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Case Comment: INS v. St. Cyr

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will be less jarring than a shift to a uniform rule. Second, the asserted values of predictability and simplicity are questionable because federal preclusion law is not entirely uniform.[74] Finally, in terms of its impact on litigants' behavior, enshrining the forum state's law as the source of all preclusion law creates just as predictable a result as would the adoption of a uniform federal rule. Litigants in diversity cases know that the substantive law of the state applies to their dispute; the knowledge that state preclusion law governs as well does not add a burdensome level of unpredictability and complexity. Presumably, in preparing for litigation the burden of determining the content of a state's preclusion law is no greater than determining the content of the remainder of the state's substantive law. Thus, the Court's decision did in fact promote predictability by firmly establishing the standard for preclusion law in diversity cases.

The Court's decision in *Semtek* correctly recognized that the possibility of violating the Rules Enabling Act, along with the longstanding federalism principles and respect for state substantive law reflected in *Erie*, is much more serious than merely sacrificing some efficiency in adjudication or potentially a degree of predictability and simplicity in the application of preclusion law. By appropriately balancing these difficult issues, the Court's conclusion brings much needed clarity to the doctrine of interjurisdictional preclusion.

C. *Habeas Corpus*

Suspension Clause. — Congress has long subjected aliens guilty of certain enumerated crimes to deportation.[1] From 1952 to 1996, however, the Board of Immigration Appeals interpreted section 212(c) of the Immigration and Nationality Act of 1952[2] as providing the Attorney General with discretion to grant waivers from automatic deportation.[3] In 1996, Congress passed two statutes — the Antiterrorism and

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[74] *See* Brief for the Petitioner, *supra* note 6, at *26 (arguing that the federal courts are split on basic preclusion law principles and that given the infrequency of Supreme Court review and resolution of these splits, following state preclusion law is a "more efficient, administrable, and reliable system than relying on the development of a uniform federal preclusion law").

[1] *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(i)–(iii) (Supp. II 1996) (providing that aliens are deportable upon conviction for one crime of moral turpitude if the crime occurred within five years of admission into the country and was punishable by a jail term of at least one year; for two crimes of moral turpitude; or for an aggravated felony).

[2] Pub. L. No. 414, § 212(c), 66 Stat. 163, 187 (repealed 1996).

[3] INS v. St. Cyr, 121 S. Ct. 2271, 2276 (2001) (explaining that although the original text of section 212(c) only granted the Attorney General discretion to admit immigrants eligible for exclusion, the Board of Immigration Appeals effectively interpreted the statute as extending the Attorney General's discretion to the deportation context). Congress limited this discretion in 1990, when it amended section 212(c) to withhold discretionary relief from anyone convicted of an aggravated felony who had served a term of imprisonment of at least five years. *See* Act of Nov. 29, 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052 (amending section 212(c)).

Effective Death Penalty Act of 1996 (AEDPA)[4] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[5] — precluding discretionary relief for persons convicted of any one of a wide range of offenses. Moreover, four provisions of AEDPA and IIRIRA significantly curtailed the reviewability of removal orders in Article III courts.[6] Last Term, in *INS v. St. Cyr*,[7] the Supreme Court held that AEDPA and IIRIRA did not deprive federal courts of habeas corpus jurisdiction to determine whether the two statutes terminated the Attorney General's discretionary authority to waive deportation for aliens convicted of aggravated felonies before the statutes' enactment.[8] The Court reached this conclusion by construing the statutes to avoid the constitutional problems that it found would have arisen under the Suspension Clause[9] had it accepted the INS's interpretation of the statutes. Because the Court's purported reliance on statutory grounds diverted attention from the constitutional foundations upon which the decision rested, the depth of the majority's constitutional reasoning was not commensurate with the breadth of its Suspension Clause holding.

In March 1996, Enrico St. Cyr, a citizen of Haiti who had been admitted to the United States in 1986 as a lawful permanent resident, pled guilty to a charge of selling a controlled substance in violation of Connecticut law.[10] Though conviction subjected St. Cyr to deportation under 8 U.S.C. § 1227,[11] he was eligible at the time of his plea for a discretionary section 212(c) deportation waiver. Between the date of St. Cyr's conviction and the initiation of the deportation process, AEDPA and IIRIRA took effect. The Attorney General determined that because removal proceedings did not commence until April 10, 1997, the limits on discretionary relief imposed by AEDPA and IIRIRA rendered St. Cyr categorically ineligible for a deportation waiver.[12] St. Cyr filed a petition for a writ of habeas corpus in federal

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[4] Pub. L. No. 104-132, § 440(d)(1)–(2), 110 Stat. 1214, 1277 (amending section 212(c) by carving out a number of offenses for which convictions categorically preclude discretionary relief).

[5] Pub. L. No. 104-208, sec. 304(a), § 240A, sec. 304(b), 110 Stat. 3009-594 to -597 (repealing section 212(c) and replacing it with 8 U.S.C. § 1229(b) (Supp. II 1996), which delegates authority to the Attorney General to cancel removal only for a narrow class of inadmissible or deportable aliens).

[6] *See* AEDPA, § 401(e) (amending 8 U.S.C. § 1105a(a)); IIRIRA § 242(a)(1) (codified at 8 U.S.C. § 1252(a)(1)); IIRIRA § 242(a)(2)(C) (codified at 8 U.S.C. § 1252(a)(2)(C)); IIRIRA § 242(b)(9) (codified at 8 U.S.C. § 1252(b)(9)).

[7] 121 S. Ct. 2271 (2001).

[8] *Id.* at 2287.

[9] 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.").

[10] *St. Cyr*, 121 S. Ct. at 2275.

[11] 8 U.S.C. § 1227 (Supp. II 1996).

[12] *St. Cyr*, 121 S. Ct. at 2275.

district court, alleging that the restrictions on discretionary relief should not apply to removal proceedings brought against an alien who — like him — had pled guilty to a deportable crime before enactment of the restrictions.[13] The district court found no congressional intent to preclude review of St. Cyr's claims under habeas jurisdiction and held that the limits on discretionary relief did not have retroactive effect.[14] The Second Circuit upheld the district court's decision.[15]

The Supreme Court affirmed. Justice Stevens, writing for a five-Justice majority,[16] first considered whether federal district courts retained habeas corpus jurisdiction to review deportation proceedings after the passage of AEDPA and IIRIRA. Justice Stevens appealed to the "strong presumption in favor of judicial review of administrative action"[17] and "the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction."[18] Justice Stevens further determined that the "plain statement rule draws additional reinforcement" from two other canons of statutory construction.[19] First, "when a particular interpretation of a statute invokes the outer limits of Congress' power, [the Court expects] a clear indication that Congress intended that result."[20] Second, according to the constitutional avoidance canon, the Court is obliged to construe a statute to avoid constitutional difficulties "where an alternative interpretation of the statute is 'fairly possible.'"[21]

Having established this framework for statutory interpretation, Justice Stevens identified the Suspension Clause as a potential source of serious constitutional difficulties.[22] He reviewed the historical development of habeas corpus, stating that "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest."[23] Furthermore, "even assuming that the Suspension Clause protects only the writ as it existed in 1789, there is substantial evidence to support the proposition that pure questions of law like the one raised by the respondent in this case could have been answered in

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[13] *Id.*

[14] Dunbar v. INS, 64 F. Supp. 2d 47, 55 (D. Conn. 1999).

[15] St. Cyr v. INS, 229 F.3d 406, 421 (2d Cir. 2000).

[16] Justices Kennedy, Souter, Ginsburg, and Breyer joined Justice Stevens's opinion. *Id.*

[17] *St. Cyr*, 121 S. Ct. at 2278 (citing, inter alia, *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986)).

[18] *Id.* (citing *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1869); and *Felker v. Turpin*, 518 U.S. 651, 660–61 (1996)).

[19] *Id.* at 2279.

[20] *Id.* (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988)).

[21] *Id.* (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

[22] *Id.* at 2279 (referring to U.S. CONST. art. I, § 9, cl. 2).

[23] *Id.* at 2280.

1789 by a common law judge with power to issue the writ of habeas corpus."[24] Although not going so far as to hold that the core of habeas protection enshrined in the Suspension Clause encompassed St. Cyr's claim regarding the failure of the executive to exercise discretion, Justice Stevens concluded that "the Suspension Clause questions that would be presented by the INS' reading of the immigration statutes before us are difficult and significant."[25]

Given that an interpretation of the statutes as denying habeas jurisdiction appeared constitutionally problematic, Justice Stevens next considered whether AEDPA and IIRIRA required such a reading by incorporating a "clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas"[26] of the Attorney General's interpretation of the statutes. Turning first to AEDPA, Justice Stevens found that although Congress titled section 401(e) of AEDPA "Elimination of Custody Review by Habeas Corpus," the text of the provision accomplished no such elimination. In support of this conclusion, Justice Stevens reasoned that section 401(e) is best understood as eliminating only the particular channel of habeas review for deportation orders identified in the 1961 amendments to the Immigration and Nationality Act, and not the general habeas review provisions of 28 U.S.C. § 2241.[27]

Turning next to the three jurisdiction-limiting provisions of IIRIRA,[28] Justice Stevens observed that each of these provisions focused on either "judicial review" or "jurisdiction to review."[29] The precise wording of the provisions was important, Justice Stevens reasoned, because "[i]n the immigration context, 'judicial review' and 'habeas corpus' have historically distinct meanings."[30] Therefore,

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[24] *Id.* at 2282.

[25] *Id.* at 2281.

[26] *Id.* at 2287.

[27] *Id.* at 2284. Justice Stevens quoted *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105–06 (1869), for the proposition that "the repeal of 'an additional grant of jurisdiction' does not 'operate as a repeal of jurisdiction theretofore allowed.'" *St. Cyr*, 121 S. Ct. at 2285.

[28] Pub. L. No. 104-208, § 242(a)(1), 110 Stat. 3009-607 (1996) (codified at 8 U.S.C. § 1252(a)(1) (Supp. II 1996)) (stating that, aside from certain exceptions, including those set out in subsection (b) of the same provision, "[j]udicial review of a final order of removal . . . is governed only by" the Hobbs Act's procedures for review of agency orders in the courts of appeals); *id.* § 242(a)(2)(C) (codified at 8 U.S.C. § 1252(a)(2)(C) (Supp. II 1996)) (addressing "[m]atters not subject to judicial review" and stating that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" certain enumerated criminal offenses); *id.* § 242(b)(9) (codified at 8 U.S.C. § 1252(b)(9) (Supp. II 1996)) ("Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.").

[29] *St. Cyr*, 121 S. Ct. at 2285.

[30] *Id.*

none of the jurisdiction-limiting provisions precluded actions brought under the general habeas statute so clearly that they escaped the Court's constitutional avoidance approach.[31]

Having determined that neither AEDPA nor IIRIRA divested the federal district courts of habeas jurisdiction under § 2241, Justice Stevens inquired whether Congress "has directed with the requisite clarity that the law be applied retrospectively."[32] He concluded that Congress had not spoken clearly enough to overcome the presumption of nonretroactivity,[33] pointing out that "depriving removable aliens of consideration for section 212(c) relief produces an impermissible retroactive effect for aliens who, like [St. Cyr], were convicted pursuant to a plea agreement at a time when their plea would not have rendered them ineligible for section 212(c) relief."[34]

Justice O'Connor filed a short dissenting opinion.. Joining most of Justice Scalia's more extensive dissent, Justice O'Connor stated that St. Cyr could not succeed even if the Suspension Clause protected a core level of habeas review, for St. Cyr's claim did not fall within that core.[35] Justice O'Connor concluded that "[t]he question whether the Suspension Clause assures habeas jurisdiction in this particular case properly is resolved on this ground alone, and there is no need to say more."[36]

Justice Scalia dissented.[37] He charged that the Court's opinion "fabricates a superclear statement, 'magic words' requirement . . . unjustified in law and unparalleled in any other area of our jurisprudence."[38] Addressing the "clear statement" rule drawn by the majority from *Ex parte Yerger*[39] and *Felker v. Turpin*,[40] Justice Scalia argued that the question before the Court in *Yerger* and *Felker* was whether the repeal of one grant of habeas jurisdiction implied a repeal of a separate grant of habeas jurisdiction.[41] *St. Cyr* presented a differ-

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[31] *Id.* at 2286 (stating that neither § 1252(a)(1) nor § 1252(a)(2)(C) "speaks with sufficient clarity to bar jurisdiction pursuant to the general habeas statute").

[32] *Id.* at 2288.

[33] *Id.* at 2290.

[34] *Id.*

[35] *Id.* ("[A]ssuming, *arguendo*, that the Suspension Clause guarantees some minimum extent of habeas review, the right asserted by the alien in this case falls outside the scope of that review for the reasons explained by Justice Scalia in . . . his dissenting opinion.").

[36] *Id.*

[37] Chief Justice Rehnquist and Justice Thomas joined Justice Scalia's opinion. *Id.* at 2293 (Scalia, J., dissenting). Justice O'Connor joined all but the portion of Justice Scalia's dissent concluding that the Suspension Clause does not guarantee any constitutional minimum of habeas jurisdiction. *Id.* (O'Connor, J., dissenting).

[38] *Id.* at 2294 (Scalia, J., dissenting).

[39] 75 U.S. (8 Wall.) 85 (1869).

[40] 518 U.S. 651 (1996).

[41] *St. Cyr*, 121 S. Ct. at 2297.

ent issue because "none of the statutory provisions relied upon . . . requires [the Court] to imply from one statutory provision the repeal of another. All *by their terms* prohibit the judicial review at issue in this case."[42] The constitutional avoidance canon was similarly unavailing because neither AEDPA nor IIRIRA could "*reasonably be construed* to avoid the constitutional difficulty."[43] According to Justice Scalia, the Court's employment of the canon in *St. Cyr* "uses one distortion to justify another, transmogrifying a doctrine designed to maintain a just respect for the legislature into a means of thwarting the clearly expressed intent of the legislature."[44]

Having criticized the majority's statutory construction, Justice Scalia next attacked the reasoning the majority had employed to conclude that the likely constitutional infirmities of AEDPA and IIRIRA mandated the majority's statutory construction.[45] Justice Scalia began by arguing that "a straightforward reading of [the Suspension Clause] discloses that it does not guarantee any content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended."[46] To the Framers, Justice Scalia argued, "suspension" meant a temporary cessation of effect, not a change in the availability of habeas review to petitioners in a set of cases defined by subject matter.[47] Because AEDPA and IIRIRA did not temporarily withhold operation of the writ but rather "permanently altered its content,"[48] Congress did not violate the Suspension Clause in enacting these bills. Citing an 1807 opinion by Chief Justice Marshall,[49] Justice Scalia argued that Congress could choose to alter the set of cases to which habeas review extends.[50] Finally, Justice Scalia argued that even if the Suspension Clause did guarantee a minimum of habeas relief, "that minimum would assuredly not embrace the rarified right asserted here: the right to judicial compulsion of the exercise of executive *discretion* (which

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[42] *Id.*

[43] *Id.* at 2298.

[44] *Id.* (internal citation and quotation marks omitted).

[45] *Id.* at 2299.

[46] *Id.*

[47] *Id.* at 2299–300.

[48] *Id.*

[49] *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94 (1807) (Marshall, C.J.).

[50] *St. Cyr*, 121 S. Ct. at 2300 (Scalia, J., dissenting). Because "'the power to award the writ [of habeas corpus] by any of the courts of the United States, must be given by written law,'" *id.* at 2301 n.5 (quoting *Ex parte Bollman*, 8 U.S. (4 Cranch) at 94), the writ cannot be "suspended" "until Congress affirmatively provide[s] for habeas by statute," *id.* It follows that "Congress may subsequently alter what it had initially provided for, lest the Clause become a one-way ratchet." *Id.* Justice Scalia continued: "The Court's position that a permanent repeal of habeas jurisdiction is unthinkable (and hence a violation of the Suspension Clause) is simply incompatible with its (and Marshall's) belief that a failure to confer habeas jurisdiction is *not* unthinkable." *Id.*

may be exercised favorably or unfavorably) regarding a prisoner's release."[51]

Although the Court's opinion in *INS v. St. Cyr* marks the first occasion on which the Court has recognized that the Suspension Clause guarantees the availability of a minimum level of habeas review, the Court's methodology obscures both the scope and the implications of its holding. The Court asserted that the Suspension Clause guarantees some core of habeas corpus jurisdiction that may not be *taken away*, yet it did not address whether the Constitution requires that any such jurisdiction be *granted* in the first instance. The Court asserted that a core of protected habeas corpus jurisdiction exists, yet the Court neither explained the analytical steps leading to this conclusion nor provided any method for discerning the reach of the Suspension Clause's protections. The Court's coupling of assertions and assumptions regarding the Suspension Clause with a lack of extended and explicit constitutional reasoning was a direct result of the Court's constitutional avoidance methodology. The Court marched down a constitutional trail to begin its journey, but switched over to the seemingly smoother statutory path when it discovered that the constitutional trail was tangled and difficult to follow (and, most importantly, unnecessary given the availability of a statutory route). The question for future travelers is whether the constitutional trail, followed to its end, would lead to the same destination. The answer may well be no.

The first task in reconstructing the Court's journey is to determine precisely where the Court left the constitutional trail. To do this, imagine that the statutory interpretation path were unavailable. Suppose that the Court interpreted AEDPA and IIRIRA to accomplish the jurisdiction-stripping that Congress undoubtedly intended, and then ask whether such a removal of habeas would, under the reasoning of the *St. Cyr* majority, violate the Suspension Clause. First, the Court recognized that, at a minimum, the clause safeguards the writ as it existed in 1789.[52] Next, the majority stated that "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention."[53] Finally, the Court noted that, as of 1789, "the issuance of the writ was not limited to challenges to the jurisdiction of the custodian, but encompassed detentions based on errors of law, including the erroneous application or interpretation of statutes."[54] Indeed, the only doubt that the majority seemed to recognize regarding the traditional scope of habeas corpus jurisdiction was whether the writ would issue when "an official had statutory authorization to de-

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[51] *Id.* at 2301.
[52] *St Cyr*, 121 S. Ct. at 2279.
[53] *Id.* at 2280.
[54] *Id.*

tain the individual but . . . the official was not properly exercising his discretionary power to determine whether the individual should be released."[55]

The constitutional trail blazed by the Court would seem to take a litigant like St. Cyr to within a proverbial stone's throw of his desired destination. At this point, however, a difficulty arises in reconstructing the Court's journey, for it seems that the Court began its march down the constitutional trail without explaining how to reach the trailhead. In particular, the Court never explained its understanding of the relationship between the Suspension Clause and statutorily granted habeas jurisdiction. There are a number of possible starting points, each leading down a different trail.[56] One reading of the Suspension Clause is that the clause itself operates as a grant of habeas corpus jurisdiction to federal courts. Another reading is that the Suspension Clause both mandates that Congress vest federal courts with habeas jurisdiction and forbids Congress from repealing that jurisdictional grant. Yet a third reading is that the Suspension Clause operates conditionally, such that if Congress vests federal courts with habeas jurisdiction, then Congress may not repeal that jurisdictional grant. A final reading is that the Suspension Clause requires only that Congress not interfere with state court grants of writs of habeas corpus. The Court quite reasonably ignored the first starting point, but waffled between the second and third without identifying the distinction between the two. Furthermore, the Court never mentioned the fourth alternative, although it is perhaps the most plausible description of the original understanding of the Suspension Clause.[57]

Given that the Court never articulated or analyzed the foundations of its constitutional reasoning, there is reason to doubt whether the Court's Suspension Clause analysis is sound. The text of the Suspension Clause does not by its terms grant or guarantee *federal* habeas jurisdiction.[58] The clause is located in Article I, Section 9, among the limits on Congress's power, rather than in Article III, among the

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[55] *Id.* at 2281 (quoting Respondent's Brief at 33, *St. Cyr*, 121 S. Ct. 2271 (No. 00-767)) (internal quotation marks omitted).

[56] *See* Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 44 (4th ed. Supp. 2001).

[57] *See* Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2566 & n.158 (1998).

[58] *See* U.S. CONST. art. I, § 9, cl. 2. One comprehensive review of federal habeas corpus jurisdiction has noted:

> The negative form of the clause was no accident of wording. Positive affirmations of a right to habeas corpus were proposed at the Convention, in subsequent ratifying conventions, and in contemporary commentary. Yet all such proposals were rejected. As the Suspension Clause stands, it is apparently directed to federal government action somehow destructive of a judicial power neither defined nor in terms compelled.

Developments in the Law—Federal Habeas Corpus, 83 HARV. L. REV. 1038, 1266–67 (1970).

grants of jurisdiction to federal courts. Because Article III makes the creation of lower federal courts optional,[59] it is doubtful that the Suspension Clause alone could require judicial intervention by such courts. Although intimating in a footnote that the Suspension Clause mandates that Congress vest federal courts with habeas jurisdiction,[60] the Court never decisively adopted such an interpretation.

The textual difficulties arising from the wording and location of the Suspension Clause in Article I and the optional nature of lower federal courts in Article III may be mitigated by attributing to the Court the view that the Suspension Clause is triggered by cutbacks on federal habeas jurisdiction beyond a particular baseline. Indeed, this is the view that the Court seemed to adopt when Justice Stevens stated that, "*at the absolute minimum*, the Suspension Clause protects the writ as it existed in 1789."[61] The principal problem with this interpretation arises from the Court's failure to respond to Justice Scalia's persuasive historical evidence that, to the Framers, "suspension" denoted a temporary withholding of habeas corpus rather than a permanent contraction of the writ.[62]

Even if the majority had demonstrated that the dissent mistakenly focused on "suspension" as an essentially temporal concept, the majority's application of a contraction-based understanding would remain problematic. The Court observed that, "at the absolute minimum, the Suspension Clause protects the writ *as it existed in 1789*."[63] The majority's choice of 1789 (the year Congress passed the First Judiciary Act creating lower federal courts and vesting the Supreme Court and the lower courts with habeas corpus jurisdiction[64]) rather than 1788 (the year in which the Constitution was ratified) suggests that it relied on the Judiciary Act and the Constitution combined rather than on the Constitution alone. This reliance requires an explanation, for it is unclear why the First Judiciary Act of 1789 provides the benchmark

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[59] *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

[60] *See St. Cyr*, 121 S. Ct. at 2281 n.24 (attributing to Chief Justice Marshall the view "that the Clause was intended to preclude any possibility that 'the privilege itself would be lost' by either the inaction or the action of Congress" (quoting *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807))).

[61] *See id.* at 2279 (emphasis added) (internal quotations marks omitted).

[62] *See id.* at 2299–300 (Scalia, J., dissenting). Apart from responding to the dissent's historical evidence, the Court should at least have addressed the "dictionary meaning" argument that the jurisdictional restrictions in AEDPA and IIRIRA are not *suspensions* in the colloquial sense but rather *contractions* of habeas review with no specified time limit.

[63] *St. Cyr*, 121 S. Ct. at 2279 (emphasis added) (internal quotations marks omitted).

[64] *See* Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C. § 2241 (1994)).

against which to measure a contraction of the "absolute minimum" level of protection guaranteed by the Suspension Clause.[65]

It may be a mistake to conclude that the Court's reasoning in *St. Cyr* was wrong or fatally incomplete. After all, the Court relied on its Suspension Clause analysis only to explain its constitutional doubts regarding the INS's proposed interpretations of AEDPA and IIRIRA. However, the effort that the Court expended in generating this constitutional doubt and justifying alternative interpretations underscores the Court's tenacious insistence on preserving judicial review. The Court's historical inquiry into the scope of habeas corpus jurisdiction may have been purely instrumental in providing shape to the functional imperative that there be some federal court jurisdiction, regardless of the form such jurisdiction takes.[66]

If the Suspension Clause unquestionably requires some level of judicial intervention in deportation cases but does not itself operate as a grant of jurisdiction, the burden is on the Court to explain the nature of this constitutional requirement. The Court has not yet borne this burden.[67] Given the gaps in the Court's constitutional reasoning and

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[65] One commentator has noted:

> The complexity of the suspension clause lies primarily in the meaning of suspension during normal times. For the clause to have meaning, some benchmark must be established beyond which a contraction of habeas review becomes unconstitutional. The difficulty in setting such a benchmark derives from the negative form in which the clause is stated and the process by which habeas review has expanded during the last two centuries.

Developments in the Law, *supra* note 58, at 1266.

The most likely explanation for the Court's reliance on 1789 is that the Court was implicitly relying on a theory that the Suspension Clause prevents the retraction of some level of habeas jurisdiction once Congress has provided such jurisdiction. Given that Congress actually granted habeas jurisdiction in 1789 concurrently with its creation of lower federal courts, the Court's historical discussion was most likely designed to identify the scope of the congressional grant. But the Court never explained why, or even if, the Judiciary Act of 1789 provides the benchmark against which to measure contractions.

If Congress tomorrow unambiguously repealed the habeas jurisdiction of all lower federal courts, that repeal would undoubtedly cause the availability of habeas review to fall below the Court's posited "absolute minimum." This hypothetical repeal would raise many questions under Article III and could violate the Suspension Clause on some accounts of that clause, but *St. Cyr* provides little guidance in analyzing the Suspension Clause problems that would be posed in such an event.

[66] *See St. Cyr*, 121 S. Ct. at 2282 (suggesting that a Suspension Clause problem would arise only if Congress were to withdraw the habeas corpus jurisdiction of federal judges to review federal executive detention "and provide[] no adequate substitute" for its exercise); *cf.* Note, *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 HARV. L. REV. 1578, 1590 (1998) (describing lower court interpretations of the jurisdiction-limiting provisions of AEDPA and IIRIRA and suggesting that these interpretations may be justified as "fierce defense[s] of federal court 'turf'").

[67] For a detailed Suspension Clause analysis of AEDPA and IIRIRA, pre-*St. Cyr*, see Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998). The *St. Cyr* majority cites Neuman's article in its opinion, *St. Cyr*, 121 S. Ct. at 2279–80 n.13, and the majority's general approach to the Suspension Clause seems to track Neuman's.

its purported reliance on statutory grounds for its holding, perhaps Congress will treat the Court's statements regarding the requirements of the Suspension Clause as the dicta that they purport to be rather than the substantive interpretations of the Constitution that they seem to be.

III. FEDERAL STATUTES AND REGULATIONS

A. Americans with Disabilities Act

Public Accommodations. — The Americans with Disabilities Act (ADA)[1] celebrated a high-profile tenth anniversary in 2000. The ADA proscribes discrimination against disabled individuals in major areas of public life, including employment (Title I), public services (Title II), and public accommodations (Title III).[2] Last Term, in *PGA Tour, Inc. v. Martin*,[3] the Supreme Court held that under Title III the Professional Golf Association (PGA) must provide accommodation for disabled golfers who compete on the PGA Tour.[4] That ruling extended the provisions of the ADA to a realm many thought the statute not intended for or capable of reaching — the arena of elite professional

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Compare, e.g., Neuman, *supra*, at 974 ("In *Ex parte Bollman*, Chief Justice Marshall read the Suspension Clause as having affirmative content, requiring Congress to vest federal habeas jurisdiction to inquire into federal confinements."), *with St. Cyr*, 121 S. Ct. at 2281 n.24 (interpreting the same provision of *Ex parte Bollman* and arguing that "Marshall's comment expresses the . . . view that the Clause was intended to preclude any possibility that 'the privilege itself would be lost' by either the inaction or the action of Congress"). Whatever the merits of Neuman's (or any other scholar's) Suspension Clause arguments, the majority only gestures at such arguments and fails to develop any constitutional account adequate to support its assertions about the meaning and significance of the Suspension Clause. This result provides further evidence of the validity of prominent criticisms leveled against the constitutional avoidance canon over the past few decades. *See, e.g.*, HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 210–12 (1967); Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 815–16 (1983); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 90–98. The canon is doubly problematic. First, "the idea that the court is avoiding a constitutional decision is illusory . . . [and] there is only negligible difference between the effect of the tentative decision in [a constitutional avoidance] case and the effect of a final decision in a case that actually decides the constitutional question." Schauer, *supra*, at 89. Moreover, and more importantly, "all of this takes place without the necessity of the full statement of reasons supporting the constitutional decision." *Id.*

[1] Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12,101–12,213 (1994 & Supp. IV 1998)).

[2] 42 U.S.C. §§ 12,111–12,117, 12,131–12,165, 12,181–12,189 (1994 & Supp. V 1999). To qualify for protection, the individual must show that he suffers from an ADA-qualified disability. *See id.* § 12,102(2) (1994). A qualifying disability is a "physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." *Id.* § 12,102(2)(A).

[3] 121 S. Ct. 1879 (2001).

[4] *Id.* at 1897.