The Not So Great Writ

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The war on terror generated renewed scholarly and judicial focus on the writ of habeas corpus. In *Boumediene v. Bush*, the Supreme Court held for the first time that the Suspension Clause guarantees some quantum of habeas corpus absent suspension of the writ.[1] Just last term, in *Department of Homeland Security v. Thuraissigiam*, the Court concluded that the constitutional guarantee of habeas corpus does not apply to noncitizen arrivals to the United States who recently entered the country without legal authorization.[2]

To get traction on questions about the scope and content of the constitutional guarantee of habeas corpus, scholars have relied on historical analyses of the writ, examining its pre-ratification history, as well as Marshall-era decisions involving federal post-conviction review, together with the Civil War era restrictions and expansions of the writ.[3] These studies have focused on how habeas functioned in individual cases during these time periods.

This mode of analysis has reinforced the idea that the writ is a device that secures individual liberty. Cases have hailed the writ as "the best and only sufficient defence of personal freedom,"[4] and maintained that "its history is inextricably intertwined with the growth of fundamental rights of personal liberty."[5] Justices from across the ideological spectrum have made similar claims. Justice Powell wrote that "[t]here has been a halo about the 'Great Writ' that no one would wish to dim."[6] In his celebrated concurrence in *Hamdi*, Justice Scalia invoked Alexander Hamilton to assert 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.'"[7] Legislators have adopted a similar tone. Then-Chairman of the Judiciary Committee Senator Patrick Leahy declared 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."[8] Responding to congressional efforts to restrict access to the writ, then Senator Russ Feingold implored his colleagues that "[t]o be true to our Nation's proud traditions and principles, we must restore the writ of habeas corpus."[9]

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[1] 553 U.S. 723 (2008).

[2] 140 S. Ct. 1959 (2020).

[3] *See infra* TAN TK.

[4] Ex Parte Yerger, 75 U.S. 85, 95 (1868).

[5] Fay v. Noia, 372 U.S. 391, 401 (1963).

[6] Schneckloth v. Bustamonte, 412 U.S. 218, 275 (19730 (Powell, J., concurring).

[7] 542 U.S. 507, 558 (2004) (Scalia, J., dissenting) (citing The Federalist No. 84, 444 (Alexander Hamilton) (J. Cooke ed. 1961)).

[8] Restoring Habeas Corpus: Protecting American Values and the Great Writ: Hearing Before the S. Comm. On the Judiciary, 100th Cong. (May 22, 2007), at 1-2, https://www.govinfo.gov/content/pkg/CHRG-110shrg37759/pdf/CHRG-110shrg37759.pdf

[9] Restoring Habeas Corpus: Protecting American Values and the Great Writ: Hearing Before the S. Comm. On the Judiciary, 100th Cong. (May 22, 2007), at 22, https://www.govinfo.gov/content/pkg/CHRG-110shrg37759/pdf/CHRG-110shrg37759.pdf.

Feingold's plea to return to a lost, great history of habeas appears in scholarship as well. Brandon Garrett invoked the "much-celebrated and storied history" of the writ to argue that the U.S. Court of Appeals for the D.C. Circuit had too narrowly construed the constitutional requirements governing habeas proceedings.[10] Scholarship on post-conviction review draws on the idea that habeas historically functioned as a meaningful guarantor of individual liberty to critique how post-conviction review operates today. One representative article argued that "the authority of the federal courts to entertain constitutional challenges to state criminal convictions is the embodiment of all that was right about the Warren Court. . . . [H]abeas corpus petitions from prison inmates[] provide[d] the indispensable machinery for maintaining and invigorating individual rights on a daily basis."[11] Relying on this narrative, scholars have argued that modern-day restrictions on federal post-conviction review have prevented habeas from performing its core, intended function of protecting individual liberty.[12]

Although "telling and retelling the history of the writ"[13] may be a common tack, this Article adopts a different framework for studying habeas. It broadens scholarly assessments of the writ by examining how habeas functioned in areas of law that the study of habeas has often neglected—specifically, the law of slavery and freedom, Native American affairs, and immigration.[14] While immigration proceedings have recently figured into analyses of habeas, the other two areas of law have been notably absent from scholarship on habeas corpus. These areas are sometimes overlooked on the ground that they are aberrational or unique. Perhaps for this reason, scholars have not examined them to better understand the nature and function of habeas corpus. But they shed light on what habeas actually does, and they constituted a significant portion of the reported federal habeas cases and a good number of state habeas cases as well.[15] This article also approaches these areas of law with

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[10] Brandon L. Garrett, Habeas Corpus and Due Process, 98 Cornell L. Rev. 47, 57 (2012); *id.* at 55 ("[S]cholars have not adequately appreciated how habeas corpus can offer far more than due process.").

[11] Richard Faust, Tina J. Rubenstein & Larry W. Yackle, The Great Writ in Action: Empirical Light on the Federal habeas Corpus Debate, 18 N.Y.U. Rev. L. & Soc. Change 637, 638 (1990).

[12] See, e.g., 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."); Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 Tul. L. Rev. 443, 444-46 (2007). Articles bemoan the remarkable tangle of procedural rules that have defanged habeas from protecting individual rights. Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 Harv. C.R.-C.L. L. Rev. 579, 690-91 (1982); John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. Chi. L. Rev. 679, 691-92 (1990); Brian M. Hoffstadt, *How Congress Might Design a Leaner, Cleaner Writ of Habeas Corpus*, 49 Duke L.J. 947 (2000); Larry W. Yackle, *The Figure in the Carpet*, 78 Tex. L. Rev. 1731, 1756 (2000).

[13] Garrett, supra note TK, at 81.

[14] *Cf.* Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 868 Chi. Kent. L. Rev. 1087, 1094 (1993) (highlighting the "necessity of teaching [slavery-related] materials in law school as part of a standard … course on constitutional law.").

[15] Of the 124 reported federal habeas cases before the Civil War, the largest category (20) involved military custody. *See* Jared A. Goldstein, *Habeas Without Rights*, 2007 Wis. L. Rev. 1165, 1181, 1193-95 (2007) The next largest (12) involved the law of slavery. *See Richardson's Case*, 20 F. Cas. 703 (CCDC 1837); *Ex parte Williams*, 29 F. Cas. 1316 (CCDC 1833); *Ex parte Robinson*, 20 F. Cas. 965 (S.D. Ohio 1856); *Ex parte Sifford*, 22 F. Cas. 105 (S.D. Ohio 1857); *United States ex rel Garland v. Morris*, 26 F. Cas 1318 (D. Wis. 1854); *Ableman v. Booth*, 62 U.S. 506 (1858); *Ex parte U.S. ex rel. Copeland*, 25 F. Cas. 646 (C.C.D.D.C. 1862); *Ex parte Jenkins*, 13 F. Cas. 445, 448 (E.D. Pa. 1853); *Ray v. Donnell*, 20 F. Cas. 325, 326–27 (C.C.D. Ind. 1849); *Case of Rosetta*, 20 F. Cas. 969 (S.D.

a systemic, holistic lens that analyzes how habeas is embedded within other legal structures and societal norms. That is, rather than an individualist, case-oriented approach, this article examines how habeas proceedings were one component in a broader legal system that was less protective of individual liberty than an analysis of individual habeas cases might suggest.

A systemic perspective into historically neglected areas of law offers a different picture of habeas than do analyses of the oft studied individual habeas cases. It is partially because habeas scholarship has not focused on these areas of law that habeas corpus is thought of today as the Great Writ of Liberty when the reality is more complicated.[16] Habeas is not a legal structure whose normative valence uniformly pushes in one direction. Extending the analysis of habeas to cover historically neglected areas of law, and analyzing the habeas cases as one part of a broader legal structure brings into focus the duality of the writ. Habeas can be empowering just as it can be constraining; instead of limiting detention schemes, habeas occasionally played a role in expanding them. And instead of curbing government power, habeas constituted an important element of government power and provided the government with a powerful tool for carrying out its policies. Habeas was a legal channel that people used to seize power, and it provided an engine for constructing racialized ideas about who gets to be free and the terms of individuals' freedom.

Excavating these forgotten usages of habeas corpus and analyzing them together serves several purposes. First, it improves our understandings of habeas. Although we are used to thinking of habeas as a great writ because it protects individual liberty and guards against the abuse of state power, plenty of habeas actions undermined individual liberty and enhanced the government's power to pursue abusive policies. In the 19th and early 20th centuries, habeas was a mechanism to vindicate constitutional structure and government power as well as individual rights. This reality has several doctrinal implications: It confirms that habeas can exist even where individual rights guarantees might not apply and it also identifies several flaws in the existing legal rules regarding habeas. The current

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Ohio 1855); *Norris v. Newton*, 18 F. Cas. 322, 322–23 (C.C.D. Ind. 1850) (describing writ issued earlier in the case); *In re Martin*, 16 F. Cas. 881, 882 (C.C.S.D.N.Y. 1835) (describing writ issued earlier in the case). Immigration cases provided a large number of habeas case that courts heard after the Civil War in the late 1800s and early 1900s. *See* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961 (1998). Of the 113 habeas cases that the Supreme Court issued reported opinions in between 1889 and 1900, 21 were immigration and Native American affairs cases—roughly 20% of the habeas cases. *Quock Ting v. United States*, 140 U.S. 417 (1891); *Ex parte Lau Ow Bew*, 141 U.S. 583 (1891); *Wan Shing v. United States*, 140 U.S. 424 (1891); *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); *Fong Yue Ting v. united States*, 149 U.S. 698 (1893); *Lau Ow Bew v. United States*, 144 U.S. 47 (1892); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895); *Wong Wing v. United States*, 163 U.S. 228 (1896); *Hilborn v. United States*, 163 U.S. 342 (1896); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Ex parte Johnson*, 167 U.S. 120 (1897); *Ward v. Race Horse*, 163 U.S. 504 (1896); *Talton v. Mayes*, 163 U.S. 376 (1896); *In re Milles*, 135 U.S. 263 (1890); *Ex parte Mayfield*, 141 U.S. 107 (1891); *In re Lane*, 135 U.S. 443 (1890); *In re Bonner*, 151 U.S. 242 (1894); *Ex parte Gon-shay-ee*, 130 U.S. 343, 345 (1889); *Ex parte Captain Jack*, 130 U.S. 353 (1889). The percentage is almost twice as high if you exclude state habeas cases on writ of error to the Supreme Court, meaning that Native American affairs and immigration habeas cases were almost half of the reported federal habeas cases from federal courts. *Cf.* K-Sue Park, *This Land Is Not Our Land*, 87 U. Chi. L. Rev. 1977, 1979 (2020) ("[R]ecognizing the histories of conquest and slavery and their erasure is critical.").

[16] Park, *Not our Land*, *supra* note TK, at 1984 ("Many widely accepted theoretical frameworks developed from established historical narratives about America evaded the histories of conquest and slavery."); Simard, Citing Slavery, 72 Stan. L. Rev. at 85 (explaining that slavery cases were "part of the foundation of American jurisprudence").

legal frameworks assume that the existence of habeas is a benefit to individuals and a burden on the government when in reality habeas can augment government power. There are theoretical implications as well: Incorporating these areas of law into the field of habeas sounds notes of caution about theories that imagine that courts, as institutions, are uniquely well positioned to safeguard the interests of the less powerful or to protect individual liberty by ensuring that the government abides by the rule of law. That is not what habeas did.

Second, a thicker understanding about habeas raises questions about suggestions, old and new, that constitutional structure is an attractive tool for addressing racial subordination and checking executive power. Both doctrine and scholarship imagine that the separation of powers safeguards individual liberty. Case after case channels the idea that dividing power among different branches of government protects individual liberty by ensuring that no one branch becomes too powerful. Recent scholarship has invoked this idea in service of more modern, egalitarian principles, arguing that distributing power to different branches or levels of government is a way to empower racial, sexual, and political minorities to secure legal protections.

Yet the forgotten usages of habeas serve as a reminder that focusing too much on dearly held principles like checks and balances or the separation of powers can fail to remedy racial subordination and can even further it.[17] In the context of habeas, the separation of powers meant that courts allowed legislatures to adopt whatever abusive policies they enacted clearly enough, since under a separated powers scheme Congress wrote the laws and courts verified the laws' interpretation. Checks and balances hardly fared better than separated powers. When courts exercised overlapping functions with other branches, they implemented detention schemes alongside executive officials, sorting between and reinforcing the distinctions between the groups that Congress wanted to detain and the groups that Congress wanted to be free. Courts also exercised the power to check other branches selectively, invalidating actions that sought to challenge slavery or challenge the scope of federal authority over Native Americans.

While constitutional structure has the theoretical potential to empower minorities and serve egalitarian ends, adopting the lens of constitutional structure risks doing the opposite because of what the framework of constitutional structure brings into focus and what it does not. Constitutional structure prioritizes attention to institutions—what institutions have more comparative competence over certain issues, and whether different institutions or levels of government all have a balanced array of powers. That way of thinking reflects the Legal Process tradition, which emphasizes questions of institutional competence, and which dominates the field of federal courts where habeas is often studied.[18] And one need not be a full-throated adherent of that legal process school to think that it often makes sense to turn from substantive worries about rights and equality to institutional competence.

The case studies suggest that too may be wrong, and that we should resist the urge to reconceptualize issues of substantive justice and racial hierarchy in terms of legal process and constitutional structure. A focus on institutional competence ignores substantive questions such as

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[17] *Cf.* Park, *Not Our Land*, *supra* note TK, at 1985 ("[D]ifferent historical accounts would likely have produced different theoretical conclusions about the operation of law. Interrogating the conceptual consequences of erasures therefore means reassessing longstanding and widely embraced interpretations.").

[18] *Cf.* Fallon & Meltzer, supra note TK, at 2034 ("[W]e write in the Legal Process tradition, [which] takes seriously, and indeed emphasizes, issues involving the distinctive competences of diverse governmental institutions.").

whose interests an institution is actually serving or what purpose power is being exercised for, which risks replicating the very hierarchies that modern scholarship on constitutional structure imagine it can undo. The frameworks of constitutional structure, separation of powers, and checks and balances also have too much baggage. Even if constitutional structure can be pushed and pulled to also encompass questions of race, power, and hierarchy, they will also include attention to institutional competence, which risks undoing the gains it can offer or at least taking focus away from issues of race, power, and hierarchy. It is in part because the study of habeas has focused on questions of institutional competence that the myth of habeas as a guarantor of individual liberty has persisted, which illustrates the limits of frameworks that abstract away from the substance of particular disputes in favor of theoretical questions about institutional competence.

Third, and finally, the case studies surface an additional function that remedies can perform. Remedies can function as tools of the state that legitimize and extend government power just as they can constrain it. The plasticity and malleability of remedies such as habeas allowed habeas to become part of the legal apparatus that furthered the American colonial project—legalizing violence against fugitive slaves and free Black persons, dispossessing Native lands and Natives' governing authority, and facilitating sweeping control over immigrant communities.

The case studies confirm one insight of critical race theory—namely, that it is difficult to fully understand an area of law like habeas without considering its contact points with issues of race.[19] Recent scholarship on federalism, the scope of Congress's powers, and debt and equity have used Native American affairs, race, and slavery to generate more broadly applicable insights for general fields in public law even though those areas were previously walled off as separate or unique.[20] The case studies on habeas similarly suggest the interconnectedness of habeas, the separation of powers, remedies, and race.[21] Habeas proceedings were an important tool for the state in racializing certain groups, but habeas proceedings also used the issue of race in furtherance of state power—to divide authority between the different branches and to expand state authority

This article proceeds in four parts. Part I provides a brief overview of scholarship on habeas, which has adopted an individual-case perspective that is limited to certain areas. Part II offers a thick analysis of how habeas functioned in three areas of law in the 19th and early 20th century, focusing on the institutional dynamics of habeas proceedings. Part III uses the case studies to shed light on the nature and function of habeas, and on how seeming institutional bulwarks of institutional liberty such as the separation of powers or checks and balances supplied important components of the legal architecture for American colonialism and racial subordination. Part IV concludes with thoughts about some modern-day codas to the case studies.

Despite surfacing these functions of habeas, and identifying how habeas became bound up with projects of racial subordination and colonialism, my goal is not to argue that habeas should be

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[19] *See* Park, *Not Our Land*, *supra* note TK, at 1986 ("[R]epresentation of and engagement with different perspectives will substantively change the shape of one's intellectual questions, narrative accounts, and theoretical conclusions.").

[20] K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 L. & Soc. Inquiry 10006, 1009-14 (2016); Gregory Ablavsky, *The Savage Constitution*, 63 Duke L.J. 999, 1038-50 (2014); Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 Yale L.J. 1792, 1824-27, 1855-61 (2019); Park, *Not Our Land*, supra note TK, at 1994-95.

[21] *Cf.* David Cole, Jurisdiction and Liberty: Habeas Corpus and Due Process As Limits on Congress's Control of Federal Jurisdiction, 86 Geo. L.J. 2481, 2483 (1998). ("Immigration is not a subject commonly addressed in Federal Courts courses.").

abolished or to suggest that the constitution supplies no guarantee of habeas. It is instead, to reorient and recalibrate the debates around habeas so they can more fully take into account some of the limitations of habeas and some of the pro-government functions that habeas can have.