

**The New York Death Penalty in Context: A Symposium**

**\*451 THE SUSPENSION CLAUSE IN THE RATIFICATION DEBATES**

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I. INTRODUCTION

The issue of the proper scope of the federal writ of habeas corpus has for the past several decades generated repeated political struggles in the judicial, legislative, and executive arenas. [FN1] The prominence of this seemingly arcane legal question is not difficult to explain; it implicates a series of fundamental issues of public policy: crime control, civil liberties, the allocation of power and responsibility between branches and levels of government, and the justice and efficacy of the criminal justice system, particularly with regard to the death penalty.

Yet the habeas corpus debate has taken place in the context of an astonishing dearth of historical knowledge. [FN2] This phenomenon results from the fact that the field has fallen into an uneasy scholarly void between law and history. It is too technically complex to be studied by those lacking a serious legal background, but lawyers are ill-suited for the pursuit because reported judicial opinions—the lawyer's primary research source—are an "unreliable indication of the actual extent of habeas corpus litigation and the types of restraints for which the writ was issued." [FN3]

An illustration of the situation is provided by our entire inability to provide a satisfactory answer to the question: What was the intended meaning of the Suspension Clause of the Constitution? [FN4] This straightforward inquiry has met with a tangled variety of proposed answers. [FN5] The two current leading candidates are:

(a) The Clause was meant to prevent Congress from limiting federal judicial review of the confinements of those in federal custody. This interpretation has the sanction of Chief Justice John Marshall. [FN6] But, at least in his version (i.e. that the Clause requires that Congress provide the writ to federal prisoners by statute), this view faces the obstacle

that Congress could violate the Constitution simply by doing nothing; the failure to provide a statutory mechanism for federal prisoners to obtain the writ would work a suspension. In Marshall's words, "the privilege itself would be lost, although no law for its suspension should be enacted." [FN7]

(b) The Clause was meant to prevent Congress from limiting state judicial review of the confinements of those in federal custody. [FN8] Notwithstanding its historical plausibility, this interpretation was rejected with some vigor by the Supreme Court in the middle of the last century, [FN9] and doubtless still would be today. There are, of course, two other logical possibilities:

(c) The Clause was meant to prevent Congress from limiting federal review of the confinements of state prisoners. Although there is excellent reason to think that the Clause should be so interpreted today, [FN10] the argument that this interpretation is reflective \*453 of the original intent appears inconsistent with the terms of Section 14 of the Judiciary Act of 1789, which provides:

That writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify. [FN11]

(d) The Clause was meant to prevent Congress from limiting the right of state judges to issue the writ to state prisoners. No one has suggested this, probably because the concept is so counter-intuitive to modern ways of thinking, but it is not entirely implausible. There was, after all, intense fear in the states about the tyrannical potential of the new federal government, fear that led to the creation of the Bill of Rights, and a belief among at least some ratifiers that the Clause gave the federal government a general power to suspend state habeas corpus laws. [FN12] Yet, although the states already had a well-developed structure of habeas corpus protections, [FN13] their proposals to Congress for a Bill of Rights did not contain suggestions for safeguarding it against federal interference. [FN14] A very reasonable deduction is that they believed that the Suspension Clause had already done the job effectively.

In a first effort [FN15] to shed some light on these obscurities, I have recently undertaken a preliminary survey of the public discussion of habeas corpus, in state conventions and in the pamphlet \*454 literature, at the time the Constitution was ratified. [FN16]

Of course, coming to some conclusion as to the views of contemporaries on the meaning of the Suspension Clause will hardly conclude the question of what it does or should mean today. Leaving entirely aside the whole debate as to the degree to which original intent should bind present interpretation, [FN17] all such inquiries have to struggle with the reality that in many respects those who attended the ratification conventions were far more ignorant of the Constitution than we are, [FN18] and, in any event, tended to disagree among themselves. [FN19] Nonetheless, in the belief that sounder Constitutional law emerges when we are aware of history than when we are ignorant of it, I offer my findings here.

Briefly put:

It is possible to marshall isolated materials in support of each of the positions outlined above. (These are collected in Part II.B.1). But to proceed in this fashion is to risk engaging in classic **\*455** "lawyer's history": collecting data to buttress a pre-conceived argument while ignoring the real drive behind the events generating the data. The overwhelming theme emerging from the historical materials has nothing to do with legal niceties; it is, rather, that habeas corpus should be preserved in full vigor as a remedy- particularly for society's outcasts-against potential governmental abuses.

Specifically, the attacks on the Suspension Clause as it emerged from the Convention fell into two groups.

First, some debaters used the existence of the Clause to attack the Federalist premise that a Bill of Rights was unnecessary because the proposed federal government would have only those powers specifically delegated to it. These arguments, described in Part II.B.2(a), offer little direct illumination on the questions laid out above, but do reveal a strong underlying consensus as to the importance of the writ.

Second, as Part II.B.2(b) describes, other debaters attacked the Clause as permitting too much suspension of the writ, to which supporters responded that they, too, expected the Clause to operate so as to protect unpopular individuals who might find themselves imprisoned.

This response appears to have been convincing to all parties, since no further protections were added, or even proposed, during the composition of the Bill of Rights. Thus, as Part III argues (and Part IV briefly re-states), a holistic view of the history would be that the participants in the

ratification debates, were they among us today, would support the independent judicial examination on federal habeas corpus of all convictions, state or federal.

## II. THE SOUNDS OF ARGUMENT

### A. The Suspension Clause in Philadelphia

The history of the Clause at the Convention itself is sparse, and, as the sources now stand, clear enough.

On August 20, 1787, Charles Pinckney of South Carolina moved that: "The 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 mmm months." [FN20] The motion was referred \*456 without debate to the Committee of Detail. [FN21]

When the matter returned to the Convention floor on August 28, Madison's notes record that:

Mr. Pinkney, urging the propriety of securing the benefits of the Habeas corpus in the most ample manner, moved 'that it should not be suspended but on the most urgent occasions, & then only for a limited time not exceeding twelve months'

Mr. Rutledge was for declaring the Habeas Corpus inviolable- He did not conceive that a suspension could ever be necessary at the same time through all the States-

Mr. Govr. Morris moved that 'The privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it'.

Mr. Wilson doubted whether in any case a suspension could be necessary, as the discretion now exists with Judges, in most important cases to keep in Gaol or admit to Bail.

The first part of Mr. Govr. Morris's motion, to the word 'unless' was agreed to nem: con:-on the remaining part; N.H. ay. Mass ay. Ct. ay. Pa. ay. Del. ay. Md. ay. Va. ay. N.C. no. S.C. no. Geo. no. [Ayes-7; noes-3.

[FN22]

Luther Martin of Maryland has left us further details of the debate on this last motion (in which he sided with the minority): [FN23]

As the State governments have a power of suspending the habeas corpus act [in cases of rebellion or invasion], it was said there could be no good reason for giving such a power to the general government, since whenever the State which is invaded or in which an insurrection takes place, finds its

safety requires it, it will make use of that power- And it was urged, that if 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 , who have had virtue and resolution enough to excite the opposition, and may imprison them during its pleasure in the remotest part of the union, so that a citizen of Georgia might be bastiled in the furthest part of New- Hampshire-or a citizen of New-Hampshire in the furthest extreme to the south, cut off from their family, their friends, and their every connection- \*457 These considerations induced me, Sir, to give my negative also to this clause. [FN24]

The clause then moved to the Committee of Style and Arrangement, which substituted the word "when" for "where," resulting in the text we have today. [FN25]

## B. The Suspension Clause After Philadelphia

While the foregoing history is generally well-known, [FN26] recent years have given scholars increased access to materials illuminating the debates that took place once the Constitution was released to the public. [FN27] In a development that we should have learned by this time to consider as less surprising than disappointing, the resulting greater clarity of the historical picture has not been accompanied by any greater insight into the specifics of original intention on matters of particular interest today [FN28] -as those matters did not happen to be the ones particularly in controversy among the debaters of the time. That fact, however, is itself illuminating. The \*458 shared premises of the political opponents may in this instance teach us as much as their disagreements.

1. The Non-Issues . Since the scope of the writ preserved by the Clause was not a matter of particular controversy, that issue was only glancingly adverted to in the ratification debates-and then exclusively by Federalists interested in showing that the Clause did not grant the federal government too much power to detain people arbitrarily. Thus, such discussion as took place had to do with the federal power of imprisonment, not release, and the limitations on the state power of release, not imprisonment.

As a result, what went undiscussed explicitly-as simply not

being on the radar screen of controversial issues-was the extent of the federal courts' role in issuing the writ to state prisoners. [FN29] Moreover, in reading that which was said, it would be anachronistic to assume that the debaters shared the view of the nineteenth-century Supreme Court that state courts could not issue the writ to federal prisoners. [FN30]

Thus, for instance, Judge Increase Sumner, supporting the Constitution in the Massachusetts convention, stated: "Congress have only the power to suspend the privilege to persons committed by their authority. A person committed under authority of the states will still have a right to this writ." [FN31] A lawyer taking the modern view would read this as a statement that the Clause only preserved a federal writ for federal prisoners. But, if one rejected that premise, it could with equal plausibility be read as also making the statement that federal prisoners would retain the right to a state writ.

Certainly, other debaters read the Clause as applying to the issuance of the writ by state courts. Thus, for example, George Nicholas told the Virginia convention that habeas corpus represented the sole instance in which Congress could "suspend our laws." [FN32] Unfortunately, Nicholas did not indicate in his brief remarks \*459 whether he thought that "our laws" would in any event permit the issuance of state writs to federal prisoners. But at least one Federalist ratifier in the same convention, Alexander White, was explicit in the belief that the state courts' authority would extend so far:

But should contests arise with respect to the extent of the respective jurisdictions the advantage is evidently on the side of the State governments. I speak now of a legal contest. The Continental Courts will have no pre-eminence; and . . . [t]he writ of habeas corpus gives a decided superiority to the State courts in all cases where personal liberty is concerned, by referring to their judgment, the legality of all imprisonments, incident to which is the right of determining the amount of bail to be required, where the commitment is judged lawful. [FN33]

Thus, if one reads the history like a lawyer, searching for scraps of data to support whatever argument is sought to be made, one will find what lawyers usually do: some quotations that may be plausibly deployed in support of any desired position, in this case in support of various of the four positions described in Part I. But to end the discussion there-concluding that the sparse record is one of disagreement that has little to say on our issue-would be to miss much,

indeed most, of what the history could teach us.

Not all disagreements are born equal. In the case of the civil and criminal immunity of an incumbent President, for example, the members of the founding generation were at odds, knew that they were, and recognized that their discord reflected a critical rift of political philosophies between the disputants: "opposing premises as to the locus of national sovereignty, some placing it in the President and others in the People." [FN34]

The case of the Suspension Clause differs in every respect. The few isolated comments with respect to the intended scope of the writ that was to be preserved were made by people who did not engage one another directly (and, had they done so, might have found that they in fact agreed), and who were addressing a minor side issue in the broad themes of the debate over the Clause.

When one looks at the center rather than the periphery of that debate, one finds that the participants did not disagree on fundamental political premises. In fact, they were united in their belief that the maintenance of a vigorous writ was indispensable to political liberty. Discussions of the Clause revolved about the adequacy \*460 of the Constitutional text to achieve the shared goal of liberty preservation. Unlike other such debates, the conclusion in this case was that text did achieve the results that everyone desired, so that no further safeguard was required in the eventual Bill of Rights.

Thus, it is in its areas of consensus as revealed by its silence that the history speaks most clearly.

2. The Issues . Discussions of the Clause focused on the power of suspension rather than on the nature of the writ-and for good reason: those discussions did not occur in isolation, but rather took place within the framework of two of the most controversial issues regarding the proposed national government.

a. The Issue of Delegated Powers . It is familiar history that, in response to the attack that the Constitution as it emerged from the Convention lacked a Bill of Rights, the Federalists argued, among other things, that the document did not need one, since every power not explicitly granted to the national government was withheld from it. [FN35]

Thus, for example, in No. 84 of The Federalist , Alexander Hamilton argued that there was no need for a Bill of Rights,

since under the proposed Constitution "the people surrender nothing; and as they retain everything they have no need of particular reservations." [FN36] He continued by urging that the inclusion of a Bill of Rights in the Constitution

would even be dangerous . . . . For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press should not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a power to provide proper regulations concerning it was intended to be vested in the national government. [FN37]

The structure and substance of the Suspension Clause enabled opponents of the proposed Constitution to respond that the government was in fact not one of delegated powers. This issue, rather than that of the scope of the writ, was at the heart of much of the debate that took place over the Clause.

Thus, for example, John Smilie drew the attention of the Pennsylvania ratifying convention to the clauses "expressly declaring that the writ of habeas corpus and the trial by jury in criminal cases shall not be suspended or infringed," and asked: "How does this indeed agree with the maxim that whatever is not given is reserved? Does it not rather appear from the reservation of these two articles that everything else, which is not specified, is included in the powers delegated to the government?" [FN38]

Similarly, a prominent Anti-federalist pamphleteer in New York wrote:

We find they have . . . declared, that the writ of habeas corpus shall not be suspended, unless in cases of rebellion . . . . If every thing which is not given is reserved, what propriety is there in [the exception]? Does this constitution any where grant the power of suspending the habeas corpus . . . ? It certainly does not in express terms. The only answer that can be given is, **\*462** that these are implied in the general powers granted. [FN39]

In short, as Patrick Henry observed, the statement that the writ of habeas corpus should not be suspended except in

certain cases meant that it could be suspended in the ones not covered; the fact that the affirmative grant of power to do so was not contained in the Constitution, but needed to be implied, "is destructive of the doctrine advanced by the friends of that paper." [FN40]

The Federalist response was to deny any inconsistency, claiming (with considerable plausibility in light of the Convention proceedings described above) [FN41] that, despite its negative phraseology, the Clause was in fact a grant of power to the federal government. Thus, the Federalist pamphleteer A Native of Virginia explained, "that as the Congress can claim the exercise of no right which is not expressly given them by this Constitution; they will have no power to restrain the press in any of the States; and therefore it would have been improper to have taken any notice of it." [FN42] Habeas corpus, on the other hand, presented a different case, one which "corroborates this doctrine." [FN43] With respect to that issue:

The Convention were sensible that a federal government would no more have the right of suspending that useful law, without the consent of the States than of restraining the liberty of the press: But at the same time they knew that circumstances might arise to render necessary the suspension of the habeas corpus act, and therefore, they require of the States, that they will vest them with that power, whenever those circumstances shall exist. [FN44]

In short, since the Suspension Clause was a grant of power to the federal government (albeit an appropriately circumscribed one), it did not represent a violation of the underlying principle that any power not explicitly granted to the federal government was withheld from it. [FN45]

For our purposes, the key point is that the Anti-federalists' attack was not on the scope of the writ being protected by the Suspension Clause. They approved of that (as did the Federalists, of \*463 course). The Anti-federalist argument, rather, was that the same protections should have been given explicitly to other rights [FN46] - hence the need for a bill of rights. [FN47]

Thus, behind the disagreements over the delegated powers issue as it relates to the Clause lie much more significant agreements: that a vigorous writ was a key safeguard of liberty, and that the writ protected by the proposed text was one broad enough to serve that purpose.

b. The Issue of the Danger of Tyranny . The second major

point of the opponents of the Suspension Clause was that its grant of power to the federal government was a dangerous one. This argument, of course, took place within the framework-long recognized by historians [FN48] -of a universal agreement among all political debaters that, because human nature was inherently power-seeking, any grant of authority to government officeholders must be scrutinized with extreme care since they would inevitably attempt to abuse the authority. [FN49]

**\*464** As the account of the debate in Philadelphia given above indicates, [FN50] a proposal to flatly bar suspensions of the writ was defeated there, on the explicit premise that there were certain circumstances under which the exercise of this power would be appropriate. This decision at the Convention, which Luther Martin promptly made public, [FN51] drew a good deal of fire during the ratification debates.

The gist of this opposition was that if the power of suspension were granted to the federal government, "such worthy characters as [Daniel] Shays and [his lieutenant Adam] Wheeler might be forced into prison, confined there until their trial, and at length be hung for attempting to introduce a desirable reformation in government." [FN52] As the French charge d'affaires wrote home in summarizing this view: "The Congress will suspend the writ of habeas corpus in case of rebellion; but if this rebellion was only a resistance to usurpation, who will be the Judge? the usurper." [FN53] Accordingly, various commentators suggested that the proposed Constitution should be re-written to forestall these outcomes. [FN54]

**\*465** The Federalists' response was that they shared the goals of their opponents-which were fully implemented by the Constitutional text. Thus, in a speech to the Maryland legislature reporting on his doings as a Convention delegate (and responding to the views of Luther Martin), James McHenry said: "Public safety may require a suspension of the Ha: Corpus in cases of necessity: when those cases do not exist, the virtuous Citizen will ever be protected in his opposition to power, 'till corruption shall have obliterated any sense of Honor & Virtue from a Brave and free People." [FN55]

As subsequent developments show, it seems fairly clear that the Federalists won this debate.

### III. THE SOUNDS OF SILENCE

As they ratified the proposed Constitution, a number of

states passed sets of amendments that they wished to see incorporated; James Madison collated these, and those that had achieved a reasonable degree of consensus among the states eventually became the Bill of Rights. [FN56] There were explicit safeguards for numerous rights—from freedom of press and religion, to protections for the civil jury trial, to a ban on cruel and unusual punishments—that the Anti-federalists had warned would be in jeopardy under the Constitution as originally proposed, and the entire project thus represented a repudiation of the Federalist position that those and other rights had already been sufficiently safeguarded. But there was not a word about the right to habeas corpus, reflecting the fact that (with one minor exception) the states had not proposed any further protection for that right. [FN57]

**\*466** A fair conclusion is that the ratification debates had convinced all parties that the Clause as proposed would meet the aims they agreed that they shared: to protect the liberties of those who might fall afoul of the organs of power. [FN58] It follows from this premise that, were they present among us today, the debaters would reject modern formulations that see the federal writ of habeas corpus for state prisoners as an assault on state sovereignty. [FN59]

**\*467** Plainly, the Federalists were not worried about preserving state sovereignty—neither in the sense of the dignity of the states as against the federal government, nor in the sense of the rights of state-wide majorities to act as they pleased towards their own citizens. With regard to the first, it was the over-abundance of reserved power in the states that led to the need to write the Constitution in the first place. [FN60] With regard to the second, it is clear that checking the excesses of local majorities (like Rhode Island's) that might act oppressively towards local minorities (like creditors) was a major Federalist goal. [FN61]

As for the Anti-federalists, their contributions to the debate over the Clause clearly show that they, unlike some modern Supreme Court Justices, were not worried about whether the states would sufficiently retain their sovereign rights to imprison or execute people, but were, rather, worried about whether the states would retain their sovereign rights to release them. In particular, **\*468** they were concerned that federal power might be exerted so as to keep unpopular prisoners—rightly or wrongly branded by the authorities as criminals—from vindicating their rights to freedom. [FN62] From the Anti-federalist point of view, a power in the general government to release state prisoners, as opposed to a power

in the general government to forestall their release, would be an example of federalism as a preserver of liberty [FN63] -an instance of the virtue of a federal, as opposed to a national, government. [FN64]

#### IV. CONCLUSION: LISTENING TO HISTORY

The fact that both sides ultimately agreed that the Clause as drafted met the goals that they proclaimed in common-as evidenced by the lack of any effort to amend it during the ratification process-suggests that all parties read it as protecting broadly against Congressional interference with the power that federal and state courts were each assumed to possess: to order the release on habeas corpus of both federal and state prisoners.

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[FN1]. For a summary of these prior to the Republican capture of Congress in the November, 1994 elections, see Larry W. Yackle, *The Habeas Hagioscope*, 66 S. Cal. L.Rev. 2331 (1993). As of the date this Symposium was held, see Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buff. L. Rev. 381 (1996), and the report of the Association of the Bar of the City of New York, *The Crisis in Capital Representation* (Mar. 1996), 51 Rec. Ass'n B. City N.Y. 169, 174-76, 191-98 (1996).

[FN2]. See Larry W. Yackle, *Reclaiming the Federal Courts* 155-56 (1994).

[FN3]. Dallin H. Oaks, *Habeas Corpus in the States-1776-1865*, 32 U. Chi. L.Rev. 243, 256 (1965).

[FN4]. U.S. Const., art. I, § 9, cl. 2: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." There is similar ambiguity surrounding the Clause's predecessor, a proposed amendment to the Articles of Confederation that would have created "a federal Judicial Court for trying and punishing all Officers appointed by Congress for all crimes, offenses, and Misbehavior in their Offices . . . provided that the trial of the fact by Jury shall ever be held sacred, and also the benefits of the writ

of Habeas Corpus . . . ." See 1 Documentary History of the Ratification of the Constitution 167 (John P. Kaminski & Gaspare J. Saldino eds., 1984) [hereinafter Documentary History ] (Proposed Article 19, submitted to the Confederation Congress on August 7, 1786 by a committee appointed to consider improvements in the Articles, but not taken up by the full body). This proposal could plausibly bear interpretation (a) or (b) discussed in the next paragraph of text, or both (a) and (b).

[FN5]. The four possibilities set forth below are by no means mutually exclusive, and, with greater or lesser degrees of plausibility, one could argue for any combination of them. Thus, for example, Professor Paschal's article described *infra* note 11, argues for (a) and (c).

[FN6]. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807).

[FN7]. *Id.* at 95.

[FN8]. See William F. Duker , *A Constitutional History of Habeas Corpus* 126- 56 (1980); Akhil R. Amar, *Of Sovereignty and Federalism* , 96 *Yale L.J.* 1425, 1509 (1987).

[FN9]. See *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871); *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858).

[FN10]. See 1 James S. Liebman & Randy Hertz , *Federal Habeas Corpus Practice and Procedure* , § 7.2d (2d ed., 1994); Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?* , 92 *Mich. L.Rev.* . 862, 871-74 (1994); Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six- Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates* , 18 *N.Y.U. Rev. L. & Soc. Change* 451, 466 (1990-1991). Justice Scalia's dissenting opinion in *Schlup v. Delo*, 115 S.Ct. 851, 875 (1995), which observes that "the very broad limits set by the Suspension Clause" constrain the Court's power to curtail federal habeas corpus review of state convictions, adopts this reading.

[FN11]. *First Judiciary Act*, ch. 20, § 14, 1 Stat 73, 81-82 (1789). See generally *Myers v. United States*, 272 U.S. 52, 136, 174-75 (1926) (setting forth reasons why actions of First Congress are regarded "as of the greatest weight in the interpretation" of the Constitution). Nonetheless, the word "appears" is used in the text advisedly. In an extremely persuasive article, Professor Francis Paschal attacked the

reading of the statute advanced by Bollman , supra note 6, and argued that state prisoners had a constitutional right to habeas corpus-an argument that led the Congress in 1968 to reject a proposed statute that would have denied state prisoners the right to assert constitutional claims in the federal courts except on direct appeal. Francis Paschal, *The Constitution and Habeas Corpus* , 1970 Duke L.J. 605.

[FN12]. See infra text accompanying notes 32-33.

[FN13]. See Steiker, supra note 10, at 872 n.43.

[FN14]. For a fuller discussion see infra text accompanying notes 56-59.

[FN15]. This is the beginning step in a larger project. I am presently at work on a book on the history of habeas corpus, projected to be published during 1998. I hope that by then my thinking will have been enriched by the reactions of other students to these initial thoughts.

[FN16]. Cf . 5 Annals of Cong. 776 (1796) (Remarks of James Madison) (" [W]hatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan . . . . If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it . . . in the State Conventions."); Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent : The Recent Past* , 77 Cal. L. Rev. 235, 250-51, 258-74 (1989) (discussing range of sources used to determine original intent).

[FN17]. See generally Daniel A. Farber & Suzanna Sherry , *A History of the American Constitution* 373-97 (1990) (summarizing originalism debate).

[FN18]. See Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 12 *The Works of Thomas Jefferson* 11-12 (Paul L. Ford ed., 1905).

Some men look at constitutions with a sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it. . . . It was very like the present, but without the experience of the present; and forty years of experience in government is

worth a century of book-reading; and this they would say themselves, were they to arise from the dead.

Id.

[FN19]. See, e.g. , Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis* , 50 U. Pitt. L.Rev. 349, 397 (1989) (" [O]n questions of race there was vast disagreement among the men who participated in framing the Constitution of 1787."); Eric M. Freedman, *The Law As King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?* , 20 Hastings Const. L.Q. 7, 16-21 (1992) (detailing how founders disagreed over scope of Impeachment Clause).

In the present case, the ratifiers were ignorant of the key official and unofficial records of the discussions in Philadelphia, which had not yet been published. See 1 *The Records of the Federal Convention of 1787* , at xi-xii (Max Farrand ed., rev. ed. 1966) (describing sequence of publication of accounts of the proceedings). However, some of them were plainly familiar with the accounts of the debate on the Suspension Clause that Luther Martin published immediately following the Convention. See *infra* text accompanying notes 23-24, 55.

[FN20]. 2 *The Records of the Federal Convention of 1787* , *supra* note 19, at 334, 340-42 (reprinting entry from *Convention Journal* of Aug. 20, 1787 and Madison's notes based thereon).

[FN21]. *Id.* .

[FN22]. *Id.* at 438.

[FN23]. See *Address No. II of Luther Martin to the Citizens of Maryland* (Mar. 21, 1788) in 16 *Documentary History* , *supra* note 4, at 456.

It was my wish that the general government should not have the power of suspending the privilege of the writ of Habeas Corpus , as it appears to me altogether unnecessary, and that the power given to it, may and will be used as a dangerous instrument of oppression; but I could not succeed.

*Id.*

[FN24]. Luther Martin, *Genuine Information VIII* (Jan. 22, 1788), in 15 *Documentary History* , *supra* note 4, at 434. See also Luther Martin, *Speech to the Maryland Assembly* (Nov. 29, 1787), in 14 *id.* . at 291.

Nothing could add to the mischievous tendency of this system more than the power that is given to suspend the Act of Ha:

Corpus-Those who could not approve of it urged that the power over the Ha: Corpus ought not to be under the influence of the General Government. It would give them a power over Citizens of particular States who should oppose their encroachments, and the inferior Jurisdictions of the respective States were fully competent to Judge on this important privilege; but the Almighty power of deciding by a call for the question, silenced all opposition to the measure as it too frequently did to many others.

[FN25]. See 2 The Records of the Federal Convention of 1787 , supra note 19, at 596 (reprinting Madison's copy of the committee's report of September 12, 1787).

[FN26]. For a detailed consideration, see Paschal, supra note 11, at 608-17. See also Mello & Duffy, supra note 10, at 463-69.

[FN27]. This is primarily due to the continuing appearance of new volumes of the scholarly and comprehensive Documentary History , supra note 4. This set, which attempts to reproduce as fully as presently-known sources will allow all ratification-related material in each state (including convention debates, published pamphlets and essays, and references in private correspondence) is far superior in its breadth of coverage to The Debates in the Several State Conventions on the Adoption of the Federal Constitution (Jonathan Elliot ed., 2d ed., 1866) [hereinafter Elliot's Debates ], which has hitherto been the standard source. Hence, scholars may confidently anticipate the availability of more research materials, if not necessarily of deeper insights, as volumes continue to be published in the forthcoming years. See generally Henry Paul Monaghan, We the Peoples, Original Understanding, and Constitutional Amendment 96 Colum. L. Rev. 121, 148 n.151 (1996). In conducting my research for this Article, I have used the Documentary History whenever possible.

[FN28]. See generally Boris I. Bittker, Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is? , 19 Harv. J.L. & Pub. Pol'y 9, 35-36 (1995).

[FN29]. A recent review of the field suggests that this issue "did not appear until after the state-federal problems created by the Fugitive Slave Act of 1850." Marc M. Arkin, The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners , 70 Tul. L. Rev. 1, 4-5 (1995).

[FN30]. See supra text accompanying notes 8-9.

[FN31]. Increase Sumner, Speech to the Massachusetts Ratifying Convention (Jan. 26, 1788), in 2 Elliot's Debates , supra note 27, at 109.

[FN32]. George Nicholas, Speech to the Virginia Ratifying Convention (June 6, 1788), in 9 Documentary History , supra note 4, at 1002. This was apparently also the view of the Federalist pamphleteer, A Native of Virginia. See A Native of Virginia, Observations Upon the Proposed Plan of Federal Government (Petersburg, Va., 1788), in id . at 691. See also [Samuel] Adams, Speech to the Massachusetts Ratifying Convention (Jan. 26, 1788), in 2 Elliot's Debates , supra note 27, at 108.

[FN33]. Letter from Alexander White to the Winchester Gazette (Feb. 29, 1788), in 8 Documentary History , supra note 4, at 442.

[FN34]. Freedman, supra note 19, at 20.

[FN35]. See , e.g. , George Nicholas, Speech to the Virginia Ratifying Convention (June 10, 1788), in 9 Documentary History , supra note 4, at 1135 ("But it is objected to for want of a Bill of Rights. It is a principle universally agreed upon, that all powers not given, are retained."); Edmund Randolph, Speech to the Virginia Ratifying Convention (June 10, 1788), in id . at 1099.

As the prompt adoption of the Tenth Amendment suggests, this argument was far from impregnable, since—apart from the considerations discussed in the text—it suffered from the serious objection that the document nowhere explicitly stated that which Hamilton, James Wilson, and other Federalists said that it meant. In a letter to James Madison that survives in two versions, Thomas Jefferson made this point with some vigor. See Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 8 id . at 250; Letter from Thomas Jefferson to Uriah Forrest (Dec. 31, 1787), in 14 id . at 488, 489 (enclosing different version of letter). See also Samuel Spencer, Speech to the North Carolina Ratifying Convention (July 29, 1788), in 4 Elliot's Debates supra note 27, at 152.

The gentlemen said, all matters not given up by the form of government were retained by the respective states. I know that it ought to be so; it is the general doctrine, but it is necessary that it should be expressly declared in the Constitution and not left to mere construction and opinion. . . . The Confederation says, expressly, that all that was not given up [to] the United States was retained by the respective states. If such a clause had been inserted in this Constitution, it would have superseded the necessity of a bill

of rights. But that not being the case, it was necessary that a bill of rights, or something of that kind, should be part of the Constitution.

Id.

[FN36]. The Federalist No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961). See , e.g. , James Iredell, Speech to the North Carolina Ratifying Convention (July 28, 1788), in 4 Elliot's Debates , supra note 27, at 148 (Constitution "may be considered as a great power of attorney, under which no power can be exercised but what is expressly given").

[FN37]. Hamilton, supra note 36, at 513-14. For a fuller description of the Federalists' position on this issue, see Paul Finkelman, James Madison and the Bill of Rights: A Reluctant Paternity , 1990 Sup. Ct. Rev. 301, 309-13.

[FN38]. John Smilie, Speech to the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 Documentary History , supra note 4, at 392.

[FN39]. Letter from Brutus II to New York Journal (November 1, 1787), in 13 id . at 524, 528. See William Grayson, Speech to the Virginia Ratifying Convention (June 16, 1788), in 10 id . at 1332 (making same argument).

[FN40]. Patrick Henry, Speech to the Virginia Ratifying Convention (June 17, 1788), in id . at 1345-46.

[FN41]. See supra text accompanying notes 22-24.

[FN42]. A Native of Virginia, supra note 32, at 691.

[FN43]. Id .

[FN44]. Id .

[FN45]. For another Federalist response, see the two versions of Jasper Yeates' speech of November 30, 1787 to the Pennsylvania convention in 2 Documentary History , supra note 4, at 435, 437.

[FN46]. See Robert Whitehall, Speech to the Pennsylvania Ratifying Convention (Nov. 28, 1787), in id . at 398-99. The cited pages contain two versions of this speech, which are consistent on our point, one recorded by Alexander J. Dallas and printed in the Pennsylvania Herald of December 15, 1787, and the other captured in James Wilson's notes. Whitehall

reiterated his position in a speech on November 30. See Robert Whitehall, *Speech to the Pennsylvania Ratifying Convention* (Nov. 30, 1787), in *id.* at 427.

[FN47]. See, e.g., *Letter from a Federal Farmer II to the Republican* (Oct. 12, 1787), in 14 *id.* at 42, 45-46; Smilie, *supra* note 38. See also Spencer, *supra* note 35.

[FN48]. See Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 21-22 (1969); James S. Young, *The Washington Community 1800-1828*, at 55 (1961) ("Power made men unscrupulous . . . . The possession of power was seen to unleash men's aggressive instincts, and power-seeking was associated with antisocial behavior."); *The Antifederalists* xxix (Cecilia M. Kenyon ed., 1966) ("Self-interest and . . . a lust for power were anticipated."); Jack P. Greene, *Ideas and the American Revolution*, 17 *Am. Q.* 592, 594 (1965) (reviewing *Pamphlets of the American Revolution* (Bernard Bailyn, ed. 1965)).

[A] dominant and comprehensive theory of politics had emerged in the colonies by the middle of the eighteenth century. At the heart of this theory were the convictions that man in general could not withstand the temptations of power, that power was by its very nature a corrupting and aggressive force, and that liberty was its natural victim. *Id.*; Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 *Wm. & Mary Q.* 334, 334-35 (1982) (reviewing historical literature from 1960's through 1980's).

[FN49]. See, e.g., William Maclay, *Journal of William Maclay* 82 (Edgar S. Maclay ed., 1890) (entry for June 18, 1789: "It is the fault of the best governors, when they are placed over a people, to endeavor to enlarge their powers . . . ."); *Broadside from A True Friend* (Richmond Dec. 5, 1787), in 14 *Documentary History*, *supra* note 4, at 373-74 (" [I]t is unhappily in the nature of men, when collected for any purpose whatsoever into a body, to take a selfish and interested bias, tending invariably towards the [i]ncreasing of their prerogatives and the prolonging of the term of their function. . . ."); William Grayson, *Speech to the Virginia Ratifying Convention* (June 21, 1788), in 10 *id.* at 1444 (" [P]ower . . . ought to be granted on a supposition that men will be bad"); Patrick Henry, *Speech to the Virginia Ratifying Convention* (June 16, 1788), in *id.* at 1321 ("Look at the predominant thirst of dominion which has invariably and uniformly prompted rulers to abuse their powers."); William Lenoir, *Speech to the North Carolina Ratifying Convention* (July 30, 1788), in 4 *Elliot's Debates*, *supra* note 27, at 203-04 (" [I]t is the nature of man to be tyrannical. . . . We ought to consider the

depravity of human nature [and] the predominant thirst for power which is in the breast of every one."); Samuel Spencer, Speech to the North Carolina Ratifying Convention (July 25, 1788), in *id.* at 68 ("It is well known that men in power are apt to abuse it, and extend it if possible."). See also The Federalist No. 51, at 322 (J. Madison) (C. Rossiter ed., 1961) (" [W]hat is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself."); Letter from John Adams to Thomas Jefferson (Nov. 13, 1815), in 2 THE ADAMS-JEFFERSON LETTERS 456 (Lester J. Cappon ed., 1959); Letter from Nathaniel Barrell to George Thatcher (June 15, 1788), in 15 Documentary History , *supra* note 4, at 372-73.

The roots of this attitude have been traced deep into American history. See T.H. Breen, Looking Out for Number One: Conflicting Cultural Values in Early Seventeenth-Century Virginia , 78 S. Atlantic Q. 342, 349 (1979) (Virginia settlers of early 1600s "assumed that persons in authority would use their office for personal gain").

[FN50]. See *supra* text accompanying note 22.

[FN51]. See *supra* text accompanying notes 23-24.

[FN52]. Letter of A Briton to the Gazette of the State of Georgia (Dec. 13, 1787), in 3 Documentary History , *supra* note 4, at 257.

[FN53]. Letter from Louis Guillaume Otto to Comte de Montmorin (Oct. 20, 1787), in 13 *id.* at 424.

[FN54]. See, e.g. , Letter of A Georgian to the Gazette of the State of Georgia (Nov. 15, 1787), in 3 *id.* at 240 (suggesting that the Clause read: "The privilege of the Writ of Habeas Corpus shall remain, without any exceptions whatever, inviolate forever."); Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 8 *id.* at 250 ("I do not like . . . the omission of a bill of rights providing clearly and without the aid of sophisms for . . . the eternal & unremitting force of the habeas corpus laws . . ."); Dissent of the Minority of the Pennsylvania Convention (Dec. 12, 1787), in 2 *id.* at 630 (calling for a Bill of Rights securing "personal liberty by the clear and unequivocal establishment of the writ of habeas corpus "). See also Letter from Thomas

Jefferson to Alexander Donald (Feb. 7, 1788), in 8 *id.* at 354 (hoping that Constitution would be amended "by a declaration of rights . . . which shall stipulate . . . no suspensions of the habeas corpus"); Letter from Thomas Jefferson to William Stephens Smith (Feb. 2, 1788), in 14 *id.* at 500 (containing same idea).

The exchange between Jefferson and Madison is more fully considered in Finkelman, *supra* note 37, at 329-34, which observes that Madison was skeptical about the ability of any constitutional guarantee against suspension of the writ, however phrased, to stand up against the force of a passionate burst of public opinion.

[FN55]. James McHenry, Speech to the Maryland House of Delegates (Nov. 29, 1787), in 14 *Documentary History*, *supra* note 4, at 283.

[FN56]. See generally Finkelman, *supra* note 37.

[FN57]. The exception was New York, which proposed an amendment, "That the writ of habeas corpus shall not, by any law, be suspended for a longer term than six months, or until twenty days after the meeting of the Congress next following the passing of the action for such suspension." Resolution of the New York Ratifying Convention (July 26, 1788), in 1 *Elliot's Debates*, *supra* note 27, at 330. Even had this limited proposal had the support of more states than it did, it likely would have had some difficulty in Congress; a similar suggestion in Massachusetts, see [John] Taylor, Speech to the Massachusetts Ratifying Convention (Jan. 25, 1788), in 2 *id.* at 108; see also [Samuel] Nason, Speech to the Massachusetts Ratifying Convention (Feb. 1, 1788) in *id.* at 137, had been laid aside when it was pointed out that the suspension power in that state's constitution was limited to twelve months, but "as our legislature can, so might the Congress, continue the suspension of the writ from time to time or from year to year." [Francis] Dana, Speech to the Massachusetts Ratifying Convention (Jan. 26, 1788), in *id.* at 108. A proposal for a defined time limit on suspensions had also been rejected in Philadelphia. See *supra* text accompanying notes 20-22.

In addition to drafting and transmitting proposed amendments to Congress, a number of states also adopted formal statements of political principles in connection with their ratifications of the Constitution. Two of these contained provisions concerning habeas corpus:

New York -

That every person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a

removal thereof if unlawful; and that such inquiry or removal ought not to be denied or delayed, except when, on account of public danger, the Congress shall suspend the privilege of the writ of habeas corpus .

Resolution of the New York Ratifying Convention (July 26, 1788), in 1 Elliot's Debates , supra, at 328.

Virginia -

That every freeman restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same if unlawful, and that such remedy ought not to be denied or delayed.

Declaration of Rights of the Virginia Ratifying Convention (June 27, 1788), in 10 Documentary History , supra note 4, at 1552.

[FN58]. Another possibility is that those with concerns about habeas rights thought that their desires would be met by the Ninth and Tenth Amendments. However, in view of their specificity in demanding safeguards for other rights, it seems unlikely that they would have left a matter of such importance to generalized provisions.

[FN59]. The contrast is starkly presented by *Coleman v. Thompson*, 501 U.S. 722 (1991). There, the Court ruled that a capital prisoner whose lawyer had filed his state habeas corpus appeals papers three days late had thereby forfeited federal habeas corpus review. This decision was premised on the explicit view that the outcome represented the appropriate allocation of costs, between the interests of the State in avoiding federal review of its conviction and those of the prisoner in not being executed pursuant to a possibly unconstitutional judgment. *Id.* at 754. In a dictum that will live in infamy, the Court began its opinion, "This is a case about federalism." *Id.* at 726. As Justice Blackmun's dissenting opinion appropriately responded, and as I elaborate in the following paragraphs of text, a conception of federalism that would justify the Court's result is simply the opposite of the founders'. See *id.* at 758-762.

It is also a fair inference from the ratification debates that the participants would side with the scholars rather than with the Supreme Court on the issue of the state courts' authority to issue the writ to federal prisoners. See *supra* text accompanying notes 8-9.

[FN60]. See *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 729 (1838).

[O]wing to the imbecility of congress, the powers of the states being reserved for legislative and judicial purposes, and the utter want of power in the United States to act

directly on the people of the states, on the rights of the states (except those in controversy between them) or the subject matters, on which they had delegated but mere shadowy jurisdiction, a radical change of government became necessary. Id. ; Merrill Jensen, *The Articles of Confederation; An Interpretation of the Social-Constitutional History of the American Revolution* 244-45 (1940).

I have set forth my views on this history in considerably more detail in Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution From the Confederation Period: The Case of the Drafting of the Articles of Confederation* , 60 *Tenn. L. Rev.* 783 (1993).

[FN61]. Madison made this argument for the new Constitution explicitly at several points in *The Federalist* No. 10, at 84, No. 43, at 275-77 (James Madison) (Clinton Rossiter ed., 1961). See also Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 12 *The Papers of Thomas Jefferson* 276 (Julian P. Boyd ed., 1950) (flagrant injustices of state legislatures to private individuals critical to preparing national mind for reform of Confederation); Henry Lee, *Speech to the Virginia Ratifying Convention* (June 9, 1788), in 9 *Documentary History* , supra note 4, at 1074 ("If Pandora's box were on one side of me, and a tender law on the other, I would rather submit to the box than to the tender law."); Edmund Randolph, *Speech to the Virginia Ratifying Convention* (June 6, 1788), in id . at 972-73 (denouncing unjust and oppressive legislative acts since the Revolution); *Speech of Jasper Yeates to Pennsylvania Ratifying Convention* (Nov. 30, 1787), in 2 id . at 436, 439 (By such enactments, "the government of laws has been almost superseded. . . . [But the Constitution will be] the glorious instrument of our political salvation."). See generally Letter XII of *The Landholder* to the *Connecticut Courant* (Mar. 17, 1788), in 16 id. at 405 (denouncing Rhode Island tender acts).

[FN62]. See supra text accompanying notes 52-54.

[FN63]. See generally *The Federalist* No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) ("In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controlled by itself.").

[FN64]. As Henry J. Bourguignon, *The Federal Key to the Judiciary Act of 1789*, 46 S.C. L. Rev. 647, 647-51 (1995) has recently reminded us, the shared belief of the founding generation-Federalists and Anti-federalists alike-in the liberty-preserving virtues of federalism (conceived of as concurrent state and federal power over as many subjects as possible) provided the basis for many important compromises, both in Philadelphia and afterwards. I would add that the same was true before Philadelphia, see Freedman, *supra* note 60, at 826 (discussing drafting of Articles of Confederation), and might yet be true today. See Eric M. Freedman, *Innocence, Federalism, and the Capital Jury: Two Legislative Proposals for Evaluating Post-Trial Evidence of Innocence in Death Penalty Cases*, 18 N.Y.U. Rev. L. & Soc. Change 315, 324 (1990-91).