The Myth of the Great Writ

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Habeas corpus is known as the "Great Writ" because it supposedly protects individual liberty against government overreach and guards against wrongful detentions. This idea shapes habeas doctrine, federal courts theories, and habeas-reform proposals.

It is also incomplete. While the writ has sometimes protected individual liberty, it has also served as a vehicle for the legitimation of excesses of governmental power. A more complete picture of the writ emerges when one considers traditionally neglected areas of public law that are often treated as distinct—the law of slavery and freedom, Native American affairs, and immigration. There, habeas has empowered abusive exercises of government authority rather than just constraining them.

Accurate histories of the writ—and accurate stories about the writ—matter. The myth of habeas was one device that courts used to fold the writ into the legal apparatus of American colonialism and racial subordination. Dispelling that myth and developing a more complete picture of habeas can provide a new lens through which to evaluate habeas-reform proposals and avoid replicating the errors of the past. Understanding the complex and sometimes internally contradictory functions of habeas illuminates the dynamic relationship between judicial remedies and government power. And these usages of habeas show how law and legal processes, including celebrated instruments such as habeas, can and have become tools of racial subordination and colonialism.

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Introduction

Habeas corpus is known as "the 'Great Writ'"[1] because it protects individual liberty and checks government power. This depiction of the writ

1. Schneckloth v. Bustamonte, 412 U.S. 218, 275 (1973) (Powell, J., concurring); Stone v. Powell, 428 U.S. 465, 474 n.6 (1976) ("It is now well established that the phrase 'habeas corpus' used alone refers to the common-law writ of habeas corpus ad subjiciendum, known as the 'Great Writ.'" (quoting *Ex parte* Bollman, 8 U.S. 75, 95 (1807))).

appears frequently in cases,[2] in scholarship,[3] and in legislative debates.[4] It also informs the law and theory of habeas and the federal courts more generally: Doctrine maintains that habeas benefits individual liberty and burdens the government.[5] Federal courts scholarship frequently points to habeas corpus as an example of how the federal courts protect individual rights from government overreach (even though the courts might not safeguard individual rights in other contexts).[6] And one persistent refrain in scholarship is the desire to eliminate existing restrictions on the availability

2. *E.g.*, Holland v. Florida, 560 U.S. 631, 649 (2010) (invoking "[t]he importance of the Great Writ"); Lonchar v. Thomas, 517 U.S. 314, 322 (1996) (invoking "the history of the Great Writ"); Reed v. Farley, 512 U.S. 339, 352 (1994) (invoking "the great writ"); Murray v. Carrier, 477 U.S. 478, 500 (1986) (Stevens, J., concurring) ("[I]t is useful to recall the historical importance of the Great Writ."); *Ex parte* Yerger, 75 U.S. 85, 95 (1868) (extolling the writ as "the best and only sufficient defence of personal freedom"); Fay v. Noia, 372 U.S. 391, 401 (1963) (asserting that the writ's "history is inextricably intertwined with the growth of fundamental rights and personal liberty"); *Schneckloth*, 412 U.S. at 275 (Powell, J., concurring) ("There has been a halo about the 'Great Writ' that no one would wish to dim."); Hamdi v. Rumsfeld, 542 U.S. 507, 558 (2004) (Scalia, J., dissenting) (arguing that the writ was "a means to protect against 'the practice of arbitrary imprisonments in all ages, the favourite and most formidable instruments of tyranny'" (quoting THE FEDERALIST NO. 84, at 577 (Alexander Hamilton) (Jacob E. Cooke ed., 1961))); Rumsfeld v. Padilla, 542 U.S. 426, 442 (2004) (referring to "the Great Writ"); Cullen v. Pinholster, 563 U.S. 170, 210 (2011) (Sotomayor, J., dissenting) (invoking "the Great Writ"); Burns v. Wilson, 346 U.S. 137, 148 (1953) (Frankfurter, J., concurring) (invoking "proper regard for habeas corpus, 'the great writ of liberty'"); Darr v. Burford, 339 U.S. 200, 225 (1950) (Frankfurter, J., dissenting) ("'The great writ of liberty' ought not to be treated as though we were playing a game."); Rose v. Lundy, 455 U.S. 509, 546 (1982) (Stevens, J., dissenting) ("[F]ederal judges at times have lost sight of the true office of the great writ of habeas corpus.").

3. Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2032 (2007) ("The Great Writ of habeas corpus is the procedural mechanism through which courts have insisted that neither the King, the President, nor any other executive official may impose detention except as authorized by law."); Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 380 (2010) [hereinafter Tyler, *Is Suspension a Political Question?*] ("[T]he Great Writ at its core is concerned with individual rights and liberty . . . .") .

4. *Restoring Habeas Corpus: Protecting American Values and the Great Writ: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 1–2 (2007) (statement of Sen. Leahy, Chairman, S. Comm. on Judiciary) (maintaining that the "Great Writ is the legal process that guarantees an opportunity to go to court and challenge the abuse of power by the Government"); *id.* at 22 (statement of Sen. Feingold, Member, S. Comm. on Judiciary) ("To be true to our Nation's proud traditions and principles, we must restore the writ of habeas corpus . . . .").

5. *E.g.*, Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1966–67 (2020) (invoking burdens on government from habeas proceedings); Engle v. Isaac, 456 U.S. 107, 126 (1982) ("[T]he Great Writ entails significant costs.").

6. Fallon & Meltzer, *supra* note 3, at 2034 (situating the authors' common law theory of habeas within the tradition of "courts hav[ing] special responsibilities for safeguarding basic freedoms"); Tyler, *supra* note 3, at 386 ("The judiciary is the sole branch constituted for the very purpose of ensuring that individual rights are not improperly displaced by a political majority merely for the sake of expediency . . . .").

of habeas corpus (at least in some subset of cases) in order to return the writ to its true, great form.[7]

This common conception of habeas is incomplete. Like other elements of the American legal system, habeas has been used to discriminate on the bases of race and citizenship and to legitimate government power. While habeas is sometimes a device for securing individual liberty, it has also served as a vehicle for the racialization and subordination of disadvantaged groups and for normalizing excesses of government power, and that is not merely because habeas courts failed to grant relief in some cases. The more complicated story of habeas emerges when one considers how habeas operated in traditionally siloed areas of law, such as immigration, Native American affairs, and the law of slavery and freedom, which also happen to be contact points between habeas and historically subordinated groups.[8]

Consider these two cases:

- *Ex parte Jenkins*[9] was the first reported federal habeas decision that freed an individual who was acting under federal authority from state criminal process. Specifically, a court freed a fugitive-slave catcher who took Black people and sold them into slavery.[10]
- *In re Archy*[11] granted a slave owner's habeas petition, giving the owner custody of a slave and allowing the owner to forcibly transport the slave to a state where slavery was legal.[12]

Or consider these cases, which are well-known in the areas of immigration and Native American affairs but not studied as habeas cases:

7. *See, e.g.*, Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 56 (2012) (critiquing judges "cherry picking from a raft of due process standards" and "adopt[ing] vague and unsettled procedures" when doing habeas corpus analysis); Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 6 (2010) ("Part II attempts to recover a lost purpose of federal habeas review by explaining that the original Reconstruction-era extension of federal jurisdiction to review state convictions was aimed at a problem of systemic state resistance to constitutional rights.").

8. *Cf.* K-Sue Park, *This Land Is Not Our Land*, 87 U. CHI. L. REV. 1977, 1984 (2020) (book review) ("Many widely accepted theoretical frameworks developed from established historical narratives about America evaded the histories of conquest and slavery . . . ."); Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79, 85 (2020) (explaining that slavery cases were "part of the foundation of American jurisprudence").

9. 13 F. Cas. 445 (E.D. Pa. 1853) (No. 7,259).

10. *Id.* at 448.

11. 9 Cal. 147 (1858).

12. *Id.* at 161, 171.

- *Chae Chan Ping v. United States*[13] announced the federal plenary power doctrine that gives the federal government expansive powers over immigration.[14]
- *Ex parte Crow Dog*[15] laid the foundation for the analogous plenary power doctrine over Native American affairs and resulted in the Major Crimes Act, a law that provides for federal jurisdiction over crimes between Native persons on Native lands.[16]

These four cases provide a different picture of habeas than the more commonly known story that is associated with better-known habeas cases such as *Boumediene v. Bush*,[17] which held that the constitutional guarantee of habeas corpus applies to the United States military base at Guantanamo Bay, Cuba,[18] or *Brown v. Allen*,[19] which held that state court prisoners could relitigate their convictions in federal court.[20] The story that emerges from these better known habeas cases is, unsurprisingly, the better known story of the writ—that habeas is a great writ of liberty and an important bulwark against government overreach.[21]

Getting the full story of habeas matters for several reasons.[22] First, the full story supplies a necessary corrective to the narrative that habeas is inherently or inevitably an instrument for justice. The writ is not inherently great or even good; even the abstract principles with which the writ is associated may sometimes serve less salutary purposes.

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13. 130 U.S. 581 (1889).

14. *See id.* at 609 ("[Complaints about immigration policies] must be made to the political department of our government, which is alone competent to act upon the subject.").

15. 109 U.S. 556 (1883).

16. *See id.* at 571–72 (holding that the government did not have jurisdiction over a crime committed by one Indian against another Indian on a reservation). The Major Crimes Act is codified at 18 U.S.C. § 1153.

17. 553 U.S. 723 (2008).

18. *Id.* at 797–98.

19. 344 U.S. 443 (1953).

20. *Id.* at 450. *Boumediene* and *Brown* are two of the five major habeas cases excerpted in Hart & Wechsler. *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1224, 1275 (7th ed. 2015). *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which held that the Due Process Clause requires more than a military officer's affidavit to detain an American citizen, is another. *Id.* at 538.

21. *Cf.* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 7 (Greenwood Press 1980) ("Before its introduction into the American legal system, habeas corpus had been 'esteemed the best and only sufficient defense of personal liberty.' . . . In the United States, the writ continues as the 'symbol and guardian of individual liberty.'" (first quoting *Ex Parte* Yerger, 75 U.S. 85, 95 (1868); and then Peyton v. Rowe, 391 U.S. 54, 59 (1968))).

22. *Cf.* Brief for Respondent at 33, United States v. Hayman, 342 U.S. 205 (1952) (No. 23) ("We shall have to look at history for the essentials of the Great Writ, but not to one point in that history for its accidents.").

More carefully delineating the precise content of what is good about the writ or when the writ does good would address one way the writ was put to less benign usages—judges invoked the myth of the great writ to assert that, at most, habeas can do no harm. In one case, for example, a court considered whether it could entertain a writ of habeas corpus filed by a slave owner who argued that another individual had (wrongfully) attempted to liberate the owner's slaves.[23] To explain why the writ could issue "at the instance of third persons"[24]—there, a slave owner seeking to claim possession of his slaves—the court offered a lengthy history extolling the importance of "the great writ of personal liberty": "There is no writ so important for good," the court wrote.[25] And, the court continued, there was no risk in expanding access to the writ since "[a]t the worst, in the hands of a corrupt or ignorant judge, it may release some one from restraint who should justly have remained bound. But *it deprives no one of freedom*."[26]

This reasoning embodies the myth of the great writ. It also highlights one of its dangers. The myth of the great writ can conceal and enable abusive exercises of authority. A court traded in on the myth to allow a slave owner to use the writ as a device to enforce a claim to slaves.

Second, fleshing out a more complete picture of habeas supplies a different perspective from which to assess habeas-reform proposals. The habeas proceedings in the case studies often purported to focus on jurisdiction. The idea that habeas was especially concerned with jurisdiction was how habeas courts justified their focus on race and citizenship and incorporated race and citizenship into the habeas process. Habeas courts insisted that race and citizenship were elements of jurisdiction, while other preconditions for detentions were not. The concept of jurisdiction was flexible enough to allow courts to graft race and citizenship onto the rules about when detentions were lawful, and it was the concept of jurisdiction that habeas courts used to give race and citizenship outsized importance in constitutional law.

Appreciating both what jurisdiction meant and what jurisdiction was used for raises some concerns about reform proposals that seek to recenter the role of jurisdiction in habeas proceedings. Calls to return habeas corpus to a review for jurisdiction gained steam after Paul Bator's influential article criticized the Warren Court's expansion of the writ.[27] They have continued

23. United States *ex rel*. Wheeler v. Williamson, 28 F. Cas. 686, 686 (E.D. Pa. 1855) (No. 16,726).

24. *Id.* at 694.

25. *Id.*

26. *Id.* (emphasis added).

27. *See*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 500 (1963) (criticizing the Court for "assum[ing], without

ever since, most recently in an opinion by then-Judge Neil Gorsuch that has shaped the scope of federal post-conviction review today.[28] Both Bator and Gorsuch argued that the core of habeas always included review for jurisdiction and that habeas should be restructured to reflect that principle.[29] The case studies, however, show how a habeas system that professed a concern with jurisdiction encoded race and citizenship into the habeas process and, in so doing, legitimated erroneous detentions and excesses of government power.

This Article does not suggest that habeas, on balance, does more harm than good. Just as the myth of the great writ is not the full story of habeas, neither are the case studies discussed in this Article. The point is that habeas, on balance, is not as good as conventional narratives or sanitized histories of the writ might suggest, and that sometimes individual habeas proceedings will bring about significant and far-reaching negative costs. Appreciating that story supplies a needed corrective to the conventional narrative and helps to assess habeas-reform proposals. It also provokes some thinking about when habeas proceedings and habeas processes might bring about more systemic harms.

The case studies show how legal instruments and legal processes are sometimes used for unexpected or overlooked ends. Whether any particular instrument or process does good should probably be assessed on a more retail basis based on what the legal instrument actually does.

The case studies do not suggest that habeas uniquely furthered colonialism and racial subordination more so than other legal processes. Other remedies and other bases for jurisdiction were also part of the legal regime of American colonialism. This Article focuses on how and why habeas played a role in that system. It does so in part because a myth surrounds habeas that does not seem to surround other remedies (like declaratory judgments or injunctions) or other bases for jurisdiction (like diversity jurisdiction).[30] Habeas may seem different from other remedies

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discussion, that it is the purpose of the federal habeas corpus jurisdiction to redetermine the merits of federal constitutional questions decided in state criminal proceedings"); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 597 (1993) ("Bator expresses dissatisfaction with the Court for not strictly limiting habeas to issues of personal and subject matter jurisdiction.").

28. Prost v. Anderson, 636 F.3d 578, 592 (10th Cir. 2011) ("[T]he writ of habeas corpus in its earliest form was largely a remedy against confinement imposed by a court lacking jurisdiction . . . ."). See *infra* notes 233–241 for a discussion of the reach of these ideas.

29. *See Prost*, 636 F.3d at 592 ("[T]he writ of habeas corpus in its earliest form was largely a remedy against confinement imposed by a court lacking jurisdiction . . . ."); Bator, *supra* note 27, at 475 ("It should not, after all, be forgotten that the classical function of habeas corpus was to assure the liberty of subjects against detention by the executive or the military without any court process at all, not to provide postconviction remedies for prisoners.").

30. The myth of the Great Writ is one piece of the "habeas exceptionalism" that scholars have described. *E.g.*, Jordan Steiker, *Habeas Exceptionalism*, 78 TEXAS L. REV. 1703, 1708, 1721

because it appears uniquely liberty enhancing or because it implements worthy anti-detention, pro-liberty principles. No similar mythology seems to surround other remedies or bases for jurisdiction.

It may be that there are features of other remedies or bases for jurisdiction that enabled those legal processes to likewise be a part of a legal system for colonialism. Understanding which features of which remedies—as well as which systemic forces common to all remedies—contribute to the remedies being used as tools for excessive government power helps to puzzle through when particular remedies should be available, when they should be used, and how and whether they should be reformed. This project, however, is focused on habeas—how the internal structure of habeas lent itself to the project of colonialism and how factors external to habeas helped do the same.

This Article proceeds in four parts. Part I provides a brief overview of scholarship on habeas, which reflects a sense that habeas is a great writ of liberty or that habeas would be a great writ of liberty if only it were more widely available or restrictions on the availability of the writ were removed. Part II complicates this story by analyzing how habeas functioned in three areas of law in the nineteenth and early twentieth centuries—the law of slavery and freedom, Native American affairs, and immigration. It suggests that there were several ways in which habeas was one component of the legal apparatus for American colonialism and racial subordination. While Part II shows how habeas furthered American colonialism, Part III attempts to explain why it did so.

I. The Myth of Habeas

The myth of habeas has its roots in historical analyses of the writ that focus on similar time periods. These periods include preratification history,[31] Marshall-era decisions,[32] Civil War-era restrictions on the writ (specifically,

(2000); *see also* Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 261 (1988) ("[T]he writ of habeas corpus often is described in exalted terms . . . .").

31. Paul Halliday examined every writ of habeas corpus issued by King's Bench in every fourth year between 1502 and 1789. PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 319 (2010). Amanda Tyler explored the history behind the English habeas statute, the English Habeas Corpus Act of 1679. AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY 21, 25 (2017).

32. *See* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 982–85 (1998) (explaining that Marshall's "common law distinction between superior and inferior courts . . . provide[d] a fundamental organizing concept for habeas corpus law throughout the nineteenth century"); David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2498–99 (1998) ("Marshall read the Suspension Clause to obligate Congress to provide habeas corpus jurisdiction[.]"); Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753, 768–70, 800–04 (2013) (discussing the impact of Marshall's *Watkins* opinion).

President Lincoln's use of military commissions),[33] and the Reconstruction Congress's expansion of the writ to state court prisoners.[34] Scholars also discuss the Warren Court's expansion of the writ to encompass state court prisoners.[35] These accounts skim the period from the Civil War to the 1960s on the ground that, during this time period, habeas was not a mechanism for relitigating criminal convictions and was accordingly quite modest in scope, particularly given the relative thinness of federal criminal law.[36] More recently, scholars have included immigration cases from the early nineteenth century in their studies of habeas. Yet these studies often purport to answer questions about the nature and function of the writ in immigration proceedings specifically, rather than habeas more generally.[37]

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33. *See* TYLER, *supra* note 31, at 159–60, 186–87 (discussing Lincoln's use of military commissions); Lee Kovarsky, *Citizenship, National Security Detention, and the Habeas Remedy*, 107 CALIF. L. REV. 867, 896–98 (2019) ("President Lincoln's unilateral suspension was one of the two most pivotal events in the development of American habeas law during the Civil War.").

34. *See* Primus, *supra* note 7, at 6 ("[T]he original Reconstruction-era extension of federal jurisdiction to review state convictions was aimed at a problem of systemic state resistance to constitutional rights."); Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 862–63, 866–68 (1994) (arguing that the Fourteenth Amendment supplies a constitutional right to federal habeas for state court prisoners). Amanda Tyler additionally focused on when President Roosevelt ordered the detention of Japanese-American citizens during World War II. TYLER, *supra* note 31, at 211–12, 222.

35. *See*, *e.g.*, Bator, *supra* note 27, at 508–11 (arguing against relitigation).

36. *See*, *e.g.*, Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1124–26 (1995) (rejecting claims that relitigation was available in habeas proceedings before the early twentieth century).

37. David Cole analyzed mid-twentieth century "judicial review of immigration detentions" to assess the constitutionality of several provisions in the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act. Cole, *supra* note 32, at 2483. Specifically, Cole "examine[d] . . . four Supreme Court cases" to conclude that the constitutional requirement of habeas in immigration proceedings extended to violations of statutes and regulations, including eligibility for discretionary relief. *Id.* at 2500–06 (citing four mid- to late-twentieth-century cases: Heikkila v. Barber, 345 U.S. 229 (1953), United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954), United States *ex rel.* Hintopoulous v. Shaughnessy, 353 U.S. 72 (1957), and United States *ex rel.* Vajtauer v. Commissioner, 273 U.S. 103 (1927)). Gerald Neuman analyzed earlier immigration cases from the eighteenth and nineteenth centuries with a similar focus on the constitutionality of the 1996 Immigration Act. Neuman, *supra* note 32, at 1008–16 (analyzing Nishimura Ekiu v. United States, 142 U.S. 651 (1892), Lem Moon Sing v. United States, 158 U.S. 538 (1895), and Fong Yue Ting v. United States, 149 US. 698 (1893)). Neuman also relied on cases decided under the 1917 Immigration Act, *id.* at 1016, and surveyed cases involving foreign ships and desertions, *id.* at 990–92; *see also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEXAS L. REV. 1, 13–14 (2002) ("Gerald Neuman's recent work on the scope of the Constitution in the immigration and territorial expansion contexts does not focus on inherent powers theories or consider the contribution of Indian law."). Brandon Garrett, Richard Fallon, and Daniel Meltzer incorporated some twentieth-century immigration law decisions to offer more general theories of habeas that applied to the detainees at Guantanamo Bay. Garrett, *supra* note 7, at 72 n.171 (citing twentieth-century cases and *United States v. Jung Ah Lung*, 124 U.S. 621,

These analyses have generated the idea that habeas is the Great Writ because it protects individual liberty. Scholarship suggests habeas secures liberty in at least three ways. First, habeas provides a remedy for certain kinds of unlawful detentions.[38] Habeas corrects for unauthorized detentions when there is no statutory authority for a detention and an officer detains someone on a whim.[39] It also corrects erroneous detentions where some law arguably supplies a basis for detention but was incorrectly applied to a particular individual.[40] Second, habeas is supposed to supply a remedy for unjust or invalid laws. It acts as a sword against detention laws that are too sweeping and exceed the government's authority,[41] such as laws that authorize detentions for invalid reasons,[42] as well as laws that authorize detentions without sufficient process.[43] For example, Brandon Garrett has suggested that

626–32 (1888) for the proposition that the Chinese Exclusion Act of 1882 did not affect jurisdiction of federal courts to hear habeas petitions); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1796–98 & nn.348–60, 1813–16 (citing twentieth century cases about the non-retroactivity doctrine and proposing a new habeas review standard).

38. The categories are not perfectly distinct (if a statute was incorrectly applied to an individual, then that particular individual's detention is not authorized). But disaggregating them is helpful in evaluating what the writ is good at.

39. Neuman, *supra* note 32, at 1022 ("The fundamental purpose of a habeas corpus guarantee is to ensure that executive officials will not be left to determine the scope of their own authority to arrest and detain individuals."); Cole, *supra* note 32, at 2503 (Habeas "require[s] that taking an individual into custody be subject to the rule of law" and the "judicial review of the legality of all executive detentions.").

40. Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1992–93 (2000) (identifying the importance of habeas in "correcting invalid administrative interpretations of the statutory criteria"); Garrett, *supra* note 7, at 66 ("[J]udicial review remained available to examine 'the construction and validity of the statute' and 'whether the person restrained is in fact an alien enemy.'" (quoting Ludecke v. Watkins, 335 U.S. 160, 171 & n.17 (1948))).

41. *See* Fallon & Meltzer, *supra* note 3, at 2032 (explaining that habeas is the procedural mechanism against detentions imposed unlawfully by sovereigns); *id.* at 2095–96, 2105–06, 2112 (describing habeas as a way to keep the government within the bounds of the law); Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 953 (2012) ("[T]he writ of habeas corpus was much more than merely a judicial remedy — it embodied and made real a host of important rights that protected individual liberty."); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 COLUM. L. REV. 537, 560–61 (2010) (noting support for the idea that "the Suspension Clause require[s] a remedy for certain kinds of constitutional errors in convictions by Article III courts," notwithstanding contrary statutes restricting review).

42. Amanda L. Tyler, *Habeas Corpus and the American Revolution*, 103 CALIF. L. REV. 635, 640 (2015) ("Significantly, the privilege associated with the English Act did not speak merely to process: it also imposed significant constraints on what causes would be deemed legal justification for detention in the first instance."); *id.* at 697 ("[T]he protections . . . imposed an important limitation on the Crown's ability to hold domestic prisoners during wartime.").

43. *See* Garrett, *supra* note 7, at 123 ("[T]he [Suspension] Clause affirmatively offers a simple but powerful form of process . . . ."); Tyler, *supra* note 3, at 337 ("[T]he Great Writ offers the judicial remedy of discharge to those deprived of their liberty without any—much less due—

detainees could assert "a claim of innocence . . . grounded in the Suspension Clause" that would "mandate federal habeas review" where "no prior court adequately examined new evidence of innocence," even where a statute purported to restrict courts from considering evidence of innocence.[44] In that scenario, the constitutional guarantee of habeas supplies the remedy and the sword against an unjust law containing evidentiary restrictions. Amanda Tyler has argued that, absent suspension, habeas supplies a substantive protection against certain detentions.[45] There too, the constitutional guarantee of habeas prohibits laws or policies that seek to authorize certain detentions. Third, and finally, habeas protects individual liberty because it frees people from detention, which provides a detainee with liberty.[46]

Scholars have tied the conclusion that habeas protects individual liberty to more general theories about constitutional structure, particularly those concerning judicial power, the separation of powers, and checks and balances.[47] Brandon Garrett, for example, argued that habeas courts' examination of whether a detention is authorized by law is one way that the separation of powers and checks and balances vindicate individual rights.[48] Lucy Salyer's examination of immigration cases at the turn of the twentieth century led her to observe that "the doctrine of habeas corpus" was "especially important to the success of" Chinese immigrants who filed habeas petitions.[49] For many scholars, the "structural role" of habeas[50]—be it

process."); *id.* at 382 ("The very essence of the Great Writ . . . is to protect one from being deprived of liberty without due process.").

44. Garrett, *supra* note 7, at 123–24. *But see* Lee Kovarsky, *Custodial and Collateral Process: A Response to Professor Garrett*, 98 CORNELL L. REV. ONLINE 1, 14–19 (2013) (suggesting these claims should be grounded elsewhere).

45. TYLER, *supra* note 31, at 139 ("[T]he Constitution's habeas privilege encompasses more than simply a promise of access to judicial review of one's detention, and instead imposes significant constraints on the power of the executive to detain . . . .").

46. *See* Tyler, *supra* note 3, at 338 (describing "the Great Writ" as "the only meaningful judicial remedy for unconstitutional deprivations of liberty").

47. Fallon and Meltzer surmised that one core function of habeas was to keep the government within the bounds of the law. *E.g.*, Fallon & Meltzer, *supra* note 3, at 2032, 2094–96, 2105–06 (arguing that because it is "unacceptable . . . for the government to be wholly free from restraint in its treatment" of Guantánamo detainees, habeas corpus jurisdiction must be available); *see also* Fallon & Meltzer, *supra* note 37, at 1778–79 ("Another principle, whose focus is more structural, demands a system of constitutional remedies adequate to keep government generally within the bounds of law."); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 606 (2009) [hereinafter Tyler, *Suspension as an Emergency Power*] (situating "suspension [of the writ] within our constitutional structure" and invoking "the twin principles of government accountability and protection of individual liberty") .

48. Garrett, *supra* note 7, at 59 ("[T]he government has the burden of showing that a detention is authorized. This burden reflects a principle central to the concept of due process: deprivation of an individual's liberty must be in accordance with the law.").

49. LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 69 (1995).

50. *E.g.*, Fallon & Meltzer, *supra* note 3, at 2070–71.

preserving judicial power, the separation of powers, or checks and balances[51]—is a way of protecting individual liberty and rights.[52]

These ideas about habeas and the separation of powers share important connections with more general theories about the federal courts.[53] Richard Fallon and Daniel Meltzer anchored their theory of habeas in "the Legal Process tradition," which "emphasizes . . . the distinctive competences" of different "governmental institutions."[54] Within that framework, they argued that "courts have special responsibilities for safeguarding basic freedoms."[55] Amanda Tyler similarly invoked the idea that "[t]he judiciary is the sole branch constituted for the purpose of ensuring that individual rights are not improperly displaced" to explain the constitutional contours of habeas.[56]

The story about habeas that has emerged from these analyses depicts habeas as a great writ of liberty. That story is true, at least some of the time. But it is not the only story or the full story, as the next Part shows.

II. Habeas Practice

This Part unpacks three areas in which habeas corpus was commonly used in the mid- to late-nineteenth century: the law of slavery and freedom, Native American affairs, and immigration. Although these areas are sometimes "ignored by mainstream constitutional law scholars as late-nineteenth-century anomalies of American constitutional jurisprudence,"[57] habeas cases in these areas are representative of habeas in part because of the

51. *See*, *e.g.*, Tyler, *supra* note 47, at 687 (invoking the principle that "the Constitution diffuses power the better to secure liberty" to explain constitutional rules regarding habeas).

52. Tyler, *supra* note 3, at 338 (describing the Great Writ as "an important judicial tool for remedying unconstitutional deprivations of liberty"); Cole, *supra* note 32, at 2484 (arguing that the structural separation-of-powers features of the Suspension Clause should be "read together" with the due process clause); Fallon & Meltzer, *supra* note 3, at 2111–12 (describing habeas and due process as working in tandem). Kovarsky's theory of habeas power is the exception. While Kovarsky argues that habeas preserves judges' power to establish rules for when detentions are lawful, he does not argue that this allocation of institutional power preserves individual rights. *See* Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753, 754 (2013) ("Modern habeas corpus law generally favors an idiom of individual rights, but the Great Writ's central feature is judicial *power*." (footnote omitted)).

53. *See* Fay v. Noia, 372 U.S. 391, 402 (1963) ("[The] root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment . . . .").

54. Fallon & Meltzer, *supra* note 3, at 2034.

55. *Id.*

56. Tyler, *Suspension as an Emergency Power*, *supra* note 47, at 691–92; *see also* Tyler, *Is Suspension a Political Question?*, *supra* note 3, at 386 ("The judiciary is the sole branch constituted for the very purpose of ensuring that individual rights are not improperly displaced by a political majority merely for the sake of expediency . . . .").

57. Cleveland, *supra* note 37, at 12.

numbers.[58] Of the 109 habeas cases in which the Supreme Court issued reported opinions between 1889 and 1899, twenty-two were immigration and Native American affairs cases—just over 20% of the habeas cases.[59] That percentage is almost twice as high if you exclude state habeas cases, meaning that Native American affairs and immigration habeas cases could be almost half of the federal habeas cases that federal courts heard on the merits.[60] These three areas of law also share another similarity that makes investigating them together useful: The claims in the habeas petitions frequently sounded in the register of jurisdiction and power rather than individual rights.[61] So analyzing the cases provides a window into the

58. Jared Goldstein argued that of the 124 reported federal habeas cases before the Civil War, the largest category (twenty-three) involved military custody. *See* Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165, 1181, 1193–94 (2007). Another significant category were cases involving the law of slavery and freedom; at least thirteen cases involved the law of slavery and freedom. *See* United States *ex rel*. Wheeler v. Williamson, 28 F. Cas. 686, 686 (E.D. Penn. 1855) (No. 16,726) (issuing a writ in a case arising out of the law of slavery and freedom); Richardson's Case, 20 F. Cas. 703, 703, 705 (C.C.D.C. 1837) (No. 11,778) (same); *Ex parte* Williams, 29 F. Cas. 1316, 1318 (C.C.D.C. 1833) (No. 17,699) (same); *Ex parte* Robinson (*Robinson II*), 20 F. Cas. 965, 969 (C.C.S.D. Ohio 1856) (No. 11,934) (same); *Ex parte* Sifford, 22 F. Cas. 105, 111–12 (S.D. Ohio 1857) (No. 12,847) (same); United States *ex rel*. Garland v. Morris, 26 F. Cas 1318, 1319–20 (D. Wis. 1854) (No. 15,811) (same); Ableman v. Booth, 62 U.S. (21 How.) 506, 507–08, 525–26 (1858) (same); *Ex parte* Jenkins, 13 F. Cas. 445, 448 (E.D. Pa. 1853) (No. 7,259) (same); *Ex parte* Robinson (*Robinson I*), 20 F. Cas. 969, 970–72 (C.C.S.D. Ohio 1855) (No. 11,935) (same); Norris v. Newton, 18 F. Cas. 322, 322–23 (C.C.D. Ind. 1850) (No. 10,307) (describing writ issued earlier in the case); Ray v. Donnell, 20 F. Cas. 325 (C.C.D. Ind. 1849) (No. 11,590) (same); *In re* Martin, 16 F. Cas. 881, 882 (C.C.S.D.N.Y. 1835) (No. 9,154) (same); United States v. Copeland, 25 F. Cas. 646, 646 (C.C.D.C. 1862) (No. 14,865a) (same) (refusing to issue writ in a case arising out of the law of slavery and freedom).

59. *See* Quock Ting v. United States, 140 U.S. 417, 419 (1891) (involving an immigration dispute); *Ex parte* Lau Ow Bew, 141 U.S. 583, 584 (1891) (same); Wan Shing v. United States, 140 U.S. 424, 424–25 (1891) (same); United States v. Wong Kim Ark, 169 U.S. 649, 650 (1898) (same); Fong Yue Ting v. United States, 149 U.S. 698, 702 (1893) (same); Lau Ow Bew v. United States, 144 U.S. 47, 48 (1892) (same); Lem Moon Sing v. United States, 158 U.S. 538, 539 (1895) (same); Wong Wing v. United States, 163 U.S. 228, 232 (1896) (same); Hilborn v. United States, 163 U.S. 342, 343 (1896) (same); Nishimura Ekiu v. United States, 142 U.S. 651, 652 (1892) (same); Chae Chan Ping v. United States, 130 U.S. 581, 582 (1889) (same); *In re* Johnson, 167 U.S. 120, 123 (1897) (involving Native American affairs); Ward v. Race Horse, 163 U.S. 504, 505 (1896) (same); Talton v. Mayes, 163 U.S. 376, 376–77 (1896) (same); United States v. Pridgeon, 153 U.S. 48, 50 (1894) (same); *Ex parte* Wilson, 140 U.S. 575, 576 (1891) (same); *In re* Mills, 135 U.S. 263, 264 (1890) (same); *In re* Mayfield, 141 U.S. 107, 108 (1891) (same); *In re* Lane, 135 U.S. 443, 445 (1890) (same); *In re* Bonner, 151 U.S. 242, 243 (1894) (same); Gon-shay-ee, Petr., 130 U.S. 343, 345 (1889) (same); *Ex parte* Captain Jack, 130 U.S. 353, 354 (1889) (same).

60. *Cf.* Park, *supra* note 8, at 1979 ("[R]ecognizing the histories of conquest and slavery and their erasure is critical.").

61. *See* Cleveland, *supra* note 37, at 13–14 (arguing that immigration and Native American affairs "share important theoretical links").

relationship between jurisdiction and power on one hand and liberty and individual rights on the other.[62]

The cases illustrate several dualities of the writ of habeas corpus. Although habeas can be a mechanism for protecting individual liberty, it can also lay some foundation for expansive government powers that undermine liberty. And although habeas can constrain the government, it can also constitute an important component of government power and solidify government authority at the expense of individual liberties. And in all three areas, habeas furthered unattractive racist visions of American society and government power.

The case studies reveal at least three different ways in which habeas became part of the legal regime for American colonialism. First, subpart II(A) shows that the availability of the habeas process legitimated detention schemes whether habeas petitions were successful or not. Habeas was a vehicle to both affirmatively authorize particular detentions and retroactively justify existing ones. Second, subpart II(B) argues that the habeas process relied on race and citizenship in order to establish the terms of membership and exclusion. Because habeas proceedings focused on whether a detention was authorized by law, habeas proceedings drew on underlying statutes, which often incorporated racial categorizations and citizenship determinations. Several elements of habeas, such as the concept of jurisdiction, were sufficiently malleable to allow courts to emphasize the importance of race and citizenship to jurisdiction. And habeas relief—when habeas successfully freed individuals from detention—was sometimes pernicious when a detention challenged racial hierarchies and subordination. Third, subpart II(C) shows how the habeas process positioned courts in a dialogue with lawmaking branches who were interested in furthering racial subordination and colonialism but in apparently lawful ways.

These mechanisms offer a more accurate picture of the writ and its strengths and weaknesses. As Christopher Columbus Langdell argued over a century ago, "any one who wishes to understand . . . equity . . . must study its weaknesses as well as its strength."[63] The case studies also provide a window into the legal processes behind American colonialism.

A. Legitimating Detention Schemes

One function that habeas performed was to legitimate detention schemes. Habeas supplied affirmative authorizations for detentions;

62. *See generally* Maggie Blackhawk, *Federal Indian Law As Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019) (arguing that jurisdiction and power better protect minority groups than rights).

63. C.C. LANGDELL, A SUMMARY OF EQUITY PLEADING 38 n.4 (Cambridge: Charles W. Sever & Co., 2d ed. 1883).

generated legal justifications for the detention schemes; provided a superficial appearance of constraint; and implemented detention schemes by distinguishing between persons who were subject to detentions and those who were not.

1. Affirmatively Authorizing Detentions.—While the prototypical depiction of the writ of habeas corpus is a wrongfully imprisoned individual who invokes a court's help, historically, third parties could sometimes invoke habeas as a way to claim authority over other persons. This feature of habeas allowed the writ to legitimate one person or one group's power over others.

Consider how habeas operated in relation to the infamous Fugitive Slave Acts of 1793 and 1850.[64] The Fugitive Slave Act of 1793 allowed a slave owner or slave owner's agent to seize an alleged fugitive and bring them before a federal or state judge to obtain permission to send the individual into slavery.[65] In response to the Fugitive Slave Acts, several states passed personal liberty laws, which the Court largely invalidated in *Prigg v. Pennsylvania*.[66] In the aftermath of *Prigg*, some states prohibited state officials from participating in the process of returning fugitive slaves,[67] and Congress responded with the Fugitive Slave Act of 1850, which increased the number of federal officials who could issue certificates of removal.[68]

Prigg and the 1850 Fugitive Slave Act preserved two usages of habeas corpus. First, people could use habeas as an affirmative way to lay claim to individuals and subject them to slavery. Persons seeking to take individuals and force them into slavery could elect to use writs of habeas corpus as the means to do so instead of the processes spelled out in the Fugitive Slave Act. *Prigg* described how an antislavery state like Pennsylvania provided for using habeas as part of the process of forcing someone into slavery:

> [T]he person to whom . . . labor or service is due . . . is hereby authorized to apply to any judge . . . who, on such application, supported by the oath or affirmation . . . shall issue his warrant . . . authorizing and empowering said sheriff or constable, to arrest and seize the said fugitive.[69]

64. Under the acts, upon "proof [of ownership] to the satisfaction" of the officer, a certificate of removal would issue that allowed the removal of the alleged slave. Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 56 J.S. HIST. 397, 420 (1990).

65. *See* 3 ANNALS OF CONG. 1414–15 (1793) (permitting slaveowners and their agents to seize suspected runaways and bring them to court to be returned).

66. 41 U.S. 539 (1842).

67. THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780–1861, at 118, 127 (1974 Lawbook Exchange, Ltd., 4th prtg. 2008) (1974).

68. Pub. L. No. 31-60, 9 Stat. 462 (1850).

69. *Prigg*, 41 U.S. at 551–52.

The law further provided that "the said fugitive shall be brought before [the court] by habeas corpus . . . for final hearing and adjudication."[70] Even in an antislavery state like Pennsylvania, habeas was a way to oversee legalized violence against Black persons.[71]

In some iterations, habeas proceedings themselves provided an affirmative authorization for that legalized violence. After *Prigg*, for example, *Ray v. Donnell*[72] described how certain individuals had applied to a district court for a writ of habeas corpus because they suspected that Woodson Clark "had certain colored persons concealed in his house."[73] A district court granted their habeas petition; in that case, habeas provided a way to identify whether Black persons were fugitive slaves, in which case they would be forced into slavery.[74]

A related use of habeas proceedings might be called anti-freedom petitions: Some states allowed owners to file habeas petitions to release slaves into an owner's custody.[75] Mississippi's habeas corpus act specifically designated habeas a vehicle to deliver up a slave and resolve contested legal ownership over them.[76] Even in ostensibly abolitionist states, habeas resolved disputed claims of title to slaves as slave owners filed habeas petitions seeking the return of their slaves.[77] In one case, a Pennsylvania court denied a slave master's habeas petition on the ground that Pennsylvania could detain the slave for violating state criminal law before returning the slave to the owner.[78]

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70. *Id.* at 554.

71. *Cf.* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 428 (2011) (summarizing *Prigg*'s holding as "violence against blacks was 'legal' violence; 'illegal' violence was violence against whites"). For a more optimistic take on state resistance to fugitive slave laws, see Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1879 (2019).

72. 20 F. Cas. 325 (C.C.D. Ind. 1849) (No. 11,590).

73. *Id.* at 326.

74. *Id.* at 326–27; *see also* Cross v. Black, 9 G. & J. 198, 200 (Md. 1837) ("The witness further deposed . . . that he . . . had in his possession, a writ of habeas corpus directed to Black, commanding him to bring the coloured persons in his custody, and whom he claimed as slaves before the judge who issued the writ . . . .").

75. *In re* Archy, 9 Cal. 147, 147 (1858) (releasing slave to custody of the owner); *Ex parte* Toney, 11 Mo. 661, 662 (1848) (per curiam) (denying writ because prisoner was confined pursuant to criminal conviction).

76. Miss. Comp. Stat. § 11 (1840); *see* DALLIN H. OAKS, HABEAS CORPUS IN THE STATES–1776–1865, at 278 (describing Mississippi's unique use of habeas corpus writs to recover alleged fugitive slaves); *see also* Scudder v. Seals, 1 Miss. (Walker) 154, 154 (1824) (determining that slaves were stolen from former owner and therefore belonged to former owner's daughter); Steele v. Shirley, 17 Miss. (9 S. & M.) 382, 382 (1848) (determining that seven slaves were stolen from the petitioner).

77. *E.g.*, State v. Anderson, 1 N.J.L. 36, 36 (1790) (determining whether a child born to a woman promised freedom fifteen years after owners' death was free); State v. Frees, 1 N.J.L. 299, 300 (1794) (holding that verbal intention to free a slave upon owner's death is not enough for manumission).

78. Commonwealth *ex rel.* Johnson v. Holloway, 1817 WL 1762, at *1–2 (Pa. 1817).

The precise legal theories on which these habeas petitions proceeded are somewhat difficult to pin down. Courts generally did not spend much time discussing whether the petitions were properly heard under courts' habeas jurisdiction. They seemed to assume that the petitions were within the purview of habeas even though the typical habeas petition is filed by someone in custody seeking their release, rather than by persons who are not in custody and who seek to bring individuals under their custody.[79] Some of the people who filed the habeas petitions asserted that the people who were housing or assisting (allegedly fugitive) slaves "ha[ve] no legal authority to detain said slave[s]" and that the slaveowner was "entitled to [the slaves'] custody."[80] These claims ignore the will of the enslaved person, who could have disputed that they were being detained if they were residing somewhere at their choice. Yet the habeas petitions were allowed to proceed, perhaps on the theory that a slave was akin to property whose will either did not legally exist or was legally irrelevant, and that the slave, relegated to the status of property, was being held by someone who lacked authority over them. Courts also may have thought the petitions could proceed in part because writs of habeas corpus could direct persons to be brought before a court where a court would then make a determination about an individual's liberty.[81] Some courts referred to writs of habeas in this way—as a device to bring persons into court and ascertain their legal status.[82]

Both of these through lines appeared in *United States* ex rel. *Wheeler v. Williamson*,[83] where the parties actually did dispute whether a slaveowner could file a writ of habeas corpus asserting a claim over persons he alleged

79. *See infra* note 81 and accompanying text (describing disagreement between Duker and Jenks on relevant origins in habeas practice).

80. *Archy*, 9 Cal. at 161; *see also* Ray v. Donnell, 20 F. Cas. 325, 326 (C.C.D. Ind. 1849) (No. 11,590) (asserting that an individual "had certain colored persons concealed in his house").

81. Analyzing early English practice, Edward Jenks argued that "whatever may have been its ultimate use, the writ of Habeas Corpus was originally intended not to get people out of prison, *but to put them in it*." Edward Jenks, *The Story of the* Habeas Corpus, 18 L.Q. REV. 64, 65 (1902). To support this claim, Jenks argued that the writ could direct sheriffs to arrest people. *Id.* at 68. William Duker argued that Jenks's historical analysis was mistaken, and that even when they did secure custody over people, the "intended purpose" of writs of habeas "was merely to secure appearance after more lenient methods had failed." DUKER, *supra* note 21, at 22. Still, Duker explained, habeas secured someone's presence at court, which might result in their imprisonment, whereas writs of capias always functioned as writs to secure arrests. *See id.* at 20–22. Whatever the precise contours of early English practice, there are decisions of American courts in the nineteenth century reporting (or at least describing) writs of habeas corpus as a mechanism to bring someone before a court, and to determine whether they should be released to the custody of another person. And the history of the two writs may have contributed to a belief that this usage was within the bounds of habeas.

82. *See, e.g.*, Norris v. Newton, 18 F. Cas. 322, 323 (C.C.D. Ind. 1850) (No. 10,307) ("[T]he sheriff had a writ of habeas corpus, and . . . they had no other object than to ascertain whether the negroes belonged to him.").

83. 28 F. Cas. 686 (E.D. Pa. 1855) (No. 16,726).

to be his slaves.[84] The court explained that the writ required parties to respond to a court's inquiry—"[t]he party assailed comes before the court in obedience to its process"; and "the first duty of a defendant, in all cases, is obedience to the writ which calls him into court," where the court could then conduct an inquiry into a person's custody or status.[85]

The court also suggested that a person's status as a slave affected a court's habeas jurisdiction, noting that the respondent "did not question the jurisdiction of the court: he did not assert that the negroes were free."[86] A person's status as free or enslaved would affect whether that person's will was legally relevant, and whether it even made conceptual sense to think of someone else as having lawful control over them. So, the substantive law of slavery helped make it possible for an owner to file a habeas petition that asserted a claim to a slave and that maintained third parties were (wrongfully) holding a slave within their custody or control. *Wheeler*'s citation of child custody cases supports this view; the court invoked habeas cases that were filed when someone alleged that a child was within another person's "possession, power or custody" or "constructive control."[87] The relevant body of substantive law appears to have shaped which individuals might be conceptualized as being within another person's custody or possession and who could file habeas petitions to ascertain where someone belonged. But whether a person was free or enslaved—whether they could be within another's control—affected not only the procedural propriety of a habeas petition but also the merits of the habeas petition. And so, courts may have decided a person's status in the course of inquiring into a person's custody, rather than doing so to determine whether a habeas petition was procedurally proper.[88]

It was not just the law of slavery and freedom where habeas proceedings allowed private citizens or public officials to lay claim over other persons. Some habeas petitions resolved competing claims of authority over Native persons. In *In re Lelah-puc-ka-chee*,[89] the court addressed a habeas petition filed by a Native woman's husband to take custody of her and to release her from a school.[90] The habeas court ultimately concluded that the woman's

84. *Id.* at 690.

85. *Id.*

86. *Id.*

87. *Id.* (citing Rex v. Winton (1789) 5 T.R. 89; and *In re* Stacy, 10 Johns. 328 (N.Y. Sup. Ct. 1813)).

88. *Id.* (noting that judges often issue writs of habeas corpus when "in truth no grievance has been sustained" because they are "not presumed to know beforehand, all the merits of the thousand and one causes that come before [them]: [they] decides when [they have] heard").

89. 98 F. 429 (N.D. Iowa 1899).

90. *Id.* at 430–31.

alleged husband could not take her away from the school.[91] Where third parties could use habeas to assert control over Natives, habeas petitions had the potential to enforce abusive guardianships over Native Americans and the forced relocation of Natives to designated schools or areas.[92]

2. Justifying Existing Detentions.—Habeas proceedings also produced doctrines that justified detentions, separate from whether writs purported to supply authority for particular detentions. The doctrines produced in habeas proceedings provided the jurisprudential architecture for the subordination of Native Americans and immigrants.

a. Native American Affairs.—*Crow Dog* was one case that laid the groundwork for the plenary power doctrine that justifies extensive federal authority over Native American affairs.[93] The case arose from Crow Dog's murder of another member of the Sioux Nation.[94] Crow Dog was convicted for a violation of the territorial law against murder in a district court sitting as a territorial court, and he filed a habeas petition challenging the court's authority over him.[95] The Court granted Crow Dog's habeas petition, concluding that the district court lacked jurisdiction because Congress had not authorized criminal jurisdiction over crimes between Native Americans on reservations.[96]

Although Crow Dog's habeas petition succeeded, the Court went out of its way to say that with "a clear expression of the intention[,]" Congress could enact a criminal code governing crimes between Native persons on Native lands.[97] In the closing of the opinion, the Court insisted that Natives "were separated by race . . . from the authority and power" vested in the federal

91. *Id.* at 436. The court also suggested that "had she in fact been married," she could not be forced to stay at the school. *Id.* at 436–47.

92. *See* Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195, 227–28 (1984) (describing forced relocation of Native children to schools); Nancy Carol Carter, *Race and Power Politics As Aspects of Federal Guardianship Over American Indians: Land-Related Cases, 1887–1924*, 4 AM. INDIAN L. REV. 197, 199–201 (1976) ("Government attorneys . . . forcefully argued in numerous cases that the United States, acting alone, had capacity to enter court as the Indians' guardian." (footnote omitted)); DAWN PETERSON, INDIANS IN THE FAMILY: ADOPTION AND THE POLITICS OF ANTEBELLUM EXPANSION 234–302 (2017) (describing "Choctaw Schooling" and the politics of Indian removal); U.S. COMM. ON CIV. RTS., BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS, BRIEFING REPORT 95–96 (2018) ("The policy entailed Native American children being forcibly separated from their parents and sent far from their communities into segregated boarding schools.").

93. *See infra* note 102.

94. *Ex parte* Crow Dog, 109 U.S. 556, 557 (1883).

95. *Id.* at 557–58.

96. The Court found that a provision that excluded such crimes from federal jurisdiction had not yet been repealed. *Id.* at 570–72.

97. *Id.* at 572.

government.[98] While the ostensible uniqueness of Native Americans insulated them from federal oversight in Crow Dog's case, the Court also treated Natives' distinctiveness as reason for extensive federal authority over them. The Court described the dispute as whether "superiors of a different race" could impose "the responsibilities of civil conduct" on Native Americans in order to discipline "the strongest prejudices of their savage nature."[99] The Court also underscored the expansive scope of the federal government's powers over Natives, whom the Court depicted "as wards, subject to a guardian":[100] They were "subject[s]" "not . . . citizens" for whom "appropriate legislation" was needed "to secure to them an orderly government."[101]

These ideas became the premises for the plenary power doctrine over Native American affairs.[102] In concluding that there was not legal authorization for Crow Dog's detention, the Court either nudged Congress to authorize similar detentions or merely made an observation that Congress could authorize such detentions, which Congress then seized on. Either way, the ruling communicated to Congress that Congress could provide for more detentions.[103] Sarah Cleveland has described the defining features of the resulting plenary power doctrine, including the claim of sweeping authority that is subject to few limitations.[104] The doctrine led the Court to affirm Congress's creation of the Dawes Commission, the infamous body that took

98. *Id.* at 571.

99. *Id.*

100. *Id.* at 569.

101. *Id.* at 568–69; *see also id.* at 569–70 (describing Native Americans as people "who were to be urged, as far as it could successfully be done, into the practice of agriculture, and whose children were to be taught the arts and industry of civilized life" and stating that they should not be treated "as separately responsible and amenable, in all their personal and domestic relations with each other, to the general laws of the United States, outside of those which were enacted expressly with reference to them as members of an Indian tribe").

102. Anthony G. Gulig & Sidney L. Harring, *"An Indian Cannot Get a Morsel of Pork . . . ." A Retrospective on* Crow Dog, Lone Wolf, Blackbird, *Tribal Sovereignty, Indian Land, and Writing Indian History*, 38 TULSA L. REV. 87, 89 (2002) (arguing that *Crow Dog* "set[] the stage for the modern plenary power doctrine"); *see also* Cleveland, *supra* note 37, at 59 ("The Major Crimes Act, which had been adopted in reaction to the Court's decision in *Crow Dog* . . . . both regulated crimes between Indians in Indian country and extended federal jurisdiction to crimes committed between Indians on reservations within the states." (footnote omitted)); Mary Kathryn Nagle, Standing Bear v. Crook*: The Case for Equality Under Waaxe's Law*, 45 CREIGHTON L. REV. 455, 459–60 (2012) ("[T]he plenary power doctrine has constituted the Supreme Court's sole doctrinal justification for its adjudications of disputes involving the balance of power between sovereign Indian nations and the . . . federal government . . . .").

103. For an explanation of how the focus on whether detentions were authorized by law fueled the expansion of detention schemes, see *infra* notes 256–277.

104. Cleveland, *supra* note 37, at 42–80; *see also* Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751, 1779–85 (2017) (describing the plenary power doctrine as a tool the U.S. government invoked to deny Native sovereignty and property rights).

land from Native American tribes through a process of cession or allotment (and sometimes fraud).[105] A Senate Report by the Dawes Commission invoked the reasoning from *Crow Dog* to justify subjecting the Cherokee Nation to the Dawes Act (the Cherokee Nation was originally exempt from the Act). The report referred to the "non-American" "deplorable state of affairs" in the Cherokee Nation, which left the United States "no alternative" but to fulfill its "constitutional obligation[]" over land and people "within its jurisdiction."[106] Congress responded by substantially limiting the authority of the Cherokee Nation and the other "Five Civilized Tribes."[107] In subsequent habeas cases, the Court described "all the advantages which may accrue" from "subjecting the Indians . . . to the same laws which govern the whites" and "transfer[ring] [them] . . . from the jurisdiction of [their] own tribe[s]."[108]

The plenary power principle also served as a justification for trimming Natives' legal remedies against the federal government when the federal government allegedly took tribal lands in violation of treaties,[109] and, more recently, when limiting tribes' ability to prosecute nontribal members for crimes committed against tribal members.[110]

b. Immigration.—Habeas cases in immigration also generated the now-infamous plenary power doctrine in immigration that justifies the

105. Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612, 645–46; *see also* Winton v. Amos, 255 U.S. 373, 374 (1921) (upholding Dawes Commission as amended).

106. S. REP. No. 53-377, at 12 (1894), *quoted in* Stephens v. Cherokee Nation, 174 U.S. 445, 451–53 (1899).

107. *See, e.g.*, Appropriations Act of 1896, ch. 398, 29 Stat. 321, 339 (1896) (enabling a commission to "negotiate with the Five Civilized Tribes" and "continue the exercise of the authority already conferred upon them by law"); Appropriations Act of 1897, ch. 3, 30 Stat. 62, 84 (1897) (granting a continuance of the same authority); Act of June 28, 1898, ch. 517, §§ 11, 26, 28, 30 Stat. 495, 497–98, 504–05 (1898) (establishing the Dawes Commission's ability to allot land, denying the enforcement of Native law in United States courts, and abolishing tribal courts).

108. Gon-shay-ee, Petr., 130 U.S. 343, 353 (1889).

109. *See* Lone Wolf v. Hithcock, 187 U.S. 553, 566 (1903) (discussing that for a hundred years "[w]hen . . . treaties were entered into between the United States and a tribe of Indians[,] it was never doubted that the power to abrogate existed in Congress." (citing United States v. Kagama, 118 U.S. 375, 382 (1886))); *see also* Joseph William Singer, Lone Wolf *or How to Take Property by Calling It a "Mere Change in the Form of Investment,"* 38 TULSA L. REV. 37, 39 (2002) (describing the case as having "legitimated . . . what is probably the most massive uncompensated taking of property in United States history"). For modern uses, see *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011) ("[T]he organization and management of the trust is a sovereign function subject to the plenary authority of Congress" and "'[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning . . . .'" (citing and quoting *Lone Wolf*, 187 U.S. at 565)).

110. Oliphant v. Squamish Indian Tribe, 435 U.S. 191, 211 (1978) (citing *Kagama*, 118 U.S. at 379 to raise concerns about tribes' judicial systems), *superseded by statute*, Act of Nov. 4, 1990, Pub. L. No. 101–511, § 8077(b), (c), 104 Stat. 1856, 1892 (codified at 25 U.S.C. § 1301(2)).

subordination and control of immigrant communities.[111] In one case, *Chae Chan Ping*, a Chinese-American laborer was detained upon returning to the United States after visiting China.[112] In another case, *Fong Yue Ting*,[113] Chinese-American laborers residing in the United States were arrested for failing to obtain the required documentation allowing them to stay in the United States.[114] Although the registration and deportation scheme in *Fong Yue Ting* was never fully implemented or enforced, the Court upheld it anyway.[115]

In both cases, the Court reasoned in capacious terms about the government's authority over noncitizens, again in racialized terms.[116] The Court in *Chae Chan Ping* proclaimed that "we are but one people, one nation" and that "[t]o preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation."[117] The Court continued that "such aggression and encroachment" could come "from vast hordes of [a foreign nation's] people crowding in upon us" or "the presence of foreigners of a different race in this country, who will not assimilate with us."[118] And the Court in *Fong Yue Ting* insisted that whether the Chinese stayed "for a shorter or longer time," "they continue to be aliens."[119]

Based in part on this idea, habeas courts reasoned that the federal government also possessed plenary control over noncitizens who were physically present in the United States, a concept that became known as the "entry fiction."[120] This idea reinforced expansive government authority over

111. *See* SALYER, *supra* note 49, at 29 ("[T]he Court's deference to immigration officers in *Nishimura Ekiu*, as well as in *Chae Chan Ping*, established the basic relationship between judges and administrators which has long distinguished immigration law from other branches of administrative law.").

112. Chae Chan Ping v. United States, 130 U.S. 581, 582 (1889).

113. Fong Yue Ting v. United States, 149 U.S. 698 (1893).

114. *Id.* at 699.

115. BETH LEW-WILLIAMS, THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA 24 (2018).

116. *See Chae Chan Ping*, 130 U.S. at 605–07 ("If . . . the government of the United States . . . considers the presence of foreigners of a different race in this country . . . to be dangerous to its peace and security, their exclusion is not to be stayed . . . ."); *Fong Yue Ting*, 149 U.S. at 729–30 (upholding a statute requiring testimony from a white witness in the absence of a certificate of residence for a noncitizen).

117. *Chae Chan Ping*, 130 U.S. at 606.

118. *Id.* In *Fong Yue Ting*, after quoting this passage from *Chae Chan Ping*, the Court asserted that "[t]he right of a nation to expel or deport foreigners[] who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country." 149 U.S. at 707.

119. *Fong Yue Ting*, 149 U.S. at 724.

120. *See* César Cauauhtémoc Garcia Hernández, *Invisible Spaces and Invisible Lives in Immigration Detention*, 57 HOW. L.J. 869, 872 (2014) (describing the entry fiction's "in-between

noncitizens in the United States,[121] and allowed the federal government to separate immigrant families at the beginning of the twentieth century. Although the federal government had allowed children to live with their parents for several years while deportation proceedings were not practicable, the government insisted that the children had not truly entered the United States and thus could be deported and separated from their families.[122]

Here too, the doctrines born in the habeas cases have taken on much broader significance.[123] The ideas about governmental power at the heart of the early immigration habeas cases were trotted out in service of recent decisions that allowed the government to exclude spouses of American

state" where "immigration detainees . . . are inside the United States[] but in substantial part beyond the reach of its constitutional guarantees of due process"). The narrowest interpretation of the entry fiction is that persons stopped at the border have not truly entered the United States even though ports of entry may be physically in the United States. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213 (1953) ("[H]arborage at Ellis Island is not an entry into the United States."). The broader interpretation is that persons who physically entered the United States but were not lawfully admitted have not truly entered the United States and crossed the border, and therefore cannot avail themselves of the full panoply of constitutional protections. For a modern application, see *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959, 1982–83 (2020) (applying the entry fiction to noncitizens "detained shortly after unlawful entry").

121. *See Chae Chan Ping*, 130 U.S. at 610 (emphasizing "the favor and consent of the government"). As Elizabeth Cohen demonstrated, this authority often spilled over to citizens as well. *See generally* ELIZABETH F. COHEN, ILLEGAL: HOW AMERICA'S LAWLESS IMMIGRATION REGIME THREATENS US ALL (2020) (discussing the impact of immigration enforcement on citizens).

122. *See, e.g.*, Kaplan v. Tod, 267 U.S. 228, 229–31 (1925) (deporting daughter who stayed with her father for six years in the United States). Another form of family separations were children and spouses excluded at the border. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 547 (1950) (excluding spouse); Low Wah Suey v. Backus, 225 U.S. 460, 476 (1912) (same); Chung Fook v. White, 264 U.S. 443, 444–46 (1924) (same); Lee Lung v. Patterson, 186 U.S. 168, 169, 177 (1902) (excluding wife and daughter); *In re* Day, 27 F. 678, 679, 682 (C.C.S.D.N.Y. 1886) (excluding children).

123. *See* Gabriel J. Chin, Chae Chan Ping *and* Fong Yue Ting*: The Origins of Plenary Power*, *in* IMMIGRATION STORIES 7, 7 (David A. Martin & Peter H. Schuck eds., 2005) ("Congressional power to determine who may come and stay, and who may not, is virtually unrestricted."); *see also* LEW-WILLIAMS, *supra* note 115, at 193 ("[T]he power the federal government marshaled to exclude the Chinese in 1888 would soon be used to sift, select, or bar all aliens at America's gates."). Scholars have documented how plenary power has influenced the Court's cases in different ways. *See generally* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Constitutional Interpretation*, 100 YALE L.J. 545, 548–49 (1990) (assessing what remains of the plenary power doctrine following a statutory interpretation trend undermining the doctrine). For other examples, see generally Nina Pillard, Comment, *Plenary Power Underground in* Nguyen v. INS*: A Response to Professor Spiro*, 16 GEO. IMMIGR. L.J. 835 (2002) (discussing whether the plenary power doctrine today is covert rather than eroded); Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373 (2004) (providing a citizen-centered analysis of the plenary power doctrine); Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MICH. L. REV. 1333 (2019) (discussing enforcement and punitive discrepancies between domestic and international terrorism).

citizens with little to no explanation,[124] as well as decisions allowing the government to summarily deport noncitizens raising asylum claims.[125] They also formed the basis of the decision upholding President Trump's ban on entry into the United States by nationals of several Muslim-majority countries.[126]

3. Providing the Appearance of Constraint.—Habeas proceedings also helped to reinforce and legitimate federal authority by offering a superficial appearance of constraint. For example, some habeas cases tweaked the contours of federal authority over Native Americans without meaningfully constraining it. In *Ex parte Bi-a-lil-le*,[127] a habeas court rejected the Secretary of War and Secretary of the Interior's detention of several Navajo members at a military fort for "threaten[ing] serious trouble upon the Navajo reservation."[128] The court rejected the government's suggestion that the Navajos could be held as prisoners of war under the federal government's war powers;[129] instead, the court reasoned, the federal government's authority came from its plenary authority over Native American affairs, not wartime exigencies.[130]

Habeas proceedings also offered a thin veneer of constraint in the area of immigration.[131] Habeas courts identified fixable errors in detention systems, which ostensibly required the schemes to conform to the law but did not meaningfully constrain the government's power over immigration. In one set of cases, the Court struck down state inspection and detention schemes

124. *Kerry v. Din*, 576 U.S. 86 (2015) (plurality opinion) cited *Fiallo v. Bell*, 430 U.S. 787, 798 (1977) as reason for additional judicial deference. 576 U.S. at 97. *Fiallo* in turn cited *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) to support the same proposition. 430 U.S. at 792. *See also id.* ("Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" (quoting Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953) (citing, among others, *Chae Chan Ping*))).

125. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1964 (2020) (citing Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892)).

126. Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018) (citing *Fiallo*, 430 U.S. at 792).

127. 100 P. 450 (Ariz. 1909).

128. *Id.* at 450.

129. *Id.* at 450–51.

130. *Id.* at 451. Similar to the Court in *Crow Dog*, the court in *Ex parte Bi-a-lil-le* underscored that "administrative correction of their [Native American] conduct . . . cannot be sanctioned, unless there is authority for it in the acts of Congress." *Compare id.*, *with Ex parte* Crow Dog, 109 U.S. 556, 567–72 (1823) (granting habeas petition because Congress had not authorized the exercise of criminal jurisdiction over crimes between Native Americans on reservations).

131. For additional examples, see generally BRAD ASHER, BEYOND THE RESERVATION: INDIANS, SETTLERS, AND THE LAW IN WASHINGTON TERRITORY, 1853–1889 (1999) ("Indians gained standing in territorial courts . . . . This shift in legal emphasis acknowledged the porousness of racial boundaries but still sought to preserve and uphold critical legal distinctions between Indians and whites.").

instituted to screen out immigrants who were viewed as undesirable at the time.[132] Ruling for the habeas petitioner, the Court concluded that states lacked the jurisdiction and authority to regulate immigration.[133] In response, the federal government adopted inspection and detention schemes that were substantially similar to the state schemes that the Court had invalidated.[134]

4. Operationalizing Detention Schemes.—In all three areas of law, habeas proceedings helped to implement detention schemes by ensuring that detentions were authorized by law—that the people being detained were actually the people that the lawmaking branches wanted to be detained.[135] While this focus allowed habeas to liberate some individuals from detention, it also meant that the habeas system reinforced the detention schemes.

a. Slavery and Freedom.—In the law of slavery, for example, habeas courts developed doctrines that preserved slave owners' ability to take slaves to other states and territories without freeing them. During the period of westward expansion, owners transported slaves to new states and federal territories.[136] Because different states had different laws on slavery, questions arose about whether someone's presence in a state or territory meant that they were governed by that state or territory's law.[137] For example, in *In re Perkins*,[138] the California Supreme Court labeled all slaves brought to California before 1852 during the height of the Gold Rush as fugitives who could be taken and trafficked under the federal Fugitive Slave Act.[139] Some doctrines addressed what kinds of travel allowed a passers-through to gain the benefit of the state's laws.[140] There, habeas courts developed a body of

132. *See, e.g.*, Chy Lung v. Freeman, 92 U.S. 275, 276–78 (1875) (state law prohibited "lewd or debauched" women from landing from a foreign vessel unless they paid a bond).

133. *Id.* at 280–81.

134. *See, e.g.*, Low Wah Suey v. Backus, 225 U.S. 460, 476 (1912) (excluding woman on grounds that she was engaged in prostitution); LEW-WILLIAMS, *supra* note 115 at 44–45 (describing origins of Page Act's restrictions on women engaged in prostitution as arising in part from state and local agitation).

135. *See also* SALYER, *supra* note 49, at xiii (arguing that scholars "have not given adequate consideration to how the laws were actually enforced by the administrative agencies and the federal courts").

136. LEA VANDERVELDE, REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT 57 (2014).

137. The overwhelming majority of freedom petitions in Missouri addressed the effect of the laws of one state or territory on another state's residents. *Id.* at 7–8.

138. 2 Cal. 424 (Ca. 1852).

139. *Id.* at 425.

140. *See, e.g.*, VANDERVELDE, *supra* note 136, at 67 (noting one statute that provided that slaves would not be freed if they were indentured within thirty days of entry into the territory or removed within sixty days).

law that effectively allowed private agreements to insulate slave owners from anti-slavery laws.[141]

b. Native American Affairs.—In the area of Native American affairs, habeas proceedings bolstered a theory of jurisdiction that supplied a superficial basis to dispossess Natives of their lands. Habeas courts often maintained that their focus was on whether a detainer had jurisdiction over a detainee,[142] and habeas courts reasoned that jurisdiction focused on place in addition to personage.[143] The focus on place coincided with a theory of jurisdiction that furthered the American colonial project—a territorial theory that imagined authority could be exercised over a given place.[144]

A territorial understanding of jurisdiction, and in particular, the mere fact that Native Americans happened to be in a place over which the United States asserted authority, had provided the legal basis for the United States' claims of power over Native Americans and Native American land.[145] Early administrations insisted that Natives were subject to federal laws because they were "within the limits of the United States."[146] The territorial theory of jurisdiction also facilitated the dispossession of Native American lands by minimizing Native claims to title. *Johnson v. M'Intosh*[147] relied on the territorial theory of jurisdiction to justify the United States' claim to Native

141. *See id.* at 79 ("[T]he distinction between a legally fully indentured servant and a slave was merely a matter of a piece of paper and taking the slave before a clerk."); *id.* at 67 ("This statute does not appear to have been designed as much to secure freedom as it was thought to accommodate bondage . . . .").

142. *See, e.g.*, *In re* Mills, 135 U.S. 263, 265 (1890) (habeas focused on jurisdiction); *In re* Mayfield, 141 U.S. 107, 111–16 (1891) (same); *In re* Johnson, 167 U.S. 120, 124–25 (1897) (same); *Ex parte* Crouch, 112 U.S. 178, 180 (1884) (same); *Ex parte* Parks, 93 U.S. 18, 21 (1876) (same); *Ex parte* Watkins, 28 U.S. 193, 202–03 (1830) (same).

143. *See, e.g.*, *Ex parte* Wilson, 140 U.S. 575, 575–79 (1891) (describing jurisdiction as concerned with place); *Ex parte* Reynolds, 20 F. Cas. 582, 582 (C.C.W.D. Ark. 1879) (No. 11,719) (stating that the Court's jurisdiction "depends upon three things: First, the nature of the offence; second, the status as to nationality of the person committing it and the person against whom it is committed; and, third, the place where it is committed").

144. Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 872–87 (1999); *see generally* CHARLES S. MAIER, ONCE WITHIN BORDERS: TERRITORIES OF POWER, WEALTH, AND BELONGING SINCE 1500 (2016).

145. *See* Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 MONT. L. REV. 11, 13–14 (2019) ("The new nation initially made an abortive attempt . . . [to] label[] the Native peoples within its new borders as 'conquered,' and so subject to the jurisdiction of both state and federal governments.") [hereinafter: Ablavsky, *Sovereign Metaphors*]; Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1062–67 (2015) (describing how U.S. officials claimed Native Americans "possessed full sovereignty" and independence, but this status was subordinated to their relationship with the U.S., such that "due to their inclusion within the United States, Native nations were not free to negotiate or associate with other Euro-American nations").

146. Ablavsky, *Sovereign Metaphors*, *supra* note 145, at 13–14.

147. 21 U.S. 543 (8 Wheat.) (1823).

lands.[148] *Cherokee Nation v. Georgia*[149] similarly rejected Native nations' power to sue in federal court precisely because Native nations "reside within the acknowledged boundaries of the United States" and "they are considered as within the jurisdictional limits of the United States."[150]

Ex parte Crow Dog, the habeas case that precipitated modern criminal jurisdiction over Native American affairs, relied on the territorial theory of jurisdiction to lay the basis for extensive federal authority over tribes. The Court in *Crow Dog* reasoned that the reservation was "within the geographical limits of the Territory of Dakota" and therefore "under the laws of the United States."[151] It was because "the *locus in quo* of the alleged offense" was "territorially" within the United States that United States courts could have authority over it.[152] The Court in *United States v. Kagama*[153] later echoed this claim when it upheld the Major Crimes Act: Congress had authority over Native Americans because "Indians are within the geographical limits of the United States" and "[t]he soil and the people within these limits are under the political control of the Government."[154]

The emphasis on place as integral to jurisdiction furthered the colonial project in more specific ways as well. Precisely demarcating places allowed the federal government to support westward expansion by making land exchangeable.[155] Habeas proceedings facilitated the marking and designation of lands as habeas courts determined whether particular lands fell within the purview of the federal government, states, or tribes. Habeas proceedings formalized treaties and customary agreements between states, tribes, and the federal government and sorted through conflicting practices in order to cleanly categorize land.[156] Habeas proceedings also zeroed in on more particular determinations about certain parcels of land, such as whether land

148. *Id*. at 573, 587–88 (explaining that the first Europeans to physically arrive at the land had "the sole right of acquiring the soil" and "unequivocally acceded to that great and broad rule").

149. 30 U.S. (5 Pet.) 1 (1831).

150. *Id.* at 17.

151. *Ex parte* Crow Dog, 109 U.S. 556, 559 (1883).

152. *Id.* at 562.

153. 118 U.S. 375 (1886).

154. *Id.* at 379.

155. K-Sue Park, *Conquest and Slavery in the Property Law Course: Teaching Notes* 6–7 (Georgetown L. Fac. Publ'ns and Other Works, July 24, 2020), https://ssrn.com/abstract=3659947 [https://perma.cc/F9SL-VELM] ("[T]hrough the processes of territorial expansion and land extraction from tribes, the Country developed its institutions for defining, organizing, and distributing property, and regulating a market in land."); *see* AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 105 (2010) ("Control of such land was believed necessary for republican and utopian visions of empire, because expansion would create a permanent condition of peace as well as the moral and economic basis for freedom.").

156. *See, e.g.*, United States v. Rogers, 23 F. 658, 663 (W.D. Ark. 1885) (assessing whether law was a reservation by sorting out conflicting customs).

had been allotted (i.e., transferred to individual tribe members).[157] By clearing up conflicting claims of authority over land, the habeas process facilitated a land system that drove Westward expansion.[158]

B. Encoding Race, Citizenship, Membership, and Exclusion

Habeas proceedings also incorporated race and citizenship into the habeas process. Habeas cases helped to construct racial categories by analyzing whether detentions were authorized by laws that incorporated race and citizenship. And habeas proceedings provided a mechanism to undercut detentions that attempted to challenge racial subordination and racial hierarchies.

1. Habeas and the Process of Racialization

a. Slavery and Freedom.—Habeas performed a liberating function within the regime of slavery when enslaved individuals used habeas proceedings to assert their freedom via freedom petitions.[159] But because habeas proceedings were trained on whether detentions were authorized by law, they incorporated the racial law of slavery: Habeas proceedings sought to determine which individuals were legally Black and subject to the regime of slavery.[160]

These habeas proceedings contributed to the development of the legal architecture of race. In order to determine if a person's detention was legally authorized, habeas courts analyzed whether a person was Black. Whether a person was considered Black depended on a set of considerations, including social conditions and societal views, which courts stitched together into a

157. *E.g.*, *Ex parte* Pero, 99 F.2d 28, 29, 32–35 (7th Cir. 1938). For descriptions of allotment, see ROBERT N. CLINTON, NELL JESSUP NEWTON & MONROE E. PRICE, AMERICAN INDIAN LAW: CASES AND MATERIALS 147–52 (3d ed. 1991); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 10 (1995).

158. *See* RANA, *supra* note 155, at 105.

159. VANDERVELDE, *supra* note 136, at 8–9 (describing freedom petitions); *id.* at 25 (noting that the very first freedom petition was stylized as a habeas petition). For a discussion of examples of freedom petitions stylized as habeas petitions, see *id.* at 29, 47 and KIMBERLY M. WELCH, BLACK LITIGANTS IN THE ANTEBELLUM AMERICAN SOUTH 82 (2018) (providing an example of the liberating function of habeas).

160. The story that emerges is consistent with Ariela Gross and Alejandro de la Fuente's historical study of three slave economies in the lead up to the Civil War. *See* ALEJANDRO DE LA FUENTE & ARIELA J. GROSS, BECOMING FREE, BECOMING BLACK: RACE, FREEDOM, AND LAW IN CUBA, VIRGINIA, AND LOUISIANA 219–20 (2020) (describing the incorporation of slavery and freedom suits in mid-nineteenth century Cuba, Virginia, and Louisiana). De la Fuente and Gross concluded that the law of freedom and laws governing newly freed slaves, not just the law of slavery, created the legal boundaries between Black and white persons. *Id.* at 221–22, 224.

racially productive body of law.[161] Habeas courts pointed to the physical attributes of a person, like the size of their nose or physical stature,[162] in addition to hair texture.[163] They also focused on ancestry and descent,[164] and a person's reputation within the community factored into the proceedings,[165] which allowed courts to draw on racial stereotypes, including anti-Black tropes about work ethic.[166] In the course of determining who could be free and on what terms, habeas jurisprudence helped to develop and reinforce the racial categories at the base of the institution of slavery.

b. Native American Affairs.—A similar dynamic played out in Native American affairs. In order to determine whether a detention was jurisdictionally sound, habeas courts zeroed in on whether persons were Native Americans. Similar to freedom petitions, habeas courts developed a body of law that helped to construct Native Americans as a distinct racial group. They examined whether petitioners were "Indians by blood";[167] whether they had "blood of the race";[168] where they resided;[169] how they lived

161. *See* ANNE TWITTY, BEFORE *DRED SCOTT*: SLAVERY AND LEGAL CULTURE IN THE AMERICAN CONFLUENCE, 1787–1857, at 67 (2016) (describing captions that described persons in terms of color).

162. *See, e.g.*, Hudgins v. Wright, 11 Va. (1 Hen. & M.) 134, 140 (1806) (Tucker, J., concurring) (determining that evidence of a person's nose shape was admissible and proper to determine someone's race); WELCH, *supra* note 159, at 67, 107 (describing focus of freedom petitions on reputation and physical appearance, such as "blunt & heavy features" and "large boned").

163. *See, e.g.*, VANDERVELDE, *supra* note 136, at 47 (describing testimony taken to determine whether a woman "was actually Indian at all[,]" which included a description of her hair); *Wright*, 11 Va. (1 Hen. & M.) at 140 (referring to "the long, straight, black hair of the native aborigines").

164. *See, e.g.*, VANDERVELDE, *supra* note 136, at 78 (describing habeas petitions of children "of the original French slaves" exempted from operation of the Northwest Ordinance). This included deciding whether persons descended from Natchez Indians on their mother's side could be slaves. Marguerite v. Chouteau, 3 Mo. 540, 541 (1834); *see also* VANDERVELDE, *supra* note 136, at 39–40 ("Missouri . . . law presumed that persons of color were slaves. . . . Knowing the times and places of one's ownership and how that ownership changed . . . were factors that could militate either for or against success.").

165. *See, e.g.*, TWITTY, *supra* note 161, at 81 ("Slaves who remained on free soil . . . frequently merited the commentary of the community[,]" which "[t]hey did . . . by cultivating reputations as individuals who were entitled to their freedom."); WELCH, *supra* note 159, at 67 ("[E]nslaved people used their reputations to defend themselves against those who might object to giving them their freedom.").

166. *See* WELCH, *supra* note 159, at 67–69 (arguing that the "politics of reputation" played a significant role in freedom suits for both enslaved and free Black people).

167. *E.g.*, *In re* Wolf, 27 F. 606, 609 (W.D. Ark. 1886); *In re* Mayfield, 141 U.S. 107, 108 (1891); Quagon v. Biddle, 5 F.2d 608, 609 (8th Cir. 1925); *Ex parte* Pero, 99 F.2d 28, 29–30 (7th Cir. 1938).

168. *In re Wolf*, 27 F. at 609; *see also Ex parte* Reynolds. 20 F. Cas. 582, 583 (C.C.W.D. Ark.) (No. 11,719) (1879) ("[H]er mother had some Indian blood in her veins."); *id.* at 585 ("defining the nationality of persons according to the quantum of . . . blood in the veins of the person").

169. *See, e.g.*, *In re Wolf*, 27 F. at 609 (noting that petitioners "reside in and are a part of the Cherokee Nation").

(whether on individually or communally owned land);[170] the manner in which they committed a crime;[171] their affiliation and association with a tribe;[172] who they were married to;[173] their parentage;[174] their reputation in the community;[175] whether their "usages and customs . . . belong[] to their race";[176] and other characteristics.

In addition to other harms associated with racialization, i.e., the process of constructing a group as a distinct race,[177] the racialization of Native Americans was used to diminish Natives' political authority. The idea that Native nations were a distinct race, rather than or in addition to a political group, provided a reason to deny Native populations the authority enjoyed by governments, including the ability to sue in federal court,[178] the authority to make treaties,[179] the power to establish membership and citizenship,[180] and the authority to govern their people (and others).[181] The government denied Native Americans these powers by insisting that Native Americans were

170. *See, e.g.*, *In re* Now-Ge-Zhuck, 76 P. 877, 877 (Kan. 1904) (noting that petitioner had resided on an Indian reservation his whole life); *Ex parte* Pero, 99 F.2d at 30 (noting that petitioner had "not been enrolled with any . . . reservation").

171. *See, e.g.*, Gon-shay-ee, Petr., 130 U.S. 343, 345 (noting that petitioner acted "feloniously, willfully, deliberately, premeditatedly, and with malice aforethought").

172. *See, e.g.*, *In re* Mayfield, 141 U.S. at 116 (petitioner "was a member of the Cherokee Nation by adoption"); *In re* Heff, 197 U.S. 488, 493 (1905), *overruled in part by* United States v. Nice, 241 U.S. 591 (1916) ("Congress only has power to regulate commerce of a tribe of Indians who maintain their tribal relations . . . .").

173. *See, e.g.*, *Ex parte Reynolds*, 20 F. Cas. at 583 ("[Petitioner] being a white man by nationality[] [and] by birth," was "only an Indian by marriage . . . ."); *Ex parte* Kenyon, 14 F. Cas. 353, 353 (C.C.W.D. Ark. 1878) (No. 7,720) (discussing petitioner's property rights following the death of his wife, who was a member of the Cherokee Nation).

174. *See, e.g.*, *Ex parte Pero*, 99 F.2d at 30 ("His mother was a full-blooded Indian . . . .").

175. *See, e.g.*, *id.* (noting petitioner "maintained tribal relations with the Indians").

176. *See, e.g.*, *id.* at 30 (defining "Indian" within a statute as meaning "those who by the usages and customs of the Indians are regarded as belonging to their race"); ASHER, *supra* note 131 at 49–50 (describing John Heo's habeas petition, which asserted "cultural transformation" as grounds to leave a reservation).

177. Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. REV. 834, 880 (2015); *see also* Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 971 (2002) (discussing "pervasive stereotypes as to the color of crime").

178. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 18, 20 (1831) (denying tribes standing to sue under Article III as foreign states).

179. *See* 25 U.S.C. § 71 (stating that tribes are not entities "with whom the United States may contract by treaty"); *see also* United States v. Lara, 541 U.S. 193, 201 (2004) (describing history of treaty making with tribes).

180. *See* United States v. Rogers, 45 U.S. 567, 572 (1846) (denying tribes' ability to offer citizenship to whites, reasoning that Native peoples "have never been acknowledged or treated as independent nations").

181. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (denying tribe ability to prosecute nonmembers).

different from nations or political communities—they were tribes or races.[182] Some of the discrete tests that habeas courts developed to determine who was Native American also facilitated the diminishment of Native authority.[183] One measure of whether the Bureau of Indian Affairs retained jurisdiction over an individual was whether the individual had voluntarily disaffiliated from their tribe.[184] That legal test provided an incentive for Native Americans to break ties with Native nations in order to free themselves from the Bureau of Indian Affairs' control.[185]

c. Immigration.—Habeas courts also produced a body of law that racialized newly targeted groups of immigrants. In determining whether a habeas petitioner was an American citizen, habeas courts examined whether they "belong[ed] to the Chinese race";[186] whether a petitioner's testimony

182. *See* United States v. Kagama, 118 U.S. 375, 381 (1886) (affirming congressional authority to regulate tribes because "[t]he relation of the Indian tribes living within the borders of the United States . . . to the people of the United States, has always been an anomalous one, and of complex character"); *see also* Montoya v. United States, 180 U.S. 261, 265 (1901) ("Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation . . . ."); *see generally* Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meaning*, 70 STAN. L. REV. 1025, 1033–42 (2018) (exploring the different meanings of the words "tribe" and "nation" in late eighteenth century Anglo–American discourse to describe Native American politics). Of course, political communities may also be defined by race; these cases and others seem to define the political community of the United States in racial terms.

183. For example, tribal membership was firmly unidirectional: Individuals could choose to disaffiliate with a tribe, which suggests tribes are nations, but tribes could not extend citizenship to anyone who wanted to affiliate with and become a member of a tribe. *Compare Ex parte* Kenyon, 14 F. Cas. 353, 355 (C.C.W.D. Ark. 1878) (No. 7,720) ("[T]he petitioner had clearly abandoned the Indian nation and was then only subject to the laws of the place of his domicile."), *with* United States v. Rogers, 45 U.S. 567, 572 (1846) (holding that "a white man who at a mature age is adopted in an Indian tribe does not thereby become an Indian").

184. *See Ex parte* Kenyon, 14 F. Cas. at 355 ("[T]he petitioner had clearly abandoned the Indian nation and was then only subject to the laws of the place of his domicile."); *Ex parte* Pero, 99 F.2d 28, 30–32 (7th Cir. 1938) (holding that defendant, who was recognized as "Indian," lived in a reservation, and maintained tribal relations, was still "Indian" despite not being enrolled in a tribe); *In re* Mayfield, 141 U.S. 107, 116 (1891) ("Mayfield was a member of the Cherokee Nation by adoption, if not by nativity . . . ."); *Ex parte* Reynolds, 20 F. Cas. 582, 583 (8th Cir. 1879) (No. 11,719) ("If we invoke the principle that when the members of an Indian tribe scatter themselves among the citizens of the United States . . . they are merged in the mass of our people, . . . subject to the jurisdiction of the courts thereof . . . it may, to say the least of it, become a very serious question" whether a given person is considered to be an Indian or not.).

185. At the time, BIA agents claimed the authority to force individuals to remain on reservation lands, to remain in marriages, and to send children to schools designed to minimize their affiliation with Native culture, among other things. *See* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 182–85 (1994) (describing what BIA authority could look like); *see also* Maggie Blackhawk, *Federal Indian Law As Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1840–42 (2019) (describing tensions in the relationship between federal Indian law and administrative law).

186. *In re* Look Tin Sing, 21 F. 905, 905 (C.C.D. Cal. 1884).

was credible;[187] a habeas petitioner's parentage;[188] the demeanor and mannerisms of Chinese witnesses;[189] a person's "appearance and language";[190] "discrepanc[ies] between the testimony of [a] petitioner and . . . white witness[es]";[191] and photographs of family members.[192] They designated certain categories of immigrants as forever foreign, warning that whether certain persons stay "for a shorter or longer time, . . . they continue to be aliens."[193]

As was true in the area of Native American affairs, racialization diminished the stature of Chinese immigrants. As a nation, China was an economic power with whom many political elites in the 1800s desperately wanted to cultivate trade and partnerships.[194] Yet the racialization of Chinese immigrants depicted them as too foreign to live in accordance with valuable American customs and practices.[195]

The immigration cases, as well as cases on Native American affairs, also reveal the complicated relationship between race and citizenship. While race and citizenship are distinct, they operated in conjunction with one another in mutually reinforcing ways. In the immigration cases, noncitizenship was an entry point to conceiving certain groups of immigrants as members of a different racial group. In Native American affairs, by contrast, race functioned as evidence of noncitizenship.[196]

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187. *See* Woey Ho v. United States, 109 F. 888, 891 (9th Cir. 1901) (questioning the credibility of a witness's testimony about petitioner's birth); United States v. Chung Fun Sun, 63 F. 261, 263 (N.D.N.Y. 1894) (questioning petitioner's claim that he was a Chinese merchant); United States v. Chin Len, 187 F. 544, 546 (2d Cir. 1911) (discussing the truthfulness of petitioner's testimony); Woo Jew Dip v. United States, 192 F. 471, 473–74 (5th Cir. 1911) (discussing the credibility of appellant's and witnesses' testimony).

188. Lee Sing Far v. United States, 94 F. 834, 836–37 (9th Cir. 1899) (asserting that "[f]rom the testimony it appears that appellant is of Chinese parentage").

189. *Id.* at 837 (claiming that government cross-examination of Chinese witnesses is important for "testing the intelligence, manner, impartiality, truthfulness, and integrity of the witness"); *cf. In re* Tom Mun, 47 F. 722, 722 (N.D. Cal. 1888) (relying on records in "the Six Company's book," a major conglomerate of Chinese-owned businesses). For more on the Six Companies, see SALYER, *supra* note 49, at 40–42.

190. Gee Fook Sing v. United States, 49 F.146, 148 (9th Cir. 1892).

191. *In re Tom Mun*, 47 F. at 722.

192. Yee Chung v. United States. 243 F. 126, 130 (9th Cir. 1917) (recounting how the appellant was shown a photo that he claimed held "resemblance to [his] father[]"); *see also* ESTELLE T. LAU, PAPER FAMILIES 42–43 (2006) (documenting anti-Chinese stereotypes in these proceedings).

193. Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893). Courts invoked tropes about how Chinese petitioners could not be believed. *See* Lee v. United States, 94 F. 834, 835 (9th Cir. 1899) (suggesting "[t]he practice is not uncommon in the Chinese cases" for counsel not to raise objections during administrative proceedings and wait to do so in habeas ones).

194. *See* LEW-WILLIAMS, *supra* note 115, at 55–62 (explaining that the general policy towards Chinese immigrants was one of exclusion but Congress created a myriad of exceptions for Chinese elites or for migration that benefited American business interests).

195. *See supra* notes 111–119 (outlining reasoning in *Chae Chan Ping* and *Fong Yue Ting*).

196. *See supra* notes 173–185 and accompanying text.

2. Challenging Anti-Subordinating Detentions.—Another way habeas proceedings reinforced racial hierarchies was by undercutting detentions that sought to challenge racial subordination. For example, habeas proceedings invalidated detentions that attempted to protect free Blacks from the institution of slavery by prosecuting fugitive-slave catchers. Habeas was the vehicle to free persons who carried out slavery by forcing people into slavery: Instead of freeing individuals from slavery, habeas freed the persons who sold them into slavery. In several cases, federal courts granted writs of habeas corpus to free fugitive-slave hunters from state criminal process.[197] The courts reasoned that federal law authorized the individuals to find fugitive slaves and force them into slavery.[198]

Habeas also enforced the federal government's authority by protecting persons who exercised authority over Native American affairs. In *Rainbow v. Young*,[199] state officers arrested two Indian policemen at the Winnebago Indian Reservation for removing an individual from the reservation.[200] A federal court freed the Indian policemen via a habeas petition, confirming the federal government's broad powers over Native American affairs and allowing the federal government to create a police force immune from state criminal laws.[201]

C. Engaging in a Subordinating Dialectic

Finally, habeas proceedings allowed courts to engage in a subordinating dialectic with lawmaking branches that were interested in pursuing colonialism and racial subordination but in seemingly lawful ways. Habeas proceedings identified gaps in detention schemes, which fueled the expansion of the detention schemes and also preemptively supplied justifications for more far-reaching ones. Some of the opinions may have deliberately sought

197. *E.g.*, *Ex parte* Jenkins, 13 F. Cas. 445, 448 (C.C.E.D. Pa. 1853) (No. 7,259) (releasing captors acting under the Fugitive Slave Act by writ of habeas corpus); *Ex parte* Robinson (*Robinson II*), 20 F. Cas. 965, 969 (C.C.S.D. Ohio 1856) (No. 11,934) (same).

198. *See, e.g.*, *Robinson II*, 20 F. Cas. at 969 (releasing captors acting under the Fugitive Slave Act by writ of habeas corpus); *Ex parte* Robinson (*Robinson I*), 20 F. Cas. 969, 969, 972 (C.C.S.D. Ohio 1855) (No. 11,935) (same); United States *ex rel.* Garland v. Morris, 26 F. Cas. 1318, 1319–20 (D. Wis. 1854) (No. 15,811) (same); *see also* DUKER, *supra* note 21, at 188 (noting that writs of habeas corpus freed officials acting pursuant to the Fugitive Slave Act from northern state jails). The habeas proceedings that freed Fugitive Slave Act kidnappers were based on the Force Act of 1833, which was passed in response to South Carolina's threats to nullify President Jackson's tariffs. JUSTIN WERT, HABEAS CORPUS IN AMERICA: THE POLITICS OF INDIVIDUAL RIGHTS 46–47 (Jeffrey K. Tulis & Sanford Levinson eds., 2011). Under the Force Act, persons acting under federal law could use habeas to challenge state criminal process against them. *Id.* Federal law previously permitted federal courts to issue writs only on behalf of prisoners held "in custody . . . of the authority of the United States." Judiciary Act of 1789, ch. 20 §14, 1 Stat. 73, 81–82 (1789).

199. 161 F. 835 (8th Cir. 1908).

200. *Id.* at 836.

201. *Id.* at 835–37.

to nudge Congress to expand the detention schemes, whereas others probably just churned through a legal analysis that was focused on determining whether a detention was authorized by statute. Either way, the habeas process signaled to Congress that it could address the "problem" of liberating a federal detainee by expanding a detention scheme.

1. Native American Affairs.—Consider *Ex parte Crow Dog*, which ruled in favor of the detainee.[202] Sydney Harring has written previously about how the government selected *Crow Dog* as the case to bring to the Court from among several possible ones, knowing that if it lost, the facts of the case would lead to cries for additional federal intervention.[203] The government's brief to the Supreme Court is a mere thirteen pages and almost exclusively quotes the lower court decisions in the case.[204] After quoting the opinions, it ends with this statement: "Without further elaboration, we think it clear that the jurisdiction of the district court . . . should be sustained."[205]

The reasoning in the Supreme Court's eventual decision did end up playing into calls for additional federal intervention, stoking fears that Crow Dog would get away with a crime if the federal government did not try him in federal court.[206] The Court described the tribal justice system as "red man's revenge" and federal law as the way to restrain "the strongest prejudices of [Natives'] savage nature."[207] Relying on the principles spelled out in *Ex parte Crow Dog* and the Court's concerns about the absence of federal legislation, Congress enacted the Major Crimes Act, which provided for federal jurisdiction over certain enumerated crimes committed by tribal members on reservation lands.[208] Several legislators specifically noted that the statute was a response to *Crow Dog*,[209] a point the government highlighted in briefs when

202. 109 U.S. 556, 572 (1883).

203. *See* HARRING, *supra* note 185, at 103, 112–13.

204. Brief of the United States at 6–13, *Ex parte Crow Dog*, 109 U.S. 556 (No. 8).

205. *Id.* at 13.

206. *See* Gulig & Harring, *supra* note 102, at 89 ("[Crow Dog] had, in the view of many white Americans of the day, 'gotten away with murder,' and the case served as the basis for a Bureau of Indian Affairs ('BIA') assault on Indian customary law . . . .").

207. 109 U.S. at 571; *see also In re* Mayfield, 141 U.S. 107, 115–16 (1891) ("The policy of Congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population . . . and to encourage them [to raise] themselves to our standard of civilization.").

208. Act of Mar. 3, 1885, § 9, 23 Stat. 362 (codified as amended at 18 U.S.C. §§ 1151, 1153); *see* United States v. Kagama, 118 U.S. 375, 382–83 (1885) (explaining that the Act of March 3, 1885, was meant to include certain crimes on reservations that *Crow Dog* would have excluded); *see* Cleveland, *supra* note 37, at 59 (noting that "[t]he Major Crimes Act . . . had been adopted in reaction to the Court's decision in *Crow Dog*").

209. 16 CONG. REC. 934 (statement of Rep. Cutcheon) ("We all remember the case of Crow Dog . . . . He returned to his reservation, feeling, as the Commissioner says, a great deal more important than any of the chiefs of his tribe."); *see also id.* at 935 (statement of Rep Cutcheon) ("[I]n

the Major Crimes Act was challenged.[210] And although the Court in *Crow Dog* concluded that Congress had not exercised the power to criminalize actions between Native persons and Native lands, it went out of its way to outline the reasons why Congress had that power it had not yet exercised. Three years later, relying on the reasoning in *Crow Dog*, the Court upheld the Act after having suggested there was a need for it.[211]

A similar dynamic played out in *In re Heff*.[212] In that case, the Court granted a habeas petition on the ground that federal laws regulating the sale of liquor to Native Americans did not apply to Native persons who were citizens.[213] The Court concluded that Native Americans became citizens after federal statutes extinguished tribal authority and individual Natives disaffiliated with tribes, and that citizenship was incompatible with federal plenary authority.[214] In response to *Heff*, Congress adopted the Burke Act, which deferred Native citizenship until Native Americans no longer held their lands in trust.[215] In a later case interpreting the Burke Act, the Court disavowed *Heff* and explained that Native citizens could "remain[] Indians by race," which allowed Congress to retain "jurisdiction over the individual members of this dependent race."[216]

The progression from *Heff* provides a snapshot of the complicated relationship between race and citizenship that habeas courts navigated and reproduced. In the post-*Heff* cases, as well as in other Native American affairs cases, race operated as evidence of (non)citizenship: The construction of Native Americans as a different racial group served as evidence that they were not citizens. This logic reinforced the significance of the boundary between Native Americans and whites and allowed courts to hold that conferring citizenship on Native Americans did not eliminate Congress's expansive authority over them.

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the case of '*Ex parte Crow Dog*,' . . . the district court of Dakota was without jurisdiction . . . . If offenses of this character cannot be tried in the courts of the United States there is no tribunal in which the crime of murder can be punished." (quoting report of the Secretary of the Interior)).

210. *See* Brief of the United States at 15, *Kagama*, 118 U.S. 375 (No. 1246).

211. *Kagama*, 118 U.S. at 382–83 (citing *Crow Dog*, 109 U.S. 556).

212. *In re* Heff, 197 U.S. 488 (1905), *overruled in part by* United States v. Nice, 241 U.S. 591 (1916).

213. *Id.* at 508–09. A mere ten years later, in *United States v. Nice*, the Court reversed this holding, concluding that "[c]itizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection." 241 U.S. 591, 598 (1916).

214. *In re Heff*, 197 U.S. at 509, *overruled in part by* United States v. Nice, 241 U.S. 591 (1916).

215. Act of May 8, 1906, ch. 2348, 34 Stat. 182 (1906) (current version at 25 U.S.C. § 349); *see* Cleveland, *supra* note 37, at 75 (noting that the Burke Act was "[p]artly in response to *Heff*").

216. United States v. Celestine, 215 U.S. 278, 290–91 (1909); *see also Nice*, 241 U.S. at 601 (overruling *Heff*).

The inferences that courts drew about race and citizenship operated in different directions in the area of Native American affairs, where race provided evidence of noncitizenship, than in immigration, where noncitizenship provided evidence of a distinct racial group. But the end result was the same. The idea that certain groups were members of a different race was used to justify more expansive, far-reaching powers over immigration and Native American affairs.

2. Immigration.—In immigration cases, habeas proceedings also identified specific gaps in detention schemes as individuals successfully argued that they did not fall within the group of persons who were subject to detention. These decisions then prompted Congress to expand the detention schemes. *Chew Heong v. United States*[217] addressed an 1882 statute that prohibited the arrival of new Chinese laborers.[218] Congress amended the statute to say that a customs certificate was the only accepted evidence for reentry,[219] but Chew Heong had departed the country prior to passage of the statutes.[220] He argued that the statute was inconsistent with a treaty guaranteeing Chinese laborers the ability to enter and exit the United States.[221] The Court ultimately sided with Chew Heong, concluding that the statute had to be interpreted as consistent with the treaty.[222]

Congress responded by enacting the 1888 Chinese Exclusion Act, which amended exclusion laws to bar all Chinese laborers who had left the United States from returning whether or not they had certificates.[223] In other cases arising out of the government's earlier anti-Chinese exclusion laws, habeas petitioners argued that prior residents were not subject to the Chinese Exclusion Act[224] and that merchants were not subject to the requirements for entry into the United States.[225] When courts agreed with these interpretations,

217. 112 U.S. 536 (1884).

218. *Id.* at 438 (discussing Act of May 6, 1882, ch. 126, §§ 1, 4–6, 15, 22 Stat. 58, 59–61).

219. Act of July 5, 1884, ch. 220, § 4, 23 Stat. 115, 115–16.

220. *Chew Heong*, 112 U.S. at 536–37.

221. Brief of Plaintiff-In-Error by Attorney Riordan at 11–13, *Chew Heong*, 112 U.S. 536 (No. 1088). He also made a due process claim. *Id.* at 40–41.

222. *Chew Heong*, 112 U.S. at 560.

223. Act of Oct. 1, 1888, ch. 1064, §§ 1–2, 25 Stat. 504, 504.

224. *See In re* Chin Ah On, 18 F. 506, 506 (D. Cal. 1883) ("The question presented for decision . . . is whether a Chinese laborer . . . who went to China before the Act of Congress of May 6, 1882, was passed, is entitled to land at this port without producing the certificate required by that act.").

225. *In re* Low Yam Chow, 13 F. 605, 606 (C.C.D. Cal. 1882); *see In re* Tung Yeong, 19 F. 184, 188 (D. Cal. 1884) (describing courts' difficulty with defining "merchants" as distinguished from "laborers" given that applicable treaties "declare[d] that the only class to be excluded are laborers"). For a discussion about how these cases furthered imperial interests, see LEW-WILLIAMS, *supra* note 115, at 61–62.

Congress responded by closing the gaps just two years later.[226] Some of the decisions that prompted Congress to expand the detention schemes were lower court decisions.[227]

Also, similar to the dynamic in Native American affairs cases, courts offered preemptive justifications for future legislative restrictions on immigration in some of the habeas cases. For example, in *Chae Chan Ping*, which upheld the Chinese Exclusion Act, the Court opined that the "enforcement" of prior exclusion acts "was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath."[228] When Congress subsequently required Chinese immigrants to prove their residence with the testimony of white witnesses, the Court pointed to that language as a justification for the additional restrictions.[229] The Court's decisions upholding the exclusion and deportation laws preemptively closed off constitutional debates about the propriety and scope of Congress's exclusion and deportation powers.

Outside of the habeas context, courts have signaled to Congress about how to revise a law in order to address legal defects in it.[230] But the focus in habeas proceedings was on whether detentions were authorized by law; that was a key component of the habeas process. That structure inherently called on courts to identify gaps in detention schemes—and flag ways for Congress to expand detentions.

III. Habeas, Remedies, and Race

This Part uses the case studies to explore the doctrine and theory of habeas and the nature and function of judicial remedies more generally. Judicial remedies are commonly thought of as constraints on the government that protect individual rights and liberty. But judicial remedies, including

226. *See* Act of July 5, 1884, ch. 220, §§ 4, 6, 23 Stat. 115, 115–17 (codified as amended at 8 U.S.C. §§ 262–297) (requiring that United States officials create certificates for departing Chinese laborers and merchants to present upon their return); *see also* Hudson J. Janisch, The Chinese, the Courts, and the Constitution 596–97, 679–89 (January 11, 1971) (J.S.D. dissertation, University of Chicago) (on file with author) (describing successes in habeas litigation in the lower courts and the tension between existing racial animus and the lower courts' jurisprudence at the time).

227. Indeed, some individual judges wrote to Congress asking Congress to expand the detention schemes. *See* SALYER, *supra* note 49, at 21 ("[T]he federal judges . . . were among those who sent letters in support of sterner measures though the judges acted primarily out of their despair over their crushing caseload.").

228. *Id.* at 598.

229. Fong Yue Ting v. United States, 149 U.S. 698, 729–30 (1893).

230. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 561–62 (1995) (invalidating statute and explaining that it "contains no jurisdictional element"); United States v. Dorsey, 418 F.3d 1038, 1046 (9th Cir. 2005) (upholding revised statute with jurisdictional element).

habeas, can also empower the government by legitimating abusive government practices that deprive individuals of liberty. That is not to suggest that one of those functions is the real story of habeas or the predominant function of judicial remedies. Almost by necessity, remedies, including habeas, serve both purposes. Yet somehow that point has been obscured when it comes to habeas, and that omission has had real consequences. Getting only half the story—or at least telling only half the story—helped to fold habeas into the legal apparatus for American colonialism. Appreciating the different functions that habeas may serve helps to construct a narrower, more precise account about when habeas may actually be great.

Habeas may not have uniquely facilitated racial subordination or colonialism relative to other parts of the law. That is, it may be possible to construct accounts showcasing how other remedies, other bases for jurisdiction, or other areas of law created, reinforced, and reflected racial hierarchies and colonialism. But it is still helpful to understand the features of habeas that allowed it to become part of the legal regime of American colonialism and racial subordination.[231] Understanding these mechanisms provides a more accurate understanding of the strengths and weaknesses of the writ, which helps to assess various models or reform proposals to habeas. And unpacking the specific legal mechanics of colonialism and racial subordination "illuminate[s] the technical role that the law and legal institutions played in those processes."[232]

Subpart III(A) explains how appreciating the two faces of habeas helps to assess habeas-reform proposals and to construct a preliminary account for when habeas may serve some of the ends associated with the Great Writ. Subpart III(B) explains how the very idea of the myth of the great writ is part of what enabled habeas to legitimate government power and private hierarchies and to construct racial categories and parallel racialized theories of power. Jettisoning the myth—and appreciating when and under what circumstances habeas may be great—is one important, albeit partial, response to the case studies.

A. Habeas Doctrine and Reform

Three features of habeas helped to produce the less salutary usages of the writ:

231. *See* James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 1999 (1992) ("[A] proper determination of the Great Writ's future requires an accurate understanding of its past.").

232. Park, *supra* note 8, at 1983.

- the focus on jurisdiction, which was flexible enough to allow courts to decide when detentions were lawful and to encode race and citizenship in those rules;
- the insistent focus on whether detentions were authorized by law, which solidified the lawmaking branches' power to expand abusive government practices and obviated any inquiry into whether detentions served anti-subordinating purposes;
- the status quo bias of the remedy, which lent itself to singular challenges and made it easier for habeas to push back against people who challenged the status quo.

While some of these features are unique to habeas, others may be generalizable to remedies besides habeas. Identifying and naming the features particular to habeas, however, provides a different lens to evaluate habeas-reform projects. It also supplies a starting point for constructing a more precise account about when and under what circumstances habeas may fulfill some of the promise of the myth of the great writ.

1. Jurisdiction.—In some respects, the preceding case studies reaffirm the importance of jurisdiction to habeas. The idea that "jurisdiction" is a key element of habeas review has animated both scholarly and judicial critiques of habeas as well as proposed reforms to habeas. After the Supreme Court held that persons convicted in state court could relitigate claims in federal habeas even where the claims had been raised in state proceedings, Paul Bator authored *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*.[233] The article outlines what became known as the "process" theory of federal habeas, which maintains that habeas review should be available for claims that could have been raised previously only if those prior proceedings did not provide a full and fair process.[234] The proposal was premised on Bator's claim that federal habeas was, at its core, supposed to supply judicial review to ascertain whether a detainer had jurisdiction over a detainee.[235]

While Bator's critique and accompanying reforms were aimed largely at ascertaining the proper scope of federal postconviction review for state prisoners, then-Judge Gorsuch recently invoked the same idea to shape

233. Bator, *supra* note 27.

234. *See id.* at 486–87, 511–12 ("The issue [is] . . . whether the federal court should redetermine the facts and the law in cases where there is no reason to suspect failure on the part of the state to provide a full and conscientious adjudication of the federal claim . . . ."); Evan Tsen Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U. L.Q. 151, 152 & n.6 (1994) (referring to Bator's theory of habeas as the "process-only model").

235. *See id.* at 465–66 ("[T]he black-letter principle of the common law [was] that the writ was simply not available at all to one convicted of a crime by a court of competent jurisdiction.").

federal habeas review for federal prisoners.[236] Judge Gorsuch relied on the principle that federal habeas review is available only for errors related to jurisdiction to assert that federal prisoners who were wrongly convicted because of an error of statutory interpretation did not have—and need not have—access to federal habeas review to correct their wrongful convictions.[237]

Bator and Gorsuch's claims about the centrality of jurisdiction to habeas have proven quite influential. Citing Bator, the Supreme Court adopted the rule that Fourth Amendment claims are not cognizable "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim."[238] This past term, Justice Thomas and Justice Gorsuch invoked Bator's claim that "the writ was simply not available at all to one convicted of crime by a court of competent jurisdiction" to argue that federal law could preclude habeas review for constitutional claims that might affect the likelihood that a convicted defendant was innocent.[239] And after then-Judge Gorsuch announced his view about the proper scope of federal habeas review, the U.S. Court of Appeals for the Eleventh Circuit reversed its own precedent to adopt Gorsuch's view.[240] Under President Trump, the Department of Justice changed positions to argue the same—that federal habeas review is not available for federal prisoners who are mistakenly convicted because of an error of statutory interpretation.[241]

To date, the rejoinder to these theories has been directed only or primarily at the historical accuracy of its claims. That is, scholars have argued that habeas courts did not just review cases to determine whether a detainer had jurisdiction, or, alternatively, that the concept of jurisdiction was

236. *See* Prost v. Anderson, 636 F.3d 578, 592 (10th Cir. 2011) ("[T]he writ of habeas corpus in its earliest form was largely a remedy against confinement imposed by a court lacking jurisdiction . . . .").

237. *See id.* ("[L]ike a statutory claim of innocence, lack of jurisdiction is not one of the two authorized grounds upon which a successive § 2254 motion may be filed.").

238. Stone v. Powell, 428 U.S. 465, 475 n.7, 481–82 (1976).

239. *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1563, 1566 (2021) (Thomas, J., concurring) ("A state court rejected petitioner's [constitutional] claim that he was entitled to a unanimous jury verdict . . . . AEDPA's explicit directive thus independently resolves this case: 'a writ of habeas corpus . . . shall not be granted.'").

240. *See* McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, 1080 (11th Cir. 2017) (en banc) ("We join the Tenth Circuit in applying the law as Congress wrote it and hold that a change in caselaw does not make a motion to vacate a prisoner's sentence 'inadequate or ineffective to test the legality of his detention.'" (quoting Prost v. Anderson, 636 F.3d 578 (10th Cir. 2011) (Gorsuch, J.)) (citations omitted)).

241. *See* United States v. Wheeler, 886 F.3d 415, 422–23 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1318 (2019) ("In the district court, the Government took the position that Appellant . . . was entitled to relief . . . . But now, on appeal, the Government has done an about-face . . . ."); *see also* Petition for a Writ of Certiorari at 15, United States v. Wheeler, 139 S. Ct. 1318 (2019) (No. 18-420) ("A federal prisoner . . . may not rely on a statutory decision that postdates his first Section 2255 motion as a basis for seeking a writ of habeas corpus . . . .").

capacious enough to include many modern errors of constitutional criminal procedure.[242]

The case studies offer a slightly different critique while adding some context to questions about the historical accuracy of the theories. It is true that courts emphasized that habeas was specifically concerned with whether a detainer had jurisdiction over a detainee. As described in Part II, that aspect of habeas facilitated courts' ability to focus on race and citizenship and emphasize their importance to governmental authority. Consider the Native American affairs and immigration cases. In both areas, there were several preconditions for valid detentions: an individual had to be Native American or a noncitizen; an individual had to be in a specific place (outside the country or on a reservation); and an individual had to have certain qualifying criminal convictions or attributes that made them inadmissible. Yet the only preconditions that courts identified as relevant to whether a detainer had jurisdiction over a detainee concerned place and race and citizenship—whether an individual was Native American or an (Asian) immigrant.[243] Habeas courts emphasized the primacy of race and citizenship over jurisdiction; they elevated the importance of race and citizenship over other questions, such as whether an individual committed the offense for which they were convicted.[244] They did not review other preconditions for jurisdiction, such as whether an individual had committed a qualifying crime or possessed some trait that made them inadmissible.[245]

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242. *See* Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 661–63 (1982) (arguing that the scope of habeas historically is enough to justify full relitigation of modern criminal procedure errors); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 588–90 (1993) (arguing that the meaning of jurisdiction in earlier cases is ambiguous); Jonathan R. Siegel, *Habeas, History, and Hermeneutics*, 64 ARIZ. L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3899955 [https://perma.cc/L5F8-ZHNK].

243. *See, e.g.*, United States *ex rel.* Tisi v. Tod, 264 U.S. 131, 133 (1924) (emphasizing importance of citizenship and race to jurisdiction); *Ex parte* Mayfield, 141 U.S. 107, 111–16 (1891) (same); *Ex parte* Reynolds, 20 F. Cas. 582, 585–86 (C.C.W.D. Ark. 1879) (No. 11,719) (same).

244. *See, e.g.*, *Ex parte Mayfield*, 141 U.S. at 116 ("As Mayfield was a member of the Cherokee Nation by adoption, if not by nativity, . . . he is amendable only to the courts of the nation . . . ."); *Ex parte Reynolds*, 20 F. Cas. at 585–86 ("Mr. Puryear was married to a woman who was legally a member of the white race, or of the body politic known as citizens of the United States. He . . . was a citizen of the United States, and being killed in the territorial jurisdiction of this court, it has jurisdiction . . . .").

245. *See, e.g.*, United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 156–57 (1923) (acknowledging that "alienage is a condition, not a cause of deportation"); Lem Moon Sing v. United States, 158 U.S. 538, 546–47 (1895) (error premised on scope of treaty not cognizable); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 291–92 (1904) (alienage critical to jurisdiction, not other preconditions for detention); Chin Yow v. United States, 208 U.S. 8, 13 (1908) (granting writ to allow determination in court about citizenship); Ng Fung Ho v. White, 259 U.S. 276, 284–85 (1922) (same); *Tisi*, 264 U.S. at 132–33 ("Such knowledge [of seditious character of the printed matter] is not, like alienage, a jurisdictional fact."); *In re* Day, 27 F. 678, 680–81 (C.C.S.D.N.Y. 1886) (declining to redetermine whether detainees were public charges because that did not go to jurisdiction).

Appreciating this dynamic helps to evaluate Bator- or Gorsuch-like claims about what constitutes the "core" of federal habeas review as well as habeas-reform projects that are premised on those theories. As a matter of historical practice, jurisdiction was a sufficiently malleable concept that it allowed courts to establish the rules about when detentions were lawful and to encode race and citizenship in those rules. Yet then-Judge Gorsuch maintained that habeas review was required for federal criminal convictions only where a court lacked jurisdiction and not where the statutory preconditions for detention were absent.[246]

This theory does not accurately reflect the practice of habeas in the nineteenth century, which Judge Gorsuch maintained involved review for jurisdiction in cases involving criminal convictions and review for a lack of legal process in cases involving federal executive detentions.[247] Jurisdiction was a guiding principle for habeas review of both court-ordered and executive-ordered detentions. Courts reviewed detentions authorized by criminal convictions (in the case of Native American affairs) and executive determinations (in the case of immigration) in similar ways—focusing on certain elements or preconditions for detention.[248] Moreover, while Justice Gorsuch maintained that jurisdiction has a particular, defined meaning that does not include whether the statutory preconditions for detention were satisfied,[249] review for jurisdiction did include review of some of the statutory preconditions for detention. Yet Justice Gorsuch would remove all cases of statutory interpretation and statutory application from the core of habeas.[250] That is not what review for jurisdiction meant.

Although the cases purported to focus on jurisdiction, that focus allowed courts to determine the rules about what made a detention lawful. This practice is consistent with Lee Kovarsky's theory of habeas power, which maintained that habeas includes the judicial power to determine when a

246. *See* Prost v. Anderson, 636 F.3d 578, 588 (10th Cir. 2011) (explaining that habeas review is available where "defendant's sentencing court had been abolished" but rejecting habeas for a petitioner convicted under an erroneous statutory interpretation).

247. *See id.* at 583 n.4 (arguing that when the Suspension Clause was drafted, "[f]ederal prisoners could use the writ [only] to challenge confinement imposed by a court that lacked jurisdiction, . . . or detention by the executive without legal process" (alterations in original) (quotations omitted)); Bator, *supra* note 27, at 475 (suggesting that jurisdiction might mean something different in cases involving executive detentions versus judicial ones).

248. *See supra* notes 243–245.

249. *See Prost*, 636 F.3d at 586 n.6 ("In those cases involving new statutory interpretations, after all, the prisoner committed acts that a court of competent jurisdiction at that time believed to be criminal under the relevant statute."); *id.* at 592 (noting that the Court has barred prisoners "convicted of murder and sentenced to death by the wrong sovereign from bringing a successive collateral attack to contest this conviction on this basis").

250. *See id.* at 578 (holding that habeas does not provide relief in certain cases where circuit precedent had erroneously foreclosed a statutory interpretation that would have resulted in petitioner's acquittal).

detention is lawful.[251] Kovarsky depicted that theory as an alternative and challenge to those who argue that jurisdiction is the core focus of habeas. While habeas courts said that habeas was about jurisdiction, Kovarsky's theory better captures the substance of habeas practice.

Equally important, using jurisdiction as an animating or organizing principle for federal habeas corpus risks replicating the errors of the past. Jurisdiction helped incorporate race and citizenship into habeas review. There are reasons to think that resurrecting a focus on jurisdiction could accomplish similar results today. Indeed, it already has. Habeas has been the vehicle to curb Native American tribes' authority to protect tribal members. With courts maintaining that habeas is particularly concerned about jurisdiction, habeas has provided a forum to address whether Native tribes have jurisdiction in different settings. Habeas limited Native nations' authority to prosecute nontribal members in *Oliphant v. Suquamish Indian Tribe*,[252] and later limited nations' authority to prosecute members of other tribes.[253] Because of these decisions, only the federal government can prosecute individuals for certain crimes that occur in Indian country. Yet the remote location of some reservations makes it more difficult to prosecute some crimes—difficulties that are reinforced by prosecutors' resource constraints as well as their ability to select which cases to prosecute. For example, federal prosecutors declined to prosecute two-thirds of Indian country cases involving sex crimes.[254]

Using jurisdiction to orient federal habeas review also ensured that habeas would not remedy certain erroneous detentions. The focus on jurisdiction was one reason why habeas courts did not live up to the myth of the great writ and correct unauthorized detentions in cases where the law was mistakenly applied to some individual. Habeas courts maintained that they

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251. Kovarsky, *supra* note 52, at 795, 810 (arguing that habeas power is the judicial power to determine if a detention is lawful); *see id.* at 758 ("Habeas has always been an instrument of judicial power . . . .").

252. 435 U.S. 191, 199 (1978) ("At least one court has previously considered the power of Indian Courts to try non-Indians and it also held against jurisdiction."); *see also* FELIX S. COHEN, DEP'T OF THE INTERIOR, HANDBOOK OF FEDERAL INDIAN LAW 148 (1941) ("[A]ttempts of tribes to exercise jurisdiction over non-Indians . . . have been generally condemned by the federal courts since the end of the treaty-making period, and the writ of habeas corpus has been used to discharge white defendants from tribal custody.").

253. Duro v. Reina, 495 U.S. 676, 679 (1990). Congress altered that rule by statute. *See* 25 U.S.C. § 1301(2) (recognizing and affirming the existence of "inherent power . . . to exercise criminal jurisdiction over all Indians"); United States v. Lara, 541 U.S. 193, 193 (2004) (holding that "Congress possessed constitutional power to lift or relax restrictions on Indian tribes' criminal jurisdiction over non-member Indians").

254. *Ending Violence Against Native Women*, INDIAN L. RES. CTR., https://indianlaw.org/issue/ending-violence-against-native-women [https://perma.cc/KB3T-NYGS]. Native American women are much more likely than white women to be victims of sexual violence, and non-Indians commit almost 96% of the violence against Native women. *Id.*

would not review cases to determine whether preconditions for detention other than race, citizenship, and place were satisfied—even if that meant a detention was not authorized by law.[255]

The fact that using jurisdiction as an organizing principle in habeas supplied the basis for focusing on race and citizenship and for sanitizing erroneous detentions raises some concerns about calls to re-center the role of jurisdiction in habeas.

2. Detentions Authorized by Law.—Habeas courts also maintained that another focal point of habeas proceedings was whether detentions were authorized by law. That focus also allowed habeas to become part of the legal apparatus for colonialism.

The focus on whether detentions were authorized by law permitted habeas to undo both detentions that were driven by racial subordination and detentions that challenged racial subordination. Sometimes the government's exercise of custodial power sought to secure other individuals' liberty. For example, the government custody of fugitive-slave catchers challenged the racist regime of slavery that was a constant threat to Black persons' liberty. And state and private challenges to federal officials' plenary authority over Native American affairs had the potential to challenge a regime of colonial power over Natives. Yet nothing about the habeas remedy and the inquiry into whether detentions were authorized by law could perceive that feature of those detentions and incorporate it into the habeas process.[256]

255. *See* sources cited *supra* notes 243–245.

256. *Cf.*, *e.g.*, CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond* Roe v. Wade, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93, 101 (1987) (critiquing rights frameworks on the ground that they overvalue negative liberties that can impede liberty-enhancing government action). That habeas has a more complicated relationship to individual liberty than might appear is related to current debates about criminal justice reform and whether criminal law can ever be a tool for challenging subordination and achieving equality. *Compare* Kate Levine, *Police Prosecutions and Punitive Instinct*, 98 WASH. U. L. REV. 997, 1003 (2021) ("[A] project to increase the harshness of the criminal legal system against police officers will . . . legitimize and increase the footprint of our current criminal legal system."), *and* Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1616 (2019) ("Whereas reformist efforts aim to redress extreme abuse or dysfunction in the criminal process without further destabilizing existing legal and social systems . . . abolitionist measures recognize justice as attainable only through a more thorough transformation of our political, social, and economic lives."), *with* Monica Bell, *Black Security and the Conundrum of Policing*, JUST SECURITY (July 15, 2020), https://www.justsecurity.org/71418/black-security-and-the-conundrum-of-policing/ [https://perma.cc/ZYG8-Z4JD] ("In these debates . . . there is an inevitable response from skeptics: What about Black people's safety? One hard truth, at least according to criminological research, is that even as policing has been brutal and racist, it may have prevented some violence. It may have deterred deaths."). Scholars have also debated the role of criminal law in addressing gender subordination. *Compare* Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1877 (2019) ("[C]riminal law has [not] protected sexual privacy as clearly or as comprehensively as it should."), *with* AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S

Instead, it ensured a legal analysis that would signal to Congress how to expand detention schemes. Courts focused on whether detentions were authorized by statute, which identified gaps in the detention schemes. The structure of the analysis in habeas proceedings implied that the fix was for Congress to authorize what were then unauthorized detentions. So, whether courts deliberately nudged Congress to authorize detentions not yet authorized by law, or merely conducted an analysis of whether a detention was authorized by law, the rulings produced opinions that told Congress how to expand detention schemes.

The cases also illustrate the importance of the law that is external to habeas—the law that governs detentions. Even where habeas may be required as a procedural matter, what habeas accomplishes will depend on the law external to habeas, a concern that should be part of any reform projects aimed at increasing the liberatory force of habeas proceedings.

Consider, by way of example, Brandon Garrett's meticulous disentangling of habeas cases from due process ones.[257] Garrett argued that, in the aftermath of *Boumediene*, the lower federal courts erroneously conflated the scope of due process protections with the Suspension Clause, resulting in a body of habeas case law that offered too few protections for individuals regarding the burden of proof, the propriety of certain kinds of evidence, or which individuals could avail themselves of habeas proceedings.[258]

Garrett is correct that habeas was routinely available in instances where individuals lacked certain individual rights and that it would be a mistake to say that habeas is unavailable in such cases.[259] He may also be correct that the procedural rules governing habeas are more fulsome than those governing due process.[260] But it does not follow that the resulting habeas structure would be more protective of individual rights and liberty. That would depend on the substance of the law governing the detentions. For example, even if habeas proceedings required a high degree of certainty about whether a person fell within the category of persons who could be detained, that would not supply meaningful protections if the persons who could be detained included those suspected of associating with persons who were involved in

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LIBERATION IN MASS INCARCERATION 5 (2020) ("Despite a burgeoning political consensus that the US incarcerates too many people, uses criminal law as the solution to too many problems, and maintains horrific prison conditions, feminists continue to champion novel penal laws and expanded carceral regimes to address the gender issues that appear on their radars.").

257. Garrett, *supra* note 7, at 54–55.

258. *See id.* at 54–56, 100–08, 111–19 (discussing examples of various cases that have conflated due process protections with the Suspension Clause).

259. *See id.* at 54–56 (explaining that, in the context of national security detention, due process and habeas provide separate types of protection).

260. *See id.* at 71–78 (arguing that habeas may offer broader protections because of its core purpose: reviewing the basis for detention).

some way in attacks on American authority abroad. Nor would it supply meaningful protections if the law external to habeas allowed the government to detain people on the basis of race or religious beliefs.

Consider another modern example related to events in the field of immigration. The Immigrant Defense Project documented a dramatic increase in the number of courthouse enforcement operations by Immigration and Customs Enforcement (ICE) from 2016 to 2018.[261] ICE previously did not maintain a frequent presence or carry out arrests in state courthouses, but during the Trump administration, the federal government asserted its intention to do so.[262] Immigration advocates maintained that ICE enforcement at courthouses made it more difficult for immigrants to rely on law enforcement, report crimes, and access various social services.[263] Reflecting these concerns, New York and other states passed laws prohibiting ICE from arresting anyone who is going to or leaving from a court proceeding unless the officer had a warrant signed by a judge.[264]

The Biden administration pulled back on the Trump-era enforcement policy of carrying out ICE arrests at state courthouses.[265] If it had not, or if a subsequent administration were to bring back the Trump-era enforcement policy, it is not far-fetched to imagine a federal officer being charged with "contempt of the court" or "false imprisonment" for carrying out immigration arrests at state courthouses.[266] And if a state attempted to prosecute ICE officers under laws designed to protect immigrants, then federal habeas proceedings could have supplied the basis for undoing or challenging the state arrests of ICE officers who carried out enforcement activities at state courthouses.[267] Nothing about federal habeas as it is currently structured

261. IMMIGRANT DEF. PROJECT, SAFEGUARDING THE INTEGRITY OF OUR COURTS: THE IMPACT OF ICE COURTHOUSE OPERATIONS IN NEW YORK STATE 3 (2019), https://www.immigrantdefenseproject.org/wp-content/uploads/Safeguarding-the-Integrity-of-Our-Courts-Final-Report.pdf [https://perma.cc/88GE-NAWP].

262. Letter from DOJ and DHS to Oregon and Washington Courts (Nov. 21, 2019), https://www.scribd.com/document/436310694/Letter-from-DOJ-and-DHS-to-Oregon-and-Washington-courts [https://perma.cc/MR8R-T3JJ].

263. *See* IMMIGRANT DEF. PROJECT, *supra* note 261, at 8 ("'These actions jeopardize public safety by instilling fear in immigrant communities, which makes victims and witnesses afraid to come forward to report crimes, and unable to get justice.'" (quoting Brooklyn District Attorney Eric Gonzalez)).

264. *E.g.*, Protect Our Courts Act, A.2176–A, 2020 N.Y. Sess. Laws 322 (McKinney) (enacted), https://www.nysenate.gov/legislation/bills/2019/a2176 [https://perma.cc/DHU6-JZP4].

265. Mark Katkov, *Biden Administration Limits Power of ICE to Arrest Immigrants in Courthouse*, NPR (Apr. 27, 2021, 10:46 PM), https://www.npr.org/2021/04/27/991460979/biden-administration-limits-power-of-ice-to-arrest-immigrants-in-courthouses [https://perma.cc/J5CV-CYKL].

266. *See, e.g.*, N.Y. CIV. RIGHTS LAW § 28.2 (McKinney 2020).

267. 28 U.S.C. § 2241(c)(2) (Habeas corpus is available "for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United

perceives a difference between those cases and the more typical habeas case in which an indigent defendant or wrongfully detained individual maintains their constitutional rights were violated or they received insufficient process.

Some of the fallout from the Supreme Court's decision in *McGirt v. Oklahoma*[268] likewise underscores how the law external to habeas will determine what habeas proceedings do. *McGirt* held that Congress had not disestablished the Creek Reservation that was created in 1866, and that, accordingly, the land (much of which was located in Oklahoma) remained "Indian country" for purposes of the Major Crimes Act.[269] Under the MCA, the United States has exclusive jurisdiction over certain crimes committed by "[a]ny Indian"; states cannot prosecute those crimes.[270] After *McGirt*, numerous people convicted in Oklahoma state courts filed habeas petitions challenging their convictions.[271] They were able to do so in part because of vestiges of the idea that habeas is especially concerned about jurisdiction. An Oklahoma appellate court held that the state courts would review errors that went to a court's jurisdiction, including whether the defendant or victims were Indian, even if those claims were not raised previously.[272]

But whether these habeas proceedings, including habeas review for jurisdiction, ultimately inure to the benefit of tribal sovereignty or individual liberty will depend on what the courts say about the law external to habeas. The Supreme Court showed some interest in one pending petition for certiorari, staying the mandate of the state court of criminal appeals. The petition asked the Court to jettison statements in previous cases, including *McGirt*, that states lack jurisdiction over crimes committed in Indian country where the victim, rather than the defendant, is an "Indian."[273] Habeas

States."); Letter from DOJ and DHS to Oregon and Washington Courts, *supra* note 262 (asserting that ICE arrests at courthouses carrying out a federal statute cannot be restricted by state rules).

268. 140 S. Ct. 2452 (2020).

269. *Id.* at 2453.

270. 18 U.S.C. §§ 1153(a), 1151(a); *McGirt*, 140 S. Ct. at 2455–56. The Ninth Circuit held that the United States' jurisdiction is concurrent with that of Native American tribes. *See* Westsit v. Stafne, 44 F.3d 823, 825 (9th Cir. 1995) (stating that "tribes retain jurisdiction over crimes within the Major Crimes Act").

271. Application to Stay Mandate of the Okla. Ct. of Crim. Appeals Pending Rev. on Certiorari at 12–13, Oklahoma v. Bosse, 210 L. Ed. 2d 855 (2021) (mem.) (No. 20A161) ("If Wagoner County's rate of post-conviction Indian Country jurisdictional claims is indicative of other Eastern Oklahoma counties, then overall there are nearly 1,200 pending post-conviction applications raising *McGirt*-related claims so far.").

272. *See id.* at 9, 12–13 (characterizing an Oklahoma Court of Criminal Appeals opinion as holding that "Indian country jurisdictional claims can *never* be waived in Oklahoma state courts" and arguing that if not for this holding, pending habeas claims would be barred by state procedural and equitable rules).

273. Application to Stay Mandate of the Okla. Ct. of Crim. Appeals Pending Rev. on Certiorari *supra* note 271 at 15–23; *see* 18 U.S.C. § 1152 (extending U.S. law "as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States" to Indian country).

proceedings like these could provide the vehicle to make the sweeping pronouncement that states possess concurrent jurisdiction over crimes on Native lands involving Native victims. As the Chickasaw Nation argued in an amicus brief to the Court, that ruling could substantially diminish tribes' authority and reduce incentives for states to work with Native nations in allocating jurisdiction.[274]

These examples suggest that a few factors affect what habeas proceedings accomplish: what kinds of claims habeas proceedings are used for, who is making those claims, and what substantive law will be used to evaluate those claims. The idea that the nature and function of habeas proceedings depend on these factors can yield some insights for habeas reform proposals. For example, if the effect of habeas proceedings depends on the kinds of claims that habeas proceedings are used for, then that is arguably a mark in favor of "claim-splitting" reform proposals, which seek to make habeas a forum for some criminal procedure claims but not others.[275]

But reform proposals should also consider some analysis of the external, substantive law that courts would apply in evaluating the claims that may be raised in habeas proceedings. Consider Payvand Ahdout's recent argument that the Supreme Court should take more cases involving "direct" collateral review—Supreme Court review of state court post-conviction decisions.[276] Ahdout maintained that her proposed restructuring would ensure that the Supreme Court reviewed, outside of federal collateral review, state court decisions involving constitutional claims that are raised in state collateral proceedings—claims like ineffective assistance of trial counsel or claims that prosecutors failed to turn over exculpatory information in violation of their

274. *See* Motion for Leave to File Amicus Curiae Brief of the Chickasaw Nation at 2–3, *Bosse*, 210 L. Ed. 2d 855 (2021) (No. 20A161) (explaining the importance of issues of different governments' jurisdiction and arguing that granting a stay would negatively affect the Nation's cooperation with other governments to allocate jurisdiction); Brief of Amicus Curiae The Chickasaw Nation at 23–24, 31, 34, *Bosse*, 210 L. Ed. 2d 855 (2021) (No. 20A161) (arguing that federal and tribal courts have exclusive criminal jurisdiction in many cases and that granting a stay would negatively affect the Nation's efforts to allocate jurisdiction through intergovernmental negotiations). The state withdrew its petition for certiorari after the Oklahoma Supreme Court revisited a ruling relevant to the decision. Joint Stipulation to Dismiss, *Bosse*, 210 L. Ed. 2d 855 (2021) (No. 21-186).

275. *See, e.g.*, Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 947, 952–53 (2000) (recommending that Congress allow federal habeas review for "claims [that] are so vital to assuring fundamentally fair criminal proceedings that they must be reheard on federal habeas notwithstanding the prior opportunity to litigate them in the state courts"); Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 5 (2010) ("[F]ederal habeas review of state criminal convictions should focus on whether there is a *systemic* state violation of criminal defendants' rights. A systemic violation exists when a state actor (or set of actors) violates defendants' rights repeatedly, such that there is a pattern of violations across multiple cases.").

276. Z. Payvand Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 159, 164–66 (2021).

obligations under *Brady v. Maryland*.[277] But whether that additional habeas review does much good for individual liberty and constitutional criminal procedure rights will depend on what the Court would say about the substance of those criminal procedure guarantees.[278] Expanding or contracting the availability of habeas review is only part of the story, since there is reason to question whether the Court's pronouncements on the scope of constitutional criminal procedure rights would cohere with habeas expansionists' ideals.

3. Status Quo Bias.—The habeas remedy also has built in a status quo bias that makes it somewhat difficult to use the remedy to challenge a broader system—in the case studies, a legal regime that was permeated by race and colonialism. The habeas remedy allows for a singular challenge: an individual seeking their freedom. That individualistic orientation provides for a single clean shot, which may be an awkward fit for more systemic challenges but works well for error correction.[279] And that has made habeas a natural way to push back against individuals and entities who challenge a larger system—and a more difficult mechanism for individuals who challenge the system as a whole to use.

Consider how state and federal habeas functioned in Native American affairs. There, habeas courts zeroed in on resolving the status of particular lands, invoking customary practices—how state, local, tribal, and federal governments acted with respect to certain lands or groups of persons.[280] Habeas formalized existing norms and hardened them into concrete law. Habeas courts supplied more formal justifications for state and federal assertions of authority over Native persons and Native lands—assertions the government regularly acted on, albeit without the kind of legal theories spelled out in the habeas cases.[281]

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277. *Id.* at 187–93.

278. *See* Application to Stay Mandate of the Okla. Ct. of Crim. Appeals Pending Rev. on Certiorari, *supra* note 271 at 1–2, 11–13, 15 (explaining that Oklahoma courts have been allowing postconviction challenges under *McGirt* and showing prisoners' habeas petitions depend on the Court's decisions on whether jurisdictional procedural limitations were waived and whether states have jurisdiction over these crimes).

279. Eve Primus has proposed some reforms to habeas to make it better suited to address systemic reforms. Primus, *supra* note 270, at 5–7. Primus has also identified some doctrinal features of habeas that ask more systemic questions, although there the remedy is still individualized. Eve Brensike Primus, *Federal Review of State Criminal Convictions: A Structural Approach to Adequacy Doctrine*, 116 MICH. L. REV. 75, 79–81 (2017).

280. *See, e.g.*, United States v. Rogers, 23 F. 658, 663, 665 (W.D. Ark. 1885) (assessing whether land was a reservation by sorting out conflicting customs and use).

281. People have rightfully criticized this theory on the ground that it works like "might makes right." *See, e.g.*, Elizabeth Reese, *Welcome to the Maze: Race, Justice, and Jurisdiction in* McGirt v. Oklahoma, U. CHI. L. REV. ONLINE (Aug. 13, 2020), https://lawreviewblog.uchicago.edu/

Or consider the area of immigration, where, as Lucy Salyer and Beth Lew-Williams have documented, habeas proceedings freed a significant number of individuals and allowed them to enter or remain in the United States.[282] Salyer estimates just over 1,500 people in a roughly 15-year period entered or remained in the United States because of habeas proceedings.[283] While that was an important result of the habeas proceedings, such proceedings did not constrain the emergent immigration regime.[284] Instead, the regime continued to expand and sweep in more persons, even as habeas remained available for error correction,[285] and even though habeas was, for a limited time, effective against new, emerging immigration restrictions.

Habeas did, however, push back against individuals and entities who challenged it, such as when habeas proceedings freed fugitive-slave catchers from state criminal process. The state criminal proceedings for fugitive-slave catchers were direct challenges to the legal regime of slavery and the slave trade on which it depended.[286] There, the habeas remedy provided a meaningful challenge to the few aberrational cases where state criminal processes were brought to bear on individuals participating in the legal regime of slavery.

The contrast between these different kinds of habeas proceedings highlights how there were some features peculiar to the immigration system at the beginning of the end of the nineteenth century that make generalizations about the effect of habeas more difficult. The immigration habeas scheme at the time was operating in the context of a wholly new and dramatically understaffed and underfunded emergent immigration regime.[287] Habeas courts reviewing immigration cases supplied an existing apparatus to

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2020/08/13/mcgirt-reese/ [https://perma.cc/NZ9B-FDSD] (discussing the *McGirt* Court's rejection of the "Indian character" test, which was based on previous state jurisdiction or treatment of Native Americans).

282. *See* SALYER, *supra* note 49, at 80, 82 (indicating that high percentages of Chinese habeas corpus cases resulted in the petitioner being allowed to enter the United States); LEW-WILLIAMS, *supra* note 115, at 208–09 (indicating low rejection rates of Chinese migrants arriving in the United States).

283. *See* SALYER, *supra* note 49, at 80, 82 (indicating the percentages of Chinese habeas corpus cases that were resolved by discharge or dismissal and the total number of cases for 1891–1905 in the district court and circuit court).

284. *See* LAU, *supra* note 192, at 28 ("Although in the long run these challenges proved fruitless, they nevertheless provided, in the short term, one means of avoiding exclusion, and they served as stop-gap measures to slow enforcement.").

285. *See* LEW-WILLIAMS, *supra* note 115, at 193 (arguing that the plenary power doctrine used to justify Chinese exclusion was used to "sift, select, or bar all aliens at America's gates" and to expand "a racially based immigration regime in the twentieth century").

286. *See supra* notes 136–141.

287. *See* SALYER, *supra* note 49, at 40 ("The division of responsibilities among . . . offices tended to lead to a diffused, uncoordinated administration of the laws . . . ."); *id.* at 57 (pointing to "shortage of funds" as an explanation for executive branch policymaking); *id.* at 69 ("[T]he judges were, in a sense, captured by law.").

administer the immigration scheme in part because there was no ready supply of federal or state immigration officers to reliably carry out the new immigration restrictions.[288] The novelty of the immigration regime—the fact that it was not yet a unified, sweeping, sprawling system—coupled with the fact that executive officers were ill-equipped to carry it out contributed to the successful outcomes in individual immigration habeas cases.

Some have suggested that habeas courts were more favorably inclined to immigrants than executive officers because of cultural or institutional attributes that courts possess, such as rule of law ideals.[289] Indeed, Salyer argued that "[t]he fact that the case came before the court on a writ of habeas corpus had special significance" in the courts' comparative receptiveness to Chinese immigrants in these cases.[290]

Yet in performing their law-declaring functions, courts were often more indulgent of expansive powers over immigration and Native American affairs than their counterparts in other branches. In both immigration and Native American affairs, the federal government initially argued for more limited theories of government power than what courts ultimately supplied. In the Chinese Exclusion case, *Chae Chan Ping*, the federal government attempted to tie its authority to enact the Chinese Exclusion Act to certain enumerated powers, including the power to regulate foreign commerce, the power to establish uniform rules of naturalization, and the Necessary and Proper Clause.[291] But the Court embraced a more capacious theory of the government's power, holding that the federal government could exclude foreigners as an incident of sovereignty in order to protect its very sovereignty.[292] In the case involving the Major Crimes Act, for example, the federal government argued that the source of Congress's power was one of its enumerated powers, the Indian Commerce Clause.[293] The federal government argued that the clause allowed the United States to legislate "intercourse" with Native Americans and that the power to create criminal laws to regulate Native Americans was incidental to that power and therefore

288. *See id.* at xv ("[T]he Bureau of Immigration did not emerge from its authorizing statute . . . fully developed with the power . . . that would later distinguish it . . . .").

289. *See id.* at xvi ("[T]he federal judges were also constrained by their perception of their institutional obligations. In the immigration cases, the federal judges often felt bound by the rules and norms of the court that called for hearing and weighing evidence in individual cases according to standard judicial practice . . . .").

290. *Id.* at 72, 75.

291. Brief for the United States at 5, Chae Chan Ping v. United States, 130 U.S. 581 (1889) (No. 1446). The government also pointed to Article I, section 9, which prohibits "[t]he migration or importation of such persons as any of the States now existing shall think proper to admit" before 1808 as evidence that Congress did have the authority to exclude foreigners. *See id.* (quoting U.S. CONST. art. I, § 9, cl. 1).

292. *Chae Chan Ping*, 130 U.S. at 609.

293. Brief for the United States at 5, 14, United States v. Kagama, 118 U.S. 375 (1886) (No. 1246) (quoting U.S. CONST. art. I, § 8, cl. 3).

within the scope of Congress's powers under the Necessary and Proper Clause.[294] Specifically, the government asserted, "If [Native Americans] are permitted to murder each other, it is certainly an interference with intercourse; because the number with whom intercourse will be held is thereby diminished."[295] The Court, however, rejected the suggestion that Congress's powers derived from or were limited by the Indian Commerce Clause and the Necessary and Proper Clause.[296] Instead, the Court maintained, the powers were an incident of sovereignty derived from the doctrine of discovery: because the United States had conquered the lands and the people, it assumed full power over them.[297] And because the powers derived from conquest and sovereignty, they were plenary, unlimited, and subject to minimal review.

The case studies also challenge the idea that courts may have been especially liberty-protective because they were bound by a requirement of reason giving.[298] This theory of legitimacy is not unique to courts; more recently, it has appeared in scholarship responding to fears about the administrative state.[299] The idea here is that reason giving—providing explanations for decisions—is a meaningful constraint on government power. In the specific context of habeas, the idea is that courts' judicial-opinion-writing responsibilities restrain them from doing things that the political branches can do without explanation.

But the reason-giving requirement did not really distinguish habeas courts from the lawmaking branches, as a comparison of the reasoning in the cases upholding exercises of power with the reasoning of the legislators illustrates. When Congress enacted the Chinese Exclusion Act, Senator Sherman stated, "current sentiment in this country [is] that we should prohibit races so distinct, so alien, so different in habits, civilization, religion, and character from ours, from coming to our country."[300] When President Cleveland signed the Act, he stated that Chinese migrants had "purposes unlike our own and wholly disconnected with American citizenship."[301] The Court's screeds in *Chae Chan Ping* sounded in a similar register. The Court

294. *Id.* at 4–6 (quoting U.S. CONST. art. I, § 8, cls. 3, 18).

295. *Id.* at 24.

296. *See Kagama*, 118 U.S. at 378–79.

297. *See id.* at 379–80 (arguing that Congress can govern Native Americans because the United States owns the territories and has sovereignty over the land and people within the United States' borders).

298. *See* SALYER, *supra* note 49, at xviii–xix, 69 (suggesting that federal courts were more receptive to Chinese individuals challenging Chinese-exclusion laws because of courts' institutional norms and judges' sense of being bound by the law).

299. *See generally, e.g.*, Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 113 HARV. L. REV. 1924 (2014).

300. LEW-WILLIAMS, *supra* note 115, at 186–87.

301. *Id.* at 188.

linked the federal government's power to exclude immigrants to the idea that "the presence of foreigners of a different race in this country, who will not assimilate with us" could "be dangerous to its peace and security."[302] The Court's reasoning drew from the racial ideologies that motivated the detention schemes themselves.[303]

The same occurred in the area of Native American affairs. The legislative history of the Major Crimes Act evinces congressional representatives' concern with "civilizing the Indian race," and "teach[ing] them regard for the law, and show[ing] them that they are not only responsible to the law, but amendable to its penalties."[304] The legislative history is also rife with expressions of concern about relying on tribal governance systems to address crimes by tribal members: "[I]t will hardly do to leave the punishment of the crime of murder to a tribunal that exists only by the consent of the Indians of the reservation . . . punished according to the old Indian custom."[305] Again the Court's reasoning sounded in a similar register. *Ex parte Crow Dog* depicted Natives as "aliens and strangers . . . separated by race" who led a "savage life" and pursued "red man's revenge."[306]

Lucy Salyer's historical analysis of the emerging immigration restrictions, and in particular her data about the unpublished district-court decisions granting writs in immigration habeas cases, is an important part of why the upshot of these case studies is not the abolition or general restriction of the writ.[307] But the several thousand immigration habeas cases decided between 1891 and 1905 were not adjudicated by the courts as such; instead, the district court that decided most of these cases outsourced the adjudication

302. Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889). Justice Field, who authored the opinion in *Chae Chan Ping*, took virulently anti-Chinese immigration positions as a presidential hopeful in the 1880 and 1884 elections; he described the question as "whether the civilization of this coast, its society morals, and industry, shall be of American or Asiatic type," CARL B. SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 221 (1969), and his campaign argued for the need to protect American institutions from "the oriental gangrene." PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 205 (1997).

303. *See, e.g.*, *Chae Chan Ping*, 130 U.S. at 595 (explaining the motivation behind immigration restrictions was that people "saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them, unless prompt action was taken to restrict their immigration"); *id.* ("In December, 1878, the convention which framed the present constitution of California . . . took this subject up" and set forth, "in substance, that the presence of Chinese laborers had a baneful effect upon the material interests of the state, and upon public morals; that their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization."); *see also* Chin, *supra* note 123, at 7 ("[T]he Court held that a returning resident non-citizen could be excluded if Congress determined that his race was undesirable . . . .").

304. 16 CONG. REC. 934 (1885) (statement of Rep. Cutcheon).

305. *Id.* at 935 (statement of Rep. Cutcheon).

306. 109 U.S. 557, 571 (1883).

307. *See supra* notes 287–290.

of Chinese immigration habeas petitions to a single commissioner who handled all of these cases during that time period.[308] The commissioner did not decide cases in accordance with "the customary trial procedures and rules of evidence"—the institutional and legal rules that are supposed to guide courts.[309] But the commissioner still recommended overturning immigration officers' decisions; the courts signed off on his decisions.[310] So it was not federal judges or the habeas process as such that drove these results.

Courts may have felt bound by norms requiring them to supply reasons or couch those reasons in a particular register. But that did not generate a body of law that was more protective of individual rights or liberty than what emerged in the political branches at the time.

* * *

In some of these cases, habeas was one of several possible vehicles or bases for jurisdiction that might have ultimately generated similar governing legal principles. Even so, that is a useful rejoinder to the myth of the great writ and the idea that there is anything unique about the writ, at least with respect to its capacity or potential to do harm or protect individual liberty.

Habeas proceedings were also the natural vehicle to test the exercise of the government's powers in these areas, which encompassed sweeping assertions of detention authority. That is, habeas, almost by necessity, will be the vehicle to challenge these kinds of excesses of government power and abusive exercises of detention authority. And as this subpart explained, there were features unique to habeas that enabled the remedy to lay the groundwork for expansive government powers and to become a part of the toolkit for American colonialism. Understanding those features provides a more accurate picture of the writ.

B. Remedies and Power

The case studies illuminate how habeas, in addition to, or sometimes instead of, safeguarding individual liberty, also helped to legitimate government power. The case studies illustrate how the process of judicial legitimation works, which also exposes some of the costs of the myth of the

308. SALYER, *supra* note 49, at 77.

309. *Id.*

310. *Id.* at 81 ("Heacock's recommendations carried great weight in the final disposition of the case because the judge routinely confirmed his decision."); *see id.* at 77 ("To free themselves to attend to the other business of the court, the judges referred the Chinese cases to a United States commissioner . . . .").

great writ.[311] The myth of the great writ helped to make habeas a mechanism for legitimating government power.

Remedies are often thought of as checks on government power,[312] and judicial remedies in particular are thought to be essential to restraining the government and protecting individual liberty.[313] But judicial remedies, including habeas, can also enhance government power by conferring authority on the government. This process, known as judicial legitimation, was part of Charles Black's original defense of judicial review.[314] Black argued that courts' power to invalidate laws gave them the politically useful ability to validate government policies.[315] The habeas case studies shed light on specific examples of how the process of judicial legitimation works, including how it works through the myth itself.

Other scholars of judicial legitimation suggested that legitimation works by discouraging protest and channeling it into judicial fora.[316] Habeas courts

311. *Cf.* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 7 (1980) ("In the United States, the writ continues as the 'symbol and guardian of individual liberty.' As such, a liberal judicial attitude has been considered appropriate in its administration.").

312. *E.g.*, Richard H. Fallon Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1736 ("The second, more absolute principle demands a general structure of constitutional remedies adequate to keep government within the bounds of law."); *id.* at 1778–79 ("Another principle, whose focus is more structural, demands a system of constitutional remedies adequate to keep government generally within the bounds of law.").

313. *E.g.*, Tyler, *supra* note 3, at 386 ("The judiciary is the sole branch constituted for the very purpose of ensuring that individual rights are not improperly displaced by a political majority merely for the sake of expediency."); *see also, e.g.*, Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 741 (2011) (describing remedies as "adequate to keep government within the bounds of law"); Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1478–79 (2018) ("[S]cholars . . . have focused on how the availability of legal remedies determines the efficacy of legal rights."); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2471 (1996) (discussing the public's belief in "the role of the courts in constraining police power"); Sunita Patel, *Jumping Hurdles to Sue Police*, 104 MINN. L. REV. 2257, 2260 (2020) (discussing the use of structural reform litigation to change "the policies or practices of a governmental entity").

314. CHARLES BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 59 (1960); *cf.* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293–94 (1957) (arguing that the Court has a "unique legitimacy attributed to its interpretations of the constitution" that allows it to make national policy, a power constrained by political forces in ways that make the Court less inclined to act against lawmaking majorities).

315. BLACK, *supra* note 314, at 66–67 (arguing that "the power to validate is necessarily the power to invalidate" and that "the legitimating function of the Supreme Court is one of immense . . . importance to the nation").

316. *See* A. JAVIER TREVINO, THE SOCIOLOGY OF LAW: CLASSICAL AND CONTEMPORARY PERSPECTIVES 216 (2017) ("People do not revolt, *because* of the effects of the legitimation process begun by legal institutions."); T. ARNOLD, THE SYMBOLS OF GOVERNMENT 34–35 (1935) ("[T]he function of law is not so much to guide society, as to comfort it . . . . From a practical point of view it is the greatest instrument of social stability . . . .").

sometimes channeled this idea in decisions interpreting the scope of the writ: Courts granted access to the writ in part because they envisioned that habeas was preferable to extrajudicial methods for challenging government policies.[317] Some scholars have further argued that courts confer legitimacy on government policies through legal reasoning that draws on "interpretations of the Constitution"[318] or through popular physical symbols, such as the black robes judges wear or the concept of blind justice.[319] These mechanisms were also on display in habeas cases. Habeas proceedings lent authority to the detentions by supplying reasons and justifications for them, reasons and justifications often grounded in political theories about the Constitution.

But the case studies also reveal three additional ways in which habeas specifically conferred authority on government policies. Understanding these mechanisms expands existing accounts about how legitimation might work:

- Habeas courts traded in on the myth of the great writ—the idea that the writ is an important bulwark of individual liberty—to legitimate abusive government practices that were challenged in habeas proceedings;
- Habeas courts freed persons who carried out government power and private individuals who exercised state-sanctioned hierarchical authority over others; and
- Habeas courts carried out detention schemes by implementing them.

These three mechanisms are unique to habeas in some respects. That is, habeas possesses some particular features that did facilitate habeas acting as a means to legitimate government power. Only in habeas proceedings would

317. United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695, 697 (C.C.D. Neb. 1879) (No. 14,891) ("It may be that the Indians think it wiser and better, in the end, to resort to this peaceful process than it would be to undertake the hopeless task of redressing their own alleged wrongs by force of arms.").

318. Dahl, *supra* note 314, at 293–94. Alan Freeman argued that the Court's equal protection doctrine legitimates existing patterns of racial subordination because it holds out a promise of liberation even when it does not deliver on its promise. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052 (1978).

319. *See* Gregory A. Caldeira & James L. Gibson, *The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support*, 89 AM. POL. SCI. R. 356, 372 (1995) ("[B]efore the [European] Court [of Justice] acquires an ideological identity, it probably has the ability to rely on traditional judicial symbols to communicate with its various constituencies."); J.D. Ura, *Backlash and Legitimation: Macro Political Responses to Supreme Court Decisions*, 58 AM. J. POL. SCI. 110, 113 (2014) (suggesting that that symbolic representations of the courts' authority allow the courts to declare that government policies are "worthy of . . . respect, deference, and obedience" (internal quotations omitted) (quoting James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New-Style" Judicial Campaigns*, 102 AM. POL. SCI. R. 59, 61 (2008))).

the myth of the great writ provide courts with the cachet to bless abusive practices (though courts could uphold the practices for other reasons). And it is because habeas is an anti-detention, decarceral remedy that habeas could free government officials and people exercising state-sanctioned power and carry out detention schemes by determining whether someone should be detained.

1. Myth and Narrative.—Habeas courts leveraged the myth of the great writ to bolster courts' authority to bless government practices. Habeas courts traded in on the idea that habeas is an important bulwark against government overreach to legitimate government power—sometimes by using faith in habeas as a way to downplay fears about government overreach.[320] Consider this statement by Henry Hart, the original co-author of the field-defining federal courts casebook, who argued that in the area of immigration, "[T]he very existence of a jurisdiction in habeas corpus . . . implied a regime of law."[321] Other times, courts borrowed from the myth of habeas to provide credibility for courts' determinations that detentions were lawful and legitimate.

Still other times, courts invoked the myth of the great writ to justify less typical usages of the writ that furthered colonialism or racial subordination. Take *United States ex rel. Wheeler v. Williamson*, which concerned a slave owner's petition for a writ of habeas corpus.[322] The petition asserted that another individual had (wrongfully) freed the owner's slaves.[323] To explain why "the writ has issued at the instance of third persons"—here, the slave owner—rather than the detainee,[324] the court offered a lengthy history extolling the importance of "the great writ of personal liberty"[325]: "The writ of habeas corpus is of immemorial antiquity"; it "ha[s] been consecrated for ages in the affectionate memories of the people as their safeguard against oppression"; "[t]here is no writ so important for good."[326]

Part of what made the writ "so important for good," the court explained, was that it was "so little liable to be abused" since "[a]t the worst, in the hands of a corrupt or ignorant judge, it may release some one [sic] from restraint

320. *E.g.*, United States v. Chin Lin, 187 F. 544, 550 (2d Cir. 1911) (explaining that if the detainee did "not have a fair hearing the writ of habeas corpus" would follow); Gee Fook Sing v. United States, 49 F. 146, 148 (9th Cir. 1892) ("[A]ny person alleging himself to be a citizen of the United States . . . and who on that ground applies to any United States court for a writ of *habeas corpus*, is entitled to have a hearing and a judicial determination.").

321. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 65 HARV. L. REV. 1362, 1390 (1953).

322. 28 F. Cas. 686, 690 (E.D. Pa. 1855) (No. 16,726).

323. *Id.*

324. *Id.* at 694.

325. *Id.* at 689.

326. *Id.* at 688–89.

who should justly have remained bound."[327] "But," the court emphasized, "*it deprives no one of freedom*."[328] That is the essence of the myth of the great writ—the idea that habeas is, at best, a device to secure important personal liberties, and, at worst, a process that does no harm. Here, the reasoning was used to justify a slave owner's ability to file a writ of habeas in order to secure the possession of his slaves who had attempted to escape with the assistance of another.

The court went on to invoke the writ's usage to free slaves as a reason why the writ also extended to slave-owners: "Freemen or bondsmen, they had rights; and the foremost of these was the right to have their other rights adjudicated openly and by the tribunals of the land. And this right at least, Mr. Wheeler [the alleged slave owner] shared with them."[329] After deploying the myth of the great writ to justify the court's authority, the court upheld the writ issued to the slave-owner and declined to consider an application filed by one of the people alleged to be his slave—a person who said she had escaped from slavery.[330]

There are myriad examples of courts trading in on the myth of habeas to legitimate abusive applications of the writ. Courts invoked "obedience to the writ of habeas corpus" as grounds to free fugitive-slave catchers.[331] Courts leveraged the idea of the "great writ of right, known as the writ of *habeas corpus*" as a basis to determine the status of Native lands.[332] They gestured toward the important office of the writ, ascertaining power and jurisdiction, as a reason why habeas courts could "look into the case" and determine whether an individual was properly categorized as Native American.[333] As a prelude to upholding draconian immigration restrictions and withholding constitutional protections from noncitizens who were outside the physical borders of the United States, courts pointed to the writ as a reason not to fear emerging restrictive immigration laws: "An alien immigrant . . . is doubtless entitled to a writ of *habeas corpus* to ascertain

327. *Id.* at 689.

328. *Id.* (emphasis added).

329. *Id.*; *see also id.* ("I was called upon to issue the writ of habeas corpus, at the instance of a negro, who had been arrested as a fugitive from labor."). Along similar lines (though different outcomes), *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891), concluded that Native Americans could file habeas petitions just as whites could do because the term person "is comprehensive enough, it would seem, to include even an Indian." *Id.* at 697; *see also id.* at 695 (stating that Native Americans are the "remnants of a once numerous and powerful, but now weak, insignificant, unlettered and generally despised race").

330. *Wheeler*, 28 F. Cas. at 694–95.

331. *Ex parte* Robinson (*Robinson II*), 20 F. Cas. 965, 968 (C.C.S.D. Ohio 1856) (No. 11,934); *see also Ex parte* Jenkins, 13 F. Cas. 445, 449 (C.C.E.D. Pa. 1853) (No. 7,259) (describing "a habeas corpus to rescue" an individual).

332. United States v. Rogers, 23 F. 658, 663 (W.D. Ark. 1885).

333. *Ex parte* Kenyon, 14 F. Cas. 353, 354–55 (C.C.W.D. Ark. 1878).

whether the restriction is lawful."[334] The writ gave courts additional purchase and credibility to uphold abusive exercises of government power.

The Court's infamous decision in *Prigg v. Pennsylvania* invoked the significance of the writ as grounds to justify Congress's power to enact the Fugitive Slave Acts.[335] After rattling off a litany of constitutionally protected activity (making treaties, prohibiting the arrest of congress persons during congressional sessions), *Prigg* posed this question: "May not congress enforce this right, by authorizing a writ of *habeas corpus*. . . .?"[336] *Prigg* then invoked both the constitutional status and importance of the writ.[337] From there, the Court deduced that Congress could create habeas protections for persons carrying out activities contemplated by the Constitution (here, the capture and return of fugitive slaves) even though the Constitution did not explicitly grant Congress such power.[338] Congress also specifically gestured toward the writ as a counterweight to abusive government practices. Section 5 of the Chinese Exclusion Act specifically provided for habeas corpus as an oversight mechanism for the new immigration restrictions.[339] The myth of the great writ gave courts and lawmakers some cover to legitimate abusive exercises of government power, including using the writ to further the American colonial project.

The phenomenon of habeas courts invoking the myth of the great writ to affirm government policies arguably reflects Charles Black's theory that courts could use their power to invalidate government actions—here, specifically via the great writ of liberty—to validate government actions. But the usages of the myth differ from Black's understanding about how legitimation would work because in these examples the story itself, rather than courts' brute authority to invalidate government actions, provided some measure of legitimation. And courts used the myth of the great writ not only to validate government policies and practices, but also to justify their power to invalidate other practices such as state prosecutions of fugitive-slave catchers or the attempted rescue of enslaved persons.

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334. Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892)*; see also* Lem Moon Sing v. United States, 158 U.S. 538, 543, 546–47 (1895) (stating that if an "alien is entitled of right, by some law or treaty, to enter this country, . . . their illegal action, if it results in restraining the alien of his liberty, presents a judicial question, for the decision of which the courts may intervene upon a writ of *habeas corpus*").

335. *See* Prigg v. Pennsylvania, 41 U.S. 539, 619–20 (1842) ("[I]t would be difficult to say, since this great writ of liberty is usually provided for by the ordinary functions of legislation, . . . it ought not to be deemed, by necessary implication, within the scope of the legislative power of congress.").

336. *Id.* at 619.

337. *Id.* at 619–20.

338. *Id.*

339. Chinese Exclusion Act, ch. 60 § 5, 27 Stat. 25 (1892) (repealed 1943); *cf.* Fong Yue Ting v. United States, 149 U.S. 698, 725 (1893) (describing the writ of habeas corpus under section 5 as applying to Chinese persons who have been denied the privilege of immigration).

While the myth of the great writ is arguably a symbol like judicial robes or blind justice, it is a different kind of symbol—a narrative, rather than a visual image. And it differs from the kind of legal reasoning that scholars argued would be a mechanism for legitimation. The myth of the great writ was not a legitimating force because it seemed obscure or impenetrable, and therefore somehow above or different from ordinary politics. The myth supplied legitimacy through a story that everyone could understand. Equally important, the power of the myth did not depend on people reading the court opinions: While judicial opinions drew on the myth, the myth could be transmitted and propagated through a simple idea rather than through legalese or impenetrable reasoning.[340] Even if no one other than judges, practicing lawyers, and political elites in the lawmaking branches read the opinions invoking the myth, the myth still served an important function. It helped legitimate the legal processes of colonialism and slavery in the eyes of the people who carried it out. The myth allowed lawyers and political elites to talk about their work in exalted terms and to rationalize their actions—or perhaps even convince themselves that they were part of a storied tradition that was worthy of respect and admiration.

These usages of the myth underscore how the stories that courts and lawyers tell have real power and can provide government with authority. The use of narrative is most often associated with critical race theory, which uses the method of narrative to incorporate the experiences of historically excluded groups into the law and to expose contradictions and hierarchies in the law.[341] But here, narrative was deployed as a tool of the state—to construct government power.[342] And these examples underscore the danger of incomplete, oversimplified, or sanitized histories of the law: The myth of the great writ became a tool to justify and obscure racial subordination and

340. *See* David Adamany, *Legitimacy, Realigning Elections, and the Supreme Court*, 1973 WIS. L. REV. 790, 843 (suggesting that "modern constitutional scholars" recognize "[t]he symbolic quality of Supreme Court adjudication" as fact, as a justification for judicial review). *But see id.* (arguing that the public has "sufficient knowledge about neither the Court's actions nor its function to meet the conditions necessary in an operationalized definition of legitimization").

341. *See, e.g.*, Eleanor Marie Brown, *The Tower of Babel: Bridging the Divide Between Critical Race Theory and "Mainstream" Civil Rights Scholarship*, 105 YALE L.J. 513, 514 (1995) ("Critical race theorists' use of narrative epitomizes this attempt to include voices 'from the bottom.'"); Nancy Levit, *Critical of Race Theory: Race, Reason, Merit, and Civility*, 87 GEO. L.J. 795, 797 (1999) ("Equally abhorrent to traditionalists are the narrative methods some critical theorists use to illustrate their arguments.").

342. *Cf.* Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 812–13 (1994) (noting that not all critical theory is narrative, and that narrative is a methodological form of "scholarship that Euro-American males have cited for generations").

colonialism—a device for lawyers and elites to connect what they were doing to a nobler story rather than to reality.[343]

2. Brute Force.—Habeas courts facilitated legitimation in other ways as well. While the literature on legitimation has focused mostly on symbols, reasoning, and courts' power to invalidate laws, habeas proceedings also provided real force behind the government's policies.

Habeas was a legal mechanism for cementing government authority by freeing persons who exercised federal authority. In the fugitive-slave habeas cases, habeas immunized fugitive-slave catchers from state criminal process. Habeas also supplied affirmative authorization to take people into slavery and to protect oneself from future criminal process. And in Native American-affairs cases, habeas was a way to free individuals who served as Indian officers and carried out federal authority over Native lands. Habeas could perform these functions because it is a decarceral remedy that frees people from detention, a feature that has a more complicated, contingent relationship to liberty than might appear.[344]

Habeas also provided a way to implement government policies—to distinguish between different groups and sort individuals along the lines that Congress had established.[345] Habeas courts regularized the process of sorting between the racial groups that Congress had sought to detain and the groups that Congress left free. In that respect, habeas courts performed a similar function to the customs officers who screened persons for exclusion from the United States.[346] The habeas proceedings were folded into the detention schemes. Habeas performed that function because it is an anti-detention remedy, which is the natural vehicle to challenge but also implement the detention schemes.

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343. The fact that habeas courts leveraged the myth of the great writ to justify American colonialism and racial subordination is also another example of the dilemma or double bind that Kimberlé Williams Crenshaw identified in early work on critical race theory—namely, that by invoking flawed legal processes and flawed institutions, victims of racial subordination may end up reifying and legitimating them. Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1366–69 (1988) ("People can only demand change in ways that reflect the logic of the institutions that they are challenging.").

344. As *Ex parte Sifford*, 22 F. Cas. 105 (S.D. Ohio 1857) (No. 12,848), one of the cases freeing fugitive-slave catchers, explained, "it seems admirably suited to effect the rescue of any prisoner in the custody of an officer." *Id.* at 106, 109, 112.

345. *See* SALYER, *supra* note 49, at 18 ("[T]he federal courts in San Francisco . . . took a surprisingly active role in administering the [Chinese Exclusion Act].").

346. Some courts complained how habeas proceedings were duplicative of administrative processes. *See* Lee Sing Far v. United States, 94 F. 834, 835 (9th Cir. 1899) (discussing how, following a district court's decision judgment in a habeas proceeding arising out of the Chinese Exclusion Act, a new attorney would often join the case and request a rehearing on the basis that the former attorney failed to note an exception to the report of the referee).

* * *

With these mechanisms in mind, it is possible to better assess the myth of habeas, which depicted habeas as a "Great Writ" because it protected individual liberty. The case studies raise questions about all three components of a myth that purports to explain why and how habeas protects individual liberty. Indeed, the case studies even raise questions about holding out the elements of the myth as unadulterated goods.

First, habeas was an unreliable way of correcting unlawful detentions for at least two reasons. The idea that habeas corrected for jurisdictional errors allowed habeas courts to create a set of rules about what made a detention lawful. That set of rules did not result in courts assessing whether all of the statutory preconditions for detention were satisfied. Instead, courts focused on certain preconditions—those regarding race, citizenship, and place. If a precondition did not affect a court's jurisdiction, then a detention would still be unlawful, but habeas would not supply a remedy.

Habeas arguably fared even worse at addressing unjust detentions and unjust laws. Habeas rarely supplied a basis for successfully challenging statutes on the grounds that they exceeded the government's authority, authorized detentions for invalid reasons, or violated individual rights. The challenges that were successful did not meaningfully constrain abusive exercises of government authority. Habeas also had a more complicated relationship with individual liberty than the myth suggests. While habeas did secure detained individuals' liberty, that sometimes came at the expense of other people's liberty. Securing an individual's liberty from detention did not necessarily bring about justice, and sometimes habeas was a way of asserting custody or authority over people who may have otherwise enjoyed greater liberty in the absence of the writ.

Even if the myth is merely a loose approximation or a stand-in for some set of abstract principles, such as the idea that people shouldn't be detained without sufficient cause, the gap between the principle and the process that implements it is notable. Understanding the gap and jettisoning the idea that habeas, at worst, imperfectly effectuates those principles are particularly important because the association between habeas and lofty principles such as safeguarding against wrongful detentions gave some purchase to less salutary usages of the writ. And it continues to provide a way to ignore the more complicated history of habeas by abstracting it away into irrelevance and to avoid developing a more precise account about what habeas should be used for.

In some respects, the story of habeas in the nineteenth century United States parallels Paul Halliday's history of the common law writ in England

between 1500 and 1800.[347] In *Habeas Corpus: From England to Empire*, Halliday surveyed English habeas practice during the sixteenth, seventeenth, and eighteenth centuries by examining every writ issued every few years between 1502 and 1798.[348] Rejecting "Whig" histories of the writ that "dr[e]w lines through certain events . . . to modern liberty,"[349] Halliday's work suggests that, during this time period, the writ functioned more as an instrument of increasing judicial power than as a way to protect individual liberty.[350] The writ helped the King's Bench preserve its authority relative to other courts and later its authority relative to Parliament and the King.[351] The nature and function of the writ "arose not from ideas about liberty, but from sovereignty."[352] In other words, habeas was an instrument for seizing and building power and control, not solely for constraining it.[353]

That is also one function the writ performed in the law of slavery and freedom, Native American affairs, and immigration. While some aspects of habeas lent themselves to that project, it would be a mistake to draw a single straight line between Halliday's history of the English common law writ and the 19th century usages of the writ and generate some grand theory of habeas. In particular, the case studies reveal how central racial ideologies were to the operation of habeas in the nineteenth-century United States, and they clarify the stakes of getting a more complete and complex picture of habeas.

Conclusion

In some ways the case studies presented in this Article call to mind the debates that surfaced in the aftermath of *Boumediene*. Seven years after the first detainees arrived at Guantanamo Bay, *Boumediene* held that the constitutional guarantee of habeas corpus extended to them while they were detained at the U.S. military base there.[354] Yet almost a decade and a half after *Boumediene*, there remain nearly forty people detained at the United

347. *See generally* HALLIDAY, *supra* note 31.

348. *Id.* at 319–33 (describing the methods and basic findings for survey of all uses of the writ of habeas corpus from the court of King's Bench every few years between 1502 and 1798).

349. HERBERT BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY 11 (1931); *see* Michael E. Parrish, *Friedman's Law*, 112 YALE L.J. 925, 954–55 (2003) (reviewing BUTTERFIELD, *supra* note 349) (discussing Butterfield's writings on "Whig" history). Steve Vladeck's review of Halliday described Halliday's work as "methodologically driven historical revisionism" that rejected "the story of habeas corpus in England [which] 'ha[d] been written less as a history than as an exercise in legal narcissism.'" Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 943, 945 (2011) (quoting BUTTERFIELD, *supra* note 349, at 14).

350. Vladeck, *supra* note 249, at 945.

351. *Id.*

352. HALLIDAY, *supra* note 31, at 7.

353. *Cf.* DUKER, *supra* note 21, at 62 ("Habeas corpus originated as a device for compelling appearance before the King's judicial instrumentalities. It is easy to conceive of the writ as a process that could be used by a repressive government to divest an individual of personal freedom.").

354. 553 U.S. 723, 771 (2008).

States military base on Guantanamo Bay.[355] Over half of the individuals released from Guantanamo Bay never filed a habeas petition,[356] and the U.S. Court of Appeals for the D.C. Circuit has developed myriad rules that make it easy for the government to win habeas cases arising from Guantanamo Bay.[357]

As a result, some scholars have questioned whether *Boumediene* was a real win for constraining government power and safeguarding individual liberty.[358] Some have openly wondered whether the availability of habeas was a net negative—in part because the availability of habeas may have blunted popular or political challenges to the detentions by providing them with a veneer of legitimacy and constraint.[359]

This reality, together with the case studies, suggests it may sometimes be worth asking whether habeas proceedings do more harm than good—even where the harms may be difficult to quantify, and even where the harms may seem more abstract relative to the possibility of releasing actual persons from detention.

We should not expect habeas to be a cure-all for expansive detentions or sweeping exercises of government power. But neither does that suggest that we should get rid of the writ altogether.[360] The case studies focused on less sanguine uses of the writ—how habeas was part of the legal apparatus for racial subordination and American colonialism. But what was true about the myth of the great writ is also true about the case studies; they are not the

355. *The Guantánamo Docket: Detainees at the Prison at Guantánamo Bay*, N.Y. TIMES (Sept. 1, 2021), https://www.nytimes.com/interactive/projects/guantanamo/detainees [https://perma.cc/4RQE-FMYR].

356. Aziz Z. Huq, *The President and the Detainees*, 165 U. PA. L. REV. 499, 559, 564, 592–93 (2017).

357. *See, e.g.*, Garrett, *supra* note 7, at 56, 93, 100, 103, 108–10 (criticizing some of these doctrines and decisions); Stephen I. Vladeck, *The Unreviewable Executive:* Kiyemba, Maqaleh, *and the Obama Administration*, 26 CONST. COMMENT. 603, 615–16 (2010) (discussing how D.C. circuit court cases have found in favor of the Obama Administration's arguments against allowing habeas relief for Guantanamo detainees).

358. *See, e.g.*, Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 551, 616–18.

359. *See* Aziz Z. Huq, *What Good Is Habeas?*, 26 CONST. COMMENT. 385, 386 ("[T]he resulting habeas jurisdiction has had at best a complex, largely indirect, effect on detention policy. In the end, the impact of habeas is far more ambiguous than either critics or supporters of *Boumediene* have recognized."); *id.* at 430 ("[T]he federal courts have done just enough to deflate significant social mobilization in favor of further releases. *Boumediene* celebrates legality but without furnishing any constraining law. At the time of this writing, the received wisdom in policy circles calls for fresh legislative involvement in detention issues."); Stephen I. Vladeck, *Normalizing Guantánamo*, 48 AM. CRIM. L. REV. 1547, 1548 (2011) (noting how pro-government law developing in Guantanamo cases has spilled into other areas).

360. *See generally, e.g.*, NANCY J. KING & JOSEPH L. HOFFMAN, HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT (2011).

only or the entire story of habeas. Habeas is not just a device for oppression, just as it is not only a device for liberation. The reality is more complicated.

That is partially why the case studies do not justify the wholesale elimination of habeas (consistent with whatever the Constitution requires) or more draconian restrictions on the writ. While this project has brought to light some of the costs of habeas, weighing those costs against the benefits may involve weighing factors that are both inextricably related to and not easily measured against one another. For example, one cost of habeas was its role in legitimating the detention schemes by providing a veneer of legality. Another cost was how it implemented detention schemes by sorting between persons. But those costs are also inextricably linked with a key benefit of habeas—identifying (some) of the people who were erroneously detained. Comparing systemic costs with individualized benefits is difficult, and there are not obvious answers as to how that comparison cuts in the case studies.

That is particularly true in the area of immigration, where work by Lucy Salyer and Beth Lew-Williams showed that, in the immediate rise of restrictive immigration laws during the late nineteenth century, habeas did function as an important mechanism for identifying erroneous detentions where a statute was wrongfully applied to some people.[361] But it is difficult to generalize about habeas from those case studies given the consensus that habeas was a poor way for correcting erroneous detentions in other areas, such as Native American affairs in the late nineteenth and early twentieth centuries,[362] and an unreliable way of correcting erroneous detentions within the law of slavery and freedom. In that area, habeas provided a vehicle for carrying out erroneous detentions in some cases.

Rather than justifying abolition of the writ or restrictions on the general availability of the writ, the upshot of this project is to begin to address the problem of erasure that results from oversimplified legal tropes about the law and derives from sanitized legal histories about particular legal processes. It suggests that more complete stories are needed to answer questions such as when and under what conditions legal processes deliver on their promises, and to better understand the promises and limits of legal processes like habeas.

One partial but important coping mechanism would be to stop indulging in the myth of habeas as the great writ of liberty. As the case studies suggested, the myth itself and the aura around habeas served as a device to excuse abusive exercises of government power. Equally important, the myth of the great writ is an act of erasure—it omits the stories of the persons who

361. *See supra* notes 282–283 and accompanying text.

362. *See* HARRING, *supra* note 185, at 133 (explaining that only one other person was released in light of the ruling in the *Crow Dog* case).

bore the negative consequences of the writ and the writ's role in racial subordination and colonialism.

Abandoning the myth of habeas could also help us conduct more accurate constitutional analyses of habeas. Existing legal frameworks err when they assume that habeas is solely a mechanism for protecting individual liberty.[363] *Boumediene* developed a test for the scope of the Suspension Clause that assumed the core purpose of habeas was to guard against the risk of erroneous detentions.[364] *Department of Homeland Security v. Thuraissigiam*[365] applied that test by assuming that habeas proceedings could "overwhelm[]" and "augment the burdens" on the government.[366] That framework, however, tells only half the story because habeas proceedings also benefit the government by solidifying and augmenting its powers.

At bottom, we should stop referring to habeas as the great writ of liberty because habeas is not necessarily great or even good. The functions habeas performs depend in part on who is invoking the writ, for what end, and what the law external to habeas is. Rather than trading in on a myth that imperfectly captures the history of the writ, habeas should be judged based on what it actually does—and invoking the myth allows us to avoid crafting an account about what habeas should do.

363. *See* HALLIDAY, *supra* note 31, at 4 ("[I]f lawyers and judges want to act on claims about history, we must first make a fully contextualized reclamation of those past principles. Only then might history serve law . . . .").

364. Boumediene v. Bush, 553 U.S. 723, 745, 766, 779 (2008).

365. 140 S. Ct. 1959 (2020).

366. *Id.* at 1966–67.