however, our argument’s originality is in many ways more of a detriment than a benefit. If the Suspension Clause is as fundamentally inconsistent with the dictates of due process and core notions of American constitutionalism as we claim it to be, then why has no one ever posited the theory before?

114 Chafee, supra note 30, at 143.
There are two responses to this counterargument. First, the fact that the power under the Suspension Clause has so rarely been exercised—only four times in the nation’s history—has rendered the issue more academic than real. In fact, even in academic circles, until very recently the Suspension Clause received virtually no attention. Moreover, by definition, the Clause’s invocation occurs solely at times of great national stress, during which the population’s instinct is to draw together. Anyone who raises constitutional questions about the validity of the suspension power at such a time would risk being labeled unpatriotic. In short, when there exists no basis for invoking the Clause, there has been little or no scholarly interest in the issue because it is purely hypothetical, but when the issue is all too real there is, as a practical or political matter, no opportunity to consider it in a thoughtful manner.

The primary flaw in the counterargument grounded in the theory’s lack of historical acceptance risks proving too much. The same could be said of the unconstitutionality of the so-called “separate-but-equal” concept, the constitutional protection of commercial speech, the unconstitutionality of quasi-in-rem jurisdiction, and the constitutional right of privacy. In each of these situations, the Court chose to develop a constitutional right despite its historical lack of acceptance. The argument for the Due Process Clause’s supersession of the Suspension Clause is far more obvious and indisputable, textually and theoretically, than the arguments in support of any of those rights.

2. The Implications of the Requirement of Congressional Authorization

On its face, the Suspension Clause is silent as to which organ of government possesses the authority to invoke its authority. Although President Lincoln asserted the constitutional authority to

---

115 See supra note 4.
invoke the authority unilaterally, \textsuperscript{120} it is generally thought today that the authorization of the legislative branch is required. \textsuperscript{121} It might be suggested that as long as the President lacks the authority to exercise the power of suspension unilaterally, the requirements of American constitutionalism are satisfied by the assertion of this legislative check. \textsuperscript{122}

The initial response to this assertion is that if our textually based contention is accurate, \textsuperscript{123} then this counterargument is beside the point: the Constitution, through the addition of the Fifth Amendment, has made the choice for us. Even from the perspective of political or constitutional theory, however, this argument is seriously flawed. If one were to accept the notion that a requirement of congressional authorization for executive action exhausted the Constitution’s separation-of-powers demands, there logically would be no need for judicial review of any legislatively authorized action. Yet that, of course, would be inconsistent with established judicial review practice. We demand judicial review of the constitutionality of even legislatively authorized executive action because we recognize the centrality of counter-majoritarian enforcement of the Constitution’s counter-majoritarian directives. Neither the legislative nor executive branch qualifies to provide this check.

This concern is of special importance in the context of the Suspension Clause because, by its very nature, that power will be in-

\textsuperscript{120} See Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 Collected Works of Abraham Lincoln 421, 430 (Roy P. Basler ed., 1953) (asserting that “[i]t was not believed that any law was violated” when he unilaterally suspended the writ).

\textsuperscript{121} Many justices have endorsed this view, including Chief Justice Marshall in \textit{Ex parte Bollman}, 8 U.S. (4 Cranch) 75, 101 (1807), Chief Justice Taney in \textit{Ex parte Merryman}, 17 F. Cas. 144, 151–52 (Taney, Circuit Justice, C.C.D. Md. 1861), and Justice Scalia in \textit{Hamdi v. Rumsfeld}, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting). As one scholar has noted, no justice has ever disagreed with this contention. See Shapiro, supra note 3, at 71–72 (arguing that Congress has the exclusive authority to suspend the writ); see also Tyler, supra note 24, at 342–43 (explaining why it is “widely thought” that only Congress has the power to suspend the writ). President Jefferson seems to have agreed that only Congress could suspend the writ insofar as he acquiesced when Congress denied his request to suspend the writ during the Burr conspiracy. See Collings, supra note 22, at 340 (recounting the history).


\textsuperscript{123} See discussion supra Section II.A.
voked only in times of great national crisis. It is at these very times that dissenting minorities are most vulnerable to majoritarian infringement. Reliance on an elected Congress as the sole check on an elected president would make little sense under these circumstances.

Finally, there is an even more dispositive response. At most, congressional authorization of executive suspension could provide a sufficient constitutional check on executive power over a general situation. It is not responsive to the individual’s constitutionally protected interest in due process to remedy unlawful detention. One could easily imagine a situation in which the general need for suspension exists, but there nevertheless exists no legal or factual basis for the arrest of a particular individual. He could have been arrested mistakenly, for ulterior political motives or out of racial or religious prejudice. In such a situation, it is of little benefit to this particular individual that Congress determined a need for a general suspension of the writ.

3. Due Process, Suspension, and the Needs of National Security

The final counterargument asserts that the interests of due process must give way to the interests of national security in times of invasion or rebellion. Thus, suspension must supersede the Fifth Amendment’s due process guarantee. At the outset, in response to this argument we should once again note the dispositive force of our reliance on textual construction. Because the due process guarantee is unlimited and unqualified in its reach, and appears in the form of a subsequently enacted amendment, it indisputably supersedes the inconsistent directive in the Suspension Clause, purely as a matter of textual interpretation. If anything, the argument grounded in national security effectively underscores our point because it highlights the inconsistency between the two provisions.

More importantly, the argument ignores the truly frightening scenarios—ones that are, unfortunately, far from inconceivable—that could result from the total preclusion of judicial enforcement

125 See, e.g., Tyler, supra note 4, at 672 (arguing that the suspension power accomplishes nothing if it does not “free the executive to act quickly and decisively, and without fear of repercussion” during “extraordinary occasions”).
of the Due Process Clause necessarily flowing from invocation of the Suspension Clause. Absent such enforcement, what is there to legally stop an executive—already politically empowered by the wave of patriotism that inevitably accompanies a crisis of national security—from immediately imprisoning all of her political opponents? Unless and until advocates of suspension are able to provide an adequate response to this question, it is impossible—or, at the very least, extremely dangerous—to accept their argument.

In any event, the inherent flexibility of the due process guarantee should provide a sufficient means by which to ensure appropriate room for executive discretion in the face of a national emergency. In the presence of an invasion or rebellion, the judiciary will no doubt recognize the need to provide the executive with more deference than might otherwise be appropriate. This flexibility, however, does not necessarily preclude judicial ability to remedy invidious or obviously mistaken detentions through provision of the core due process notions of notice and some form of meaningful hearing before a neutral adjudicator.

III. PROCEDURAL DUE PROCESS DURING AN ATTEMPTED SUSPENSION: WHAT IS THE PROPER JUDICIAL ROLE?

We have established that individuals retain their right to “due process of law,” regardless of the availability of the writ of habeas corpus. In this Part we explore exactly how the Due Process Clause will apply in various permutations of attempted suspension.

We begin by discussing detainees’ procedural due process rights during a blanket suspension of habeas corpus similar to the one described previously—a situation in which habeas has been suspended and the executive chooses to detain individuals summarily. In the second permutation, we consider a situation in which habeas has been suspended, but the executive has chosen to provide to those detained some form of intra-branch hearing. In this context, assuming (as we contend) that the Due Process Clause constrains the suspension, we examine the court’s role in ensuring that “executive due process”—that is to say, hearings provided by a civilian executive tribunal—complies with the constitutional re-

---

126 See supra Subsection II.A.2.
127 See supra Subsection II.C.3.
quirements of the Fifth Amendment. Third, we analyze whether suspension legislation containing a limit on the duration of detention is unconstitutional. In the fourth and final permutation, we briefly discuss a reviewing court’s role in evaluating the sufficiency of process afforded by military tribunals or commissions.

In this discussion, we fashion two different “levels” of a court’s procedural due process analysis.128 “First-level” due process analysis involves the constitutional question of what procedures are necessary to satisfy the dictates of “due process of law” in a given case, as well as how that standard is to be applied to determine whether the executive has satisfied it. “Second-level” analysis, in contrast, refers to the adjudicator’s performance of the individualized fact-finding function to determine whether the arrest was in fact lawful. The court will proceed to perform this second-level function if and only if it has determined that the procedures provided by the executive, if any, fail to satisfy the court’s first level analysis of what procedures are constitutionally required. As a final point of emphasis, this Part involves an interpretation of the Due Process Clause, not the Suspension Clause. As we established in the previous Part, a suspension of habeas corpus must be unconstitutional unless it satisfies the demands of the Due Process Clause. One might disagree with the elements of our due process analysis, but whatever one decides that “due process” requires in a given case, it still overrides the suspension power.

A. Suspension of Habeas Corpus Absent Provision of Executive Due Process

Suppose that the constitutional prerequisite of a “[r]ebellion or [i]nvasion” has been satisfied. Imagine further that Congress has decided to take the bold step of suspending the writ of habeas corpus nationwide and has enacted legislation granting the executive unfettered discretion to arrest and detain any individual whom he deems to be a threat to national security. Pursuant to this limitless authority, the President orders the arrest and imprisonment of all individuals of Irish descent for the duration of the suspension.

128 Our labels are not intended to coincide with labels used by other scholars to differentiate between constitutional and factual questions. See, e.g., Issacharoff & Pildes, supra note 122, at 7 (discussing the Court’s analysis of “first-order” claims of rights).
Once her officers identify a person as “Irish” (a rather haphazard inquiry in and of itself), they immediately arrest her without providing her with any process whatsoever—no opportunity to see any evidence against her (at least in part because no evidence need exist), no access to counsel, and no hearing to challenge the basis of her detention. Of course, this hypothetical scenario represents the most extreme permutation of the suspension power, but we must always keep in mind that any argument that the Suspension Clause is constitutional necessarily considers such a situation to be acceptable.129 Because the Suspension Clause itself imposes no requirement on the executive branch to provide its detainees with individual hearings, we must at the outset proceed on the assumption that the executive will choose not to do so.

As we demonstrated earlier, the government violates the core dictates of the Due Process Clause when it summarily and indefinitely detains its citizens. As we also established previously, to satisfy due process government must provide an adequate hearing before a neutral adjudicator. A detainee thus must have access to a court in order to satisfy this constitutional guarantee. But it will not always be immediately clear what the court’s role would be in this situation. In deciding this question, the reviewing court must determine what procedures are required by due process in this specific context. Then, still as part of this first-level analysis, it must determine whether whatever procedures that actually have been provided by the executive satisfy those constitutional requirements. Of course, if, as hypothesized here, absolutely no procedures are provided, the answer to that question would be obvious: the detainee has been denied due process. At that point the court will necessarily turn to the second-level due process inquiry: determining whether, on the basis of facts proven at a constitutionally appropriate hearing, the individual’s detention was lawful. We now examine each of these levels of due process inquiry in detail.

B. Type and Scope of Procedures Required to Satisfy Due Process

The “essential principle” of due process of law is that an individual deprived of her liberty must be provided with “notice and op-

129 See supra Section II.A.
portunity for hearing appropriate to the nature of the case.” In invoking a “first-level” due process analysis, an Article III court would have the opportunity to determine whether the procedures actually provided to the detainee by the executive, both before and immediately following arrest, satisfy these foundational constitutional requirements. Indeed, the political insulation of the Article III courts likely makes them the most neutral forum available to adjudicate detainees’ due process claims.

This is not to imply that the court’s “first-level” analysis of the constitutional requirements of due process will always be easy or straightforward. Even if it is clear that the executive has failed to provide any process at all, the court will still have to determine the type, terms, and timing of the notice and hearing mandated by the Due Process Clause. We assume, arguendo, that a detainee will seek a full evidentiary hearing reminiscent of a criminal trial, because that type of hearing will give her the fullest opportunity to contest the sufficiency (or even the validity) of the government’s evidence against her. The executive, by contrast, will presumably argue that providing the detainees with any process will unduly undermine national security interests because such a hearing could force the government to divulge sensitive state secrets that might compromise its ongoing efforts to thwart the “[r]ebellion or [i]nvasion” that precipitated the suspension.

At that point it will fall to the judge to define the requirements of due process of law in the context of a blanket suspension. The Supreme Court’s due process jurisprudence provides little concrete


\[131\] It should be noted that while we refer here to this due process inquiry being performed by an Article III federal court, it is arguable that, under generally accepted precepts of congressional authority to regulate federal court jurisdiction, Congress could replace the federal courts with state courts. See Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 7–52 (2d ed. 1990). However, because Congress possesses the power to control neither state judicial tenure nor state judicial salaries, those courts would also satisfy the neutrality requirements of due process. See id. at 43–44.

\[132\] See Morrison, supra note 4, at 1613.

\[133\] Moreover, the interest at stake for the detainee is roughly analogous to the interest at stake for a criminal defendant. These arguments parallel the ones made by the alleged “enemy-combatant” in Hamdi v. Rumsfeld, who had also been denied any procedural rights. See 542 U.S. 507, 511–12 (2004).
guidance on this question. To the contrary, the Court has repeatedly emphasized that due process is “not a technical conception with a fixed content unrelated to time, place and circumstances.”

Under well-established Supreme Court doctrine, to determine what procedures are constitutionally required in a particular case, a reviewing court will invoke the test of *Mathews v. Eldridge*, under which it balances three factors to determine which procedures are necessary to satisfy the dictates of “due process of law” in a given case:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The narrow, utilitarian nature of this test has been roundly criticized for its focus on providing the minimal amount of process necessary to assure a reasonable degree of decisionmaking accuracy. The problems with this balancing approach are arguably many, and the outcomes of courts’ application of it have on occasion proven difficult to predict. Nonetheless, the case-by-case flexibility it

---


136 Scholars have argued that the narrow, utilitarian focus of this test overlooks the individual’s “dignitary values,” which could be fostered by the use of additional procedures that only minimally increase decisionmaking accuracy. See Coleen E. Klasmeier, Towards a New Understanding of Capital Clemency and Procedural Due Process, 75 B.U. L. Rev. 1507, 1527 n.117 (1995); see also Jerry L. Mashaw, The Supreme Court’s Due Process Calculus for Administrative Adjudication in *Mathews v. Eldridge*: Three Factors in Search of a Theory of Value, 44 U. Chi. L. Rev. 28, 47–48 & n.61 (1976). Standing alone, the test also fails to establish a constitutional floor for the definition of due process, see Redish & Marshall, supra note 80, at 472–74, and fails to recognize the value of litigant autonomy, see Martin H. Redish & Nathan D. Larsen, Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process, 95 Cal. L. Rev. 1573, 1578–79 (2007).

137 See, e.g., Farina, supra note 57, at 234 (“If due process is to mark out and defend a sphere in which the individual is reliably preserved from the demands of the collective, how can the extent of the protection the individual receives turn on some calculus explicitly designed to maximize aggregate welfare?”); Rubin, supra note 58, at
prescribes is valuable in the context of a social or political crisis, because it allows the courts to strike “the proper constitutional balance” during a period of ongoing domestic combat.\textsuperscript{138}

The major “first-level” issue for the court will likely involve the detainee’s claim that he is constitutionally entitled to a live hearing. Applying the \textit{Mathews} test, the court should first note the gravity of the private interest at stake in this case. Freedom from wrongful detention is generally considered the most fundamental of liberty interests, particularly when that imprisonment is of indeterminate and possibly indefinite length. To be sure, \textit{any} forced custody is sufficient to trigger the protections of the Due Process Clause.\textsuperscript{139}

But a detainee’s interest is potentially magnified in the context of modern warfare, because conflicts such as the “war on terror” are unlikely to have a finite and conclusive resolution.\textsuperscript{140} Moreover, it is not inconceivable that the government could continue the suspension of habeas corpus indefinitely, either by arguing conclusorily that it needs additional time to identify and apprehend all of the parties involved in the “[r]ebellion or [i]nvasion,” or by arguing that the “public [s]afety” requires continued suspension in order to prevent similar attacks in the future. Not only have the individuals who have been imprisoned under a blanket suspension already suffered a deprivation of their most fundamental liberty interest, but they also face the strong possibility of \textit{indefinite} wrongful imprisonment.\textsuperscript{141}

\textsuperscript{1138} (“Establishing three distinct factors, two of which operate in opposition to each other, seems impressive, but it is unclear how to resolve the inevitable conflicts between them.”).

\textsuperscript{138} \textit{Hamdi}, 542 U.S. at 532.

\textsuperscript{139} Id. at 531.

\textsuperscript{140} In \textit{Hamdi}, the government conceded that “given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement.” Id. at 520. The Court then concluded that “[t]he prospect [of indefinite detention that] Hamdi raises is therefore not farfetched.” Id.

\textsuperscript{141} Although it is not essential to our central argument, it should be noted that the detainees might also be able to claim a viable liberty interest in the damage that the government would do to their reputations through this wrongful imprisonment. See \textit{Goss v. Lopez}, 419 U.S. 565, 574 (1975) (“The Due Process Clause also forbids arbitrary deprivations of liberty,” including deprivation of “a person’s good name, reputation, honor, or integrity . . . .”); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572–75 (1972). The Court has also recognized the right not to be stigmatized as a liberty interest protected by the Due Process Clause. See \textit{Vitek v. Jones}, 445 U.S. 480, 491–94 (1980).
In assessing the private interest at stake, the Supreme Court has often considered whether the individual’s protected interest can be fully remedied by post-deprivation damages. Essentially, if the individual can obtain full retrospective relief if she later establishes that the government deprivation was wrongful, her private interest in obtaining immediate process is diminished. The availability of compensatory damages for individuals wrongfully detained during a suspension has been a hot-button issue in recent scholarship interpreting the Suspension Clause. For purposes of Due Process Clause interpretation, however, the crucial point is that the damage done by a wrongful executive detention must, simply as a matter of common sense, be deemed irreparable. It would be absurd to posit that a post hoc damage award could reasonably compensate a wrongfully imprisoned individual, arrested and imprisoned without any meaningful opportunity to challenge the accuracy or lawfulness of her detention, for the tangible and intangible harm done by the arbitrary conduct of the executive. As a general matter, the Court has refused to “embrace[] the general proposition that a wrong may be done if it can be undone,” which logically leads to the conclusion that the Due Process Clause cannot be interpreted to allow the government to “buy” the right to imprison individuals when the writ of habeas corpus is unavailable. As a general matter, the idea that a subsequent award of damages can adequately remedy continuing unlawful confinement is preposterous on its face.

---

142 See Mathews v. Eldridge, 424 U.S. 319, 340 (1976) (finding ability of full retroactive relief a significant factor in the determination that the Due Process Clause does not mandate a full evidentiary hearing prior to the termination of the plaintiff’s social security disability benefits); Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970) (holding that a full evidentiary hearing is necessary before the termination of welfare benefits).

143 Compare Morrison, supra note 4, at 1539 (“Suspension does not displace any post-detention remedies, nor does it alter a detention’s legality.”), with Shapiro, supra note 3, at 89 (arguing that suspension of the writ “frees the Executive from the legal restraints on detention that would otherwise apply”). See also Tyler, supra note 4, at 609 (endorsing Shapiro’s argument).

144 While the Court has never directly addressed this issue, analogies to previous rights that the Court has deemed “irreparable” provide ample support for our argument. In Fuentes v. Shevin, the Court held that no later monetary award could compensate the plaintiff for the arbitrary repossession of her gas stove, 407 U.S. 67, 82 (1972), see also Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 341–42 (1969) (concluding that a prejudgment garnishment of wages may do irreparable harm by “as a practical matter driv[ing] a wage-earning family to the wall”).

145 Fuentes, 407 U.S. at 82 (quoting Stanley v. Illinois, 405 U.S. 645, 647 (1972)).
To be sure, if no remedy were sought or available during the unlawful confinement, the award of damages is far better than nothing. However, it is no answer to one continuing to be unlawfully confined who seeks direct judicial intervention to end that confinement that her requested relief is being denied because of the availability of a damage award following her release.

In deciding what specific procedures must be provided, the court will have to balance the gravity of the individual’s fundamental interest in physical liberty against the public interest at stake were the government to be forced to provide every detainee with a full evidentiary hearing. The “public interest” component of the Mathews balancing test usually includes an assessment of the administrative and financial burden that would flow from the holding of the required hearings, but this will likely not be the primary argument made by the government. More probable is that the government will argue that national security interests could be seriously compromised by providing individual detainees with the opportunity to review and challenge the evidence against them, which in turn would compromise the public interest in preventing future attacks. Although the Court minimized similar concerns in Hamdi v. Rumsfeld (when, it should be emphasized, the Suspension Clause had not been invoked), it is conceivable that the argument could carry more weight if the country is embroiled in a serious and ongoing domestic conflict. It is crucial to note, however, that the existence of an ongoing “[r]ebellion or [i]nvasion” should influence only the timing or scope of the hearing, not the availabil-

---

146 See, e.g., Mathews, 424 U.S. at 347.
147 See Hamdi v. Rumsfeld, 542 U.S. 507, 531–32 (2004) (summarizing the government’s argument that its interest in reducing process available to detainees is “heightened by the practical difficulties that would accompany a system of trial-like process. In its view, military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war.”).
148 See id. at 534 (“We think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts.”).
149 The Supreme Court entertained Hamdi’s habeas petition nearly three years after the attacks precipitating the detention took place. At that point, he had been in custody for nearly two years. See id. at 512–13.
ity of some meaningful proceeding in the first instance. Although the Mathews test provides the reviewing court with the power to tinker with the timing or terms of the proceeding, as a constitutional floor the Due Process Clause demands that each person imprisoned by the government receive some form of hearing. To accommodate the government’s interest in not divulging sensitive information, the court might adapt or even limit particular elements of the hearing. Similarly, the judge might order a change of venue to a different federal court if particular regions of the country have been ravaged by the rebellion or invasion. She might even decide to postpone the hearing until after the immediate crisis has passed. But whatever the court interprets due process to require in the context of a blanket suspension, it must include some form of a meaningful individualized hearing.

The specific terms of the hearing will likely be determined by the court’s analysis of the second Mathews factor: “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards . . . .” Recall that in this version of the “blanket suspension” scenario, the executive has thrown the detainees in jail without providing them with any process whatsoever. Any “additional procedural safeguards” will, under Mathews, therefore necessarily be designed to reduce the risk of an erroneous imprisonment. The Mathews framework requires the court to attempt to weigh the benefit of each of these individual procedures in light of

---

150 The Court has never explicitly addressed this question in the context of a liberty deprivation. It has, however, noted that certain exceptional circumstances may justify a delay in providing a hearing in cases involving deprivations of property. See, e.g., Connecticut v. Doehr, 501 U.S. 1, 16–18 (1991) (noting that the possibility that Doehr was about to transfer or encumber the property at issue would have been an “exigent circumstance permitting postponing any notice or hearing until after the [deprivation] had been affected,” but later clarifying that “[w]e do not mean to imply that any given exigency requirement protects an attachment from constitutional attack”); see also Mitchell v. W.T. Grant Co., 416 U.S. 600, 615–18 (1974) (upholding a Louisiana sequestration statute that delayed a hearing until after property purchased on installment contracts had been repossessed).

151 See discussion supra Subsection II.A.1 and accompanying notes.

152 See Hamdi, 542 U.S. at 535 (“[T]he threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen’s core rights to challenge meaningfully the Government’s case and to be heard by an impartial adjudicator.”).

both the grave interest at stake for the detainees and the government’s legitimate interest in both protecting sensitive information and devoting as much of its attention as possible to abating the national crisis.

C. Determination of the Adequacy of Procedures Already Provided by the Executive

Once the reviewing court determines what procedures are required by due process under the specific circumstances of the individual case, it must determine whether the procedures provided by the executive—if any—satisfy those requirements. This represents the second step in the first-level due process inquiry. In this context, the “first-level” analysis by an Article III court functions as a necessary and appropriate safeguard to ensure that executive tribunals that are provided afford the detainees a constitutionally sufficient level of process.

As a preliminary matter, one may reasonably wonder whether so-called “executive due process” is an oxymoronic concept. As noted earlier, a neutral adjudicator is one of the three essential requirements of due process of law. This requirement logically applies to both levels of the due process analysis: not only must the adjudicator be “neutral” with respect to the “second-level” factual determination (that is, the individualized determination as to the lawfulness of the detention), but also with respect to the “first-level” question of what due process requires in the context of a suspension. It would hardly make sense—or be consistent with due process—to allow the executive itself to have the final say as to whether the procedures it has provided to determine the lawfulness of detention actually satisfy due process. Such “protection” of constitutional rights effectively amounts to no process at all. That determination must be made by the independent Article III court. In making that determination, it is difficult to imagine that any adjudicator chosen by the executive branch who is herself part of the executive branch (and whose position within that branch therefore ultimately turns on exercise of the unreviewable discretion of the President himself) could satisfy the due process requirement of a neutral adjudicator. We are, then, skeptical that an executive adju-

154 See supra Subsection II.A.1.
indicator can ever meet the standard for adjudicatory neutrality that the Supreme Court has fashioned, regardless of what specific procedures have been provided. Although the Supreme Court has held that an executive agency is capable of functioning as a neutral adjudicator,\textsuperscript{155} it has never confronted the question in the context of a deprivation of liberty or, equally important, in the context of a suspension of habeas corpus, which enables the President to arrest and detain without the availability of any judicial review. A reasonable adjudicator who is part of the executive branch or subject to direct executive control would certainly fear that if she invalidated a presidential determination that a given detention was justified, she might quickly lose her position.

The Supreme Court first articulated a standard for adjudicatory neutrality in \textit{Tumey v. Ohio}, in which it required a judge to recuse himself if he had a “direct, personal, substantial, pecuniary interest in reaching a conclusion against [the defendant].”\textsuperscript{156} In that decision the Court adopted an objective test in which “[e]very procedure which would offer a possible temptation to the average man as a judge . . . or which might lead him not to hold the balance nice, clear and true between the State and the accused” violated due process.\textsuperscript{157} At the very least, it would be reasonable to assume that the intra-branch executive adjudicator would have a subconscious desire to avoid invalidating the decisions made by her superiors, leading her to defer to her fellow executive officials’ assertions that certain procedures were not “really required” to fail the constitutional requirements of neutrality and independence.\textsuperscript{158} To be sure, some executive adjudicators might be able to “hold the balance true” on even the “first-level” question, but the Due Process Clause has never required proof of actual bias in order to invali-

\textsuperscript{155} Withrow v. Larkin, 421 U.S. 35, 47 (1975) (holding that “[t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication [is] a . . . difficult burden of persuasion to carry” because it “must overcome a presumption of honesty and integrity in those serving as adjudicators”).

\textsuperscript{156} 273 U.S. 510, 523 (1927).

\textsuperscript{157} Id. at 532; see also Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986); Ward v. Vill. of Monroeville, 409 U.S. 57, 61 (1972).

\textsuperscript{158} Cf. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263 (2009) (“There are instances when the introspection that often attends this process may reveal that what the judge had assumed to be a proper, controlling factor is not the real one at work.”).
date an adjudicatory framework for lack of neutrality.\textsuperscript{159} Rather, the realistic risk of bias—the appearance that the adjudicator might favor the claims of one side over the other—is sufficient to undermine her neutrality for purposes of the Due Process Clause.\textsuperscript{160}

This argument is wholly consistent with the Court’s current doctrine governing judicial review of administrative action; the availability of review of constitutional questions by an Article III court is a long-standing and undisputed tenet of administrative law.\textsuperscript{161} Edward Rubin argues that any deference to administrative agencies with respect to the procedural due process is “singularly inappropriate,” as “[a]dministrative decisions, being both particularized and obscure, are rarely subject to extralegal constraints, and it therefore seems dangerous to leave them within the exclusive control of a singular instrumentality of government.”\textsuperscript{162} His concern is particularly salient in the context of a deprivation of liberty, and even more compelling in the case of a rebellion or invasion, where the detainees are likely members of ethnic or political minority groups who lack the political or popular support necessary to obtain a political remedy for their detentions. In accordance with its traditional role as the counter-majoritarian guardian of individual rights, the Supreme Court has consistently allowed for judicial re-

\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} See, e.g., Withrow v. Larkin, 421 U.S. 35, 46 (1975) (reviewing constitutional question of whether a state medical examining board could function as a neutral adjudicator for purposes of the Due Process Clause); Fallon, supra note 56, at 336–37 (noting that the due process doctrine’s “macro-managerial concerns are reflected in cases that insist on minimally adequate availability of judicial review to ensure that the general structure of administrative schemes is fair, that call for judicial review of constitutional issues . . . , and that apply the balancing test of \textit{Mathews v. Eldridge }to ensure administrative procedures adequate to achieve a tolerable average level of accuracy in the application of law to fact”). The Court is particularly wary of cases in which the “second-level” determination is made by a party who appears to be performing an enforcement, rather than an adjudicatory, function. That could be a relevant concern in the suspension context, as the executive adjudicator might feel pressure to affirm, rather than to neutrally evaluate, the merits of the detentions. See Marshall v. Jerrico, Inc., 446 U.S. 238, 249–50 (1980).
\textsuperscript{162} Rubin, supra note 58, at 1157–58; see also Redish & Marshall, supra note 80, at 477 (“[I]f the adjudicator is himself an integral part of the governmental body on the other side of the case, then it is likely that his decision will be based on considerations other than the merits as developed by the evidence. The government would, in effect, be the judge of its own case. Once again, traditional procedural protections, however meticulously adhered to, become irrelevant.”).
view of whether the “broad outlines of an administrative scheme satisfy constitutional requirements” of due process, even if the relevant statute explicitly attempted to preclude judicial review.\footnote{Fallon, supra note 56, at 333–34 and accompanying notes.} This pattern of decisions, Professor Fallon argues, “strongly suggests that due process requires judicial review of the fairness of [executive] decisionmaking procedures.”\footnote{Id.} It should also be noted, in conclusion, that the judicial review of the procedural schemes established by the executive tribunals would not intrude upon their core function of making “second-level” factual determinations regarding the grounds of the detention because any cases in which the procedures were held to be constitutionally inadequate would be remanded to the tribunals. Moreover, a small number of judicial rulings would likely be necessary to inductively clarify the procedures that the tribunals would be required to apply.\footnote{Fallon & Meltzer, supra note 70, at 2101.}

\textit{D. Legislative Limitation on the Duration of Suspension}

Assume a situation in which Congress suspects that the President might abuse the suspension power and therefore attempts to limit this danger by specifying a maximum length of time that an individual may be detained without the filing of formal charges. More specifically, assume that this hypothetical suspension legislation requires the Secretary of War to provide each United States Court of Appeals with an updated list of detainees on a weekly basis. If the government could not secure a criminal indictment of the detainee within twenty-one days of the initial arrest, the detainee could petition the circuit court for release.\footnote{This hypothetical legislation represents a simplified version of the Habeas Corpus Act of 1863, ch. 81, 12 Stat. 755 (1863). The Court in \textit{Ex parte Milligan} did not evaluate the constitutionality of the Act because Justice Davis mistakenly viewed any suspension as presumptively valid. See 71 U.S. (4 Wall.) 2, 114–15 (1866). It should be noted that these restrictions were not actually enforced during the Civil War. See Mark E. Neely, Jr., \textit{The Fate of Liberty}: Abraham Lincoln and Civil Liberties 175–79 (1991).} In this permutation, the reviewing court is required to make a “first-level” determination of whether postponing any hearing for twenty-one days (or whatever the specified period) is constitutionally acceptable.
As we have emphasized throughout, any deprivation of liberty, no matter how temporary, necessarily triggers due process protections. This means that as soon as an individual is imprisoned by the government, she becomes constitutionally entitled to notice and a hearing before a neutral adjudicator. Yet this type of statute would allow the executive to arrest and release people without providing them with any process at all, so long as the detention did not exceed the statutory time limit. Moreover, nothing in the statute precludes the executive from repeatedly arresting the same individuals and detaining them for periods that stop just short of the statutory maximum. This permutation, then, irreconcilably conflicts with due process and is therefore unconstitutional. The legislative attempt to prevent abuse of the suspension power is immaterial, as it does not remedy the fundamental constitutional defect of this type of legislation: that it allows the executive to imprison individuals without providing them with the three core requirements of due process. In any event, even if we were to assume the acceptability of such a legislative scheme for due process purposes, judicial review would have to be available to assure executive compliance with it.

E. Military Commissions

The final permutation involves a suspension of habeas corpus, combined with a provision for individual hearings in front of military commissions, rather than before an Article III court—even when the detainee is a civilian. In *Ex parte Milligan*, the Supreme Court held that, at least in the absence of a formal suspension of the writ of habeas corpus, a civilian detainee could not be tried before a military commission while the federal courts were open and able to hear the case. This holding conclusively limited military trials to individuals who physically participated as enemy combatants, as well as those rare cases in which the federal courts are “actually closed, and it is impossible to administer criminal justice according to law . . . .” Thus, were one to accept our conclusion (not

---

167 As a practical matter, the threat of even temporary imprisonment might suffice to silence political opposition and allow an ambitious president to accrete more power.

168 *Ex parte Milligan*, 71 U.S. at 122.

169 Id. at 127.
accepted by the Court in *Milligan*) that the constitutional dictate of due process survives a suspension of habeas, the alternative provision of a hearing before a military commission, rather than a court, would categorically fail to satisfy constitutional requirements—at least when the defendant is a civilian citizen.\(^{170}\)

It is conceivable that the suspension legislation would order the military commission to make only the “second-level” due process determination as to whether the ongoing detention in the particular case before it is justified on its facts. In this context, the military commission would perform the same function as the civilian executive tribunal considered earlier. Because they would have to apply civilian, rather than military law, they would also be subject to “first-level” review by an Article III court to assure that they satisfied constitutional requirements of neutrality. Our concerns over adjudicatory neutrality of military commissions would thus largely mirror doubts previously expressed over executive tribunals.\(^{171}\)

**F. Second-Level Due Process**

Where the reviewing court has concluded that the executive’s detention has failed to satisfy due process, it will then need to proceed to the second level of the due process inquiry. By this we mean the court will itself have to determine the accuracy and lawfulness of the detentions, employing the procedures it has already determined are required as part of its first-level analysis.

Of course, if the decision that the executive’s detention of an individual has failed to satisfy due process has been made finally at the appellate level, this second-level inquiry will not be conducted, in the first instance, by the appellate court itself. The initial inquiry will instead be conducted by the trial court. However, it is important to keep in mind that whatever court makes the second-level inquiry, it will have to satisfy the constitutionally established requirements of adjudicatory neutrality.\(^{172}\)

\(^{170}\) Throughout this Article, we have chosen to avoid issues involving arrest of non-citizens or enemy combatants—issues which are beyond the scope of our inquiry.

\(^{171}\) See supra Subsection II.C.3.

\(^{172}\) See supra Subsection II.A.1.
IV. REJECTION OF SCHOLARLY ARGUMENTS FOR THE SUPERIORITY OF THE SUSPENSION CLAUSE

A. The Argument from Original Intent

Professor Amanda Tyler has recently argued that the Suspension Clause supersedes the Due Process Clause, rather than the other way around. In her view, suspension of habeas corpus “does not simply remove a judicial remedy but ‘suspends’ the rights that find meaning and protection in the Great Writ.”\(^\text{173}\) Indeed, she argues that the “very purpose of suspension” is to allow Congress to override core due process safeguards to enable the executive to effectively combat a national crisis.\(^\text{174}\) Suspension thus operates as an “on/off” switch for individual due process rights “and possibly other portions of the Constitution as well.”\(^\text{175}\) Remedies other than

\[^{173}\text{Tyler, supra note 4, at 603. Professor David Shapiro also endorses this view of the suspension power, arguing that because the writ was originally understood as the method for challenging the lawfulness of executive detention, the Framers (by including the Suspension Clause in the Constitution) were “willing to allow Congress to abridge [the underlying right to challenge the basis for the detention] during times of crisis.” See Shapiro, supra note 3, at 93.}\n
\[^{174}\text{Tyler, supra note 24, at 386; see also Shapiro, supra note 3, at 90 (worrying that the “very purpose of the suspension” might be undermined if the executive could be subject to ex post financial liability or allegations of violating the oath to support the Constitution and its laws).}\n
\[^{175}\text{Tyler, supra note 4, at 604. Professor Tyler is skeptical of claims that an act of suspension does not apply to a particular petitioner and that his due process rights to a full hearing thus remain intact. She notes that such claims can easily shade into arguments that a petitioner is not, for example, “really a ‘terrorist’ at which a suspension is aimed,” and thus can indirectly transform any judicial hearing into an analysis of the legal basis for the detention. Tyler, supra note 24, at 388. She argues that courts “should hesitate to entertain such contentions, lest they undermine the very point of the suspension in the first instance (namely, to make the capture and detention of prisoners during times of crisis easier).” Id. Our reaction to Professor Tyler’s skepticism is total shock that she would so willingly defer to an executive’s unreviewed conclusion that a detainee is, in fact, a terrorist. Presumably, her reasoning would prevent the chair of the Democratic Party, arrested by order of a Republican president, from judicially challenging the president’s conclusory characterization of her as a “terrorist.” Such reasoning could be labeled nonsensical—if it were not so dangerous. See infra Section IV.B.}\n
While at certain points Professor Tyler advocates recognition of an unlimited congressional suspension power, see, e.g. Tyler, supra note 24, at 386 (arguing that the “very purpose of suspension is to permit Congress to override core due process safeguards during times of crisis”), at other points she appears to qualify this position, see id. at 390–92 (noting that “[t]here exists a formidable argument that even in the event of a valid suspension, equal protection principles at a minimum would have something
habeas corpus remain available to address collateral claims, but the courts cannot use any of these remedies to order the discharge of the detainee.  

Tyler and Shapiro base their argument on the historically “coextensive” relationship between the writ of habeas corpus and the Magna Carta. After the writ of habeas corpus became the primary vehicle for the enforcement of the due process rights embodied by the Magna Carta, contemporary English legal scholars be-

to say about [a hypothetical involving Congress suspending the writ in Muslim neighborhoods”). See also Tyler, supra note 4, at 685–86 (noting that one cannot reach “anything other than a tentative conclusion” on the question of whether a suspension may validly operate to displace either First Amendment or equal protection rights). We find these qualifications to be rather puzzling from two very different perspectives. On the one hand, if she is willing to accept (or even consider accepting) the position that certain individual rights embodied in the amendments restrict the otherwise unlimited suspension power, it is unclear why those particular rights could have such a legally displacing impact, but the Fifth Amendment’s Due Process Clause would not. Surely, it could not be as a result of Framers’ intent in drafting the Suspension Clause, since it would be anachronistic to assume the Framers contemplated any sort of equal protection limit on the suspension power when no such right was even contemplated for approximately eighty years, and it was not until 1954 that the Supreme Court—without any textual support—applied it to the federal government in *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). Thus, her concession that some constitutional rights may limit the Suspension Clause power would logically seem to concede applicability of the Due Process Clause—the very point of this Article. In any event, her concession about the possible applicability of equal protection and free speech protections would seem also to concede that discriminatory application by the President of a non-discriminatory suspension would be subject to constitutional scrutiny as well.

On the other hand, if the purpose of the Suspension Clause is to free government from the burdens of judicial interference in times of crisis, as has generally been assumed, see supra pp. 118–20 and accompanying notes then Professor Tyler’s concession would appear to undermine that very purpose. It does so by authorizing judicial interference in individual cases in which discrimination or penalization of free expression is alleged. Presumably in every case where such an allegation is made by a restrained individual, a court would need to make a full inquiry into the truth of the charge. Thus, Professor Tyler’s concession satisfies neither side of the constitutional equation.

Shapiro, supra note 3, at 91–92. Because the writ was historically used to challenge the lawfulness of detention, Professor Shapiro argues, the Framers only contemplated the suspension of that particular aspect of due process during times of crisis. So long as the relief sought for violations of ancillary rights does not result in discharge, Professor Shapiro sees no inconsistency between, for example, the availability of a remedy for maltreatment during detention and the unavailability of a remedy for the detention itself. Id. at 93.

See Tyler, supra note 24, at 382–83; see also Shapiro, supra note 3, at 91–92.
gan to equate the right to be free from unlawful detention with the central role of habeas corpus in guaranteeing that right. These scholars note that the Framers drew their understanding of the writ, and its relationship to due process, from their knowledge of the work of English scholars such as Blackstone and Coke, as well as their first-hand experience with suspensions prior to the Philadelphia Convention. Thus, Tyler and Shapiro assume, the Framers presumably intended to insert the English understanding of the inextricable link between habeas corpus and due process of law into the American Constitution. The fact that the Due Process Clause was added in an amendment does not, Tyler and Shapiro assert, undermine their argument in the slightest. In Tyler’s words, “[t]o be sure, the Bill of Rights, with its Due Process Clause, was not part of the original constitutional text; there was, all the same, widespread understanding that it would be added shortly following ratification.”

We find this reasoning flawed, to say the least. Mystifyingly, it chooses to ignore unambiguous textual directives—i.e., that the due process guarantee applies in all contexts and situations—in favor of some vague and wholly unsupported assertion of an original intent to turn constitutional interpretation on its head. Instead of accepting the natural implication of orderly modes of interpretation—namely, that an unambiguous amendment necessarily trumps

---

178 Tyler, supra note 24, at 382–83; see also Shapiro, supra note 3, at 87 (noting that Blackstone described the Magna Carta as establishing a “substantive commitment[] of compliance with law” and the writ of habeas corpus as requiring “that a reason be given for every commitment”).

179 See discussion supra Section I.B and accompanying notes.

180 See Tyler, supra note 4, at 618 (noting that “the two primary influences on the Framers regarding the English conception of suspension reinforce the conclusion that the Founding generation viewed the protections embodied in the Great Writ and the effects of a suspension as mirror opposites”); Shapiro, supra note 3, at 87 (concluding, after discussing the function of the writ in the legal system, that “it seems more than likely that contemporary thinking tended to equate the right to be free from unlawful detention with the role of habeas corpus in guaranteeing that right”).

181 Tyler, supra note 24, at 382; see also Shapiro, supra note 3, at 93 (“Rather, in both its inception and its development (though recent years have seen some significant expansion), the writ was understood as the method of challenging the lawfulness of detention. Thus, in my view, it was that particular aspect, and only that aspect, of due process that the Founders were willing to allow Congress to abridge during times of crisis.”).
inconsistent provisions in the body of the Constitution\textsuperscript{182}—these scholars actually reverse the intersection: the body of the text is somehow thought to supersede that inconsistent amendment. Even if Tyler or Shapiro were to point to some supporting documentation of this counterintuitive inversion (which they do not), the argument would still be ineffective in altering the inescapable implications of the traditionally accepted mode of interpretation. External expressions of intent may not operate as contradicting codicils to otherwise unambiguous constitutional text. It was, after all, the text, not the unstated codicil, that was subjected to the ratification process. Thus, we give no credence to an originalist argument that seeks to divine what the Framers “intended” to accomplish by including a limited suspension power in the original Constitution and later amending the document to include an unequivocal guarantee that no person can be imprisoned without “due process of law.” It would be incoherent, and even deceptive, to choose to privilege an assertion of textually unstated “original intent” over the answer inescapably dictated by examination of the unambiguous text.

Did the Framers foresee the irrevocable conflict between the Suspension and Due Process Clauses? It does not appear that they devoted sufficient attention to the text or the meaning of the Due Process Clause to anticipate the issue\textsuperscript{183} But it is clear that the initial decision to recognize a suspension power was a controversial one\textsuperscript{184}, so much so that three state delegations dissented from ever permitting Congress to suspend the writ.\textsuperscript{185} It is also clear that the Framers defined “tyranny” as the accumulation of power by a sin-

\textsuperscript{182} We should once again emphasize that while the Due Process Clause is surely not unambiguous as to its outer frontiers, it most definitely is unambiguous that summary and indefinite coercive confinement without the provision of any form of meaningful opportunity to be heard most certainly fails to qualify as due process. See discussion supra Subsection II.A.1.

\textsuperscript{183} One scholar argues that the Due Process Clause was redundant because “[d]ue process was constitutional shorthand for many particular rights that other clauses of the Fifth and Sixth Amendments explicitly protected,” and that “[i]nclusion of the clause showed conventional deference to Magna Carta . . . .” Levy, supra note 112, at 305.

\textsuperscript{184} See discussion supra Section I.B.

\textsuperscript{185} Neuman, supra note 25, at 566.
gle person or branch of government, and that they institutionalized prophylactic methods for controlling government and preventing the accretion of power by any single branch. Finally, we also know that James Madison declared that the “great object” of the Bill of Rights was to “limit and qualify the powers of Government.” Even though they probably never expressly contemplated our argument that the Due Process Clause supersedes the suspension power, it seems that the Framers were moving toward that very conclusion.

B. Challenge to the Suspension of Habeas as a Substitute for Individual Due Process

Professor Tyler offers an additional argument to support her position by suggesting that the requirements of due process can be satisfied during a suspension by allowing detainees to challenge the validity of the suspension legislation itself. Much like her other arguments, however, this contention fails to justify an abandonment of the individual due process guarantee because it fails to satisfy the specific interests sought to be protected by that guarantee. Initially, it should be emphasized that her contention is wholly inconsistent with the very concept of suspension: if the writ of habeas corpus has been suspended, by what procedural avenue may a detainee obtain legal relief in court in order to challenge the validity of the suspension itself? The whole point of the suspension was, presumably, to preclude such review. More importantly, Tyler’s argument ignores the explicit text of the Fifth Amendment, which

---

186 See The Federalist No. 47 (James Madison), supra note 19; The Federalist No. 48 (James Madison) supra note 19, at 313 (arguing that the “mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands”).


188 James Madison, Adding a Bill of Rights to the Constitution (Speech in Congress, June 8, 1789), in Selected Writings of James Madison 164, 170 (Ralph Ketcham ed., 2006).

189 See Tyler, supra note 24, at 337 (arguing that the “internal predicates required for a valid suspension (the existence of a ‘Rebellion or Invasion’) are inextricably intertwined with the core due process right to seek impartial review of the Executive’s justification for a prisoner’s detention”).
confers a right to due process of law upon each individual “person” who has been deprived of his or her “life, liberty, or property.”¹⁹⁰

As demonstrated earlier, the Supreme Court has consistently emphasized that the “essential principle of due process” is individual “notice and opportunity for hearing appropriate to the nature of the case.”¹⁹¹ The Court has never suggested that a detainee’s individual due process rights can be satisfied by the judgment in a case to which she was not a party, in which she did not have the opportunity to defend her own interests and, indeed, which was not even about her.¹⁹² It is certainly conceivable that the suspension would be found to satisfy the constitutional standard imposed by Article I, Section 9 as a general matter, yet the individual detainee in question has nevertheless been improperly or incorrectly taken into custody. This could be due to either a simple mistake by the arresting authority or the executive’s ulterior political motivation to imprison an opponent. Review of the generic validity of the suspension itself, in such situations, would hardly satisfy the Fifth Amendment’s requirement of due process for the individual detainee.

**CONCLUSION**

The questions addressed in this Article cut to the very core of the principles of democratic government. The Framers chose to adopt a written Constitution in order to restrain democratic government within a set of carefully delineated boundaries as a means of ensuring that it would not be able to arbitrarily use its power to repress the very individuals to whom it is accountable.¹⁹³ The writ of habeas corpus has historically served as the primary check on executive power by ensuring that all individuals imprisoned by the government receive due process of law. Yet to this point, scholars

¹⁹⁰ See U.S. Const. amend. V.
¹⁹² The Court recently limited “virtual representation,” a preclusion doctrine that permits a litigant to be bound by a judgment in a prior case in which she was not a party. Taylor v. Sturgell, 553 U.S. 880 (2008).
and the Court seem to have agreed unanimously that suspension effectively removes all judicial oversight over exercises of the executive detention power, at least while they are taking place. We are completely mystified that all involved to this point have been so willing to risk the foundations of democratic government by trusting the one branch least trustworthy: the executive, who, as commander in chief, has full control of the nation’s military.

Exercise of the suspension power inevitably confers upon the President an unchecked power to suppress minority groups and political opponents, or whomever else, in the exercise of her whim, she wishes to suppress. It is impossible to reconcile the exercise of such unrestrained and unchecked authoritarian power with our constitutional commitment to the rule of law and steadfast aversion to tyranny. Therefore, in order to preserve the foundations of American constitutionalism—the system that guarantees continuation of democratic government—the Suspension Clause must be viewed as limited by the Due Process Clause and superseded to the extent the two provisions are found to be inconsistent. This is a conclusion, moreover, that follows from application of long accepted and applied precepts of textual construction.

To conclude otherwise would not only imperil individual and minority rights, but it would also pose a grave danger to the foundational elements of our constitutional structure.