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Habeas Corpus and the Politics of History

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HABEAS CORPUS AND THE POLITICS OF HISTORY

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ABSTRACT

Vijayakumar Thuraissigiam, a Tamil citizen of Sri Lanka, was apprehended after unlawfully entering the United States. Placed in expedited removal proceedings, which allows for streamlined deportation, Thuraissigiam sought asylum. However, he was found to lack the requisite credible fear of persecution based on a protected status. He petitioned for a writ of habeas corpus to review the legality of that determination. But because the expedited removal process limits federal habeas jurisdiction, his petition was dismissed. He claims that limitation violates the U.S. Constitution's Suspension Clause, which provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The Supreme Court agreed to hear his case, and its decision is expected by June 2020.

The Court's Suspension Clause jurisprudence has long been guided by historical inquiry into the nature of habeas in English law. This Thesis examines how history should inform the creation of law by studying the uses of history in habeas jurisprudence. I identify three distinct ways of invoking history to write law, assess their desirability, and argue that jurisprudential reliance on history tends to distort the historical record. I then tell two histories of the so-called Great Writ—one that emphasizes its role in progressively protecting liberty and another that emphasizes the distribution of power among different institutions in medieval and early modern England. Though the latter is more historically accurate, I show through juxtaposing these contrasting narratives that ambiguities complicate the application of historical practice to constitutional jurisprudence. I argue, therefore, that history generally cannot cabin judicial discretion more than other traditional tools of legal analysis (namely, precedent). This Thesis concludes by returning to Thuraissigiam's case and arguing that history cannot determine the outcome. History, I claim, will permeate the Court's opinion, even as it will not meaningfully constrain the decision.

ACKNOWLEDGEMENTS

A Senior Thesis should be a capstone of one's undergraduate education. The roots of this work, however, represent over a decade of my education, extending all the way back to middle school. I owe a debt to and am grateful for the many, many people who helped me find my way.

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I first learned about Thuraissigiam's story from Professors Steve Vladeck and Bobby Chesney's wonderful (and wonderfully named) podcast: *The National Security Law Podcast*. But

I think of this Thesis as the intersection of two of my enduring passions—history and law. My appreciation for history is largely due to the amazing social science and humanities teachers I have had throughout my education. In middle school, Ilana Rembelinsky (our beloved Ms. R) challenged me to pursue my passions with independence and academic rigor. Her sharp eye and seemingly ruthless purple pen gave me a strong foundation in writing. In high school, multiple teachers deserve credit: Maricruz Aguayo-Tabor, whose AP World History class enlarged my worldview; Jason Flowers, whose entertaining stories and encyclopedic knowledge of U.S. history captivated me throughout junior year in high school; Elizabeth Hewitt, who showed me how art could so insightfully capture the workings of history; and Lauren Graeber, who was always there to help me think through difficult questions, including how we ought to judge history. Beyond my teachers, many friends debated and explored questions about history with me, namely: Cameron Kocher and Belinda Li in middle school; and in high school, Corin Wagen, Chloe Carlander Wagen (!), Jasmine Stone, Evelyn Burd, Mason Marriot-Voss, and Jonathan Sadun, in addition to Ethan (as mentioned earlier).

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real exposure to reading and thinking through cases. I also met two amazing friends there whom I still think of as inspirations—Hala El Solh and Isabel Ivanescu.

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Finally, a few others deserve recognition. Councilman Jed Leano gave me a glimpse into immigration law when I worked for him, and he offered me the opportunity to see, first-hand, the ways that our immigration system (mis)treats migrants. Professor Susan McWilliams Barndt taught me the powerful way that stories shape politics, an idea that undergirds much of this Thesis and that rises to the surface in its concluding chapter. Lastly, I am so grateful to the Physics and Astronomy Department at Pomona, which created a home for me in college.

It is hard to adequately express my gratitude for and dependence on all of those aforementioned people (and countless others). All errors in this Thesis, however, are my own.

INTRODUCTION: THURAISSIGIAM AT THE BORDER

By the time Vijayakumar Thuraissigiam unlawfully entered the United States on a calm, partly-cloudy night in January 2017, he had traveled halfway around the world from his home in Sri Lanka.[1] Apprehended twenty-five yards north of the U.S.–Mexico border near the San Ysidro Port of Entry in San Diego, California,[2] Thuraissigiam must have felt exhausted by his seven-month trek in search for a sanctuary.[3] But as a noncitizen who lacked valid entry documents, Thuraissigiam was placed in "expedited removal" proceedings, a system created by the 1990s era immigration reform[4] that allows the federal government to fast-track the deportation of certain inadmissible noncitizens.[5] However, within the expedited removal process, there are "special procedures"[6] for

[1] Form I–213 (Feb. 18, 2017), *reprinted in* Joint Appendix at 37, 38, Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. Dec. 9, 2019). Weather data from that night (January 17, 2017) comes from *San Diego, CA Weather History*, WEATHER UNDERGROUND, https://www.wunderground.com/history/daily/KSAN/date/2017-1-17 (last visited Apr. 26, 2020).

[2] Form I–213, *supra* note 1, at 38.

[3] Thuraissigiam explained to a border patrol officer that he left Sri Lanka on June 29, 2016. *Id.* at 41.

[4] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 302, 110 Stat. 3009-546, 579–82 (1996).

[5] *See* 8 U.S.C.A. § 1225(b)(1)(A)(i) (Westlaw through Pub. L. No. 116-138) ("If an immigration officer determines that an alien . . . who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review . . . ."). The two explicit categories of inadmissibility for expedited removal noted in Section 1225(b)(1)(A)(i) cover a non-citizen who "by fraud or willfully misrepresenting a material fact, seeks to procure . . . admission to the United States," *id.* § 1182(a)(6)(C); or who "at the time of "application for admission[,]" either lacks a "valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document . . . , and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required" or "whose visa has been issued without compliance with the provisions of section 1153," *id.* § 1182(a)(7). Expedited removal can be expanded, however, to "any or all aliens" that have not "been admitted or paroled into the United States" and who have not "affirmatively shown" that they have been "physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility . . . ." *Id.* § 1225(b)(1)(A)(iii). Authority to expand the coverage of expedited removal is vested by statute in the Attorney General, see *id.*, but it was delegated to the Secretary of Homeland Security, see Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,878 (Aug. 11, 2004). In contrast to expedited removal proceedings are formal removal proceedings. *See* 8 U.S.C.A. § 1252 (Westlaw). For a helpful comparison between the two systems, see Brief of *Amici Curiae* Asylum Law Professors in Support of Respondent at 5–10, Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. Jan. 22, 2020) [hereinafter Asylum Law Professors Amicus Brief]; Brief for Amici Curiae Immigration and Human Rights Organizations in Support of Respondent at 5–8, Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. Jan. 22, 2020) [hereinafter Immigration & Human Rights Organizations Amicus Brief]. For an overview of the expedited removal process and its legislative history, consult HILLEL R. SMITH, CONG. RES. SERV., R45314, EXPEDITED REMOVAL OF ALIENS: LEGAL FRAMEWORK 6–11 (Oct. 8, 2019), https://crsreports.congress.gov/product/pdf/R/R45314 (last visited Apr. 28, 2020).

[6] Brief for the United States at 7, Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. Dec. 9, 2019) [hereinafter U.S. Brief].

those who are escaping persecution or torture, or who fear returning to their home countries. Thuraissigiam claimed those special procedures. He explained that he had spent "years . . . being threatened" in Sri Lanka, leading him to flee for the United States because he simply "want[ed] a safe place" to live.[7] Accordingly, Thuraissigiam was given an interview with an asylum officer to determine whether he had a credible fear of persecution to be eligible for asylum.[8]

In his hour-long interview,[9] Thuraissigiam recounted his harrowing experiences of being beaten in Sri Lanka.[10] The asylum officer believed his fear was subjectively credible[11] but determined that there was no evidence that the attacks were due to a protected characteristic,[12] such as race or religion, which is necessary to qualify for asylum.[13] That conclusion was certified by a supervising officer,[14] and when Thuraissigiam asked for review by an immigration judge (IJ),[15]

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[7] Form I–213, *supra* note 1, at 41, 42.

[8] *See* 8 U.S.C.A § 1225(b)(1)(A)(ii) (Westlaw) (If the "immigration officer determines that an alien . . . who is arriving in the United States or is described in clause (iii) is inadmissible . . . and the alien indicates either an intention to apply for asylum . . . or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer . . . ."); *accord* 8 C.F.R. § 235.3(b)(4) (Westlaw through 85 F.R. 21305) (If the alien subject to expedited removal "indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer shall not proceed further with removal of the alien until the alien has been referred for an interview by an asylum officer . . . . The examining immigration officer shall record sufficient information in the sworn statement to establish and record that the alien has indicated such intention, fear, or concern, and to establish the alien's inadmissibility.").

For an overview of this process, see SMITH, *supra* note 5, at 17–20 (describing the credible fear determination process).

[9] Asylum officer interview notes (Mar. 9, 2017), *reprinted in* Joint Appendix, *supra* note 1, at 60 (noting that the interview, which took place on March 9, 2017, began at 8:03am and ended at 9:09am).

[10] *See id.* at 71 ("They arrested me and put me in their van and they started beating me and I fainted and after that I don't know what happened."); *id.* at 70 (He "was arrested and beaten and they were looking for me. I could not live in Sri Lanka so left [*sic*] the country."). When asked why he never went to "the police/authorities," he explained, "I thought if I go to the police, the problems will be more. I don't know why, I just left the country." *Id.* at 72. He also explained that he did not contact the police because "I do not know who did it and if I complain to them they will ask who did it and since I do not know who did it, they will not help me." *Id.*

[11] *Id.* at 83.

[12] *Id.* at 87 ("The applicant provided no testimony indicating that he was or will be targeted because of race, religion, nationality, membership in a particular social group, or political opinion. It is unknown who these individuals [who beat him] were or why they wanted to harm the applicant. Thus, the applicant failed to establish that these acts were due to a protected characteristic.").

[13] *See* 8 U.S.C.A. § 1101(a)(42)(A) (Westlaw).

[14] *See* Joint Appendix, *supra* note 1, at 54. This is required under federal law. *See* 8 C.F.R. § 208.30(e)(8) (Westlaw through 85 F.R. 21305) ("An asylum officer's determination [on the existence of credible fear] shall not become final until reviewed by a supervisory asylum officer.").

[15] The expedited removal system allows applicants who seek to establish their credible fear to request for an IJ's review of the asylum officer's conclusion. *See* 8 C.F.R. § 208.30(g)(1) (Westlaw). Regulations specify that the IJ's

the IJ came to the same conclusion.[16] None of them thought Thuraissigiam would qualify for asylum, and under federal law, the IJ's decision was "final and may not be appealed."[17]

To Thuraissigiam, this process was deeply flawed. He argued that the immigration officials failed to take into account the context of the Sri Lankan government's systematic targeting of Tamils such as himself.[18] He claimed that his assault, where he was taken into a van and beaten so intensely that he lost consciousness and spent eleven days in a hospital recovering,[19] exemplified the tragically common but well-documented practice of so-called "white van" beatings.[20] And with that context—information that the asylum officer, by law, should have known[21]—Thuraissigiam argued that a negative credible fear determination was absurd. Thus, in early 2018, he petitioned for a writ of habeas corpus—a judicial order to review the legality of someone's detention or imprisonment. [22]

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review is based on "[t]he record of the negative credible fear determination, including copies of the Form I–863, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based . . . ." *Id.* § 208.30(g)(2)(ii). And under statutory law, "Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination" that the alien has no credible fear of persecution. 8 U.S.C.A. § 1225(b)(1)(B)(iii)(III) (Westlaw).

[16] *See* Transcript of Credible Fear Review Proceedings at 6 (Mar. 17, 2017), Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. Mar. 6, 2020) (The judge stated, while "[t]here's no reason to doubt your [Thuraissigiam's] fear of return for the reasons you stated," the asylum officer "very specifically analyzed the information and found no testimony that you were or would be harmed on account of race, religion, nationality, membership in a particular social group, or political opinion. This does seem to follow the information that you did not know how these individuals were or why they were doing this to you.").

[17] 8 C.F.R. § 1208.30(g)(2)(iv)(A) (Westlaw).

[18] *See* Petition for Writ of Habeas Corpus at ¶¶ 54–56, Thuraissigiam v. U.S. Dep't of Homeland Sec., No. 18CV0135L AGS (S.D. Cal. Jan. 19, 2018), *reprinted in* Joint Appendix, *supra* note 1, at 12 [hereinafter Habeas Petition].

[19] Asylum Officer Interview Notes (Mar. 9, 2017), *reprinted in* Joint Appendix, *supra* note 1, at 60, 70–71.

[20] *See* Habeas Petition, *supra* note 18, at ¶ 55. *See generally* Brief of Professors of Sri Lankan Politics as Amici Curiae in Support of Respondent at 7–10, Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. Jan. 22, 2020) [hereinafter Sri Lankan Politics Professors Amicus Brief] (describing "white van" beatings and concluding that Thuraissigiam's details "precisely mirror the infamous 'white van abduction' practice," *id.* at 10).

[21] Asylum officers make the determination of whether an applicant has a credible fear based on "the credibility of the statements made by the alien . . . and other such facts as are known to the officer . . . ." 8 C.F.R. § 208.30(e)(2) (Westlaw through 85 F.R. 21305). Asylum officers, additionally, must have had "professional training in country conditions . . . ." 8 U.S.C.A. § 1225(b)(1)(E)(i) (Westlaw through Pub. L. No. 116-138).

[22] *See* Habeas Petition, *supra* note 18.

Habeas corpus (a Latin phrase translating to "we command you that you have the body"[23]) has long been used by prisoners and detainees to challenge their confinement.[24] And so Thuraissigiam turned to habeas, what we often call the "Great Writ,"[25] to challenge his credible fear determination, requesting a judicial order directing the Department of Homeland Security (DHS) to "provide him with a new, meaningful opportunity to apply for asylum and other relief from removal."[26] But by statute, habeas review of expedited removal proceedings is limited. Specifically, Congress limited habeas review to three factual questions, as laid out in 8 U.S.C. Section 1252(e)(2): (1) whether the habeas petitioner is a noncitizen; (2) whether the petitioner was ordered removed; and (3) whether the petitioner is a legal permanent resident, refugee, or asylee.[27] Moreover, the statute limits the inquiry into whether a person has been ordered removed "to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal."[28] Because of Section 1252(e)(2), the federal district court dismissed Thuraissigiam's habeas petition for lack of

[23] *See* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 40 (2010)

[24] The eighteenth-century English jurist Sir William Blackstone, for example, called habeas the "great and efficacious writ in all manner of illegal confinement . . . ." 3 WILLIAM BLACKSTONE, COMMENTARIES *131.

[25] So often is it described in this way that Justice Sotomayor referred to it as such when Thuraissigiam's case was argued at the Supreme Court. *See* Transcript of Oral Argument at 63, Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. Mar. 2, 2020). The original terminology—habeas as the "great writ of English liberty"—dates back to at least 1729. *See* Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 580 n.10 (2008).

[26] Habeas Petition, *supra* note 18, at 14.

[27] *See* 8 U.S.C.A. § 1252(e)(2)(A)–(C) (Westlaw). An overarching provision states that federal courts cannot enter declaratory, injunction, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) . . . except as specifically authorized in a subsequent paragraph of this subsection[.]" *Id.* § 1252(e)(1)(A). The statute does allow for judicial review of whether the Section 1225(b) statute is "constitutional" and whether "a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law." *Id.* § 1252(e)(3)(A). But the plain language of those provisions does not allow for a test of whether those procedures were dutifully applied to a specific applicant, such as Thuraissigiam. Challenges to the legal validity of the expedited removal system, also, must be "filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure . . . is first implemented." *Id.* §1252(e)(3)(B).

[28] *Id.* § 1252(e)(5).

jurisdiction.[29] Thuraissigiam appealed to the Ninth Circuit Court of Appeals, claiming that Section 1252(e)'s restriction on habeas corpus violates the Constitution's Suspension Clause.

Before diving into the legal intricacies about Thuraissigiam's case, it is worth surveying the forest to avoid getting lost in the trees. In some ways, Thuraissigiam is no unique petitioner. As noted below,[30] the expedited removal system is an enormous part of the federal government's immigration enforcement apparatus. Each year, over one hundred thousand people are deported through expedited removal.[31] In that sense, Thuraissigiam represents scores of people who are deeply affected by American immigration enforcement. But Thuraissigiam's case is also an excellent test case for different reasons. No one contends that formal, mandatory procedures were denied to him; as the government's brief notes, Thuraissigiam was afforded a credible fear interview with an asylum officer, which was reviewed by a supervisory officer and an immigration judge.[32] Yet each immigration official found his testimony credible, and the government never contested the country-conditions information about white van abductions or the Sri Lankan government's persecution of Tamils. Taken together, it seems difficult to doubt that, if given the opportunity to present his case again, Thuraissigiam would pass the threshold of having a "significant possibility" of showing his persecuted status, which is the barrier for getting past the credible fear interview.[33]

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[29] *See* Thuraissigiam v. U.S. Dep't of Homeland Sec., 287 F. Supp. 3d 1077, 1080–82 (S.D. Cal. 2018), *rev'd & remanded*, 917 F.3d 1097 (9th Cir. 2019), *cert. granted*, 140 S. Ct. 427 (mem.) (2019).

[30] *See infra* Introduction, Part II.

[31] *See* MIKE GUO & RYAN BAUGH, DEP'T OF HOMELAND SEC. OFF. OF IMMIGR. STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2018, at 9 tabl. 6 (Oct. 2019), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/enforcement_actions_2018.pdf (noting the following numbers for expedited removals each fiscal year: 112,057 in 2010; 124,567 in 2011; 165,613 in 2012; 197,608 in 2013; 188,428 in 2014; 152,770 in 2015; 155,789 in 2016; 121,998 in 2017; and 144,263 in 2018).

[32] *See* U.S. Brief, *supra* note 6, at 44–45; *see also id.* at 19 ("[Thuraissigiam] does not deny that he was provided all of the procedures mandated by statute or regulation.").

[33] *Id.* at 8 (citing 8 U.S.C.A. § 1225(b)(1)(B)(v) (Westlaw)).

Amidst the fast-moving machinery[34] of a massive governmental bureaucracy that processes hundreds of thousands of cases each year, Thuraissigiam asks to make his case to an independent judge. He seeks protection from an ancient writ, one whose core function, as historian Paul Halliday has explained, is to allow judges "to hear the prisoner's sighs . . . ."[35] More than anything, Thuraissigiam's case is about balancing between procedural protections and administrative efficiency, between respecting the individual's dignity and maintaining the swift and orderly execution of public policy in response to perceived exigencies. It seems all the more appropriate, then, that he pleas for the writ of habeas corpus, a device whose long history includes many instances where judges, legislators, and executives sought to navigate the boundary between due process and emergency action. Indeed, it is in the context of crises—when parliaments and executives sought to limit the writ by suspending its action—that habeas was enshrined in the American Constitution, in a provision that we now call the Suspension Clause.

I. The Suspension Clause

The Suspension Clause is a curious provision buried in Article I of the Constitution. Its cryptic language reads only: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[36] Notwithstanding the fame of the writ of habeas corpus, the Suspension Clause has been the subject of very little case law; as a panel of the Ninth Circuit noted in Thuraissigiam's case, the Supreme Court has "rarely addressed who may invoke the Suspension Clause and the extent of review the Clause requires."[37]

[34] Consider, for example, that the IJ's review of the asylum officers' determination on credible fear, by statute, "shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date" of the credible-fear determination. 8 U.S.C. § 1225(b)(1)(B)(iii)(I) (Westlaw).
[35] HALLIDAY, *supra* note 23, at 2.
[36] U.S. CONST. art. I, § 9, cl. 2.
[37] Thuraissigiam v. U.S. Dep't of Homeland Sec., 917 F.3d 1097, 1105 (9th Cir. 2019).

Two cases form the crux of the Court's relevant Suspension Clause doctrine,[38] and they are worth exploring in full. Thus, we momentarily depart from Thuraissigiam's story to elaborate on the meaning of the Suspension Clause as Thuraissigiam seeks to invoke it.

A. Boumediene

Boumediene[39] came to the Supreme Court at the end of a line of cases dealing with the United States government's response to the attacks of September 11, 2001.[40] Pursuant to the 2001 Authorization for the Use of Military Force,[41] the U.S. military began detaining purportedly hostile combatants at the American naval base in Guantánamo Bay, Cuba. In 2002, various Guantánamo detainees filed suit in the D.C. District Court seeking review of the legality of their detention.[42] After winding its way through the federal courts, the case made its way to the Supreme Court, which held that the habeas statute extended federal jurisdiction to Guantánamo Bay, thus affording federal courts the authority to review the legality of the petitioners' detention.[43]

[38] Broadly speaking, federal habeas case law has developed in two distinct areas—habeas as a means for postconviction collateral review and habeas in the noncriminal context (i.e., executive detention). *See, e.g.*, Brief for Respondent at 31–32, Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. Jan. 15, 2020) [hereinafter Respondent Brief] (arguing that there is a "fundamental distinction between habeas challenges to criminal convictions (where there has already been full judicial review and often a jury trial) and habeas challenges to *executive* detention (where there has been none)") (emphasis original); INS v. St. Cyr, 533 U.S. 289, 300–01 (2001) (same). This Thesis focuses on the latter.

[39] Boumediene v. Bush, 553 U.S. 723 (2008).

[40] Some of those key cases are Rumsfeld v. Padilla, 542 U.S. 426 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[41] *See* Authorization for Use of Military Force § 2(a), Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) (authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons . . . .").

[42] Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002).

[43] *Rasul*, 542 U.S. at 473.

Congress responded by passing the Detainee Treatment Act of 2005 (DTA), which, among other things, amended the habeas statute to bar courts from hearing habeas petitions from noncitizens held at Guantánamo.[44] The Court interpreted the DTA's jurisdictional bar to be inapplicable to litigation that was ongoing at the time of its passage,[45] which then spurred Congress again to amend the habeas statute to make the jurisdiction-stripping provision retroactive in the Military Commissions Act of 2006 (MCA).[46] With habeas jurisdiction statutorily removed, the *Boumediene* detainees, held as "enemy combatants," had two mechanisms left to test whether they were rightly identified as such. First, a Combatant Status Review Tribunal (CSRT) process existed within the military, subject to rules promulgated by the Secretary of Defense.[47] Second, the DTA provided the D.C. Circuit authority to review whether the CSRT's status determination for any given petitioner was (1) in accordance with the Secretary's prescribed procedures, and (2) consistent with the "Constitution and laws of the United States[ ]" as relevant.[48] *Boumediene* reviewed two major questions stemming from this situation: Does the Suspension Clause protect the petitioners, who are noncitizens and alleged enemy combatants?[49] And if so, has Congress enacted an "adequate substitute" for the provision of habeas?[50]

Beginning with the first question, the Court took two approaches. It looked to history, noting that legal authorities dating to 1789 are persuasive guidance for understanding the Clause's scope.[51] The Court's historical exegesis led it to conclude that the Framers "deemed the writ to be

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[44] Detainee Treatment Act of 2005, 119 Stat. 2739, 2742 (2005) [hereinafter DTA].
[45] *Hamdan*, 548 U.S. at 576–77.
[46] *See* Military Commissions Act of 2006 § 7, Pub. L. No. 109-366, 120 Stat. 2600, 2636 (2006) [hereinafter MCA], *amending* 28 U.S.C.A. § 2241(e); *see also* Boumediene v. Bush, 553 U.S. 723, 736–39 (2008) (holding that Section 7 of the MCA did, in fact, apply retroactively to strip federal courts of habeas jurisdiction for litigation that was ongoing).
[47] *See Boumediene*, 553 U.S. at 733–34.
[48] DTA § 1005(e)(2)(C).
[49] *See Boumediene*, 553 U.S. at 739–71.
[50] *Id.* at 771–92.
[51] *Id.* at 739 ("[T]o the extent there were settled precedents or legal commentaries in 1789 regarding the extraterritorial

an essential mechanism in the separation-of-powers scheme."[52] By requiring formal suspension (i.e., a congressional act to limit habeas) in narrow circumstances, the Suspension Clause "ensures that . . . the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty."[53] But on the "specific question . . . whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation's security, may assert the privilege of the writ and seek its protection[,]" the Court stated that "[d]iligent search by all parties reveals no certain conclusions" about whether the Suspension Clause should extend to the petitioners.[54] Thus, it turned to precedents and "fundamental separation-of-powers principles" to conclude that habeas jurisdiction should be coterminous with areas of *de facto* U.S. sovereignty.[55] The Court explained that its previous cases dealing with the extra-territorial application of the Constitution concluded that the territorial scope of the Constitution depends "on objective factors and practical concerns" rather than the "formalism" of the government's interpretation, which sought to limit the scope of the Suspension Clause to areas of *de jure* American sovereignty.[56] From this analysis, the Court put forth "at least three factors" relevant to the question of the Suspension Clause's reach: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[57] Those factors led the Court to conclude that the Suspension Clause applied to the *Boumediene* petitioners.[58]

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scope of the writ or its application to enemy aliens, those authorities can be instructive for the present cases.").
[52] *Id.* at 743.
[53] *Id.* at 745.
[54] *Id.* at 746.
[55] *Id.* at 755.
[56] *Id.* at 764.
[57] *Id.* at 766.
[58] *Id.* at 766–71.

Having established that the petitioners had rights under the Clause, the Court then turned to whether the DTA's procedures constituted an "adequate substitute" for the privilege of habeas corpus; if so, the MCA's jurisdiction stripping of habeas jurisdiction would not constitute a suspension. The Court identified two core aspects of habeas review. It noted that it was "uncontroversial" that "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' or relevant law."[59] Additionally, the Court stated that "the habeas court must have the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted."[60] Furthermore, citing early American sources that suggested that the scope of habeas review varied with the extent of a prior proceeding's rigor, the Court analogized Suspension Clause rights to due process jurisprudence.[61] Thus, "[w]here a person is detained by executive order, . . . the need for collateral review is most pressing."[62]

The Court then examined the process by which the petitioners were designated as enemy combatants and noted that the process affords detainees limited ability to provide evidence to challenge the government's case; that detainees do not have access to counsel and may not be aware of the allegations the government claims to justify their designation; and that there is little limit on the admission of hearsay evidence.[63] Because the DTA could not be fairly read to remedy these

[59] *Id.* at 779 (quoting INS v. St. Cyr., 533 U.S. 289, 302 (2001)).
[60] *Id.*; *see also id.* at 787 ("We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, and order directing the prisoner's release.").
[61] *See id.* at 781 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
[62] *Id.* at 783.
[63] *Id.* at 783–84.

concerns, the Court concluded that the MCA's jurisdiction-stripping provision was an unconstitutional suspension of the writ.[64]

B. St. Cyr

The second recent precedent where the Court elaborated on the scope of the Suspension Clause was *INS v. St. Cyr*.[65] Enrico St. Cyr, a citizen of Haiti and a legal permanent resident admitted in 1986, pleaded guilty in 1996 to a violation of law that rendered him deportable.[66] He sought a waiver for deportation, but the federal government construed two recently-passed laws (the Anti-terrorism and Effective Death Penalty Act,[67] AEDPA, and the Illegal Immigration Reform and Immigrant Responsibility Act,[68] IIRIRA) to block waivers for deportation—even for those who (as with St. Cyr) were convicted of their offense before the statutes went into effect. St. Cyr petitioned for habeas corpus, "rais[ing] a pure question of law" about the government's interpretation of these new laws.[69,70] The Court in *St. Cyr* began by noting the canon of constitutional avoidance, which urges courts to construe statutes to accord with the Constitution's requirements.[71] It noted that its precedents implied that "some 'judicial intervention in deportation cases' is unquestionably

[64] *Id.* at 792.
[65] INS v. St. Cyr, 533 U.S. 289 (2001).
[66] *Id.* at 293.
[67] Pub. L. No. 104-132, 110 Stat. 1214 (1996).
[68] Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).
[69] *St. Cyr*, 533 U.S. at 298.
[70] It is worth noting that the distinction between a "question of law" and a "question of fact" is both fundamental in American law and often murky. The core idea is that a question of *law* deals with the meaning of a legal provision while a question of *fact* deals with circumstances of a specific case. St. Cyr argued that the government misinterpreted the meaning of the 1996 immigration reforms, and thus he was contesting solely a question of law; he did not challenge any facts, such as whether he had been convicted of a deportable offense. The big grey area, however, is with "mixed questions of law and fact," which broadly have to do with the application of legal principles to a set of factual circumstances. As we shall see, a substantial amount of the dispute in Thuraissigiam's case concerns how to classify the challenge in his habeas petition and whether it raises a question of law, fact, or a mixed question. *See infra* notes 89–92, 568–573 and accompanying text. For a helpful overview of the law-fact distinction in the context of immigration proceedings, consult Rebecca Sharpless, *Fitting the Formula for Judicial Review: The Law-Fact Distinction in Immigration Law*, 5 INTERCULTURAL HUM. RTS. L. REV. 57 (2010).
[71] *St. Cyr*, 533 U.S. at 299–300.

'required by the Constitution[ ]'"[72] due to the Suspension Clause. It thus argued that any construction of the laws that "entirely preclude[s] review of a pure question of law" would raise "substantial constitutional questions[ ]" that would counsel against such an interpretation.[73]

To justify its suggestions about the scope of the Suspension Clause, the Court turned to a historical analysis of the function of the writ of habeas corpus. The Court noted that the "historical core" of the writ was as a "means of reviewing the legality of Executive detention," and "it is in that context that its protections have been strongest."[74] At common law before 1789 and in the Founding era, "the writ of habeas corpus was available to nonenemy aliens as well as to citizens[,]"[75] and it allowed nonenemy aliens and citizens alike "to challenge Executive and private detention in civil cases as well as criminal."[76] Habeas challenges included review of "the erroneous application or interpretation of statutes[ ]"; early cases from American history "contain no suggestion that habeas relief in cases involving Executive detention was only available for constitutional error."[77] And though historical evidence of the writ at common law was somewhat mixed about whether courts could review, through habeas, the discretionary actions of an official who had undoubted detention authority, the Court proclaimed that cases from the late-nineteenth century to the mid-twentieth century (known as the "finality era," because Congress attempted to render executive immigration decisions "final" as much as constitutionally permissible[78]) were also informative about the Suspension Clause question.[79] "[P]ure questions of law like the one raised by

[72] *Id.* at 300 (quoting Heikkila v. Barber, 345 U.S. 229, 235 (1953)).
[73] *Id.*
[74] *Id.* at 301.
[75] *Id.*
[76] *Id.* at 302.
[77] *Id.* at 302–03.
[78] *See, e.g.*, U.S. Brief, *supra* note 6, at 35 n.9; Respondent Brief, *supra* note 38, at 13 ("Congress enacted a series of statutes that governed from 1891 to 1952, eliminating judicial review by making administrative immigration orders 'final' (hence the term 'finality era').").
[79] *St. Cyr*, 533 U.S. at 304.

[St. Cyr,]" the Court explained, "could have been answered in 1789 by a common-law judge with power to issue the writ of habeas corpus. It necessarily follows that a serious Suspension Clause issue would be presented if we were to accept the [government's] submission that the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute for its exercise."[80] Upon finding such serious Suspension Clause concerns with certain readings of AEDPA/IIRIRA, the Court considered whether the statutes could be read to avoid those issues; it concluded that they could be.[81]

C. Thuraissigiam

Given this context, we return now to Thuraissigiam, for *Boumediene* and *St. Cyr* formed the backdrop of the Ninth Circuit's analysis of his Suspension Clause claim.[82] In particular, it characterized *Boumediene* and *St. Cyr* as "provid[ing] an analytical blueprint."[83] The Ninth Circuit invoked *Boumediene* for its "two-step approach" to analyzing the Suspension Clause, such that the Ninth Circuit considered (1) whether the Suspension Clause applied to Thuraissigiam; and (2) if it does, whether there was an adequate substitute for habeas.[84] Additionally, it noted that *St. Cyr* implies that both "the common-law history of the writ and the [Supreme] Court's finality era cases are relevant to what and whom the Suspension Clause protects."[85]

On *Boumediene* step one, the Ninth Circuit first examined history and the Supreme Court's precedents. It cited the Supreme Court's holdings in *St. Cyr*, *Boumediene*, and *Rasul* to conclude

[80] *Id.* at 304–05.
[81] *See id.* at 308–26.
[82] *See, e.g.*, Thuraissigiam v. U.S. Dep't of Homeland Sec., 917 F.3d 1097, 1106 (9th Cir. 2019) ("*Boumediene* is our starting point, even if it does not provide a direct answer to Thuraissigiam's challenge."); *id.* at 1108 (*St. Cyr* "sheds additional light on the Court's approach to Suspension Clause questions.").
[83] *Id.* at 1106.
[84] *See id.* at 1106–07.
[85] *Id.* at 1109–10.

that the writ would have extended to noncitizens.[86] It also canvassed a litany of case law since the Constitution's ratification to show that habeas was "available to noncitizens—even excluded noncitizens stopped at the border."[87] It furthermore placed "significant weight" on the fact that "[c]ases throughout the finality era, from the 1890s to the 1950s, . . . held firm to this constitutional premise."[88] Thus, the Ninth Circuit concluded that Thuraissigiam was protected under the Suspension Clause.

Turning to *Boumediene* step two, the Ninth Circuit reviewed the credible fear procedures and explained that they lack "rigorous adversarial proceedings prior to a negative credible fear determination[ ]" and that Section 1252(e) "prevents any judicial review of whether DHS *complied* with the procedures in an individual case or applied the correct legal standards."[89] The panel admonished, "We think it obvious that the constitutional minimum—whether Thuraissigiam was detained pursuant to the 'erroneous interpretation or application of relevant law'—is not satisfied by such a scheme."[90] It noted that because the provision "prevents a court from reviewing claims of procedural error relating to a negative credible fear determination, it precludes review of the agency's application of relevant law and thus raises serious Suspension Clause questions."[91] The Ninth Circuit thus reversed the district court and remanded for it to "consider Thuraissigiam's legal challenges to the procedures leading to his expedited removal order."[92] The government petitioned for the Supreme Court to review the case,[93] which was granted on October 18, 2019.[94] The Court's ultimate conclusion on his Suspension Clause challenge should be issued by June 2020.

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[86] *Id.* at 1114.
[87] *Id.*
[88] *Id.* at 1115.
[89] *Id.* at 1118.
[90] *Id.*
[91] *Id.* at 1119.
[92] *Id.*
[93] *See* Petition for Writ of Certiorari, Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. Aug. 2, 2019).
[94] *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 427 (mem.) (2019).

II. Why *Thuraissigiam*

Thuraissigiam's story is worth following not only out of academic interest. His case implicates two crucial areas—one of constitutional law and one of public policy.

First, *Thuraissigiam* is the first case where the Court will have meaningfully expounded the scope of the Suspension Clause since *Boumediene*, over a decade earlier. And the Suspension Clause matters. Habeas, as one commentator noted over half a century ago, is "the safeguard of most other human rights."[95] The writ "is the most powerful weapon for enforcing numerous clauses in the Amendments of 1791 [i.e., the Bill of Rights]."[96] Hence, the Court has "used habeas cases as the vehicle for some of its most consequential constitutional rulings."[97] As a pair of comparative legal scholars put it, the writ of habeas corpus "is definitively the fundamental remedy under the Rule of Law."[98] That so little precedent exists regarding the Suspension Clause, at least according to the *Boumediene* Court, is more reason to believe that habeas is a treasured right; it "simply confirms the care Congress has taken throughout our Nation's history to preserve the writ and its function."[99] *Thuraissigiam*, thus, will almost certainly be an important constitutional development, regardless of its outcome.

Second, the expedited removal process is an enormously important part of the federal government's immigration enforcement. As an amicus brief of various states explained, over forty

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[95] Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143, 144 (1952).
[96] *Id.*
[97] Brief of ABA as *Amicus Curiae* in Support of Respondent at 17, Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. Jan. 22, 2020) [hereinafter ABA Amicus Brief] (citing Roper v. Simmons, 543 U.S. 551 (2005) (Eighth Amendment bars executing juveniles); Strickland v. Washington, 466 U.S. 668 (1984) (establishing standard for ineffective assistance of counsel); In re Gault, 387 U.S. 1 (1967) (establishing due process requirements for juvenile court proceedings); Gideon v. Wainwright, 374 U.S. 335 (1963) (establishing Sixth Amendment right to counsel is incorporated against states); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding facially neutral law administered with prejudice violates Equal Protection Clause)).
[98] DAVID J. CLARK & GERARD MCCOY, THE MOST FUNDAMENTAL LEGAL RIGHT: HABEAS CORPUS IN THE COMMONWEALTH 35 n.3 (2000).
[99] Boumediene v. Bush, 553 U.S. 723, 773 (2008).

percent of all removals in 2016 were through expedited removal; around thirty-five percent of all removals in 2017 were expedited removals.[100] The states claimed that the habeas restriction at issue in *Thuraissigiam* is "a critical component of the expedited removal framework" and that "[e]liminating this provision nullifies the critical feature of expedited removal: the ability to expeditiously remove aliens who are clearly inadmissible."[101] In a similar vein, but in the opposite political direction, an amicus brief from another set of states argued that expedited removal has resulted in "hasty deportations with practically none of the safeguards used in typical immigration proceedings to mitigate the risk of erroneous removal,"[102] leading to even American citizens being wrongfully deported.[103] It is clear that from both perspectives, the stakes in *Thuraissigiam* are behemoth—regardless of whether one hopes for more efficient immigration enforcement or whether one seeks to ensure greater procedural protections in removal proceedings.

Recent policy decisions will also magnify the impact of the Court's decision in *Thuraissigiam*. The statutory framework for expedited removal originally only authorized expedited removal proceedings for noncitizens "arriving in the United States" who were inadmissible due to lack of valid documentation or due to fraudulently misrepresenting facts.[104] However, that provision allows the Attorney General to expand the scope of expedited removal to include "any or all"

[100] Brief for *Amici Curiae* the States of Arizona, Alabama, Alaska, Arkansas, Indiana, Louisiana, Nebraska, South Carolina, South Dakota, and Texas in Support of Petitioners at 5, Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. Dec. 16, 2019) [hereinafter Arizona et al. Amicus Brief].
[101] *Id.* at 14.
[102] Brief for the States of Illinois, California, Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington and the District of Columbia as *Amici Curiae* in Support of Respondent at 4, Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. Jan. 22, 2020) [hereinafter Illinois et al. Amicus Brief].
[103] *See id.* at 7–9 (collecting examples).
[104] *See* 8 U.S.C.A. § 1225(b)(1)(A)(i) (Westlaw through Pub. L. No. 116-138).

noncitizens who cannot show that they have been "physically present in the United States continuously for" two years.[105] Over time, the federal government has exercised greater authority pursuant to that second provision.[106]

Thus, in 1997, when the federal government first promulgated regulations to implement the expedited removal framework, the process was limited to people arriving at ports of entry without requisite documents.[107] In 2002, expedited removal was extended to entrants at sea,[108] and then in 2004 to people "encountered within 14 days of entry without inspection and within 100 air miles of any U.S. international land border."[109] In 2019, DHS announced it would seek to exercise its full statutory authority in implementing expedited removal, thus applying the procedures to anyone who is encountered anywhere within the United States and who has been present for less than two years.[110]

The government claims that expansion of expedited review is "a necessary response to the ongoing immigration crisis."[111] It cites how "hundreds of thousands of aliens are released into the interior of the United States, pending the outcome of their immigration proceedings[,]" because the federal government lacks "sufficient detention capacity and resources to detain the vast majority of aliens DHS apprehends along the southern border."[112] It further points to how there are over 900,000 pending immigration cases (whereas, in 2004, there were less than 168,000).[113] And it explains that "the volume of illegal entries, and the attendant risks to national security and public

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[105] *Id.* § 1225(b)(1)(A)(iii).
[106] This history is lain out in the Illinois et al. Amicus Brief, *supra* note 102, at 9–10.
[107] *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10355 (Mar. 6, 1997).
[108] *See* Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,923, 68,925 (Nov. 13, 2002).
[109] Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,879 (Aug. 11, 2004).
[110] *See* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019).
[111] *Id.* at 35,411.
[112] *Id.*
[113] *Id.*

safety presented by these illegal entries, warrants this immediate implementation of DHS's full statutory authority over expedited removal."[114] The sheer scope of the expedited removal process with its 2019 expansion is "breathtaking," in the words of one amicus brief,[115] and it guarantees much greater application of this summary procedure—especially if the expansion is, indeed, meant to deal with the "hundreds of thousands" of migrants released into the United States pending immigration proceedings.

III. Habeas Corpus and History

This Thesis examines Thuraissigiam's case, but it focuses on a narrow aspect. In particular, I seek to understand the way that history is invoked in the development of law, and I do so through the lens of the Suspension Clause as applied to Thuraissigiam. History is increasingly relevant in constitutional adjudication given the rise of originalism, the idea that the Constitution should be interpreted according to its original public understanding.[116] Additionally, the Suspension Clause is unique among constitutional provisions in that the Court has consistently and diligently looked to history to interpret its meaning. So much is obvious from a cursory review of *St. Cyr*, *Boumediene*, and the Ninth Circuit's analysis in *Thuraissigiam*. And this tendency goes all the way back to the first habeas cases decided by the Court. Chief Justice John Marshall once explained that "for the meaning of the term habeas corpus, resort may unquestionably be had to the common law . . . ."[117] Elsewhere, he wrote that habeas corpus "is used in the [C]onstitution, as [a term] which was well understood"[118] according to English common law, because the common law "is in considerable

[114] *Id.* at 35,412.
[115] Brief for Scholars of the Law of Habeas Corpus as Amici Curiae Supporting Respondent at 23, Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. Jan. 22, 2020) [hereinafter Habeas Scholars Amicus Brief].
[116] *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669 (1991).
[117] Ex parte Bollman and Swartwout, 8 U.S. (4 Cranch) 75, 93–94 (1807).
[118] Ex parte Watkins, 28 U.S. (3 Pet.) 193, 201 (1830).

degree incorporated into our own."[119] Amanda Tyler has remarked that Chief Justice Marshall's observations "confirmed what common sense suggests—namely, that it would be impossible to interpret the Suspension Clause without some understanding of the development of habeas law that preceded its adoption."[120] The Suspension Clause invariably leads us to history.[121] It is therefore a unique provision with which to analyze, more broadly, the ways in which history is invoked to create law.

A. A Roadmap

In considering the broad question of how history is used to write law, this Thesis is split into five subsequent chapters.

Chapter 1 begins by considering the relevance of history in the writing of law. Why, it asks, ought we turn to history to begin with? And what are the ways that history can be invoked? I argue that history is normatively attractive because it provides a neutral metric with which to assess law, which promotes determinism in the law, circumscribes the discretion of judges, and better accords with democratic values. I further identify three distinct ways that history can be used to write law: to establish *practice*, to expound a *theory of politics*, and to affirm notions of *progress*. Each usage of history, I claim, is apparent in the majority opinion in *Boumediene*, and each has particular

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[119] *Id.* at 202.

[120] AMANDA L. TYLER, HABEAS CORPUS IN WARTIME 155 (2017).

[121] *See also* JUDITH FARBEY & R.J. SHARPE WITH SIMON ATRILL, THE LAW OF HABEAS CORPUS 1 (3d ed. 2011) ("Dealing with any aspect of habeas corpus almost inevitably involves its history.") [hereinafter FARBEY & SHARPE]; Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2516 (1998) ("It is well established that the common law history of habeas corpus is integral to the Suspension Clause."); U.S. Brief, *supra* note 6, at 28 (The Court "has focused on Founding-era parameters for the scope of the writ . . . . Indeed, the Court has never found that the Suspension Clause protects a right to habeas corpus that it did not believe had some historical support in 1789."); Brief of Legal Historians as *Amici Curiae* in Support of Respondent at 1–2, Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. Jan. 22, 2020) [hereinafter Legal Historians' Amicus Brief] ("Historical evidence has long been considered by the Court as important in interpreting the Great Writ's availability and scope as guaranteed by the Suspension Clause and federal habeas statute.").

ramifications on the normative value of invoking history. Chapter 1 further argues that history as progress tends to envelop the other uses of history, distorting their value.

Chapters 2 and 3 provide examples of how history can be written differently based on some of the considerations lain out in Chapter 1. In particular, Chapter 2 provides a history of habeas corpus told through particular narratives where the work of the so-called Great Writ was truly extraordinary. Chapter 2 does so not in an ahistorical manner—each story is, in itself, true to the historical record. But it is a tenuous way of telling history. Its history is one that is enticing to the liberal, twenty-first century reader. It is not one that reflects the broader historical record in its full complexity. Chapter 3 thus attempts to tell a different, more holistic story of the writ of habeas corpus. In doing so, it argues that the Great Writ's development was not driven so much by notions of liberty but by the distribution of power among different loci of authority, breaking drastically with the narrative of Chapter 2. After its overarching narrative of the history habeas corpus through the Framing era, Chapter 3 revisits the stories in Chapter 2 to explain how those heroic invocations of the Great Writ might be explained by this revisionist history.

Chapter 4 returns to the question of how to write law from history, and it argues that deep problems nevertheless plague the application of the historical principles of Chapter 3's revisionist history to the creation of habeas jurisprudence. In particular, it emphasizes three evident difficulties that can be shown through comparing Chapters 2 and 3: (1) the difficulties with translating English practice into the new American constitutional schema; (2) the misleading ways in which historical sources, such as William Blackstone or Edward Coke, wrote histories that were nevertheless persuasive to the Framing generation; and (3) the circularity of historical analysis, which is most apparent when considering the early history of the writ. Chapter 4 concludes by showing how analysis of history becomes embedded in judicial opinions and becomes malleable much in

the same way that legal precedents do. Chapter 4 therefore argues that history cannot perform much of what is necessary for it to be normatively desirable given the analysis from Chapter 1.

The final Chapter concludes by returning to Thuraissigiam's plight. It analyzes the core legal questions posed by his habeas petition, and it assesses how history might—or might not—reveal particular paths forward for the Court. It emphasizes that the applications of history revealed in the briefing demonstrate that a key distinction between the government and Thuraissigiam's historical arguments is the distinction between history as practice and history as a theory of politics. Though I make conclusions about the relative strength of the historical evidence, I show more broadly that the level of analysis with which one uses to analyze the historical record powerfully influences the conclusions that one may draw. History, I argue, will play an integral role in *Thuraissigiam*, even as it leaves sufficient latitude to allow for a range of outcomes.

B. A Review of the Literature

We rarely write on clean slates. That truism is all the more appropriate when it comes to the scholarship on habeas corpus, which has been the subject of research, writing, and punditry for centuries. In the American legal context, discussion of habeas is generally bifurcated between habeas as a tool of post-conviction review—implicating issues of criminal justice, judicial efficiency, and federalism—and habeas as a check on executive detention, whether in the context of immigration, war, or terrorism. In the former context, much scholarly work arose around (and in response to) the Supreme Court's 1963 decision in *Fay v. Noia*,[122] which drastically expanded the reach of

[122] 372 U.S. 391 (1963).

habeas in post-conviction review.[123] Particularly influential pieces dating to that era are Paul Bator's 1963 article, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,"[124] and Dallin Oaks' 1966 article, "Legal History in the High Court: Habeas Corpus."[125] Since then, debates over the rightful domain of federal habeas in the postconviction context have raged on,[126] but those questions are outside of the scope of this Thesis. In the non-criminal context, substantial work on habeas corpus has been related to the Court's decisions in *St. Cyr* and its Guantánamo cases (especially *Boumediene*). Especially influential articles include Daniel Meltzer and Richard Fallon's "Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror"[127] and Paul Halliday and G. Edward White's "The Suspension Clause: English Text, Imperial Contexts, and American Implications."[128] Similarly, of course, other commentary abounds.[129]

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[123] *See, e.g.*, Hafetz, *supra* note 121, at 2517–18.

[124] Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 HARV. L. REV. 441 (1963).

[125] Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966) [hereinafter Oaks, *Legal History*].

[126] *See, e.g.*, Frank W. Smith, Jr., *Federal Habeas Corpus: State Prisoners and the Concept of Custody*, 4 U. RICH. L. REV. 1 (1969); Henry M. Hart, Jr., *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219 (2015); Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791 (2009); Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1 (2010); Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417 (2018).

[127] Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007).

[128] Halliday & White, *supra* note 25.

[129] *See, e.g.*, Hafetz, *supra* note 121; Jennifer Norako, *Accuracy or Fairness: The Meaning of Habeas Corpus after* Boumediene v. Bush *and Its Implications on Alien Removal Orders*, 58 AM. U. L. REV. 1611 (2009) (concerning the issues raised by *Thuraissigiam*); Vanessa M. Garza, *Unheard and Deported: The Unconstitutional Denial of Habeas Corpus in Expedited Removal*, 56 HOUS. L. REV. 881 (2019) (same); Daniel Kanstroom, *Expedited Removal and Due Process: A Testing Crucible of Basic Principle in the Time of Trump*, 75 WASH. & LEE L. REV. 1323 (2018) (same); Sonia R. Farber, *Forgotten at Guantánamo: The* Boumediene *Decision and Its Implications for Refugees at the Base Under the Obama Administration*, 98 CALIF. L. REV. 989 (2010) (refugee context); Eva L. Bitran, Boumediene *at the Border?: The Constitution and Foreign Nationals on the U.S.-Mexico Border*, 49 HARV. C.R.-C.L. L. REV. 229 (2014) (on the extension of Boumediene's logic in the extraterritoriality context); Abra Edwards, Note, Cornejo-Barreto *Revisited: The Availability of a Writ of Habeas Corpus to Provide Relief from Extradition under the Torture Convention*, 43 VA. J. INT'L L. 889 (2003) (on extradition).

On the narrower question of how habeas jurisprudence has developed in relation to legal history, three primary areas of literature are relevant to this Thesis. The first area, and perhaps most obvious, consists of analyses of habeas history meant to lay out relevant facts or practices.[130] Included in this category are sources that straddle the line between primary and secondary sources, i.e., early works that purport to lay out the history of habeas corpus while also having the effect of *creating* that history for posterity, since such works might be viewed as authorities on the customs of the time.[131] Second, many works of legal history are critiques or analyses of specific legal controversies; rather than purporting to lay out a comprehensive analysis of the history of habeas corpus, they focus on specific applications of history to law.[132] Third are pieces that are meta-

[130] *See, e.g.*, HALLIDAY, *supra* note 23; Halliday & White, *supra* note 25; TYLER, *supra* note 120; Paul Halliday, *Habeas Corpus*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 673 (Mark Tushnet, Mark A. Graber & Sanford Levinson eds., 2015) [hereinafter Halliday, *Oxford*]; FARBEY & SHARPE, *supra* note 121, at 1–17; CLARK & MCCOY, *supra* note 98, at 34–60; William F. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 953 (1978); Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451 (1996); Neil Douglas McFeeley, *The Historical Development of Habeas Corpus*, 30 SW. L.J. 585 (1976); Dallin H. Oaks, *Habeas Corpus in the States: 1776–1865*, 32 U. CHI. L. REV. 243 (1965); Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605; Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600 (2009); Amanda L. Tyler, *A "Second* Magna Carta*": The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 NOTRE DAME L. REV. 1949 (2016) [hereinafter Tyler, *"A Second* Magna Carta"]; Justin J. Wert, *With a Little Help from a Friend: Habeas Corpus and the Magna Carta after Runnymede*, 43 POL. SCI. & POL. 475 (2010); Donald E. Wilkes, Jr., *Habeas Corpus Proceedings in the High Court of Parliament in the Reign of James I, 1603–1625*, 54 AM. J. LEGAL HIST. 200 (2014); Edward Jenks, *The Story of the Habeas Corpus*, 18 L.Q. REV. 64 (1902); Chafee, *supra* note 95; Maxwell Cohen, *Some Considerations on the Origins of Habeas Corpus*, 16 CAN. B. REV. 92 (1938) [hereinafter Cohen, *Considerations*]; Maxwell Cohen, *Habeas Corpus Cum Causa — the Emergence of the Modern Writ—Parts I & II*, 18 CAN. B. REV. 10, 172 (1940) [hereinafter Cohen, *Cum Causa*].

[131] *See, e.g.*, BLACKSTONE, *supra* note 24; EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND (1644); HENRY CARE, ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT'S INHERITANCE (1680); 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (1803).

[132] *See, e.g.*, Oaks, *Legal History*, *supra* note 125; Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119; Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079 (1995) (providing a broad review of habeas history to situate an analysis of post-conviction review); Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753, 759–70 (2013) (analyzing habeas history to put forth a theory of constitutional habeas); James Oldham & Michael J. Wishnie, *The Historical Scope of Habeas Corpus and* INS v. St. Cyr, 16 GEO. IMMIGR. L.J. 485 (2002) (on the history of habeas corpus and immigration law); Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941 (2011) (reviewing HALLIDAY, *supra* note 23); James Oldham, *The DeLloyd Guth Visiting Lecture in Legal History: Habeas Corpus, Legal History, and Guantanamo Bay*, 36 MAN. L.J. 361 (2012) (discussing the role of legal historians in the Guantanamo litigation).

historical in nature, analyzing the role of history in the development of law at an institutional or theoretical level rather than being case- or even issue-specific.[133]

This Thesis's treatment of legal history straddles the lines dividing the literature on legal history and habeas corpus. I create a framework for describing the ways in which history can be used in the making of law—for evaluating the *role* that history plays when it is invoked. But I also tell two conflicting narratives of the history of habeas corpus to show how different histories can be invoked even when working with the same set of sources. The contradictions between those narratives are then combined with the framework for analyzing the roles of history to engage in the theoretical debate about how history ought to inform constitutional interpretation generally. Finally, in returning to *Thuraissigiam* in its conclusion, this Thesis also applies the insights gleaned from the historical debate back to the instant legal and policy issue.

This Thesis thus provides two primary contributions to the literature. For one, the vast majority of the retellings of the history of habeas corpus were written before Paul Halliday's sweeping revisionist history published in 2010,[134] which is rightly regarded as today's definitive account of the history of habeas in England.[135] But Halliday's history, as another commentator has noted, "is not so much a history of habeas as it is a study of habeas across a fixed time period,

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[133] Some of these pieces deal with questions of constitutional or statutory interpretation. *See, e.g.*, Scalia, *supra* note 116; William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986); GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION (2009). Others are focused on the question of how to use or write history well. *See, e.g.*, Michael E. Parrish, *Friedman's Law*, 112 YALE L.J. 925 (2003); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Kelly, *supra* note 132; Oaks, *Legal History*, *supra* note 132; HERBERT BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY (Norton Library 1965) (1931).

[134] HALLIDAY, *supra* note 23.

[135] *See, e.g.*, John McLaren, *Review of* Habeas Corpus: From England to Empire, 16 REV. CONST. STUD. 121, 121 (2011) (describing Halliday's work as a "magisterial study" that "is destined to be the lasting authoritative work on the history" of habeas corpus); Michael Lobban, *Review Essay*, 7 INT'L J.L. IN CONTEXT 257, 261 (2011) (reviewing HALLIDAY, *supra* note 23) (describing how Halliday's is "the definitive work setting out the history of the writ"); Katy J. Harriger, *How the Writ Became Great*, 73 REV. POL. 162, 162 (2011) (reviewing HALLIDAY, *supra* note 23) (describing the book as a "monumental reexamination of the history of *habeas corpus*" backed by "an impressive empirical study of thousands of writs").

within which distinct themes (rather than time) serve as the independent variable."[136] Halliday's research design is in part a claim about the broader history of habeas; he argues that the writ essentially developed in the late decades of the sixteenth century, without meaningful continuity from earlier forms of habeas corpus or from other kinds of judicial writs.[137] I claim that that there is value in taking the longer-term view of habeas history dating back to the twelfth century, and I attempt to reconcile his history with other retellings. My second main contribution is in using a novel form—that of contrasting two deliberately distinct ways of telling a history of habeas corpus—to justify my substantive claim that history provides only weak constraints on judicial decision making. Whereas other works in habeas history set out to *answer* certain historical questions, my telling of this history in distinct ways is meant to open up philosophical questions about the process of writing history.

[136] Vladeck, *supra* note 132, at 943 n.10.
[137] HALLIDAY, *supra* note 23, at 18.

CHAPTER 1: WRITING LAW THROUGH HISTORY

The provision of the U.S. Constitution concerning the writ of habeas corpus leaves much to be inferred. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[138] That terse sentence, alone, is what the Framers of the Constitution left to posterity. The meaning of the term "Habeas Corpus," the significance of its status as a "Privilege," and the implications of its suspension cannot be ascertained from the face of the text. Proper interpretation of the Suspension Clause, as argued earlier,[139] invariably leads us to history.

This Chapter begins with an analysis of why we might use history when writing law. I offer a few explanations: history is an intuitive guide, it cabins the discretion of judges, and it respects democratic ideals. With a better sense of the purpose of history, I turn to three ways in which history can be invoked. First, lawyers might cite history to argue about established *practice*—what happened in the past might explain what certain words, such as "Habeas Corpus," meant. Second, history might serve to expound a *theory of politics*—history might provide lessons on how people, institutions, or structures operate in order to guide the formation of law. Third, and finally, history might reflect *progress*—by situating the present in an arc of progress from the past, history can be invoked to reflect the development of certain contemporary values.

Each of these three usages of history has particular ramifications on the development of law. What matters for now is not necessarily which usages should be normatively preferred. Instead, this section seeks to show how all three are embedded in the case law relating to the Suspension Clause—specifically in *Boumediene*—and how all three raise issues for guiding law.

[138] U.S. CONST. art. I, § 9, cl. 2.
[139] *See supra* Introduction, Part III.

I. Why Enlist History?

We turn to history primarily because history can elucidate what the law is. As noted at the outset of this Chapter, very little can be ascertained from the face of the Suspension Clause; its text invites an investigation into its historical meaning. But that the law must be determined does not provide a means by which one might determine it. History, legal principles, intuition, or public opinion might all be plausible means for deciding the meaning of a law. The need for determinism is thus unhelpful for assessing different means of legal interpretation.[140]

History provides a particular mechanism for determining law. For one, it seems intuitive that a law should mean whatever it meant when it was first enacted. Hence, as Jamal Greene, Nathaniel Persily, and Stephen Ansolabehere have noted, "Most responsible constitutional interpretation begins with the original meaning of the text . . . ."[141] For two, there is an institutional justification for tying law to history. Ideals about the importance of majoritarian rule and representative institutions permeate the Constitution; after all, its opening phrase is a claim about democratic consent.[142] History cabins the discretion of unelected and unaccountable judges to determine the law because it acts as a benchmark against which to measure different interpretations of law. History thus constitutes, in Justice Scalia's words, a set of criteria "that is conceptually quite separate from the preferences of the judge . . . ."[143] For three, history, conversely, also ties the judge's determination of the law to its original enactment, which at least ostensibly can claim the mantle of democratic ratification (through whatever means were regarded as legitimate at the time). Reliance on history therefore might actualize democratic ideals best because it gives due

[140] *Cf.* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right.").
[141] Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 357 (2011).
[142] U.S. CONST. pmbl. ("We the People of the United States . . . do ordain and establish this Constitution for the United States of America.").
[143] Scalia, *supra* note 116, at 864.

deference to established procedures for ascertaining the will of the people. In this sense, there is merit to Steven Calabresi's statement that Justice Scalia's "theorizing about constitutional interpretation must be read with [a] democratic lodestar in mind."[144]

II. The Uses of History in Writing Law

Given a clearer understanding of the purpose of history in interpreting law, I now turn to three separate ways that history might be employed.

A. History as Practice

History as *practice* is perhaps the most intuitive application of history. In invoking history in this way, we seek the facts of "what happened" in order to inform what the meaning of a provision of law must have meant. For example, in *Boumediene*, the Court turned to history to "address[ ] the specific question . . . whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation's security, may assert the privilege of the writ and seek its protection."[145] The Court's analysis of history is informative.

First, the Court noted that the common law courts "entertained habeas petitions brought by enemy aliens detained in England," but those cases—where courts denied relief to habeas petitioners—were decided on an uncertain basis.[146] The relevance of the petitioners' status as alleged enemy combatants, then, seemed unanswered by historical practice, at least according to the Court.[147] It then considered historical jurisdictions that might be similar to Guantánamo. The government

[144] Steven G. Calabresi, *Afterword to the New Edition*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION 151, 151 (new ed. 2018).
[145] *Boumediene*, 553 U.S. at 746.
[146] *Id.* at 747.
[147] *See id.* at 746 ("Diligent search by all parties reveals no certain conclusions.").

argued that Guantánamo Bay should be analogized to Scotland and Hanover, territories controlled by the English Crown where the writ purportedly did not extend,[148] whereas petitioners and amici sought to analogize Guantánamo to the counties palatine and India, where the writ did run even though the England did not hold formal, sovereign authority over the areas.[149] The Court denied the analogies on both sides, finding the "evidence as to the geographic scope of the writ at common law informative, but, again, not dispositive."[150] The majority in *Boumediene* ended its seven-page-long historical exegesis by noting that all of these arguments relied on an assumption that "the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before us."[151] The novelty of the issues posed by *Boumediene*, and the "unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age," prevented the Court from "infer[ing] too much, one way or the other, from the lack of historical evidence on point."[152]

The Court's conclusion is reflective of the core difficulty with using history to establish practice—the identification of what practice is probative to the legal question. Surely the question whether the writ ran to specific faraway lands could be easily answered as a factual matter.[153] But

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[148] *Id.* at 749–50.
[149] *Id.* at 748–49.
[150] *Id.* at 748. Specifically, it distinguished Scotland and Hanover by noting "the possibility that the common-law courts' refusal to issue the writ to these places was motivated not by formal legal constructs but by . . . prudential concerns." *Id.* at 749; *see also id.* at 750 (noting that Scotland and Hanover both maintained their "own laws and court system[s]" and that, therefore, "prudential considerations would have weighed heavily when courts sitting in England received habeas petitions" from there"). It dismissed the analogy to the counties palatine because the crown maintained sovereignty in these areas, whereas the United States lacks "formal sovereignty" over Guantánamo Bay. *Id.* at 748. Finally, the Court distinguished the India example by arguing that British courts *in India* could issue writs, whereas the petitioners and amici did not bring evidence that British courts in *England* could issue writs *to India*, which would be the relevant analogy to Guantánamo since "no federal court sits" at Guantánamo. *See id.* at 748–49.
[151] *Id.* at 752.
[152] *Id.*
[153] Indeed, Justice Scalia's dissent lambasts the majority precisely because he thought the question was simple: "It is entirely clear that, at English common law, the writ of habeas corpus did not extend beyond the sovereign territory of the Crown." *Id.* at 844 (Scalia, J., dissenting). Sovereignty, of course, is an ill-defined term, *cf. id.* at 754 (majority opinion) (noting ambiguities in the term "sovereignty"), but Justice Scalia's argument draws the key distinction repeatedly between "territories of the Crown" and "foreign dominions." *E.g., id.* at 844–47 (Scalia, J., dissenting). But in recognizing the various distinct ways in which the Crown related to territories—whether the counties palatine,

the question whether the writ ran to "foreign nationals, apprehended . . . during a time of serious threats to the Nation's security," when those threats are "the particular dangers of terrorism in the modern age," can be answered by reference to seventeenth century practice only through analogy. There might be better or worse analogies, but the decision about the propriety of any given analogy—and whether one is sufficiently apt—is difficult. Hence, when we consider a text such as the Suspension Clause, though we might intuitively seek an understanding of its history, the history may have only limited utility if we analyze practice alone. Originalist methods that seek to bind the meaning of the Constitution exclusively to its original understanding are thus unlikely to result in the same conclusion among different judges in difficult cases such as *Boumediene*.[154]

B. History as a Theory of Politics

where local governments ruled based on "franchised granted by the Crown," *id.* at 845, or Ireland, which his dissent quotes Blackstone to say is "'a dependent, subordinate kingdom' that was part of the 'king's dominions[,]'" *id.* at 847 n.7 (quoting 1 BLACKSTONE, *supra* note 24, at *98, *100)—the dissent necessarily acknowledges the myriad forms of sovereignty held by the monarch in early-modern England. Halliday notes, "the terms in every dominion differed owing to the historical circumstances of its acquisition by the king as well as to the environmental, commercial, social, or political possibilities and liabilities peculiar to each. . . . [L]aw made many dominions, not a single empire." HALLIDAY, *supra* note 23, at 143–44. Indeed, writs would issue from the courts of Westminster to Jamaica and Barbados in the seventeenth and eighteenth centuries. *See id.* at 268–71. And, with regard to India, writs issued by the Supreme Court in Calcutta, *see id.* at 284–85, were based on the authority granted to that court by the king, who provided the justices of the Supreme Court "like jurisdiction and authority as may be executed by the chief justice and other justices of the court of King's Bench in England." Quoted in *id.* at 283. In all cases, Halliday's analysis demonstrates that Justice Scalia's dissent is right to emphasize the ways in which habeas jurisdiction was limited by the authority of the king, but it identifies that authority with a very narrow set of practices backed by a limited historical record rather than the broader principles that Halliday attributes to the writ.

[154] *See* Scalia, *supra* note 116, at 856–57 (noting the biggest problem with public understanding originalism as the difficulty of its application). Of course, other methods of interpretation might also rely on the original understanding of the Constitution. *See, e.g.*, James E. Ryan, *Laying Claim to the Constitution*, 97 VA. L. REV. 1524, 1552–55 (2011) (theory of "new textualism"); Perry, *supra* note 116, at 686–87 (delineating between public meaning originalism, "nonoriginalist textualism," and "nonoriginalism"); LIU, KARLAN & SCHROEDER, *supra* note 133, at 2 ("To be faithful to the Constitution is to interpret its words and to apply its principles in ways that preserve the Constitution's meaning and democratic legitimacy over time. Original understandings are an important source of constitutional meaning, but so too are the other sources that judges, elected officials, and everyday citizens regularly invoke: the purpose and structure of the Constitution, the lessons of precedent and historical experience, the practical consequences of legal rules, and the evolving norms and traditions of our society."). But public meaning originalism is unique for its *exclusive* reliance on the original public understanding of constitutional provisions, whereas these other methods of interpretation provide the judge with more tools for assessing the meaning of ambiguous text.

History might be invoked not merely for facts but also for theory. That is, history can be used to instruct—to help us understand principles that might have been embedded into the Constitution. When we understand the context by which certain provisions came about, we gain more insight into the justification for how those provisions were meant to work. By extension, by understanding a particular theory of politics, we may gain insight into what a provision would have meant to someone when the law was first established.

Boumediene is instructive in how it abstracted lessons from history to inform law. The Court understood the Suspension Clause to be a reflection of the Framers' "inherent distrust of governmental power," which "dr[ove]" them to design a government that "allocated powers among three independent branches . . . not only to make Government accountable but also to secure individual liberty."[155] In recounting English history through 1789, the majority wove a narrative where habeas was the enforcement mechanism by which Magna Carta's decree that imprisonment be consistent with law was actualized[156]—a story not unlike that told by the famed English jurists Sir William Blackstone or Sir Edward Coke centuries before.[157] Moreover, the history of the writ's suspension, a history "known to the Framers,"[158] contextualized the Court's observation that they took care "to specify the limited grounds" for suspending habeas since they "deemed the writ to be an essential mechanism in the separation-of-powers scheme."[159] Thus, the formal procedure of suspension—and the limited means by which it can occur—ensured that courts would "have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty."[160]

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[155] *Boumediene*, 553 U.S. at 742.
[156] *Id.* at 740.
[157] *See infra* Chapter 2, Part II(A).
[158] *Boumediene*, 553 U.S. at 742.
[159] *Id.* at 743.
[160] *Id.* at 745.

For the *Boumediene* majority, the history of English practice would serve as context by which to understand the Suspension Clause, and its animating purposes—specifically its role in the separation of powers—would serve as the lodestar for its application to the case itself. This history mattered for the majority, then, not because of what happened, but rather, because of how the Framers *interpreted* what happened. This bifurcates into two separate usages of history in constitutional interpretation. To a public meaning originalist, the historical context for a provision might help us understand what the provision itself meant. To others, that the lessons learned from historical context might serve *as the provision's meaning* on their own. For example, the theory of constitutional fidelity "requires judges to ask not how its general principles would have been applied in 1789 or 1868, but rather how those principles should be applied today in order to preserve their power and meaning in light of the concerns, conditions, and evolving norms of our society."[161] Such a theory would depend on history primarily to contextualize the *principles* embodied by constitutional provisions.[162] As Martin Flaherty has written, "situating ideas in the context in

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[161] LIU, KARLAN & SCHROEDER, *supra* note 133, at 25.

[162] Two other examples are illustrative. Justice William Brennan, in an address on constitutional interpretation, has explained,

> The Framers discerned fundamental principles through struggles against particular malefactions of the Crown; the struggle shapes the particular contours of the articulated principles. But our acceptance of the fundamental principles has not and should not bind us to those precise, at times anachronistic, contours. Successive generations of Americans have continued to respect these fundamental choices and adopt them as their own guide to evaluating quite different historical practices. Each generation has the choice to overrule or add to the fundamental principles enunciated by the Framers; the Constitution can be amended or it can be ignored.

Brennan, *supra* note 133, at 437. By "adopt[ing]" those "fundamental principles" as a "guide to evaluating quite different historical practices[,]" Brennan's understanding of history is primarily as a pedagogical tool rather than a legal constraint on the scope of the Constitution.

Similarly, Justice Jackson's famous opinion for the Court in the flag saluting case explained that constitutional interpretation consists of "translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century," where principles that "in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs[,]" must be "transplant[ed]" into "a soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639–40 (1943). For Justice Jackson, it is precisely the role of the Court—indeed, it is a role that "history authenticates as the function of

which they arose enables us to comprehend and assess those ideas better than we would by viewing them as free-floating principles."[163]

The distinction between history as practice and as a theory of politics demonstrates the ambiguity inherent in interpretive methodologies that prioritize history. Constitutional fidelity, by maintaining that the Constitution is a "declaration of ideals," constitutes a kind of originalism, one founded on the premise that the Framers "memorialized our basic principles of government with broad language whose application to future cases and controversies would be determined not by a mechanical formula but by an on-going process of interpretation."[164] Constitutional fidelity is a kind of public meaning originalism if one believes the original public understanding of the Constitution was that it was an evolutionary document.[165] Another way of interpreting constitutional fidelity is as a kind of originalism at a higher level of generality, where the original public meaning is cast at the level of principle rather than specific practice. It is this flexibility of originalist methodologies that allowed Justice Elena Kagan, during her confirmation hearings, to argue: "[S]ometimes [the Framers] laid down very specific rules. Sometimes they laid down broad principles. Either way, we apply what they say, what they meant to do. So in that sense, we are all originalists."[166] The flexibility in interpretive methodology (what *is* originalism?) mirrors the flexibility in usage of history (when is an application of history an example of history as practice versus an example of history as a theory of politics?).

C. History as Progress

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this Court," *id.* at 640—to maintain the vitality of constitutional principles as society changes.

[163] Flaherty, *supra* note 133, at 550.

[164] LIU, KARLAN & SCHROEDER, *supra* note 133, at 3.

[165] *Cf.* Scalia, *supra* note 116, at 861–62 (noting possibility of this interpretation of the Eighth Amendment but claiming that a lack of persuasive evidence to confirm it).

[166] The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States, Hearing Before the S. Comm. on the Judiciary, 111th Cong., 2d Sess. 62 (2010) (statement of Elena Kagan).

History might also be invoked to define our identity in terms of progression from some previous form. For example, in *Boumediene*, the Court noted that the Suspension Clause's protections may "have expanded along with post-1789 developments that define the present scope of the writ[ ]"[167] as a procedural guarantee. Thus, no matter what the present limits of the writ, the Suspension Clause, the Court reaffirmed, protects "'at the absolute minimum' . . . the writ as it existed with the Constitution was drafted and ratified."[168] Implicit in the Court's dicta is a conviction that the current writ—and our current constitutional order—presumptively guarantees a liberty that is more capacious than the liberty of the 1787 Constitution.[169] In characterizing the past, the Court thus situated the present, invoking history in contrast to our present-day notions of morality, law, and rights.[170] History, when used in this way, is reminiscent of what Sir Herbert Butterfield, in 1931, criticized as a "Whig history."[171] Such uses of history, Butterfield thought, "emphasize certain principles of progress . . . to produce a story which is the ratification if not the glorification of the

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[167] Boumediene v. Bush, 553 U.S. 723, 746 (2008).

[168] *Id.* (quoting INS v. St. Cyr, 553 U.S. 289, 301 (2001)).

[169] In Halliday's words, underlying this statement is

> condescension: a belief that during later epochs, including our own, habeas corpus has more nearly reached its ideal form. That presumption relies on the oldest of Anglo-American narratives, one so deeply engrained . . . that we are unaware of how it obscures our view of the past and of how it guides our thoughts and actions in the present. It is a story in which the life of habeas corpus—thus the life of liberty, we insist—is assumed to have followed a nearly consistent upward path.

HALLIDAY, *supra* note 23, at 314.

[170] Halliday has critiqued this tendency, noting that many narratives of the history of habeas corpus are

> written less as a history than as an exercise in legal narcissism. Through our celebrations of habeas corpus, the Anglo-American liberal mind has praised its uniqueness. It proclaims itself the result of an inescapable process, begun in a misty past, carried through to Magna Carta, past a tyrannical king or two, and finally to its triumph: the realization of all that the writ portended with the help of democratic impulses working through statute-making bodies . . . . This makes an appealing story, in part because we believe—or hope—that it arrives in us.

Id. at 2. *Cf.* Flaherty, *supra* note 133, at 550 ("American theorists do well to turn to our early constitutional history precisely because it is ours. . . [A] given theory should broadly comport with our constitutional document and culture.").

[171] *See generally* BUTTERFIELD, *supra* note 133.

present."[172] Rather than understand the past for its own sake, Butterfield understood Whig histories to "stud[y] the past with reference to the present . . . ."[173]

Consider, for example, Justice Brennan's characterization of the Constitution when explaining his theory of constitutional interpretation:

> The amended Constitution of the United States entrenches the Bill of Rights and the Civil War amendments and draws sustenance from the bedrock principles of another great text, the Magna Carta. So fashioned, the Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being. The Declaration of Independence, the Constitution, and the Bill of Rights solemnly committed the United States to be a country where the dignity and rights of all persons were equal before all authority. In all candor we must concede that part of this egalitarianism in America has been more pretension than realized fact. But we are an aspiring people, a people with faith in progress. Our amended Constitution is the lodestar for our aspirations.[174]

In drawing a throughline from Magna Carta to the Constitution to the Bill of Rights and the Reconstruction Amendments, Justice Brennan invokes a kind of progressive history—one where "bedrock principles" established centuries ago were embedded in the values of the people who "brought this nation into being[,]" to be sacralized into documents that should serve as "the lodestar for our aspirations." History, here, is not invoked with academic rigor that would carefully trace the connections between historical events separated by centuries of experience. It is instead an aspirational call to history, where the past is invoked to bring about some future.

Justice Brennan thus continues, arguing that the foundational ideals behind the U.S. Constitution were "jealously preserved and guarded throughout our history" and "still form the vital force in creative political thought and activity within the nation today."[175] In drawing that narrative arc, Justice Brennan completes a picture not only of a history, but of *Americans'* history—a history

[172] *Id.* at v.
[173] *Id.* at 11.
[174] Brennan, *supra* note 133, at 443.
[175] *Id.* at 445.

of a people guided by a commitment ideals of human dignity and equality. Thus, he concludes, "The Constitution with its Bill of Rights thus has a bright future, as well as a glorious past, for its spirit is inherent in the aspirations of our people."[176] Justice Brennan's invocation of history helps us understand not only how notions of historical progress can attempt to generate certain futures—in this context, a future where liberty and justice are increasingly secured for all people[177]—but also how the mechanism by which it generates those futures is through situating present-day people in a moral arc of progress. It makes for a beautiful call to action, but one that necessarily centers the present and the writer (whether a judge or historian), which is troubling if history is meant to cabin the discretion of judges or to realize some democratic ideal.[178]

III. Butterfield's Challenge

The three uses of history—history as practice, as a theory of politics, and as progress—are analytically distinguishable, but invoking Butterfield helps us understand how history as progress might come to encapsulate and distort the other uses of history. Butterfield was careful to emphasize that the Whig interpretation of history is not "a problem in the philosophy of history, but rather . . . an aspect of the psychology of historians."[179] In other words, we might tell Whig histories not because we lack the ability to tell better histories, but rather, because we are drawn to thinking about history in Whiggish ways—in Butterfield's words, "there is a tendency for all history to veer over into [W]hig history," as if "[t]here is a magnet for ever pulling at our minds . . . ."[180]

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[176] *Id.*
[177] *Id.* ("As we adapt our institutions to the ever-changing conditions of national and international life, those ideals of human dignity—liberty and justice for all individuals—will continue to inspire and guide us because they are entrenched in our Constitution.").
[178] *See supra* Chapter 1, Part I.
[179] BUTTERFIELD, *supra* note 133, at vi.
[180] *Id.* at 6–7.

For Butterfield, "the chief aim of the historian is the elucidation of the unlikenesses between past and present . . . ."[181] Rather than search for the "present in the past[,]"[182] Butterfield thought that historians must try to "understand the past for the sake of the past";[183] only then, in Halliday's words, might history inform law: "not as a grab bag of poor analogies, but as an otherwise unseen position from which to think anew about the questions that law must answer."[184]

Butterfield thought that the key to understanding the past on its own terms was to embrace its full complexity—to refuse to distill history into simple, unidirectional narratives.[185] It is exactly this imperative that helps us understand why lawyers tend to write Whiggish histories.[186] First, it is easiest to cite canonical sources—Blackstone's *Commentaries* or Coke's *Institutes*, for example, to explain the state of early modern English law, or *The Federalist* to examine the original public understanding of the 1787 Constitution—to draw conclusions about history. But those sources alone do not provide a holistic understanding of the past, especially in the context of highly politicized debates. (We might recall, for example, that the writers of *The Federalist* were partisans in a rancorous ratification debate.) Yet such simplistic histories are not uncommon in legal literature.[187]

Second, common law adjudication naturally tends toward problematic abridgments of history because of its adversarial nature.[188] When historical precedents are valued for their own

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[181] *Id.* at 10.
[182] *Id.*
[183] *Id.* at 16.
[184] HALLIDAY, *supra* note 23, at 4.
[185] *See, e.g.*, BUTTERFIELD, *supra* note 133, at 21 ("Perhaps the greatest of all lessons of history is this demonstration of the complexity of human change and the unpredictable character of the ultimate consequences of any given act or decision of men; and on the face of it this is a lesson that can only be learned in detail.").
[186] The empirical claim here is observed by Parrish, *supra* note 133, at 955. For other examples of how "constitutional discourse is replete with historical assertions that are at best deeply problematic and at worst, howlers[,]" see Flaherty, *supra* note 133, at 525–26.
[187] *See* Flaherty, *supra* note 133, at 553–55 (collecting examples).
[188] For example, Robert Kagan has written of the American "legal culture" that emphasizes not only client advocacy over the pursuit of truth on the part of advocates for each side, but also constraints on judges' ability to look to outside evidence than that brought by the lawyers on either side. *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE

sake[189] and when lawyers are zealous advocates for specific causes, they naturally will tend to use—and thus to abuse—history in service of their end.[190] Third, reliance on familiar legal sources, such as reported case law,[191] may not be most instructive to answer the question of what the public meaning of a certain textual provision would have been at the time of its adoption. The insularity of judicial decision making (e.g., norms that bind the facial justifications for decisions)[192] renders court opinions a necessarily slanted perspective on the practices of the time. Legal opinions on

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AMERICAN WAY OF LAW 243–45 (paperback ed., 2d prtg. 2003). Though that specific analysis was in the context of criminal justice adjudication, the broader lesson—about constraints on judicial decision making that bias toward certain ways of explaining the outcome of a case—nevertheless demonstrates how connecting the dots between judicial opinions is not always a meaningful way of telling history.

[189] Alexis de Tocqueville memorably wrote of English and American law:

> [T]here laws are esteemed not so much because they are good as because they are old; and if it be necessary to modify them in any respect, or to adapt them to the changes which time operates in society, recourse is had to the most inconceivable contrivances in order to uphold the traditionary fabric, and to maintain that nothing has been done which does not square with the intentions and complete the labors of former generations.

1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282 (Henry Reeve trans., 1899) (1835).

[190] An interesting analogy here is Coke's speeches during the Parliamentary debates over the Petition of Right, when he drew a (historically problematic) line between Magna Carta and habeas corpus. *See infra* Chapter 2, Part II(A); Chapter 3, Part I(A). Coke, the historian Sir James Holt has emphasized, was not attempting to be a historian when he invoked Magna Carta; rather, he sought to bolster his attack against detention without cause by turning to the past. Hence, "[a]ny judgement he made about medieval society was entirely subsidiary" to his political goal. JAMES C. HOLT, MAGNA CARTA 39 (3d ed. 2015). But moreover, Holt has argued that Coke's invocation of the Great Charter can hardly be described as distortionary because Magna Carta's vagueness, and its ability to bend, "was part of the document's potential." *Id.* Magna Carta, per Holt, is better understood as "a stage in an argument"—as "not only law" but "also propaganda[]"—rather than as a codification of prior custom. *Id.* at 48. Strategic, and sketchy, invocations of historical practice grounded in the Charter, for Holt, should be understood as "inherent in the Charter itself and in the whole debate." *Id.* at 47. Holt continues,

> When Coke asserted that the Charter simply re-established ancient rates of relief, he not only misled his public; he was himself misled by the Charter. Just as Coke used Magna Carta as a defence of 'ancient liberties' against the Stuarts, so the barons of the Charter called on the Laws of Edward the Confessor and Henry I to maintain what they alleged was ancient custom against the government of King John. They distorted just as much as, if not more than, Coke.

Id. Thus, Holt concludes, "to accuse Coke or anyone else of 'distortion' is scarcely illuminating, for to distort a distortion is little more than venial." *Id.* at 48.

[191] Substantial issues exist with the printed case reports as a means for understanding the writ of habeas corpus, as Halliday and White have explained. *See generally* HALLIDAY, *supra* note 23, at 2–5 and accompanying notes; Halliday & White, *supra* note 25, at 589–90.

[192] Gordon Silverstein, for example, has described judges as "not bound by earlier decisions" but, rather, as implicated in "a professional syntax" that privileges at least facial reliance on past decisions. He elaborates,

> [E]arlier decisions structure the dimensions and language of new decisions. Judges . . . are trained (and have been well rewarded) to use that language — to reason by analogy, to think 'like a lawyer,' to build decisions not simply to resolve a particular case, but as part of a far more complex tapestry of reasons and reasoning that might stand for, influence, and shape other cases and other claims.

GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS 64 (2009).

their own, in Halliday's words, are "literally meaningless without the contexts—social and cultural, as well as those provided by other cases—through which we can hope to understand them."[193]

Fourth, these issues compound on each other. Judicial opinions that invoke history become cited in future opinions as authorities on the history.[194] Moreover, the practical realities of judging are also slanted against fully accurate retellings of history in judicial proceedings. When an injured person alleges a violation of law, judges are obligated to render a decision even if the history that should inform their decision is uncertain.[195] Moreover, in the context of a mixed and complex historical record, judges who are trained in law, not history, may not be well positioned to draw conclusions.[196] And judges also have dockets full of cases that need to be decided, which might prevent them from taking the full time necessary to thoroughly review the historical record.[197]

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[193] HALLIDAY, *supra* note 23, at 5.

[194] Examples abound in the briefing for *Thuraissigiam*, to take one example. *See, e.g.*, U.S. Brief, *supra* note 6, at 28 (relying on *St. Cyr* for the statement that habeas, "[a]t its historical core, . . . has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest"); *id.* at 29 (relying on *Munaf v. Green*, 553 U.S. 674 (2008), for the proposition that the "long-standing understanding" of habeas is as a "mechanism for challenging executive detention and seeking release from that detention"); *id.* at 30 (citing *Castro v. U.S. Dep't of Homeland Sec.*, 835 F.3d 422, 450 (3d Cir. 2016) (Hardiman, J., concurring dubitante) and *Hamama v. Adducci*, 912 F.3d 869, 875–76 (6th Cir. 2018) for the proposition that Thuraissigiam's requested relief "has no parallel in the common-law writ"); *id.* at 45 (citing the district court's judgment in *Castro* for the proposition that "historical precedent strongly suggests" that the Suspension Clause does not require review of questions of fact or mixed questions of law and fact (quotation marks omitted)); Respondent Brief, *supra* note 38, at 24 (citing *St. Cyr* for the proposition that habeas "has historically covered both the 'interpretation' and 'application' of the law"); *id.* at 26 (citing *St. Cyr* for the argument that "in 1789 habeas was a powerful tool for judicial examination of the lawfulness of restraint on a wide range of contexts"); *id.* at 34–35 (citing *Boumediene* for authority that the Framers, in writing the Suspension Clause, specifically intended to replace the "King's prerogative to call any jailer to account" with ensuring that judges "would always be empowered to inquire into the legality of physical restraint by the other branches, except during formal, and carefully circumscribed, suspensions"); Habeas Scholars Amicus Brief, *supra* note 115, at 6–7 (citing *St. Cyr* for the historical scope of habeas).

[195] *Cf.* Brennan, *supra* note 133, at 434 ("Judges cannot avoid a definitive interpretation because they feel unable to, or would prefer not to, penetrate to the full meaning of the Constitution's provisions. Unlike literary critics, judges cannot merely savor the tensions or revel in the ambiguities inherent in the text—judges must resolve them.").

[196] *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 126 (2005) (In discussing historical uncertainty regarding the Ex Post Facto Clause, Justice Stephen Breyer notes, "[t]he truthful answer . . . is that no one but an expert historian could possibly know. And even the experts might disagree. Judges are not expert historians. How does reliance upon history bring about certainty or objectivity in such a case?").

[197] Justice Scalia, for example, has written regarding the Supreme Court's term,

> Except in those very rare instances in which a case is set for reargument, the case will be decided in the same Term in which it is first argued—allowing at best the period between the beginning of

None of this is to say that lawyers are necessarily abusing the past when they invoke history. Rather, it is to show that lawyers will be drawn toward the kind of bold storylines that tenuously connect the dots between successive cases to arrive at legal rules and principles to explain the present. Telling such stories is an inevitable aspect of history, for historians must "distill the nearly infinite records of the past in order to impose some semblance of order on what would otherwise feel like overwhelming chaos."[198] But Butterfield's critique was not against abridgment generally; it was, instead, that Whig historians assume the outcome of their analysis of history, such that their distillation of the historical record is not a "genuine abridgment, for it is really based upon what is an implicit principle of selection."[199] In this way, history as progress—history written with the present in mind—can distort whatever benefits of objectivity that history as practice or as a theory of politics may bring. Chapters 2 and 3 present contrasting examples of the history of habeas corpus to illuminate these dynamics.

> October and the end of June, and at worst the period between the end of April and the end of June. . . . Do you have any doubt that this system does not present the ideal environment for entirely accurate historical inquiry?

Scalia, *supra* note 116, at 860–61 (footnote omitted).

[198] William Cronon, *Two Cheers for the Whig Interpretation of History*, AM. HIST. ASS'N: PERSP. ON HIST. (Sept. 1, 2012), https://www.historians.org/publications-and-directories/perspectives-on-history/september-2012/two-cheers-for-the-whig-interpretation-of-history (last visited Mar. 7, 2020).

[199] BUTTERFIELD, *supra* note 133, at 25.

CHAPTER 2: THE GREAT WRIT OF LIBERTY

What Chief Justice Marshall referred to as the "great writ"[200] was a powerful one indeed. For hundreds of years now, we have told stories of the Great Writ of Liberty, one that attributes a kind of heroic agency to habeas corpus. This Chapter tells one version of that history. It begins by examining four particular cases where the writ did much to actualize liberty, and then it turns to prominent commentators—both English and American at the time of the Constitution's framing—to show how entrenched versions of this history are in American law.

I. Hearing the Sighs of Prisoners and Detainees[201]

This section examines four stories of how habeas corpus, when wielded by the capable justices of King's Bench, was able to do so much to guarantee the liberty of early-modern English subjects.

A. Walter Witherley[202]

Walter Witherley suffered to the point of drinking his own urine while in prison. Ordered jailed in 1604 by the Council in the Marshes of Wales, Witherley sought help: he asked the justices of King's Bench, in Westminster, to issue the writ of habeas corpus. The writ issued to Francis Hunnyngs, Witherley's jailer, asking for Hunnyngs to bring Witherley's body to Westminster and to explain the cause of his detention. Hunnyngs was told to ignore the writ, and the writ was thus left unreturned. King's Bench sent another writ—an *alias* writ. Another writ left unreturned. In

[200] *See generally* Ex parte Bollman & Swartwout, 8 U.S. (4 Cranch) 75 (1807).
[201] I borrow this phrasing from Halliday. *See* HALLIDAY, *supra* note 23, at 7 ("[U]nderlying modes of judgment was the central fact of habeas corpus: that a judge should hear the sighs of all prisoners, regardless of where, how, or by whom they were held.").
[202] Witherley's story is told in *id.* at 11–13.

February 1605, Hunnyngs was brought to London and examined by King's Bench. Hunnyngs must have thought he was safe: he was supported by the Earl of Salisbury, second only to the king, and his justification for jailing Witherley was that he was ordered to do so by the Welsh Council, which traced its authority through the Privy Council—the King's advisory body—to the king himself. Surely, Hunnyngs must have thought, he was on firm legal footing.

Not so. The justices of King's Bench, confronted with a man who dared to not return their writs, were not impressed by his defenses. Instead, Attorney General Sir Edward Coke argued, Hunnyngs's actions reflected *insubordination* to the king, for his "absolute and supreme power" is embodied in "his bench, which is his proper seat of justice." Witherley was already freed at this point, but King's Bench was not satisfied. For good measure, they jailed Hunnyngs for contempt, slapping him with a £100 fine to force the point home. The essential purpose behind the Great Writ had been served for Witherley: he was set a liberty, and King's Bench taught the jailer a lesson.

B. Bridget Hyde[203]

The Great Writ's most famous work would be for prisoners such as Witherley—those who were jailed (justly or unjustly). But the writ was capable of much more, as Bridget Hyde would learn. Hyde was a mere three years old when her mother remarried, with Sir Robert Viner, the lord mayor of London, as her new husband. One John Emerton claimed Hyde to be his wife, but Viner, who hoped Hyde would marry the son of the Earl of Danby for political purposes, hoped to keep Hyde away from Emerton. Emerton pleaded to King's Bench, and Chief Justice Sir Matthew Hale issued the writ of habeas corpus to Viner, demanding Hyde be brought into court. After ignoring both the initial writ and the *alias* writ, Viner finally sent a return to the *pluries* writ, claiming (falsely) that

[203] Hyde's story comes from *id.* at 125.

Hyde was not in his custody. Chief Justice Hale, skeptical of the return, demanded that Viner bring Hyde into court. Gathered in the Court of King's Bench, Hyde—at this point, she must have been around thirteen years old[204]—stood in-between Viner to one side and Emerton to the other. Chief Justice Hale asked her to whom she wished to go with. She would choose Viner. Perhaps a questionable choice to leave such a momentous question up to a teenager. But the authority of the Great Writ was clearly broad when the liberty of English subjects was threatened. Hyde's story shows how the writ not only extended into various facets of life beyond state-sanctioned captivity, but also how judges could do justice as they saw fit, with Chief Justice Hale leaving the outcome of the litigation to Hyde.

C. Mary Lady Rawlinson[205]

Beyond policing the actions of seemingly-abusive fathers, the writ also issued in cases of violent husbands. In the 1720s, Mary Lady Rawlinson was kidnapped by her estranged husband. Before her marriage to Michael Lister, she arranged for her estate to be under her sole power, out of his control should the marriage turn ugly. It was a prescient move. Their marriage did fall apart. They made a deed of separation, which kept them married in law, but, by contract, they became financially independent. Lister sought to reconcile with her, and when she refused, he and an accomplice kidnapped her "to a remote place." And yet, a writ of habeas corpus would issue from King's Bench. Within a few short days, Lister would go before the justices, having produced the body of his wife. Perhaps he complied relatively quickly because he was confident in his position. After all, by law, as his lawyer would argue to the justices, "the husband has a coercive power over his

[204] This episode occurred in 1675, and Hyde was born around 1662. *See Bridget Hyde*, GENI, https://www.geni.com/people/Bridget-Hyde/6000000003972012241 (last visited Mar. 8, 2020).
[205] This story comes from HALLIDAY, *supra* note 23, at 177–78.

wife." Undoubtedly so. Early-modern English law certainly afforded a husband authority over his wife. But, the justices would note, that authority was not broad detention authority, "for by the law of England she is entitled to all reasonable liberty, if her behavior is not very bad." While perhaps neither the most philosophically sophisticated statement nor a shining example of egalitarian principles, the Great Writ did as it was charged: it set an abused woman at liberty, even in the seemingly-private domain of marriage.

D. James Somerset

The most famous illustration of the Great Writ's power did not concern child custody or abusive husbands—it had to do with the ugly institution of slavery. In 1749, James Somerset was made Charles Steuart's slave under the laws of the colony of Virginia.[206] Two decades later, Somerset would accompany Steuart to England; when he had the chance, he fled from Steuart's captivity in October 1771.[207] Steuart had Somerset seized and put on a ship bound for Jamaica, to be sold in the slave markets.[208] But the abolitionist Granville Sharp heard of Somerset's captivity and sought a writ of habeas corpus from King's Bench.[209] Habeas, through *Somerset's Case*, was used to directly question whether slavery would be lawful in England[210]—an early example, perhaps, of impact litigation.

The writ was issued to Captain Knowles, who was detaining Somerset;[211] the return, explaining Captain Knowles's purported authority to detain Somerset, consisted of a simple statement—Somerset was a slave. Chief Justice Lord Mansfield summarized the case: "[T]he only

[206] *Id.* at 174.
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.* at 175.
[211] Somerset v. Stewart (1772) 98 Eng. Rep. 499, 499 (K.B.).

question before us is, whether the cause on the return is sufficient? If it is, the negro must be remanded; if it is not he must be discharged."[212] Observing that slavery is "so odious, that nothing can be suffered to support it, but positive law[,]"[213] Lord Mansfield searched in vain for legal authorization for slavery. Given none, "the black must be discharged."[214]

Lord Mansfield understood his opinion to have potentially groundbreaking effects, given that some fourteen thousand Africans were enslaved in England.[215] And his analysis of slavery—grounded on an intuition that slavery was against the law of nature and thus needed support in positive law[216]—reflected the height of the potential of habeas corpus as the Great Writ of Liberty. It was a decision that was "widely understood as freeing slaves in England,"[217] and it was "immediately and widely celebrated."[218]

II. Writing the Great Writ

Stories such as the aforementioned four must have had a powerful effect on commentators in the seventeenth and eighteenth centuries, many of whom were effusive about the Great Writ. This section examines two particularly important legal figures—Blackstone and Coke—and then turns to a survey of historical evidence from the American Constitution's Framers. All evince a robust faith in the Great Writ.

A. William Blackstone and Edward Coke

[212] *Id.* at 510.
[213] *Id.*
[214] *Id.*
[215] *Id.* at 509 ("The setting 14,000 or 15,000 men at once free loose by a solemn opinion, is much disagreeable in the effect it threatens.").
[216] *See* Eugene V. Rostow, *The Negro in Our Law*, 9 UTAH L. REV. 841, 842 (1965) ("Mansfield's position has powerful echoes of the Roman law, where slavery was regarded as contrary to the law of nature.").
[217] J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 543 (3d ed. 1990).
[218] HALLIDAY, *supra* note 23, at 175.

Given the broad ability of the writ to secure the liberty of individuals, it should be no surprise that Sir William Blackstone, in his influential *Commentaries on the Laws of England*, described habeas corpus as "that second *magna carta*, and stable bulwark of our liberties."[219] Blackstone saw habeas corpus—and in particular, the Habeas Corpus Act of 1679[220]—as perfecting the English Constitution's devotion to liberty and the rule of law first laid down in Magna Carta:

> *Magna carta* only, in general terms, declared, that no man shall be imprisoned contrary to law: the *habeas corpus* act points him out effectual means, as well as to release himself, though committed even by the king in council, as to punish all those who shall thus unconstitutionally misuse him.[221]

Indeed, Blackstone saw a heritage of liberty tracing further back even than the 1215 Magna Carta. Instead, liberty from arbitrary imprisonment was a doctrine embedded in "the first rudiments of the English constitution[,]" one that was "handed down to us from our Saxon ancestors"; that, while subverted by "struggles with the Danes[ ] and the violence of the Norman conquest[ ]" was nevertheless "confirmed by the conqueror himself and his descendants[ ]"; that became "established on the firmest basis by the provisions of *magna carta*, and a long succession of statutes enacted under Edward III[.]"[222]

Blackstone's faith in habeas corpus was well-placed. He was no libertarian who believed in absolute liberty; indeed, he explained that an "absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society[.]"[223] Thus, instead, he identified the "glory of the English law" in "clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful."[224] Concomitant

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[219] 1 BLACKSTONE, *supra* note 24, at *133.
[220] For example, Blackstone elsewhere describes the Habeas Corpus Act as "that great bulwark of our constitution." 4 *id.* at *431.
[221] *Id.* at *432.
[222] 3 *id.* at *133; *see also id.* at *135 (describing the "famous *habeas corpus act*" as "frequently considered as another *magna carta* of the kingdom") (footnote omitted).
[223] *Id.* at *133.
[224] *Id.*

to that commitment to rule of law was the ability of a court "upon an *habeas corpus*" to inquire into the validity of the cause of detention, and "according to the circumstances of the case may discharge, admit to bail, or remand the prisoner."[225] Indeed, so infatuated was Blackstone with the writ that he proclaimed that the writ should be understood as "the true standard of law and liberty."[226] Habeas was a synecdoche for liberty itself, in Blackstone's eyes, in part because of its supposed heritage in Magna Carta, which, as Halliday describes it, is "as close to scripture as English law comes."[227]

Blackstone was no aberration. Over a hundred years earlier, lawyers arguing for the Petition of Right[228] also traced the writ to the Great Charter. Sir Edward Coke's draft Petition of Right, submitted a few months before its eventual adoption in June 1628, connected Magna Carta to habeas:

> Whereas it is declared and enacted by Magna Carta that no free man is to be convicted, destroyed, etc. . . . ; and whereas the said Great Charter was confirmed and that the other laws, etc., be it enacted that Magna Carta and these said acts of explanation and other the acts be put in due execution, and that all judgments, awards, and rules given or to be given to the contrary shall be void; and whereas by the common law and statutes it appears that no free man ought to be committed by command of the King, etc., and if any free man be so committed, and the same returned upon a *habeas corpus*, he ought to be delivered or bailed.[229]

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[225] *Id.*
[226] *Id.* at *135.
[227] HALLIDAY, *supra* note 23, at 15.
[228] Greater historical context for the Petition of Right and the Habeas Corpus Act are provided below. *See infra* Chapter 3, Part I(E)(3)(iii)–(iv).
[229] Speech in the Committee of the Whole House (Apr. 29, 1628), *reprinted in* 3 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 1270, 1270 (Steve Sheppard ed., 2003) [hereinafter SELECTED WRITINGS OF COKE].

Indeed, the final version of the Petition of Right itself would prominently emphasize detention without cause as a key grievance,[230] and Coke would go on to describe the Petition of Right as "a branch of Magna Carta."[231]

We shall see later that this link between Magna Carta and habeas is ahistorical.[232] But it made for stirring arguments in seventeenth-century Parliament. Thus, the historian Faith Thompson writes, "protagonists of the common law such as Coke" are responsible for "the elaborate glosses which made" chapter 29 of Magna Carta into "the 'palladium of English liberties'" and subsequently linked that chapter to habeas corpus—a link that is still a common misconception.[233]

B. The Framing of the American Constitution

The Great Writ also made a powerful impression on the Framing generation. The denial of habeas was one of the reasons used to justify the American Revolution,[234] and revolutionaries ensured its provision, for example, in the Northwest Ordinance.[235] The positive law authorizing habeas in the

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[230] One clause of the Petition reads,

> [D]ivers of your subjects have of late been imprisoned, without any cause shewed; and when, for their deliverance, they were brought before your justices, by your maj.'s writs of *Habeas Corpus*, there to undergo and receive as the court should order, and their keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained by your maj.'s special command, signified by the lords of your privy council; and yet were returned back to several prisons, without being charged with any thing, to which they might make answer by due process law.

Petition of Right, *reprinted in id.* at 1288, 1289.

[231] Speech reporting on delivering, enrolling, and printing the Petition of Right (June 13, 1628), *reprinted in id.* at 1297, 1297.

[232] *See infra* Chapter 3, Part I(A).

[233] FAITH THOMPSON, MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300–1629, at 68 (1948); *see also id.* at 325 (summarizing parliamentary debates over the Petition of Right that link Magna Carta to habeas corpus); HALLIDAY, *supra* note 23, at 15–16 ("Habeas corpus, argued Sir Edward Coke, John Selden, and their allies during the 1628 House of Commons debates on the 'liberty of the subject,' was the means implied in the charter by which English law could ensure that 'the law of the land' was rightly used. By this brilliant sleight of hand, they fused Magna Carta and habeas corpus together for the purposes of political argument. . . . [H]abeas corpus remains firmly, if incorrectly, joined to the charter in the popular imagination. Like the ideas conveyed by scripture, belief, not empirical demonstration, continues to hold them together.") (footnotes omitted).

[234] Halliday, *Oxford*, *supra* note 130, at 677.

[235] ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT § 14, art. 2, *reprinted in* 1 UNITED STATES CODE at LVI (Office of the Law Revision Counsel of the House of Representatives ed., 2006), https://uscode.house.gov/download/annualhistoricalarchives/pdf/OrganicLaws2006/ord1787.pdf ("[T]he inhabitants of the

Northwest Territory specifically stated that inhabitants were "entitled" to habeas; similarly, state constitutions also used the language of entitlement, "recognizing a liberty claim that preceded any formal provision."[236] Before the ratification of the Constitution, four states provided for the writ explicitly in their constitutions, and courts in most others used the writ without legislative authority.[237] Thus, the men who gathered in Philadelphia to write the new Constitution in 1787 "assumed the importance of habeas corpus."[238] That assumption of importance is reflected in the discussions of habeas sprinkled throughout Framing-era documentation.

For example, the Suspension Clause itself seemed to justify little debate at the Convention. On August 28, 1787, Charles Pinckney, "urging the propriety of securing the benefit of the habeas corpus in the most ample manner, moved, that it should not be suspended but on the most urgent occasions, and then only for a limited time, not exceeding twelve months."[239] Though John Rutledge and James Wilson both were skeptical about the need for suspension, Gouverneur Morris moved forward with text that, with very minor modifications, would become the final Suspension Clause,[240] thereby allowing for suspension "when in Cases of Rebellion or Invasion the public Safety may require it."[241] Other than small stylistic concerns, this was essentially the scope of the debate at the Convention; when Morris's proposed clause went up to a vote, there was unanimity in the necessity of the provision of habeas corpus, but there was limited dissent from a pocket of Southern states for allowing suspension.[242]

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said territory shall always be entitled to the benefits of the writs of *habeas corpus* . . . .").
[236] Halliday, *Oxford*, *supra* note 130, at 679.
[237] *Id.*
[238] *Id.* at 677.
[239] 5 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 484 (1836).
[240] See id.
[241] U.S. CONST. art. I, § 9, cl. 2.
[242] *See* TYLER, *supra* note 120, at 128–29 (summarizing the Convention debates).

That a guarantee of habeas was assumed can also be ascertained from the descriptions of the writ throughout the Framing era. John Taylor, at the Massachusetts ratifying convention, called habeas a "darling privilege" and asked why the Suspension Clause lacked a temporal limit on suspension.[243] At that same convention, Judge Increase Summer described the "privilege" as "essential to freedom, and therefore the power to suspend it is restricted."[244] Indeed, Samuel Nason, a vociferous polemicist against the Constitution, harshly critiqued the Suspension Clause because the writ is "a great bulwark—a great privilege indeed. We ought not, therefore, to give it up on any slight pretence. . . . Why is not the time [for suspension] limited, as is our Constitution? But, sir, its design would then be defeated. It was the intent, and by it we shall give up one of our greatest privileges."[245]

Similarly, Thomas Tredwell, at the New York ratifying convention, was concerned that the Suspension Clause provided the authority for suspending habeas, that "great privilege, so sacredly secured to us by our state constitutions[.]"[246] William Grayson, at the Virginia convention, described habeas as "that great and valuable right."[247] And James Iredell, at the North Carolina ratification debates, noted the crucial way that habeas and trial by jury "secure the citizen against arbitrary imprisonment, which has been the principal source of tyranny in all ages."[248] *The Federalist* took the same position, describing "the establishment of the writ of *habeas corpus*, the prohibition of *ex post facto* laws, and of TITLES OF NOBILITY" as "perhaps greater securities to

[243] 2 ELLIOT, *supra* note 239, at 108.
[244] *Id.* at 109.
[245] *Id*. at 137.
[246] 2 *id.* at 399.
[247] 3 *id.* at 449.
[248] 4 *id.* at 145; *see also id.* at 171 ("[T]he great instrument of arbitrary power is criminal prosecutions. By the privileges of the *habeas corpus*, no man can be confined without inquiry; and if it should appear that he has been committed contrary to law, he must be discharged.").

liberty and republicanism than any" the Articles of Confederation contained.[249] Quoting Blackstone to describe habeas as "the BULWARK of the British Constitution,"[250] Alexander Hamilton clearly understood the provision of habeas—along with jury trials and the few other rights provisions in the 1787 Constitution—to be a critical protector of liberty. Thus, he wrote in *Federalist* 83,

> Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas corpus* act, seems therefore to be alone concerned in the question. And both of these are provided for in the most ample manner in the plan of the convention.[251]

The Framers of the Constitution evinced an expectation that habeas corpus would be incorporated into their new charter. The debate was about whether to allow its suspension—to allow for *exceptions* to habeas. Its inclusion in the 1787 Constitution—before the addition of the Bill of Rights—surely, then, suggests the centrality of this Great Writ of Liberty.[252] At least in the eyes of Edward Coke and William Blackstone, the Great Writ descended from Magna Carta itself. Over time, as notions of English liberty crystallized under the rule of law, the Great Writ would continue to serve as the "stable bulwark of our liberties."[253] When its protections were deprived of the British colonists in America, the Americans would revolt, and, upon overthrowing the British, they would return the writ to its proper place in their own Constitution.[254]

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[249] THE FEDERALIST NO. 84, at 418–19 (Alexander Hamilton) (Jim Miller ed., 2014).
[250] *Id.* at 419 (quoting 4 BLACKSTONE, *supra* note 24, at *438).
[251] *Id.* NO. 83, at 408 (Alexander Hamilton).
[252] *See* Boumediene v. Bush, 553 U.S. 723, 739 (2008) ("[P]rotection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights. In a system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause.").
[253] 1 BLACKSTONE, *supra* note 24, at *133.
[254] *See infra* Chapter 3, Part I(E)(4) (discussing parliamentary suspensions of the writ and their lasting impression on the Framing generation).

This is a particular way of telling history, one that focuses on the progressive development of liberty. It is certainly a selective story; four centuries of history between the issuance of the 1215 Magna Carta and Edward Coke's speeches on the Petition of Right in 1628 are left out. And it is an episodic understanding of history, whereby a few illustrative stories, culled of their proper historical context, might stand in for centuries of complex experience. Chapter 3 proceeds with a different history of the Great Writ.

CHAPTER 3: TOWARD A NEW HISTORY OF HABEAS CORPUS

This Chapter attempts to tell a different story of the Great Writ, one that does not locate the crux of its development in evolving standards of liberty. Though the writ is often traced back to Magna Carta, this story locates the antecedents of habeas corpus in writs concerning the movement of bodies in legal processes and in attempts to centralize power within the courts of Westminster. In tracing the development of legal writs—some known by the name of habeas corpus and others not so—we tell a more complicated story of habeas corpus that emphasizes both power struggles between different institutions and also contingency in the development of what we now know as the Great Writ.

I. A Revisionist History of Habeas Corpus

A. Magna Carta and the Antecedents to the Writ of Habeas Corpus

The language of "habeas corpus" certainly dates back far, at least to the twelfth century,[255] and those Latin words were not uncommon in judicial writs by the early thirteenth century.[256] The claim, then, that the writ's origins lie in Magna Carta is not facially implausible. As noted earlier,[257] Coke, in the 1628 parliamentary debates over what would become the Petition of Right, invoked the Great Charter to claim that the 1215 charter's thirty-ninth chapter[258] called for the writ of habeas corpus as a way to check against unlawful detention. Historians into the nineteenth century

[255] Cohen, *Considerations*, *supra* note 130, at 112.
[256] FARBEY & SHARPE, *supra* note 121, at 2.
[257] *See supra* Chapter 2, Part II(A).
[258] Magna Carta, 1215, c. 39, *reprinted in* HOLT, *supra* note 190, at 373, 389 ("No free man is to be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, or will we go or send against him, except by the lawful judgement of his peers or by the law of the land."). In subsequent issuances of Magna Carta, this clause would be renumbered to become the twenty-ninth chapter.

would continue to perpetuate the idea that Magna Carta was "the parent of the writ."[259] But there is now broad consensus among historians that Chapter 39 of Magna Carta did not point to any specific process to guarantee detention only according to the "law of the land,"[260] and, thus, there is no historically-sound way to trace the writ to Magna Carta.[261]

That being said, a handful of legal writs did perform some of the functions that the writ of habeas corpus later would, in the sense that they concerned the liberty of detained bodies. In most discussions of the history of habeas corpus, the same writs are routinely mentioned: the writ *de odio et atia* ("for hatred and ill will"), the writ *de homine replegiando* ("personal replevin"), and *manucaptio* (also known as "mainprize").[262] And in this early period—the twelfth, thirteenth, and fourteenth centuries—these writs were "more closely associated with the idea of liberty" than early forms of habeas corpus.[263]

De odio et atia was a writ used to test whether a prosecution of homicide was based out of hatred or malice and, unlike the other two writs,[264] could lead to the full release of a petitioner

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[259] Cohen, *Considerations*, *supra* note 130, at 94.

[260] *See, e.g.*, HOLT, *supra* note 190, at 39–48 (emphasizing subsequent developments to the 1215 issuance of Magna Carta that clarified its chapters); BAKER, *supra* note 217, at 537–38 ("No remedy was mentioned, and that was perhaps the source of its strength; for this vague promise would become, in later centuries, a broad guarantee of personal liberty and a source of protection against the Crown itself. It was taken in the early seventeenth century, anachronistically, to entrench procedural natural justice, *habeas corpus*, the grand jury, and jury trial. In medieval times it was more often cited as the warrant for trial by peers in the House of Lords. None of these was part of the original intent.") (footnote omitted).

[261] Jenks, *supra* note 130, at 65; HALLIDAY, *supra* note 23, at 15–16; Cohen, *Considerations*, *supra* note 130, at 94–95 ("[I]t is generally agreed that there was in fact no strict connection between the writ and Magna Carta. . . . [T]he spirit of liberty which the Barons sought to protect [in ratifying Magna Carta] was hardly the same high sentiment which Coke and Seldon [sic] had in mind when they debated the merits of *habeas corpus*.") (footnotes omitted).

[262] *See* Cohen, *Considerations*, *supra* note 130, at 96; 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW *582–87 (S.F.C. Milsom ed., 2d ed. 1968) (1898); FARBEY & SHARPE, *supra* note 121, at 2–4; HALLIDAY, *supra* note 23, at 17; Jenks, *supra* note 130, at 66. Indeed Coke himself put habeas in the category of the "number and diversity of remedies, which the laws give against imprisonment, *viz. Breve de Homine replegiando; de Odio & Atia; de Habeas Corpus;* an appeal of imprisonment. *Breve de Manucaptione*. The two latter of these are antiquarted; but the writ *de odio & atia* is revived . . . ." Speech in Conference with the Lords (Apr. 3, 1628), *reprinted in* 3 SELECTED WRITINGS OF COKE, *supra* note 229, at 1243, 1246 (footnote omitted). Similarly, Blackstone also invoked these same writs and grouped them with habeas. *See* 3 BLACKSTONE, *supra* note 24, at *128–29.

[263] FARBEY & SHARPE, *supra* note 121, at 3.

[264] HALLIDAY, *supra* note 23, at 17 (noting mainprize and *de homine replegiando* could only be used to release someone on bail).

upon a successful motion.[265] The writ *de homine replegiando* was invoked to secure one's release upon bail, but it did not issue for those imprisoned by special command of the king or those accused of felonies.[266] As a result, it was primarily used in the context of private detention or non-felony breaches of the peace.[267] Finally, mainprize was a kind of bail.[268] Though all three writs were ancient, dating back certainly to the thirteenth or even twelfth centuries,[269] two key factors differentiate these writs from habeas corpus. First, none allowed the judge to scrutinize the legality of a body's detention.[270] Second, they were all "special procedures for special situations[,]" rather than being general remedies.[271,272]

That procedures existed for securing bodies from detention surely matters in writing a history of habeas corpus. But no line exists between these writs and habeas corpus. Searching for a history of legal protections of liberty leads us to *de homine*, *de odio*, and mainprize, but those writs cannot compose the early history of habeas corpus unless we assume in a Whiggish manner that habeas corpus has always been intimately connected to liberty. Instead, if we follow the words "habeas corpus" themselves,[273] we find ourselves in an unlikely location for the historical roots of the Great Writ—we are led to medieval civil procedure and, specifically, mesne process.

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[265] Cohen, *Considerations*, *supra* note 130, at 99.
[266] *Id.* at 96.
[267] *Id.*
[268] *Id.* at 98.
[269] *See id.* at 96–99; HALLIDAY, *supra* note 23, at 17.
[270] Cohen, *Considerations*, *supra* note 130, at 103.
[271] FARBEY & SHARPE, *supra* note 121, at 3.
[272] It is worth noting that this should not be read to suggest that medieval England was a site of rampant incarceration. As Pollock and Maitland have explained, one's instinct that a legal system lacking a general remedy for causeless detention must have dangerous amounts of incarceration "suppose[s] too perfect a centralization." 2 POLLOCK & MAITLAND, *supra* note 262, at *584. In the thirteenth century, people who were arrested were usually set free quickly upon bail. It was "not common to keep men in prison[ ]" in this time, not "due to any love of an abstract liberty[,]" but rather because "[i]mprisonment was costly and troublesome." *Id.* at *582.
[273] *See* Cohen, *Considerations*, *supra* note 130, at 105 ("The search for the writ, then, must be directed toward the expression of *habeas corpus* itself rather than to a study of medieval criminal procedure."). *But see* Eric M. Freedman, *Habeas Corpus in Three Dimensions: Dimension I: Habeas Corpus as a Common Law Writ*, 46 HARV. C.R.–C.L. L. Rev. 591, 593 (2011) ("In researching the history of habeas corpus we need to get beyond the label 'habeas corpus.' The constitutional importance of the writ is in its function, not its name.").

B. Mesne Process and the Centralization of Authority

Recall that the words "habeas corpus" concern bodies and their location. Though habeas as we know it today deals with the law underpinning a body's detention, the words themselves suggest a different origin that implicates bodily presence—and specifically, presence at a court—more than legal authorization.

We begin with procedure, for a proper understanding of English legal history, in the words of Sir John Baker, requires us to ignore the "separation of law from procedure . . . ."[274] Habeas in the modern imagination is meant to secure a certain end—the liberty of the subject—and we associate habeas with substantive rules about the limitations on successive petitions, prohibitions on controverting the factual details in the return, and so on.[275] But habeas to the thirteenth-century English lawyer had more to do with the orderly process of litigation; a writ of habeas corpus would allow a lawsuit to proceed, but it would neither initiate a lawsuit nor would it implicate the substantive outcome of litigation. Nevertheless, the means by which habeas pushed forward a lawsuit (the *procedural* aspects of the writ) reflect characteristics of the writ—in particular, its flexibility and its relationship to central authority—that would carry forward into the version of the writ as we know it, with its *substantive* ability to test detention authority.

To initiate a lawsuit in the Court of Common Pleas or in King's Bench—the highest common law courts of the land, both of which sat in Westminster Hall—a plaintiff would first go to

[274] BAKER, *supra* note 217, at 63.
[275] *See, e.g.*, Felker v. Turpin, 518 U.S. 651 (1996) (upholding the Antiterrorism and Effective Death Penalty Act's limits on successive habeas petitions); Oaks, *Legal History*, *supra* note 125, at 453 (noting common law rule that habeas petitions could not contest the truth of the return to the writ).

the Chancery to buy an original writ.[276] Civil lawsuits, however, could not proceed until a defendant was present at the court. Thus, courts needed to develop a way of ensuring the defendant's presence; this was known as mesne process, according to Baker, "because it was intermediate between the original writ and the judgment."[277] Habeas, in the thirteenth century, was a command to a sheriff to bring the defendant into court. Though there were summons that could be used to request a defendant's presence, habeas was an order to a sheriff to find that evasive defendant. It was thus used usually when proceedings "were well on their way but through the contumacy of an evading party the cause was being delayed."[278]

A habeas writ was no small command. As Maxwell Cohen has explained, a reticent defendant who sought to avoid his or her day in court could be quite difficult to track down: "One sheriff might never know what lay in another county and pursuit into the next shire was high adventure."[279] When ordinary mesne process failed, then, habeas was the means by which defendants would be dragged into court. As the nineteenth-century legal historians Pollock and Maitland explained with some exasperation,

> One thing our law would not do: the obvious thing. It would exhaust its terrors in the endeavor to make the defendant appear, but it would not give judgment against him until he had appeared, and, if he was obstinate enough to endure imprisonment or outlawry, he could deprive the plaintiff of his remedy. . . . Our law would not give judgment against one who had not appeared.[280]

It is worth noting that a writ of habeas corpus, like any other summons or other mechanism in mesne process, was merely a judicial order. Its ability to succeed at its mission was, in Cohen's words, "depend[ent] entirely upon the command of the court."[281] Because habeas was invoked

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[276] BAKER, *supra* note 217, at 63.
[277] *Id.* at 76.
[278] Cohen, *Considerations*, *supra* note 130, at 110.
[279] Cohen, *Cum Causa*, *supra* note 130, at 10.
[280] 2 POLLOCK & MAITLAND, *supra* note 262, at *592. Parliament would resolve this "stupid obstinacy[,]" where the law "wants to be exceedingly fair, but is irritated by contumacy," in the eighteenth century. *Id.* at *593.
[281] Cohen, *Considerations*, *supra* note 130, at 116.

only when nothing else worked, there was flexibility to the writ—the writ, in this early time, could issue formally as a legal order or simply by word of mouth, where a justice of King's Bench would tell a royal sheriff to find an unwilling party.[282] The writ was executed in a "very informal but nevertheless effective fashion,"[283] reflecting how it was in part a problem-solving device for tricky situations. At this time, however, the writ had no relationship to inquiries into the legal cause of a body's detention; it was concerned only with the movement of bodies and, indeed, did not concern people's imprisonment.[284]

C. Searching for a Cause

Into the fourteenth century, writs containing the language of habeas corpus were mostly focused on the production of bodies for judicial proceedings. Royal courts other than King's Bench were the first to issue habeas writs that summoned prisoners from other jurisdictions: first, the Royal Council—essentially an advisory body to the king that sometimes doubled as a court, later known as the Privy Council—and then the Court of Chancery, the high court of equity.[285] Especially relevant is the writ of *habeas corpus cum causa* ("you have the body with the cause"), used first by

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[282] Cohen, *Cum Causa*, *supra* note 130, at 10.
[283] *Id.*
[284] Cohen, *Considerations*, *supra* note 130, at 107. In one of the earliest works of contemporary scholarship attempting to write a history of habeas corpus, Edward Jenks argued that habeas "was originally intended not to get people out of prison, *but to put them in it*." Jenks, *supra* note 130, at 65 (emphasis original). Jenks identified the role of habeas in mesne process, *see id.* at 68 (noting that "we may be warned to look for the origin of that weapon [habeas corpus], not in vague assertions of the liberty of the subject, but in . . . that practice of arrest on mesne process"), but more recent scholarship has shown that the early purpose of habeas was not to arrest people for the sake of placing them in jail—instead, it was only to ensure their presence in court. *See, e.g.*, FARBEY & SHARPE, *supra* note 121, at 2 (citing Jenks and arguing that his claim "seems to have been a mistaken impression").
[285] HALLIDAY, *supra* note 23, at 17. In explaining the rise of the Chancery, and the division between equity and common law, Baker writes:

> "[I]t was difficult to conceive of the common law apart from the procedures through which it operated. In the King's Bench and Common Pleas it was circumscribed by the writ system. Its mesne process was dependent on the good will of sheriffs. It was further constrained by the forms of pleading, by the rules of evidence, and by the uncertainties of jury trial. The possibilities of mechanical failure were legion. And the growing strength of the substantive law could also work injustice, because the judges preferred to suffer hardship in individual cases than to make exceptions to clear rules. . . . The chancellor was free from the rigid procedures under which such injustices sheltered.

fifteenth-century chancellors to compel the delivery of prisoners from other courts.[286] Especially when paired with two other writs—the writ of *certiorari*, which was an order to a lower court to provide records to the higher court,[287] and the writ of *privilege*, which immunized a person from civil proceedings in a specific inferior court[288]—the *corpus cum causa* writ played a vigorous role in centralizing judicial authority.[289]

The *corpus cum causa* issued from the king's officers, seated in Westminster, in a time when central courts sought to wrest authority away from local jurisdictions by literally pulling bodies out of litigation in local courts and into royal courts.[290] This was in part out of mere financial desire: these writs "helped to channel the litigation, and the fees, towards a central administration."[291] But the usage of royal writs also reflected an ongoing attempt by the king and his officers to establish the royal supremacy over local law;[292] hence, this form of the writ of habeas corpus

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> His court was a court of conscience, in which defendants could be coerced into doing whatever conscience required in the full circumstances of the case.

BAKER, *supra* note 217, at 118 (footnotes omitted). This "transcendant [sic] form of justice," Baker elaborates, is what we now know as "equity." *Id.* at 122. This distinction between common law and equity—where the former operated in accordance with strict rules and precedents while the latter accorded with conscience and was flexible was a hardened distinction by the end of Henry VIII's rule, *id.* at 124, and it was clearly understood to the Framers of the American Constitution, who explicitly combined courts of equity and courts of common law in the federal "judicial Power." *See* U.S. CONST. art. III, § 2. But even as late as the early sixteenth century, "it could still be argued that equity or conscience operated in all courts," and the relationship between Chancery and the common law courts was generally harmonious. BAKER, *supra* note 217, at 124.

[286] HALLIDAY, *supra* note 23, at 17.

[287] *See, e.g.*, Jenks, *supra* note 130, at 69 (describing *certiorari* as "a prerogative writ, by which the King's Bench removed the proceedings from an inferior tribunal to its own *forum*").

[288] Jenks explains how the writ of privilege would have operated with the *corpus cum causa* in the fifteenth century:

> Where a man is sued in a superior court, and, on coming to appear, is arrested on a process in an inferior tribunal, he is entitled to a *Corpus cum causa*, directed to the officers who have arrested him; and they will be ordered to produce him before the higher court.

Id. at 71.

[289] Cohen, *Cum Causa*, *supra* note 130, at 14.

[290] THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 57 (5th ed., Liberty Fund ed. 2010) (1956) ("Gradually the courts acquired the habit of issuing the writ in order to bring before them persons who had been committed by inferior jurisdictions—particularly the courts of cities and local franchises. The motive of this policy seems to have been to enlarge the powers of the Courts of Westminster at the expense of local tribunals, and the result was not infrequently confusion and injustice.").

[291] FARBEY & SHARPE, *supra* note 121, at 4.

[292] Cohen, *Considerations*, *supra* note 130, at 116 ("The stronger the King's judges became in a relatively decentralized and anarchic feudal society, the more could they seek to impose their will. And what was more natural that the

"was at the very heart of the rise of a centralized and powerful monarchial order."[293] By pulling prisoners and litigants alike from inferior, local courts into the courts of Westminster, the *corpus cum causa* writ was used "to manage the relationship among otherwise legally distinct domains held by a single king."[294]

D. The Many Lives of Habeas Corpus

The writ's role in civil litigation would endure into the early modern period and, indeed, even at the height of the *ad subjiciendum* writ's usage—the version of the writ that we are ultimately concerned with—it was the forms of habeas that concerned civil litigation that most lawyers would use.[295] Thus, before diving into the history of the *ad subjiciendum* writ, it is relevant to note the various other forms of habeas.

The forms of habeas were legion. In Halliday's words, "courts deal routinely in bodies. Bodies institute prosecutions and answer them; they testify to facts in those prosecutions; and as jurors, bodies declare the truth or not of such facts."[296] Blackstone, in his *Commentaries*, helpfully

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exercise of that will should take the form of *personal* commands from these same judges. So the process of centralization and the extension of Royal authority is indissolubly linked with effectiveness of instruments devised to enforce that power through the courts of the King.").

[293] *Id.; see also* Cohen, *Cum Causa*, *supra* note 130, at 11 ("Parties were brought before the King's judges, whether such parties were free or *in detention* at the time of the writ's issue. Upon delivery of the 'body' named in the instrument, the duties of the sheriff or other directed person were at an end. As yet there was no mention in the writ of production accompanied by a statement as to the *cause* of detention at the time of the command. Indeed, in most cases the writ was aimed at persons not in custody, but at large. There was no reason to ask for the explanation of a detention. Only production itself was important.") (footnote omitted).

[294] HALLIDAY, *supra* note 23, at 18.

[295] *See* Halliday & White, *supra* note 25, at 598 n.50 ("The two most common forms of the writ in the early modern period were the writ *ad respondendum* and the *ad faciendum et recipiendum* writ, both of which removed a body from one court into another in a private action. To early modern lawyers, these two forms of the writ were central because they aided pleadings in disputes about debts and other private complaints, where professional incomes were earned. Thus early modern practice manuals focused almost entirely on these forms of the writ, not on the *ad subjiciendum et recipiendum* form."); *see also* HALLIDAY, *supra* note 23, at 41 ("Practice manuals of the period are full of information on how to use the forms of habeas corpus concerned with private pleadings, while virtually none addressed the *ad subjiciendum* writ. This might seem surprising, given the later fame of this writ. But criminal and civil liberties law did not pay the bills; private litigation did.") (footnote omitted).

[296] HALLIDAY, *supra* note 23, at 40.

provided a survey of the many kinds of habeas: *ad respondendum*, which removed a prisoner from an inferior court into a superior court for a new action; *ad satisfaciendum*, which moved a civil action into a superior court to execute an inferior court's judgment; *ad prosequendum*, to remove a prisoner "in order to prosecute" private pleadings; *ad testificandum*, to bring a prisoner to testify in court; *ad deliberandum*, to move a body for trial in a different jurisdiction; *ad faciendum et recipiendum*, similar to the *corpus cum causa*, to move a body into a royal court in a private proceeding.[297] But the writ that Blackstone would call that "great and efficacious writ in all manner of illegal confinement"[298] was the writ of habeas corpus *ad subjiciendum et recipiendum* ("to undergo and receive"), generally shortened to habeas corpus *ad subjiciendum*.[299]

E. Habeas Corpus Ad Subjiciendum

The development of the *ad subjiciendum* writ traces to the early seventeenth century. Indeed, Halliday has argued, "[t]o understand the [*ad subjiciendum*] writ's past, we must drop our expectation that there is a long story to tell, one statute, writ, or judgment begetting another from 1215 forward."[300] His history of habeas—perhaps today's defining account of the history of habeas in England[301]—is a story where the *ad subjiciendum* writ "was made into a powerful writ by judges responding to the volatile mix of social, religious, and political controversy present in the decades just before and after 1605."[302] This is in part a claim about a lack of historical continuity before and after the turn of the seventeenth century: for Halliday, there is not much to say about earlier

[297] 3 BLACKSTONE, *supra* note 24, at *129–30; *see also* HALLIDAY, *supra* note 23, at 40.
[298] 3 BLACKSTONE, *supra* note 24, at *131.
[299] HALLIDAY, *supra* note 23, at 41. The Latin phrase *ad subjiciendum* has also been translated as "to submit to." *See* Cohen, *Cum Causa*, *supra* note 130, at 28; 3 BLACKSTONE, *supra* note 24, at *131.
[300] HALLIDAY, *supra* note 23, at 18.
[301] *See supra* note 135 and sources cited.
[302] HALLIDAY, *supra* note 23, at 18.

forms of habeas because they simply do not reflect the traits of the *ad subjiciendum* writ.[303] But it is also in part a statement about Halliday's research design, one that, as Steve Vladeck has characterized, "is not so much a history of habeas as it is a study of habeas across a fixed time period, within which distinct themes (rather than time) serve as the independent variable."[304]

In writing a history of habeas that focuses on a wider time period, I seek not to argue that there is, in fact, an ancient document or practice dating to the pre-Norman era from which the *ad subjiciendum* writ descends.[305] Instead, I assume many of Halliday's conclusions—that the turn of the seventeenth century was a time of rapid development in the usage of the *ad subjiciendum* writ, and that therefore the meaningful period of the writ's history is the two hundred years between the end of the sixteenth and eighteenth centuries[306]—while still attempting to show strands of continuity in the usage of writs known as "habeas corpus." Indeed, as we explore the *ad subjiciendum*

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[303] For example, when dismissing *de odio*, *de homine*, and mainprize as antecedents, Halliday notes, "[n]one of these three writs could be considered means for scrutinizing the behavior of other jurisdictions in the intensive manner associated with the later writ of habeas corpus." *Id.* at 17. Similarly, he argues that the *corpus cum causa* writ and other fifteenth-century writs could not be considered antecedents of the *ad subjiciendum* writ because "little evidence survives in the writ files to suggest the existence of a great power, lodged in one court, enabling it to inspect all other jurisdictions, thereby making it the final arbiter of what counted as the subject's liberties." *Id.* at 18.

[304] Vladeck, *supra* note 132, at 943 n.10.

[305] In contrast is Blackstone's explanation of the "personal liberty of the subject" that traces the animating force behind to writ centuries into the past to a pre-Norman time:

> It was shewn to be a natural inherent right, which could not be surrendered or forfeited unless by the commission of some great and atrocious crime, nor ought to be abridged in any case without the special permission of law. A doctrine co-eval with the first rudiments of the English constitution; and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman conquest: asserted afterwards and confirmed by the conqueror himself and his descendants: and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis by the provisions of *magna carta*, and a long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible: but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This induces an absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon an *habeas corpus* may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

3 BLACKSTONE, *supra* note 24, at *133.

[306] *See, e.g.*, Halliday & White, *supra* note 25, at 591 (arguing that the critical period of the *ad subjiciendum* writ is "roughly 1580 to 1780").

writ's history, we shall see how the writ's flexibility and its relationship to the distribution of power among different institutions—important characteristics of antecedent forms of habeas corpus—continued to play an animating role.

A brief detour into the mechanics of the *ad subjiciendum* writ is worth it in order to make sense of its history. The writ in this form ordered a body to be brought into court—as with other forms of habeas—but it also crucially required the detainee or prisoner to be accompanied by a justification for that body's detention, an explanation that was called the "return."[307] Blackstone explained that the *ad subjiciendum* writ did not issue "as of mere course" but rather required some "probable cause why the extraordinary power of the crown is called in to the party's assistance."[308] Blackstone's statement may be misleading; as Halliday has explained, the discretion that the justices of King's Bench had in issuing the writ "typically erred on the side of issuance."[309] But what is important about Blackstone's observation is that it demonstrates how the *ad subjiciendum* writ was at its heart about gathering information. The body—the object that was to "undergo and receive"—was to be brought to the justices so that they, using the return (and other sources of information[310]), could determine what the body *should* receive: typically whether the prisoner ought to be remanded (i.e., returned to detention), bailed, or discharged completely.[311]

Many texts emphasize the *ad subjiciendum* writ's ability to test imprisonment by the Privy Council and other royal officials—in other words, its ability to check even the highest authorities in the land.[312] Though the writ's ability to test detention justified by order of the Council certainly

[307] HALLIDAY, *supra* note 23, at 48.
[308] 3 BLACKSTONE, *supra* note 24, at *132.
[309] HALLIDAY, *supra* note 23, at 55.
[310] Indeed, part of the insight of Halliday's work is his demonstration that the justices of King's Bench did not have to accept the factual allegations from the return at face value and, instead, often controverted the return. *See id.* at 108–16. For an example of King's Bench controverting the veracity of the return, see *infra* text accompanying notes 328–329.
[311] HALLIDAY, *supra* note 23, at 59.
[312] *See, e.g.*, BAKER, *supra* note 217, at 168; *see also* HALLIDAY, *supra* note 23, at 30 ("[T]he writ's history has

matters, our story begins where most who sought the *ad subjiciendum* writ in the seventeenth century would have invoked it: imprisonment by justices of the peace.[313] The rest of this section traces the development of the writ as it began to issue to more and more contexts—beyond justices of the peace enforcing statutory law to supervising private and conciliar detention. In each case, we see the gradual emergence of what Halliday has described as a "jurisprudence of normalcy" centered on a single idea: "that the court might inspect imprisonment orders made at any time, anywhere, by any authority[ ]" through the writ.[314] The story then turns to famous episodes in English constitutional law: the Petition of Right in 1628 and the Habeas Corpus Act of 1679. Finally, after the insertion of Parliament into the work of the writ through the Habeas Corpus Act, the story of habeas becomes mired by a story of parliamentary suspension and sovereignty. Our story ends in the era of the British Empire, as the writ's work would drastically change with the suspension of 1777, a suspension that would so powerfully influence the American colonists when it came time for them to provide for the privilege of the writ in their own constitution.

1. Supervising Justices of the Peace

The work of the *ad subjiciendum* writ was primarily concerned with oversight of detention by justices of the peace, "those workhorses of the law scattered across the counties of England and Wales and among the nearly two hundred incorporated towns."[315] Numerous and vested with broad authority by Parliament, justices of the peace were natural targets if one sought to prevent abuses of the law. Justices of the peace were "legal amateur[s]" who could summarily convict people for

traditionally been written around a presumed contest between King's Bench and the king's Privy Council . . . .").
[313] *See* HALLIDAY, *supra* note 23, at 329 fig. 3.
[314] *Id.* at 160.
[315] *Id.* at 21.

misdemeanors.[316] Hence, Halliday has explained, "For most people, the potential for oppression did not come from Whitehall [i.e., from the king or his Privy Council]. It came from the tyrant next door: the local justice of the peace."[317]

That the writ supervised the work of justices of the peace suggests a real, practical way that the writ did secure the liberty of the subject. But it also illuminates how habeas continued to act as a centripetal force working against the centrifugal nature of a realm governed by "polyglot law."[318] Beyond the numerous and poorly-trained justices of the peace, local and ecclesiastical courts exercising authority over their own domains dotted the land, and they had little to no oversight in the early seventeenth century.[319] Just as the *corpus cum causa* writ was used to wrestle some authority over these myriad jurisdictions into the hands of the Chancery, the *ad subjiciendum* writ would be employed to help the common law live up to its name—as law that was common to all.

2. Writ of Spouses, Children, and Lunatics

Though the work of the *ad subjiciendum* writ in supervising justices of the peace is underemphasized in most histories of habeas, it is not unexpected. After all, in this context, the writ performed its traditional duty—it ensured that one's detention by state authority was in accordance with law. In the seventeenth century, the writ, issued by the able justices of King's Bench, would expand to supervise other forms of detention as well.

Starting around 1605, the justices began issuing writs to test the detention of husbands who were jailed on order of ecclesiastical courts enforcing adultery and marital separation decisions.[320]

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[316] *Id.* at 30.
[317] *Id*. at 147.
[318] *Id.* at 20.
[319] *Id.* at 19–20.
[320] *Id.* at 122.

This was novel, since the law of marriage had long been considered "the sole province of ecclesiastical courts."[321] Intervene the justices did, however, and they did so not only to enforce law but also to opine on the underlying justice of the situation. For example, even when King's Bench ordered Robert Bradston bailed because the justices did not believe the Court of High Commission (the highest ecclesiastical court) could have him jailed for failing to pay alimony, they nevertheless ordered him to obey the High Commission's commands because of their disgust with Bradston's adulterous behavior.[322] Importantly, though, the justices did not seek to completely strip authority away from the High Commission—or any other ecclesiastical court. Upon deliverance of the body and return of a habeas petitioner, the justices did not shy away from remanding the petitioner to imprisonment.[323] The salient point is not that the justices did away with ecclesiastical jurisdiction, but rather, that they established their court's supremacy over those ecclesiastical courts, at least when it came to the detention of subjects.

This expansion of judicial authority was also evident in the 1670s, when the justices began using the writ in family disputes.[324] For example, in 1671, King's Bench issued the writ for a wife who was confined by her abusive husband; she was brought into court, where she swore articles against her husband, allowing the justices to require "that he give a bond to keep the peace toward her."[325] Similarly, in 1675, as explored in Chapter 2, habeas would issue to decide a dispute concerning Bridget Hyde, then a teenager, and who—between Robert Viner, her stepfather, or John Emerton, her purported future husband—had custody over her.[326] In that same decade, habeas

[321] *Id.* at 123.
[322] *Id.*
[323] *See id.* at 122–23.
[324] *Id.* at 32.
[325] *Id.* at 43.
[326] *See supra* Chapter 2, Part I(B).

would be used to verify whether someone was indeed a "lunatic," which would justify her detention in a so-called madhouse.[327]

Many of these extensions of judicial authority required innovation on the part of the justices. For example, though the return to the writ has often been understood as the means by which the justices of King's Bench would gather information, the justices actually relied on affidavits from doctors who visited madhouses and who could provide information that would justify issuing the writ to secure the liberty of a purported lunatic.[328] When the return for Hyde's writ falsely stated that she was not held by Robert Viner, Chief Justice Hale called Viner out on his lie.[329] How he knew Viner was lying, we may never know. But that he was able to gather evidence outside of the standard process demonstrates how innovative the justices of King's Bench could be. Moreover, Chief Justice Hale deviated from the normal outcomes of a habeas proceeding—typically, upon delivering the body, the judge would order remand, bail, or discharge. Instead, that Chief Justice Hale gave Hyde the opportunity to choose whom she wished to go with suggested just how flexible the writ could be when wielded by the right justices. All of this demonstrates that the seventeenth century was a time of great innovation for the writ. Just like its antecedent writs, the *ad subjiciendum* writ was flexible, and it was used to expand the jurisdiction and thus authority of its issuing court.

3. Interjurisdictional Warfare

[327] HALLIDAY, *supra* note 23, at 127.
[328] *Id.*
[329] *Id.* at 125.

So far, we have examined how the scope of the *ad subjiciendum* writ would reach even into private domains. In parallel, habeas corpus was front-and-center in many of the seventeenth-century constitutional disputes in Great Britain.[330] This part begins with the struggles between the common law and equity and traces the rise of King's Bench as the premier voice of the king, at least in the detention context. Toward the middle of the seventeenth century, however, Parliament became a core player in this history—an intervention that, we shall see, far from securing that "stable bulwark of our liberties"[331] actually did harm to the Great Writ, eclipsing its common law authority with that of Parliament.

i. Courts of Law and Equity

The courts of common law and equity, though harmonious leading into the sixteenth century, would begin to draw sharp jurisdictional lines by the end of the reign of Henry VIII.[332] And in the seventeenth century, the courts began to interfere in each other's business: the Chancery, led by Lord Ellesmere, would issue injunctions to try to prevent litigation in the courts of common law, and it would take up many cases after judgment by the common law courts; King's Bench, especially once led by Sir Edward Coke who assumed the Chief Justice position in 1613, would issue habeas corpus to release those who were imprisoned for violating those injunctions.[333,334] Tensions

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[330] Indeed, in remarking on the fame of the writ of habeas corpus, David Clark and Gerard McCoy have written, "Part of the fame that attaches to habeas corpus may be attributed to its continuing role in conflicts that are often political in origin." CLARK & MCCOY, *supra* note 98, at 1. They continue,

> The most important formative period leading up to the modern form of the writ began in the late sixteenth century, and developed further in the notable constitutional struggles of the seventeenth century. Because of its ideological role in these political and legal struggles, a certain mythology has grown up around it.

Id. at 34–35.

[331] 1 BLACKSTONE, *supra* note 24, at *133.

[332] *See supra* note 285.

[333] FARBEY & SHARPE, *supra* note 121, at 5; BAKER, *supra* note 217, at 125–26; Russell Fowler, *Judicial Warfare and the Triumph of Equity*, TENN. B. ASS'N L. BLOG (Mar. 26, 2019), https://www.tba.org/index.cfm?pg=LawBlog&blAction=showEntry&blogEntry=34004 (last visited Feb. 21, 2020).

[334] The distinction between law and equity is still relevant in American law not only in the Constitution, as noted

reached an apex in 1615 in the case of *Courtney v. Glanvil*, which arose out of a dispute over fraudulent jewelry. Courtney contractually agreed to purchase a jewel from Glanvil for an exorbitantly high price compared to the actual worth of the jewel; once he realized the actual jewel's worth, he reneged on his contract because he considered it fraudulent.[335] Glanvil sought judgment from a common law court to require the execution of the contract, which he secured.[336] In turn, Courtney went to the Chancery, and Lord Ellesmere declared the contract void, ordering Glanvil to return the money to Courtney.[337] When Glanvil refused, Lord Ellesmere jailed him for contempt, leading Glanvil to seek a writ of habeas corpus from King's Bench. Chief Justice Coke was happy to oblige.[338]

Lord Ellesmere was not a happy Chancellor. He had long viewed his authority as coterminous with that of the King himself, and according to Baker, he saw Coke's opposition as "an attack on the monarchy as established by God."[339] This was not a ludicrous idea; as one commentator has explained it, the Chancery had long been "associated with royal prerogative," whereas the common law courts were associated "with parliamentary rights."[340] So when Lord Ellesmere went to King James I to settle this and other similar disputes, the Attorney General, Sir Francis Bacon, urged the King to act, for Coke's actions were an "affront . . . to your high Court of Chancery, which is the court of your absolute power."[341] King James ordered the judges and Lord Ellesmere to appear

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above (see *supra* note 285), but also in discussions of equitable remedies (such as injunctions) versus legal remedies (such as damages provided by positive law). For a discussion of the history of the Chancery and its relationship to pre-*Erie* American law, see generally Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 224–43 (2018).

[335] Fowler, *supra* note 333.

[336] *Id.*

[337] *Id.*

[338] *Id.*

[339] BAKER, *supra* note 217, at 125.

[340] Fowler, *supra* note 333.

[341] Quoted in *id.* Note that this Sir Francis Bacon, the Attorney General, noted scientist, and later Lord Chancellor, is not to be confused with another Sir Francis Bacon, who occupied a seat on King's Bench beginning in 1642.

before him and, appearing "in his crown, crimson velvet robe, and full regalia[,]" he declared his supreme authority to render judgment, found in favor of the Lord Chancellor, and, quickly thereafter, Coke was dismissed as Chief Justice.[342]

It is easy to exaggerate the outcome of *Courtney v. Glanvil* and to place it within a larger arc of institutional conflicts; after all, one commentator has described the judges' and Lord Chancellor's appearance before King James as "one of the greatest moments of legal history . . . ."[343] But *Courtney v. Glanvil* is perhaps better understood as "a clash of strong personalities[ ]" than as an institutional conflict.[344] For example, even though jurisdictionally there was a divide between equity and law—that is, the courts of equity had their own well-defined body of coherent principles separate from the common law, and a litigant was forced to exhaust his or her remedies at common law before going to the courts of equity[345]—there was still plenty of overlap between the personnel of the various courts. The chief justices of King's Bench generally sat in the Privy Council and in the Court of Star Chamber, where they would have interacted with both equitable principles and the leaders of the courts of equity on a daily basis.[346] Lawyers practicing in common law courts also argued in front of the Chancellor.[347] The worlds of common law and equity would have been familiar to many of these prominent lawyers and jurists, even as they operated in separate realms.

Moreover, though the conclusion of *Courtney v. Glanvil* itself was remarkable, the broader pattern of writs issued from King's Bench for prisoners ordered jailed by the Chancery reveals a

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[342] *Id.*; *see also* PLUCKNETT, *supra* note 290, at 194 ("In 1616 James I personally adjudicated between the two jurisdictions and decided in favour of the Chancery, thereby showing that he was 'judge over all his judges', and Bacon hailed the vindication of the Chancery as the court of the King's 'absolute power'.").
[343] Fowler, *supra* note 333.
[344] BAKER, *supra* note 217, at 125; *see also* HALLIDAY, *supra* note 23, at 90 ("The most famous institutional conflict between equity and common law [*Courtney v. Glanvil*] was less a clash between law and equity than a clash between Coke and Ellesmere.").
[345] *See, e.g.*, BAKER, *supra* note 217, at 124 (noting principles that bound the Chancellor); Morley, *supra* note 334, at 229 (noting courts of equity only had jurisdiction when a party lacked an adequate remedy at common law).
[346] HALLIDAY, *supra* note 23, at 90.
[347] *Id.*

different story—once again reaffirming Halliday's methodological claim that single cases alone are "literally meaningless without the contexts . . . through which we can hope to understand them."[348] Halliday's archival research shows that King's Bench, under Chief Justice Coke, issued twenty habeas writs to prisoners detained on order of the Chancery; only one prisoner was discharged and two bailed.[349] The rest were remanded, affirming the Chancery's original decision. To frame *Courtney v. Glanvil* purely as a story of institutional conflict is misleading, then, because King's Bench never purported to overthrow the Lord Chancellor's authority, just as, in issuing writs to husbands jailed by ecclesiastical courts, the justices never purported to completely take over the domain of marriage law.[350] Instead, King's Bench was doing something more subtle. It was attempting to supervise the Chancery—not to displace it. Indeed, Lord Ellesmere noted at the time, "in giving excess of authority to the King's Bench he [Chief Justice Coke] doth as much as insinuate that this court is all sufficient in itself to manage the state . . . as if the King's Bench had a superintendency over the government itself."[351] Even though King James may have stepped in and dismissed Coke from his position on King's Bench, the episodic issuance of writs to prisoners detained by order of the Chancery (and the frequent remand of those prisoners) nevertheless served to establish a broader principle: that the justices of King's Bench, through the *ad subjiciendum* writ, had authority to determine whether those prisoners could be detained—even when ordered by the Chancery itself.

ii. King's Bench Ascendant

[348] *Id.* at 5.
[349] *Id.* at 91.
[350] *See supra* notes 320–323 and accompanying text.
[351] Quoted in BAKER, *supra* note 217, at 166.

The crucial argument underpinning the outcome of *Courtney v. Glanvil* was the idea that the king—and the court that represented him—was supreme.[352] Traditionally, the court that represented the king was the Chancery. In the context of detention authority, however, King's Bench would seek to take that authority for itself and thereby propel the gradual expansion of the *ad subjiciendum* writ's authority. Over time, it would establish its authority to supervise, through habeas, the detention of any body jailed in the name of the king.

King's Bench was not an illogical place to vest this authority. Clause 17 of Magna Carta mandated that "[c]ommon pleas are not to follow our court but shall be held in some fixed place."[353] The result, according to Baker, was the establishment of two courts that we now know as common law courts: the Court of King's Bench, which would be held "before the lord king wheresoever he should be in England"; and the Court of Common Pleas, which settled in Westminster.[354,355] Thus, at the beginning, King's Bench was literally *coram rege* ("in the presence of the king")—as Baker has described it, it was "in effect a meeting of the king's council for occasional business of importance."[356] In the late thirteenth century, under Edward I, the king stopped regularly participating in King's Bench, and its peripatetic phase ended in the early fourteenth century, with King's Bench settling down alongside the Exchequer, Common Pleas, and, eventually, the Chancery in Westminster Hall.[357] So while three hundred years separated the time of the

[352] *See supra* note 342 and accompanying text.
[353] Magna Carta, 1215, c. 17, *reprinted in* HOLT, *supra* note 190, at 373, 385.
[354] BAKER, *supra* note 217, at 45.
[355] As Halliday has explained, at the beginning of the seventeenth century, there were four high courts that "occupied the center of English law[ ]": the King's (or Queen's) Bench, the Common Pleas, the Chancery, and the Exchequer. HALLIDAY, *supra* note 23, at 19. The Exchequer's origin was as a revenue court, and it settled down in Westminster first in the twelfth century. BAKER, *supra* note 217, at 21. Contemporary Britain's Chancellor of the Exchequer still retains this revenue-focused role; the position is analogous to the American Secretary of the Treasury. Of the King's Bench, the Common Pleas, and the Exchequer—the courts traditionally described as the three common law courts, see *id.* at 56, though Halliday has explained that the Exchequer also had an equity side, see HALLIDAY, *supra* note 23, at 19—the Exchequer was the last to regularize hearing common pleas. BAKER, *supra* note 217, at 56.
[356] BAKER, *supra* note 217, at 46.
[357] *Id.*

literal *coram rege* from the development of the *ad subjiciendum* writ, the justices of King's Bench in the seventeenth century would eagerly exploit the legal fiction to expand their jurisdiction. In 1605, Justice Sir Christopher Yelverton wrote,

> [B]y the jurisdiction of this court it is intended that the king sits here in his own person, and he is to have an account why any of his subjects are imprisoned. And for this reason, the judges of this court may send for any prisoner to any prison in England.[358]

Similarly, Sir Thomas Fleming, who would serve as the Lord Chief Justice, the Lord Chief Baron of the Exchequer, and the Solicitor General at different times, wrote that Queen's Bench is "the jurisdiction of the queen herself. It is so high that in its presence other jurisdictions cease."[359] It was no coincidence that the writ would later be described by Blackstone as a "high prerogative writ" that would "run[ ] into all parts of the king's dominions: for the king is at all times intitled to have an account, why the liberty of any of his subjects is restrained, wherever that restrained may be inflicted."[360]

The source of the writ's authority traced to royal authority, and so its capabilities were predicated on the ability of King's Bench to credibly claim the mantle of speaking on behalf of the king. No wonder, then, that Chief Justice Sir Henry Montagu, writing in 1619, would describe habeas as a "writ of the prerogative by which the king demands account for his subject who is restrained of his liberty."[361] King's Bench would never fully succeed in being the exclusive and authoritative voice of the king—*Courtney v. Glanvil* proved that. But the justices tried, and the dramatic scope of the *ad subjiciendum* writ's purview demonstrated that they were in many ways successful. This insight—that the writ's authority stemmed from royal authority, which King's

[358] Quoted in HALLIDAY, *supra* note 23, at 75.
[359] *Id.*
[360] 3 BLACKSTONE, *supra* note 24, at *131.
[361] Quoted in HALLIDAY, *supra* note 23, at 65.

Bench sought to wrest from other institutions—will help us understand one of the most famous cases in English constitutional history: *Darnel's Case*, also known as the *Five Knights' Case*.[362]

iii. The Five Knights' Case and the Petition of Right

The context of the *Five Knights' Case* was the Thirty Years' War in Europe, which began in 1618 and had raged for almost a decade by the time the Five Knights petitioned for habeas corpus in 1627.[363] Parliament refused to fund continual English participation in the war, so King Charles naturally turned to his wealthy nobles for a "loan."[364] When some refused, he threw them into London's Fleet Prison;[365] five of the knights then sued habeas corpus in King's Bench, and the return was simple: they had been committed "'by special command of the king' (*per speciale mandatum regis*)."[366] Despite being represented "by some of the English bar's finest," the justices would order the knights remanded to prison. [367]

Viewed from the perspective of the Great Writ of Liberty, the *Five Knights' Case* seems decidedly wrong. How, after all, could the "special command of the king" constitute a sufficient authority to detain someone? At the time, though, there was meaningful debate about whether the precedents were stronger for the petitioners or for the Attorney General, who argued in favor of the king's authority.[368] From a historical perspective, however, two aspects of this litigation mattered much more than the legal doctrine itself.

First, King's Bench decided on the merits of this habeas petition. As Cohen has emphasized, habeas corpus

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[362] *Five Knights' Case* (1627), 3 How. St. Tr. 1 (K.B.).
[363] TYLER, *supra* note 120, at 15–16.
[364] *Id.*
[365] *Id.* at 16.
[366] Quoted in BAKER, *supra* note 217, at 539.
[367] TYLER, *supra* note 120, at 16.
[368] For more details on these debates, consult *id.* at 16–18; HALLIDAY, *supra* note 23, at 138–39.

> had been made the basis for the attack upon an imprisonment commanded by the King himself and had proven a quick method . . . to have one so imprisoned brought before a competent tribunal and there have himself charged and heard and the legality of the detention argued and adjudged. There was no other remedy available to accomplish the same purpose with the same efficiency. Even though the prisoners in this case were denied their freedom the writ did have their case completely aired before a court.[369]

The substance of the law, perhaps, was less relevant than the *process* by which that law came to be determined, i.e., that it was King's Bench who answered the question of what the law was.[370] Understood thusly, the *Five Knights' Case* fits well with our broader story of the *ad subjiciendum* writ, where, by issuing habeas corpus, King's Bench established its exclusive authority to supervise other jurisdictions, including the highest one in the land—the king himself. As Halliday has put it, "With every judgment of remand or release—whether for those jailed by privy councilors or by any other magistrate—King's Bench declared what counted as jurisdiction. Thus the common law was not superior; King's Bench was."[371]

Second, the cause of the Five Knights would not go unheard after King's Bench rendered its decision. The very next year, one of the knights' counsel—the famous John Selden—went to Parliament and, aided by Sir Edward Coke and others, argued forcefully that Parliament ought to respond to the injustice of the case.[372] In those early months of 1628, Coke, Selden, and the others

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[369] Cohen, *Cum Causa*, *supra* note 130, at 38–39.

[370] There is a not inappropriate parallel here with another famous constitutional case, this time in the American context: *Marbury v. Madison*, 5 U.S. 137 (1803). Here, as with *Marbury*, the aggrieved parties seemed to have rights for which they sought judicial vindication. *See id.* at 162 (determining that Marbury had a legal right from his commission). And here, as with *Marbury*, the court did not order a remedy. *See id.* at 175 (holding that the Supreme Court could not issue a writ of mandamus). But in both cases, *that* the court rendered judgment is why these cases are landmarks in constitutional history. *See id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

[371] HALLIDAY, *supra* note 23, at 139.

[372] TYLER, *supra* note 120, at 18.

drew from foundational English law, citing Magna Carta and other due process statutes "as confirmations of the 'fundamental laws' of the realm."[373] In the end, Parliament would issue the Petition of Right in June 1628,[374] which responded to "the main grievances of the day against Charles I—arbitrary taxation, billeting of soldiers and mariners, abuses through martial law proceedings, and perhaps most important, arbitrary imprisonment."[375] Though Charles would reluctantly accept that petition, presumably to try to build greater goodwill with Parliament, he ended up dissolving Parliament in 1629 in response to yet another tax dispute, and, "as if to drive home the point that the Petition had changed little," he jailed John Selden and other opposition parliamentarians in the Tower of London.[376] In the end, the Petition of Right was merely aspirational, with little legal effect.[377] But it did signal the entrance of Parliament into the question of how, and under what conditions, the king could arrest and detain people.[378]

iv. Habeas Corpus in Statutory Law

The middle of the seventeenth century witnessed two important parliamentary interventions into the law of habeas corpus. In part as a result of the *Five Knights' Case*, parliamentarians became extremely skeptical of conciliar courts—that is, the Privy Council (the direct advisers to the king) and its associated institutions (such as the Court of Star Chamber). In particular, the Star Chamber, during the Stuart Period[379] became infamous for authorizing summary trials without juries, thus

[373] BAKER, *supra* note 217, at 539–40.
[374] Petition of Right, 3 Car. 1 c. 1 (1628) (Eng.).
[375] FARBEY & SHARPE, *supra* note 121, at 11.
[376] *Id.* at 12; *see also* TYLER, *supra* note 120, at 19.
[377] TYLER, *supra* note 120, at 19.
[378] It is worth noting one detail that is glossed over by this retelling, not because it is unimportant but because it is somewhat tangential to this history of habeas. In early modern English law, detention and arrest were distinct. *See* HALLIDAY, *supra* note 23, at 48–53. Up until the *Five Knights' Case*, the *ad subjiciendum* writ searched for the legal cause of one's detention, but not his or her arrest. After that case, writs began to issue requiring the return to detail the legal cause of both one's arrest and detention. *See* Halliday, *Oxford*, *supra* note 130, at 676.
[379] Beginning with the reign of James I and continuing into Charles I and Charles II's reigns, ending with Queen Anne.

becoming a useful tool for monarchs to prosecute sedition and ecclesiastical offenses.[380] Additionally, the court was known for its "imaginative range of punishments . . . , including the slitting of noses and severing of ears."[381] Thus, when Parliament reconvened after being dissolved for over a decade, it passed the Habeas Corpus Act of 1641, which abolished the Star Chamber and mandated that those imprisoned by the king or the Privy Council could petition for habeas in King's Bench.[382] Thus, Parliament did in 1641 what it failed to in 1628—it created law that was binding.[383]

Parliament's next intervention into habeas would come about in 1679, when it passed the more famous Habeas Corpus Act.[384] This Act—the one that Blackstone effusively celebrated as that "great and important statute"[385] "form[ing] a second *magna carta*"[386]—was created to remedy perceived procedural issues with the writ. In particular, it guaranteed that the writ could issue in vacation (i.e., when the courts were out of session), that the Court of Common Pleas had general jurisdiction to issue the writ, that prisoners could not be moved between jails to prevent effective issuance of the writ, and that prisoners could not be sent outside of England to subvert the ambit of the writ.[387] However, the writ at common law, Halliday has carefully shown, already developed

[380] BAKER, *supra* note 217, at 137.
[381] *Id.*
[382] *See* Habeas Corpus Act 1641, 16 Car. 1 c. 10 (Eng.); *see also* FARBEY & SHARPE, *supra* note 121, at 13. The 1641 Habeas Corpus Act is more commonly referred to as the Star Chamber Act. *See, e.g.*, HALLIDAY, *supra* note 23, at 224–25.
[383] The Petition of Right's legal status has long been disputed. *See* HALLIDAY, *supra* note 23, at 225.
[384] Habeas Corpus Act 1679, 31 Car. 2 c. 2 (Eng.). The Act has an (in)famous procedural history because there is some dispute over whether Parliament actually passed the Act. For a helpful summary of the debate, as well as the political context of the Act, see Tyler, *A "Second* Magna Carta*"*, *supra* note 130, at 1974–76.
[385] 3 BLACKSTONE, *supra* note 24, at *137.
[386] 4 *id.* at *431.
[387] *See* FARBEY & SHARPE, *supra* note 121, at 14–15 (summarizing the provisions of the Act)..

many of those procedures; the Habeas Corpus Act of 1679, according to Halliday, is better understood as codifying existing judicial practice rather than meaningfully altering it.[388] Outside of procedure, the Habeas Corpus Act mattered in that it imposed substantive limitations on the king's detention authority while also "dramatically curtail[ing] judicial discretion."[389] In this sense, it aided the work of the writ. But it certainly was not the source of it. Yet as Blackstone's statements clearly demonstrate, the Act was celebrated as the guarantor of the writ.[390] The result was that the Act established "a new insistence that statute was required to make the writ effective[,]"[391] paving the way for statute to eclipse the vigorous work of the writ at common law.

v. The Era of Suspension

For those with Whiggish sensibilities, the decade between 1679 and 1689 is an odd period of English history. Both the Habeas Corpus Acts of 1641 and 1679 purported to establish and regularize the application of habeas to the king's detention authority; indeed, as two modern scholars have noted regarding the Act of 1679, "the importance of the Act is perhaps explained not so much by what it actually did, but by the fact that it established the principle that the efficacy of habeas corpus is not to be thwarted."[392] Aided by statutory law, habeas was, indeed, that "great and efficacious writ in all manner of illegal confinement . . . ."[393]

And yet. Almost immediately after the accession of William and Mary in 1688, Parliament passed legislation providing the monarchy with broad authority to arrest people in form of the first

[388] HALLIDAY, *supra* note 23, at 216–17.
[389] TYLER, *supra* note 120, at 25.
[390] This is also the conventional story. See, for example, BAKER, *supra* note 217, at 540 (The Long Parliament abolished the Star Chamber in 1641, and it "took care to reverse the effect of the *Five Knights' Case* and to guarantee *habeas corpus* as a remedy in case of committal by the king or the Council. This safeguard continued after 1660, and indeed the remedy of *habeas corpus* was further improved by legislation in 1679.").
[391] HALLIDAY, *supra* note 23, at 217.
[392] FARBEY & SHARPE, *supra* note 121, at 17.
[393] 3 BLACKSTONE, *supra* note 24, at *131.

suspension of habeas corpus.[394] This was a time when James II had recently fled to France, seeking refuge with his cousin, Louis XIV, and Parliament and royalty alike were anxious about the possibility of "papists" invading.[395] But it was also a time in which Parliament's power was rising.[396] This is illustrated perhaps most obviously with the Declaration of Rights, issued by Parliament in February 1689, that indicted James II for suspending laws of his own accord.[397] Literally within weeks after lambasting the king for suspending law, Parliament would pass a suspension of habeas corpus that was given the king's assent on March 16, 1689.[398] What mattered, then, was not the *authority* to suspend; rather, it was the location of that authority. Parliamentary suspension was essentially a copy of what King James II had done: In White and Halliday's telling, "The imitation of royal practice by Parliament could not have been more plain. Of course, it was not merely imitation of royal powers; it was capture."[399]

Suspension, however, did not mark the end of the Great Writ's operation. Between 1689 and 1777, parliamentary suspension had a consistency; as Halliday and White put it, suspension was "formulaic," using "similar—often the same—language."[400] First, per Tyler, every suspension "by its express terms 'impowered' the executive to arrest and detain certain classes of persons—specifically, those believed to be engaged in treasonous acts in concert with the king's enemies at

[394] *See* Habeas Corpus Suspension Act 1688, 1 W. & M., c. 2 (Eng.). The Suspension of 1688 was reaffirmed twice that year. *See id.* cc. 7 & 19. *See also* HALLIDAY, *supra* note 23, at 247; CLARK & MCCOY, *supra* note 98, at 41.
[395] TYLER, *supra* note 120, at 35.
[396] *Id.*
[397] *See* Bill of Rights 1688, 1 W. & M. 2d Sess. c. 2 (Eng.) ("[T]he late King James the Second . . . did endeavour to subvert and extirpate the Protestant Religion and the Lawes and Liberties of this Kingdome[ ] . . . By Assuming and Exerciseing a Power of Dispensing with and Suspending of Lawes and the Execution of Lawes without Consent of Parlyament."); Halliday & White, *supra* note 25, at 616.
[398] Halliday & White, *supra* note 25, at 617.
[399] *Id.* at 619.
[400] *Id.* at 617.

home or abroad."[401] Thus, suspension "altered the underlying law of detention by bestowing expanded powers upon the executive during periods of instability and war."[402] That suspension was specifically for holding people who were suspected of treason mattered, because it reflects how suspension was tied to the Habeas Corpus Act, which modified the scope of the writ only with regard to alleged treason or felony.[403] Thus, a second important characteristic of suspension is that it did not curtail the operation of the common law writ outside of the treason and felony context.[404] Third, every suspension was limited to a specific time period, and each suspension in this era showed that, upon expiration, the work of the writ would begin anew immediately.[405] Fourth, sus-

[401] TYLER, *supra* note 120, at 50.

[402] *Id.*; *see also* HALLIDAY, *supra* note 23, at 249.

[403] *Compare* Habeas Corpus Act 1679, 31 Car. 2 c. 2, § 2 (Eng.) (creating procedures "[f]or the prevention whereof, and the more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters" by mandating specific responses to a habeas writ issued for prisoners "unless the commitment . . . were for treason or felony, plainly and specially expressed in the warrant of commitment"), *with id.* § 7 (creating process for people committed "for high treason nor felony"); *see also* Halliday & White, *supra* note 25, at 612 n.97 ("The act concerned the use of habeas corpus only in cases of alleged felony or treason."); HALLIDAY, *supra* note 23, at 242–46 (same).

For a helpful overview of the provisions of the Habeas Corpus Act of 1679, consult Tyler, *A "Second* Magna Carta*"*, *supra* note 130, at 1977–79 (explaining that Section 2 of the Act concerned procedures in response to an issuance of a habeas writ, while Section Seven provided judges authority to release prisoners who were accused of felonies or treason but not given a trial).

[404] For example, Halliday and White have explained,

> That the writ in its common law form developed new uses is evident not only from the non-felony matters to which it was put, but also from the note written on the back of each writ . . . saying whether it had issued according to the terms of the 1679 statute—a relatively rare occurrence—or by rule of the court.

Halliday & White, *supra* note 25, at 612 n.97. Thus, Halliday has explained elsewhere, "the common law writ persisted throughout, ready for use, at least on the king's behalf, even during suspensions." HALLIDAY, *supra* note 23, at 250. Tyler has stated that suspension "set aside 'all other Laws and Statutes any way' relating to the liberty of the subject, establishing the principle that suspension also set aside . . . the common law writ of habeas corpus." TYLER, *supra* note 120, at 39. Though this is obviously the plain meaning of the statute, it is somewhat misleading if read to suggest that suspension entirely stopped the operation of habeas. By empowering the executive in specific circumstances, suspension provided unchecked authority *for certain prisoners*, i.e., those suspected of treason. But suspension did not entail a broader halting of the work of the common law writ because that writ issued in many non-treason contexts. Hence, for example, Blackstone would explicitly distinguish the authorities of the common law and statutory writs, remarking that the Habeas Corpus Act—that "great and important statute"—would only "extend[ ] . . . to commitments for such criminal charge, as can produce no inconvenience to public justice by a temporary enlargement of the prisoner: all other cases of unjust imprisonment being left to the *habeas corpus* at common law." 3 BLACKSTONE, *supra* note 24, at *137.

[405] HALLIDAY, *supra* note 23, at 249.

pension, as part of a broader rise in parliamentary authority, could only be authorized by Parliament;[406] Parliament worked hard to wrest that authority away from the king and ensure its exclusive right to suspend law.[407] Fifth, and finally, suspension was always justified by the language of "necessity," where parliamentarians would point to the dangers of rebellion on British soil or imminent invasion to justify temporary suspension.[408]

Suspension seems contradictory: what Parliament took away in 1641, it gave back in 1689. But suspension was also carefully limited, had a settled practice, and generally had meaningful justification between 1689 and 1747. Hence, Tyler has explained, suspension in this era "stands as another example of Parliament attempting to honor its prior commitments and work within the law—rather than outside of it . . . ."[409] The suspension of 1777, where we finish our history of habeas, would prove to be very different, at least in the minds of the Americans who would go on to write the Constitution of 1787.

4. The Imperial Writ

In February 1777, Lord North, the king's chief minister, introduced a suspension statute in response to the rebelling American colonists. That suspension would apply only to those "as shall have been out of the realm" when they committed their offense.[410] Though this provision was intended to limit the scope of the suspension—as Halliday puts it, supporters of the bill "celebrated

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[406] *Id.*

[407] Blackstone, remarking on suspension authority, explained,

> [T]he happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient. For the parliament only, or legislative power, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for doing so.

1 BLACKSTONE, *supra* note 24, at *132.

[408] HALLIDAY, *supra* note 23, at 248.

[409] TYLER, *supra* note 120, at 54.

[410] Quoted in HALLIDAY, *supra* note 23, at 252.

this aspect of the law, arguing that it retained the widest liberty possible in a time of danger by distinguishing among varieties of subjects based on the location of their arrest"—this was also a novel aspect of the 1777 suspension.[411] Up until 1777, habeas corpus always applied equally to the diverse subjects of the realm. The 1777 suspension paved the way for distinctions in who could access habeas "in a way that would increasingly be mimicked in imperial practice: in India, Quebec, New Zealand, and beyond."[412]

The 1777 suspension was also novel in that the "necessity" rationale did not apply as it did previously, given that no one claimed that there was an imminent risk of rebellion on British soil or invasion. As Halliday and White put it, between 1689 and 1777, there was "a self-restraining legislative tradition that simultaneously declared parliamentary supremacy and Parliament's fundamental respect for the writ of habeas corpus. That tradition was to shatter in 1777 . . . ."[413] The 1777 suspension simply could not be justified by claims of necessity. Instead, it was meant to "ensur[e] that large numbers of people could be held without judicial review of their detention."[414] Third, and finally, the 1777 suspension lasted substantially longer than any of the previous ones—six years in the end,[415] compared to an average of five months for previous suspensions.[416]

These factors made the 1777 suspension detested among the Americans. American newspapers featured debates over the suspension, and American revolutionaries would point to the suspension as "a point of honor by which Americans could sustain rebellion."[417] By the era of the framing of the U.S. Constitution, the importance of habeas corpus was "assumed," according to

[411] *Id.*
[412] *Id.*
[413] Halliday & White, *supra* note 25, at 624–25.
[414] HALLIDAY, *supra* note 23, at 252.
[415] *Id.*
[416] *Id.* at 249.
[417] *Id.* at 253.

Halliday.[418] Indeed, the Framing generation was "steeped in . . . Blackstone's recently published *Commentaries*,"[419] which glorified habeas; they embedded into the 1787 Northwest Ordinance a statement that inhabitants were "entitled" to habeas;[420] and people in most states had access to the writ either by virtue of their state constitution or at common law.[421] Thus, when it came to writing the 1787 Constitution itself, the Suspension Clause, according to Halliday and White, "implicitly restored the traditional order of writs and suspensions that had existed before the Parliamentary suspension acts that began in 1777."[422] But whereas Americans' provision of habeas was rendered textually static at this point, the development of parliamentary supremacy over the writ would continue throughout the British Empire. Halliday has shown how suspension, indemnity acts, and martial law, exported to colonial governance, would neutralize the work of the Great Writ throughout the empire.[423] "[T]he once vigorous common law writ," Halliday writes, would be eclipsed "behind its chimerical statutory twin. It was remarkable how many places the writ would go. And it was remarkable how constraints would always follow."[424]

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Our story of the Great Writ began with medieval civil procedure—where habeas was a means of securing the presence of reticent defendants in a lawsuit—and ends with parliamentary supremacy that suppressed the work of the writ in supervising executive authority through all sorts of statutory devices. This story has very little to do with securing the liberty of the subject, the traditional object that habeas has been associated with.[425] Instead, we have emphasized two consistent themes. First,

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[418] Halliday, *Oxford*, *supra* note 130, at 677.
[419] TYLER, *supra* note 120, at 31.
[420] Halliday, *Oxford*, *supra* note 130, at 679.
[421] *Id.*
[422] Halliday & White, *supra* note 25, at 671.
[423] HALLIDAY, *supra* note 23, at 258.
[424] *Id.*
[425] *See, e.g.*, PLUCKNETT, *supra* note 290, at 57 ("The writ of *habeas corpus* has played such a large part in the struggle for liberty that a short history of it must be given here.").

the justices who wielded writs of habeas corpus used it with great acumen. Habeas exhibited great flexibility even before the height of the *ad subjiciendum* writ's work in the seventeenth and eighteenth centuries. Whether in wresting control from parochial localities, in hauling reticent defendants into court, or in adjudicating child-custody disputes, habeas corpus, for centuries, was employed with creativity to further the authority of judges. Second, and related, the history of habeas is a history of power and its distribution among different institutions: from centralizing authority in King's Bench over local courts and helping to establish the supremacy of the common law, to the justices aggrandizing authority to speak in the voice of the royal prerogative, and then finally to the rise of Parliament as the supreme authority of the land.

And yet, the Great Writ certainly was capable of much; the stories of Chapter 2 demonstrated that without a doubt. Part II of this Chapter, therefore, revisits those stories and helps illuminate how this new history of habeas corpus might nevertheless explain the scope of this majestic writ.

II. Revisiting the Great Writ

This section revisits the stories of Chapter 2 and demonstrates how its episodic retelling of history, though so easily connected by a throughline focused on the development of liberty, can also be explained by the overarching narrative of Part I. We begin with a central characteristic of the writ—that it was a writ of the prerogative. Its ability to protect the liberty of the subject, its extension to seemingly-private life, its equitable usage, and its capacity to issue across the empire all follow from this single characteristic.

A. Writ of the Prerogative

Recall the plight of Walter Witherley, that man who was jailed in the early seventeenth century by order of the Welsh Council and who sought the writ from King's Bench.[426] Conspicuously absent from the litigation was a meaningful discussion about his liberties. The Attorney General at the time, Sir Edward Coke, happened to opine on his case, arguing to King's Bench that some lawyers believed—erroneously, in his mind—that King's Bench could not send habeas to those jailed by conciliar order. That must be wrong, he argued, because Magna Carta guarantees that imprisonment accords with the "law of the land."[427] It was a nice argument, but, as Halliday has explained in summarizing this case, the justices of King's Bench did not care for it; the easier argument—and the one that they emphasized—was that Francis Hunnyngs, Witherley's jailer, disobeyed writs issued by King's Bench, which amounted to "a derogation of the royal prerogative of the king."[428] That King's Bench, through issuing the *ad subjiciendum* writ, spoke with the prerogative of the king was the crucial justification for jailing Hunnyngs, that poor jailer who was merely following the orders of the Welsh Council. In other words, insofar as the writ served the ends of liberty, its means was the prerogative; it was "a writ of the prerogative in order to be a writ of liberty."[429] Indeed, as William Williams, a lawyer arguing in front of King's Bench in 1677 put it,

> It is the prerogative of the King to deliver all prisoners upon habeas corpus or to be satisfied that there [is] just cause for their imprisonment. It is the right of the subject to be so delivered and it is the right of the court to deliver them be the crime what it will and be the[y] committed by what court soever . . . .[430]

[426] *See supra* Chapter 2, Part I(A).
[427] Magna Carta, 1215, c. 39, *reprinted in* HOLT, *supra* note 190, at 373, 389.
[428] Quoted in HALLIDAY, *supra* note 23, at 13 (quoting Chief Justice Sir John Popham).
[429] *Id.* at 65.
[430] Halliday & White, *supra* note 25, at 594.

The fact that the writ was a prerogative writ[431] helps us understand three other facets of the writ: its relationship to liberty, its flexibility, and its geographic spread.[432]

B. The Writ and Liberty

If the writ stemmed from the king's prerogative, then it follows that the king must have had some interest in the detention of bodies; otherwise, the writ would never be invoked in service of liberty. That interest was grounded in a reciprocal obligation of protection: subjects of the king had a duty to protect the king (such as in times of war), and so the king also had a duty to his subjects.[433] The king's duty to his subjects was capacious. Hence, Coke explains in his *Institutes* regarding the jurisdiction of King's Bench:

> [T]his Court hath not only jurisdiction to correct errors in judicial proceeding, but other errors and misdemeanors extrajudicial tending to the breach of the peace, or oppression of the subjects, or raising of faction, controversy, debate, or any other manner of misgovernment; so that no wrong or injury, either public or private, can be done, but that this shall be reformed or punished in one Court or other by due course of law. As if any person committed to prison, this Court upon motion ought to grant an Habeas corpus, and upon return of the cause do justice and relieve the party wronged. And this may be done though the party grieved hath no privilege in this Court. It granteth prohibitions to Courts Temporal and Ecclesiastical, to keep them within their proper jurisdiction. Also this Court may bail any person for any offence whatsoever. And if a freeman in City, Burgh, or Town corporate be disfranchised unjustly, albeit he hath no privilege in this Court, yet this Court may relieve the party . . . .[434]

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[431] Indeed, Blackstone, too, would comment that the *ad subjiciendum* writ was a

> high prerogative writ, and therefore by the common law issuing out of the court of king's bench not only in term-time, but also during the vacation, by a *fiat* from the chief justice or any other of the judges, and running into all parts of the king's dominions: for the king is at all times intitled [sic] to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted.

3 BLACKSTONE, *supra* note 24, at *131 (footnotes omitted).

[432] That habeas reflects other structural dynamics is reflected by the changes in the other prerogative writs in the early seventeenth century. As Halliday and White put it, "It was no accident that the other prerogative writs underwent major developments in the early seventeenth century, in the same period that the justices of King's Bench were arguing that they used the king's prerogative when they issued habeas corpus, by which they gave that writ its strength." Halliday & White, *supra* note 25, at 608 n.81.

[433] HALLIDAY, *supra* note 23, at 70.

[434] 4 COKE, *supra* note 131, at *71.

The king's interest in the liberty of his subjects thus extended to ensuring that royal authority was not misused. And, as embodied in habeas corpus, that was potent authority for King's Bench to test the legality of prisoners' detention in nearly all circumstances—even when, paradoxically, the court was testing the *king's* authority.

Thus, even in the height of civil war in the 1640s, Sir Francis Bacon of King's Bench would be bailing and discharging prisoners so long as their detention was not according to law.[435] Similarly, in 1690 under Chief Justice Sir John Holt, over half of the habeas petitions sent to King's Bench were for prisoners accused of treasonous conduct, given that fears of revolution and invasion were rampant.[436] King's Bench under Chief Justice Holt would release nearly eighty percent of those prisoners.[437] Indeed, even with imprisoned sailors captured in battle, habeas corpus would issue from King's Bench to distinguish between those foreign soldiers were properly held as prisoners of war (and thus could not be released by a court) and those who were not, in which case they could be bailed, set at liberty, or kept for trial as traitors.[438] Habeas corpus was the means by which courts would examine people's allegiance, leading to a determination of whether prisoners were rightly prisoners of war subject to the law of nations, or whether they were the king's subjects, given both the substantive rights of habeas litigation (such as the possibility of bail) and also the obligations arising from English penal law.[439] As Halliday sums it up, habeas issued based on the king's prerogative interest in his subjects' liberty, but "'subject' was a highly elastic status, one that included any person held by another who acted by the king's authority."[440] In locating the

[435] *See* HALLIDAY, *supra* note 23, at 160–61.
[436] *Id.* at 32.
[437] *Id.*
[438] *See id.* at 168–73.
[439] TYLER, *supra* note 120, at 56–61, 73–78.
[440] HALLIDAY, *supra* note 23, at 173.

authority of habeas in the king's prerogative, we can begin to understand why the work of the writ was so broad, extending to even the most dangerous of prisoners and those captured in wartime.

The king's interest in the liberty of his subjects also helps us understand why habeas could be used in seemingly-private disputes—why it could allow Bridget Hyde to choose between an alleged spouse and a stepfather,[441] and why it was used to liberate Mary Lady Rawlinson from the confines of an abusive husband.[442] Through the *ad subjiciendum* writ, "the court extended the protection of the king's laws and made effective his prerogative interest in his subjects' liberties, including their freedom from violence and fear."[443]

C. The Equitable Writ

The fact that the writ's authority stemmed from the prerogative also explains its flexibility, and thus its equitable nature. To the early modern English legal theorist, the king's prerogative divided into two categories: ordinary and absolute. The king's ordinary authorities included abilities that the king exercised "through law by his voluntary desire to act according to law."[444] But while the king normally opted to follow law, he had the ability to transcend them in particular scenarios through exercises of his absolute prerogative. In analogy to God, who established normal laws of nature but also could perform miracles that bent those laws, the king, in certain circumstances, could transcend law even as he was bound normally to follow it.[445] The courts of equity originated with this principle—the idea that, when the common law was too stringent to do justice in a given case, then the king, acting through the Chancery primarily, could step in and provide justice outside

[441] *See supra* Chapter 2, Part I(B).
[442] *See supra* Chapter 2, Part I(C).
[443] HALLIDAY, *supra* note 23, at 44.
[444] *Id.* at 68.
[445] *Id.* at 67–68.

of the law.[446] The justification for the exercise of this authority was to benefit the people. Thomas Fleming, Coke's immediate predecessor as Chief Justice, explained,

> The king's power is double, ordinary and absolute, and they have several laws and ends. That of the ordinary is for the profit of particular subjects . . . . The absolute power of the king is not that which is converted or executed to private use, to the benefit of any particular person, but is only that which is applied to the general benefit of the people and is *salus populi*.[447]

The power to suspend law, as explained earlier, reflected this kind of absolute power to transcend normal rules.[448] But other exercises of the prerogative, including the prerogative writs, were also derived from this authority—this authority to perform legal miracles pursuant to *salus populi*, the health of the people.

In what ways, then, was the *ad subjiciendum* writ miraculous? For one, as Halliday and White put it, the justices "regularly rendered judgments that did more than answer the question about the propriety of the arrest warrant, ostensibly the only matter raised by the writ."[449] Consider, for example, when Robert Bradston was bailed on habeas because King's Bench was skeptical that the High Commission had authority to jail him for contempt of alimony.[450] The justices did not stop there. They also chose to opine on his adulterous behavior, chastising him and ordering him to obey the High Commission—that very institution whose authority they circumscribed. Bridget Hyde's remedy through habeas—neither discharge, bail, nor remand—was also far from the traditional outcome of suing for habeas.[451]

The miraculous nature of the *ad subjiciendum* writ is also displayed by the fact that the justices often ignored their own rules. It was an ostensible rule of habeas litigation that the facts

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[446] *See* BAKER, *supra* note 217, at 112–17.
[447] Quoted in *id.*
[448] *See supra* note 399 and accompanying text.
[449] Halliday & White, *supra* note 25, at 610.
[450] *See supra* notes 321–322 and accompanying text.
[451] *See supra* Chapter 2, Part I(B).

of the return could not be challenged.[452] And yet, when Robert Viner falsely claimed in the return to Hyde's writ that he was not holding her, Chief Justice Hale paid lip service to the return and ordered their presence in his court. With habeas corpus, then, the justices of King's Bench—the highest common law court of the land—dispensed with their rigid adherence to rules and instead performed legal miracles, adapting the Great Writ to all sorts of circumstances by wielding the power of the royal prerogative.

D. The Writ Across the Empire

Our story of the *ad subjiciendum* writ began with the justices supervising local justices of the peace to ensure that they did not abuse the legal authority vested in them by the king and Parliament.[453] In representing the king's prerogative, the writ ensured that the king's authority was not misused; hence, with habeas, the "justices focused less on prisoners' rights . . . than on the wrongs of jailers."[454] Sir Matthew Hale, who was Lord Chief Justice in the 1670s, explained this view: "The jails regularly are all in the king's disposal . . . for the law hath originally trusted none with the custody of the bodies of the king's subjects . . . but the king or such to whom he deputed it."[455] If habeas was about supervising those representing the king, it followed that the writ would issue wherever there were jailers purporting to jail in the name of the king. Thus, even though normal private litigation implicating the counties palatine could not be brought in the courts of Westminster, habeas would issue to subjects detained there.[456] Similarly, habeas would issue to more remote places—Berwick-upon-Tweed, the Channel Islands, Wales, Ireland, and further.[457] Each of these

[452] *See* Halliday & White, *supra* note 25, at 610; *see also supra* note 310.
[453] *See supra* Chapter 3, Part I(E)(1).
[454] Halliday, *Oxford*, *supra* note 130, at 674.
[455] Quoted in HALLIDAY, *supra* note 23, at 74.
[456] *Id.* at 143.
[457] Halliday & White, *supra* note 25, at 637–39.

places was a legal island, with special exceptions from the normal English common law. But prerogative writs such as habeas, Blackstone explained, would nevertheless issue to these "exempt jurisdictions,"[458] for these writs would "run[ ] into all parts of the king's dominions . . . ."[459]

Beyond the writ's geographic scope was the question of *who* could claim its protections. The answer, in short, was anyone who could claim subjecthood:

> [I]deas about liberties running through the writ of habeas corpus arose from and marked out an astonishingly vast subjecthood. Subjects varied—wives were not husbands, "natural-born" subjects were not "local" subjects—but all were subjects. As subjects, many were their liberties, all rapidly in motion as English law covered more people across the globe.[460]

This is not to suggest that English law did not discriminate among different subjects. It did. For example, by the time of the *ad subjiciendum* writ, aliens could bring personal actions at common law and own personal property, but they could not own real property (i.e., land).[461] Yet aliens within the king's domains would be in a condition of local subjecthood, so they enjoyed other benefits (and obligations) of being the king's subjects—including the ability to invoke the writ of habeas corpus "[i]n virtually all the same ways, in the same instances, and with the same results as the king's other subjects."[462] Indeed, according to Chief Justice Hale, even an enemy alien who entered England not in "open hostility" could be afforded local subjecthood and thus provided

[458] 3 BLACKSTONE, *supra* note 24, at *79.
[459] *Id.* at *131.
[460] HALLIDAY, *supra* note 23, at 179.
[461] BAKER, *supra* note 217, at 531.
[462] HALLIDAY, *supra* note 23, at 205.

the privilege of habeas.[463] However, as noted earlier, this unitary subjecthood would become fractured after the suspension of 1777.[464] Until then, however, the history shows that habeas extended across the entirety of the king's domains, and it applied to nearly all people who entered the domain.

E. Law from Liberty or Liberty from Law

Perhaps the most majestic use of habeas was when James Somerset sought—and secured—his freedom from slavery by suing for the writ.[465] It was a glorious invocation of the writ, an episode where law purported to serve its purpose—to protect liberty. But the precedent itself did little. The holding of the case itself was limited to the statement that slaves could not be forcibly deported from England.[466] If taken out of England, slaves' status as property would immediately revive, and the writ could not save them because their detention—as slaves—was once again lawful.[467] Indeed, even within England, slavery did not end.[468] In Halliday's words, "Habeas corpus, by its nature, could not enable a judge to declare illegal an entire system of bondage created by colonial legislatures."[469] Habeas, by the late eighteenth century, channeled the increasingly popular language of liberty; demands for liberty sought refuge in law. But habeas corpus, as demonstrated by *Somerset's Case*, could never live up to those demands. Habeas corpus, Clark and McCoy emphasize,

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[463] Halliday & White, *supra* note 25, at 606. To offer another contemporary explanation of local subjecthood, Joseph Yates, who was a justice of King's Bench in the eighteenth century, explained, "Local Allegiance is that which is due from a Foreigner during his Residence here; and is founded in the Protection he enjoys for his own person his Family & Effects during the Time of that Residence." Quoted in Patrick J. Charles, *Decoding the Fourteenth Amendment's Citizenship Clause: Unlawful Immigrants, Allegiance, Personal Subjection, and the Law*, 51 WASHBURN L.J. 211, 217 n.39 (2012).
[464] *See supra* Chapter 3, Part I(E)(4).
[465] *See supra* Chapter 2, Part I(D).
[466] BAKER, *supra* note 217, at 542.
[467] CLARK & MCCOY, *supra* note 98, at 49.
[468] *See id.* ("In fact after the Somerset decision there is evidence that slaves continued to be bought and sold in England.").
[469] HALLIDAY, *supra* note 23, at 175.

"cannot be understood in practice apart from the political and legal environment in which it operates . . . ."[470]

James Somerset, Walter Witherley, Mary Lady Rawlinson, and Bridget Hyde all sought to secure their liberty through law. Their stories are testaments to all that law could do to serve that end. But the Great Writ could not do everything. For all those who secured their liberty through habeas, there were many others who were remanded to detention. After all, habeas is not, at its core, a writ of liberty. It tests whether detention is lawful. And if it is—regardless of whether it is right or just—the writ can do nothing more.[471] Thomas Darnel and the many other nobles detained in London's Fleet Prison on special command of the king understood this.[472] So too did Blackstone. Though he gushed about habeas, he was clear-eyed about its purpose. The "glory of the English law" did not consistent in establishing "absolute exemption[s] from imprisonment" but rather, in "clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful."[473] For Blackstone, the liberty protected by English law was procedural, not substantive. No wonder then that he celebrated habeas corpus. The writ was "definitively the fundamental remedy under the Rule of Law."[474] It guaranteed all that law did. As a corollary, it guaranteed only that which law could.

This story of habeas—one premised primarily on the distribution of power among different institutions in early modern England—is not nearly as comforting as the Whiggish story of habeas as the guarantor of a progressive liberty. It certainly questions the modern liberal imagination that

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[470] CLARK & MCCOY, *supra* note 98, at 59.
[471] *See id.* at 35 ("The constant repetition by several of the great figures in English legal history of various encomia as to its efficacy has tended to obscure another side of the history of the remedy. That is, since the remedy exists to establish whether or not a detention is lawful, once it is shown that the detention is lawful there is nothing further for the writ to do.").
[472] *See supra* Chapter 3, Part I(E)(3)(iii).
[473] 3 BLACKSTONE, *supra* note 24, at *133.
[474] CLARK & MCCOY, *supra* note 98, at 35 n.3.

dares to assume that we, today, must have a more perfect form of liberty than those before us. That our modern liberty is not assuredly superior to our forebears' is manifestly true if we continue to view habeas as synecdoche for liberty itself. After all, Halliday has argued, "the writ's vigor may have peaked in the 1780s."[475] For Halliday, this conclusion is enough; the point of history, according to him, "is to discomfit us with the significance of the unfamiliar."[476]

But we seek not to write history for its own sake. We seek to enlist history to write law. With a reconstructed history of habeas corpus, one that is more true to the full historical record, we now have the capacity to return to the animating question of this Thesis: how does one enlist history in service of law?

[475] HALLIDAY, *supra* note 23, at 314.
[476] *Id.* at 6.

CHAPTER 4: HISTORY IN SERVICE OF LAW

As noted at early in this Thesis,[477] history invariably plays an important role in understanding habeas corpus as it is provided for in the U.S. Constitution. One simply cannot read the Suspension Clause and ascertain its meaning from its text alone. And the natural place to go for answers is history. In writing a history of the practice of habeas corpus in England in the lead up to its incorporation into the Constitution, I hope to provide the context for approaching the Suspension Clause. But that history alone cannot answer all questions. This Chapter assesses some core ambiguities in the application of this history to analyzing the scope of the Suspension Clause. Upon finding such ambiguities, I turn to an analysis of why, specifically, we seek history's guidance. The normative justifications for history, however, intermix with these ambiguities in ways that suggest that the history of habeas corpus cannot fulfill the role that history must in order to better promote law.

I. The Problems of History

This section takes the insights from Chapter 3 (and from juxtaposing it with Chapter 2) to identify three core problems with invoking history in the context of American habeas jurisprudence: first, that it requires translating English practice into a very different context of government; second, that key authorities from the Framing generation were likely relying on dubious histories; and third, that narratives of history can easily be written based on a pre-existing conviction.

A. Translating from England to America

[477] *See supra* Introduction, Part III; Chapter 1.

One of the most obvious problems with applying our history of habeas to the United States is that early modern England and the United States have fundamentally different structures of governance. If the animating force behind the practice of the writ in the late eighteenth century was the royal prerogative, how do those practices overlay into a system with separated powers?[478]

History alone cannot answer this question. For example, Halliday and White have characterized the Suspension Clause as "implicitly restor[ing] the traditional order of writs and suspension" to the pre-1777 era, suggesting that the Clause "was an English text made in defiance of imperial contexts, by which Americans rejected a lesser status in a faltering British imperium and claimed for themselves a fully recovered subjecthood within their own new imperium."[479] This may be true, but it does not offer an answer to the question of how to implement the requirements of the Suspension Clause today.

For example, it may be that there were certain practices that were custom by 1777 in England, such as the idea that the writ would run to all the king's domains as a corollary of its implementation of the king's prerogative interest in his subjects' liberty.[480] But depending on one's level of generality for analyzing the principle, one can come to different conclusions about the lesson of history—even if history is meant to be employed solely to establish practice. That principle, for example, might lead one to believe that the writ should run to all of the domains for which the United States has effective authority over.[481] That principle could also imply that the writ should only extend to overseas American citizens, based on an argument that subjecthood should be the

[478] Similar arguments have been made by Aziz Z. Huq, *What Good is Habeas?*, 26 CONST. COMMENT. 385, 387–90 (2010) (surveying Framing-era sources on the question whether the separation-of-powers understanding of habeas is correct); Annika Mizel, *Clash of the Titans: Plenary Power and Habeas Corpus in* Castro, 127 YALE L.J.F. 270, 273–75 (2017).
[479] Halliday & White, *supra* note 25, at 671.
[480] *See supra* Chapter 3, Part II(D).
[481] *See* Boumediene v. Bush, 553 U.S. 723, 769 (2008) ("In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.").

analogized to modern understandings of citizenship; after all, though the United States government certainly has an interest in the wellbeing of its overseas citizens, it hardly has such an interest in non-citizens outside of its formal jurisdiction.[482] Moreover, even if explicit *practices* were transplanted from the English framework, because the *underlying principle* is no longer applicable in the American context (i.e., the Constitution does not provide for a monarch with prerogative interests), it is difficult to ascertain how history can guide the development of doctrine into new contexts.[483]

In some sense, the Suspension Clause employs a framework built on assumptions that are almost all obsolete in the American context. English practice depended on a monarch with reciprocal obligations to subjects when early American notions of citizenship were poorly contoured and left vague in the Constitution;[484] its authority as a prerogative writ derived from the king's ability to perform legal miracles, including the dispensation of law as applied to specific people,[485] whereas the American system of separated powers provides the President with a pardon power[486] and separate judicial authority to issue writs of habeas corpus;[487] and in the English context, King's

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[482] *Cf. id.* at 835 (Scalia, J., dissenting) ("Lest there be any doubt about the primacy of territorial sovereignty in determining the jurisdiction of a habeas court over an alien, Justice Jackson distinguished two cases in which aliens had been permitted to seek habeas relief, on the ground that the prisoners in those cases were in custody within the sovereign territory of the United States. . . . *Eisentrager* thus held—*held* beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign.").

[483] *Cf. id.* at 752 (majority opinion) ("And given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one.").

[484] *See, e.g.*, ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 3 (2019) ("In British law, the American colonists, like persons in Great Britain, were 'subjects' of the crown, entitled to protection and required to provide allegiance. Independence transformed British subjects into American citizens. Yet despite the enormous 'cultural currency' that the idea of citizenship acquired in the United States in the first half of the nineteenth century, it was not until the constitutional revolution of Reconstruction that a commonly agreed-upon understanding of the rights it entailed and the role of the federal government in defining and guaranteeing those rights developed."). *But see, e.g.*, Philip A. Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1844–47 (2009) (arguing that a principle of protection, which defined the limits of whom law applied to, was well-established in the state constitutions).

[485] *See supra* Chapter 3, Part II(C).

[486] *See* U.S. CONST. art. II, § 2.

[487] There was previously meaningful dispute about whether federal courts have an inherent authority to issue writs of habeas corpus given the negative phrasing of the Suspension Clause. *See, e.g.*, Halliday & White, *supra* note 25, at

Bench purported to speak on behalf of the executive, whereas in the United States, federal courts are guaranteed independence from the executive.[488] Developing Suspension Clause doctrine based on history thus requires answers that cannot, in themselves, come from history.

578 n.2 (noting that the Suspension Clause, pre-*Boumediene*, had not been interpreted to guarantee an affirmative right to habeas review); HALLIDAY, *supra* note 23, at 253 (describing the Suspension Clause as "negative in construction, presuming the writ rather than importing it"); Fallon & Meltzer, *supra* note 127, at 2051 ("Uncertainty persists partly because the Suspension Clause, though it does not affirmatively and expressly guarantee habeas corpus jurisdiction, does presuppose that it will exist, and Congress acted consistently with that presupposition in 1789 by conferring such jurisdiction on the federal courts.").

Though it is clear that the Framing generation was jealously protective of the habeas privilege, it is not clear whether they would have viewed federal courts as the primary guarantors of that right, especially since habeas was well-established in all of the states prior to the adoption of the Constitution. *See, e.g.*, Halliday & White, *supra* note 25, at 672–76 (discussing pre-Constitution history of habeas in the colonies). Thus, one way to interpret the negative phrasing of the Clause is to suggest that it merely limits Congress's authority to suspend habeas as a state remedy or as a statutorily granted right. For a succinct summary of this debate, consult TYLER, *supra* note 120, at 137–38. Another interesting component of the debate is that some state courts understood themselves to have authority to issue habeas writs to prisoners held under color of federal law during the Framing and Antebellum eras. *See id.* at 194. The Supreme Court, in *Tarble's Case*, 80 U.S. (13 Wall.) 397, 409 (1871), held that habeas writs issued from state courts on behalf of prisoners "confined under the authority or claim and color of the authority of the United States" obligated the federal official only to provide a return "show[ing] distinctly that the imprisonment is under the authority . . . of the United States . . . ." Thus, state courts lack the ability to inspect the legality of federal imprisonment, even though it had been a well-established practice before the Civil War and likely would have factored into the Framers' understanding of whether the Federal Constitution affirmatively guarantees a right to habeas in federal court. *See also* Halliday & White, *supra* note 25, at 682 n.330 (discussing the habeas authority of state courts and concluding that it is "historically inaccurate" to believe that state courts lack authority to issue writs to federal officials). Regardless, *Boumediene* settled the question about federal courts' inherent habeas authority, concluding that the Suspension Clause does guarantee an affirmative right to the habeas privilege unless in time of suspension. *See Boumediene*, 553 U.S. at 771.

[488] Halliday, for example, has emphasized that King's Bench, Parliament, and the Privy Council should not be viewed "as coordinate—much less checking and balancing—institutions." HALLIDAY, *supra* note 23, at 27. Suffice it to say that Halliday is skeptical of viewing the development of the writ in terms of the separation of powers—which is logical given that the pre-revolutionary England lacked a comparable form of separated powers to the American system. *See also* Halliday & White, *supra* note 25, at 673 ("[A]lthough English government, by the late eighteenth century, was surely a 'mixed' government, with royal ministers, the Privy Council, Parliament, and King's Bench each performing governmental functions and to an extent competing with one another, the system of separated tripartite powers, a two-tiered federal Union, and a republican form of government established by the American Constitution was a major departure from the English model. Crucially, the various parts of English government were characterized more by the ways in which they interpenetrated one another—even when competing—than by any balancing or checking function.").

> In contrast, Vladeck, in reading Halliday's conclusions, has argued,
> the conclusion that English habeas was about *judicial* power is ubiquitous throughout [Halliday's] narrative, and takes on separation of powers undertones when viewed in light of America's divided constitutional system. Indeed, it could hardly have been lost on the Founders that they were simultaneously enshrining in the Constitution a prerogative writ and the structural independence of the judges who would issue it.

Vladeck, *supra* note 132, at 969 n.135. *See also, e.g.*, Respondent Brief, *supra* note 38, at 34–35 ("When the Framers enshrined the writ into our Constitution, they did so as part of the 'constitutional plan that allocated powers among three independent branches.' In place of a King's prerogative to call any jailer to account, they dictated that *judges* would always be empowered to inquire into the legality of physical restraint by the other branches, except during formal and carefully circumscribed, suspensions.") (quoting *Boumediene*, 553 U.S. at 742) (internal citations omitted).

B. The Historical Abuse of History

A second problem in enlisting English history is that the Framing generation in the United States, to put it frankly, used bad history. Consider, for example, the question whether the "Habeas Corpus" referred to in the Suspension Clause was about the common law or statutory writ.[489] Halliday and White have argued that the Habeas Corpus Act "must be understood against a common law backdrop . . . ."[490] Elsewhere, Halliday claims that the Habeas Corpus Act primarily codified common law practice[491] and that the Act therefore played little role in the development of the *ad subjiciendum* writ into that powerful general test of detention authority.[492] Halliday also cites some evidence that the common law writ, not the statutory writ, was on the mind of the Framing generation—for example, an American commentator who observed that "the habeas corpus act in England gives not, but it is only declaratory of a right."[493] John Hancock, similarly, seemed to recognize that habeas corpus existed as a prerogative writ independent of the statute, even as he explained that the Habeas Corpus Act was what was incorporated into Pennsylvania's laws.[494]

On the other hand, substantial evidence suggests that the Framing generation primarily cared about the Habeas Corpus Act. For example, Halliday emphasizes that Blackstone was "the era's leading legal commentator,"[495] and Blackstone's ecstatic praise was saved for the Habeas

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[489] Tyler emphasizes this distinction as a key complicator in American habeas scholarship that relies heavily on history. *See* TYLER, *supra* note 120, at 13.
[490] Halliday & White, *supra* note 25, at 631.
[491] *See* HALLIDAY, *supra* note 23, at 216–17.
[492] *See* Halliday, *Oxford*, *supra* note 130, at 676–77.
[493] Quoted in *id.* at 676.
[494] *See* Letter from John Hancock to William Livingston (Aug. 30, 1777), *reprinted in* 7 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 572 (Paul H. Smith et al., eds., 1976–2000) ("The habeas corpus Act forms a part of the Code of the Pennsylvania laws, and has been always justly esteemed the palladium of liberty. Before that statute the habeas corpus was considered to be a prerogative writ, and also a writ of right for the subjects . . . .") (quoting Thomas McKean).
[495] *See* Halliday, *Oxford*, *supra* note 130, at 678.

Corpus Act, not for the common law writ.[496] Regardless of whether Blackstone was wrong or wrote a sketchy history, his work "dominated the popular and political discourse surrounding habeas corpus during this period," and Tyler argues that, as a result, the Act was "the central component of the story[ ]" of the Suspension Clause.[497] Similarly, a decent amount of Founding-era documentation emphasizes the Habeas Corpus Act.[498] Thus, Tyler has argued, "focusing exclusively on the common law writ and its judicial origins gives insufficient attention to what was a tremendously significant factor in the development of Anglo-American habeas jurisprudence—namely, the English Habeas Corpus Act . . . ."[499]

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[496] Indeed, Halliday critiques Blackstone and Hamilton in *Federalist* 83 for "conflat[ing] the common law writ with the act." *Id.*

[497] TYLER, *supra* note 120, at 31.

[498] *See, e.g.*, 2 ELLIOT, *supra* note 239, at 19 (quoting a speech at Virginia's ratifying convention delivered by George Nicholas, who described how magna carta "was renewed, enlarged, and confirmed, by several succeeding kings: the Habeas Corpus under Charles II"); Luther Martin, Genuine Information (Nov. 29, 1787), *reprinted in* 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 172, 213 (1911) (critiquing the Suspension Clause by noting how the states "have a power of suspending the *habeas corpus* act"); Federal Farmer VIII to the Republican (Jan. 3, 1788), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION 993, 995 (John P. Kaminski et al. eds., 2009) [hereinafter DOCUMENTARY HISTORY] ("In England, the people have been led uniformly, and systematically by their representatives to secure their rights by compact, and to abolish innovations upon the government: they successively obtained Magna Charta, the powers of taxation, the power to propose laws, the *habeas corpus act*, bill of rights, &c. they, in short, secured general and equal liberty, security to their persons and property; and, as an everlasting security and bulwark of their liberties, they fixed the democratic branch in the legislature, and jury trial in the execution of the laws, the freedom of the press, &c.") (emphasis added); Federal Farmer XVI (Jan. 20, 1788), *reprinted in id.* at 1051, 1058 ("The people by adopting the federal constitution, give congress general powers to institute a distinct and new judiciary, new courts, and to regulate all proceedings in them, under the eight limitations mentioned in a former letter; and the further one, that *the benefits of the habeas corpus act shall be enjoyed by individuals*.") (footnote omitted and emphasis added); Giles Hickory, Essay in New York *American Magazine* (Jan. 1, 1788), *reprinted in id.* at 553, 554 (describing how "the habeas corpus act . . . and many others which are declaratory of certain privileges, are justly considered as the pillars of English freedom"); A Native of Virginia: Observations upon the Proposed Plan of Federal Government (Apr. 2, 1788), *reprinted in* 9 *id.* at 655, 691 ("[T]he Congress can claim the exercise of no right which is not expressly given them by this Constitution . . . . The article respecting the habeas corpus act corroborates this doctrine. The Convention were sensible that a federal government would no more have the right of suspending that useful law, without the consent of the States, than that of restraining the liberty of the press: But at the same time they knew that circumstances might arise to render necessary the suspension of the habeas corpus act, and therefore they require of the States, that they will vest them with that power, whenever those circumstances shall exist.").

[499] Tyler, *A "Second* Magna Carta*"*, *supra* note 130, at 1951; *see generally* TYLER, *supra* note 120, at 102–40 (documenting history of habeas in the early American context with a focus on how the Habeas Corpus Act was integral to American habeas law, concluding that the Act "remained a central and profoundly influential part of the development of American habeas law during the Founding period, and proved to be the reference point for the protections enshrined in the Suspension Clause," *id.* at 139).

To be sure, part of Halliday and White's argument is that the Habeas Corpus Act incorporated common law practices. By transitivity, then, even if the Suspension Clause was modeled off the statutory writ, it could also preserve the characteristics of the common law writ. But the relevant question is not whether the provisions of the Habeas Corpus Act are relevant for the scope of the Suspension Clause—that much is undeniable even if one fully buys Halliday and White's argument. Rather, the question is whether characteristics of the common law writ *outside of those provided for* in the Act were incorporated into the Suspension Clause. For that to be the case, one would need compelling evidence that the American colonists understood the contours of English habeas practice sufficiently well to distinguish between the statutory and common law writ.[500] The evidence that Halliday and White provide seems fragmentary at best, and it is suggestive that American colonists' practice could cohere with the English framework that distinguished between the common law and statutory writs.[501] It does not necessarily prove that the Americans consciously understood that distinction and chose to incorporate the common law writ specifically into their Constitution.

Two other comments are worth noting at this point. First, the historical abuse of history might be suggestive that the original understanding of the Suspension Clause was imprecise. It seems perfectly reasonable that the American colonists were well-steeped in the discourse of liberty and eager to preserve their rights even when lacking precise information about those rights. If habeas is today "a synecdoche for modern liberal ideas[ ]"[502] due in part to ahistorical ideas peddled by the likes of Blackstone and Coke, is it unreasonable to believe that the Framing generation

[500] Keep in mind that the way Halliday distinguished between writs issued at common law and pursuant to statute is that the latter, per the Habeas Corpus Act of 1679, required such writs to be inscribed "'*per statum tricesimo primo Caroli Secundi Regis*," which was usually written on the verso of the writ, instead of the customary '*per regulam curiam*.'" HALLIDAY, *supra* note 23, at 426 n.105. *See generally* Habeas Corpus Act 1679, 31 Car. 2 c. 2, § 1 (Eng.).
[501] *See* Halliday & White, *supra* note 25, at 674–75.
[502] *Id.* at 581.

could have conceived of the Suspension Clause similarly, such that they did not have precise ideas in mind about the practice of habeas corpus? Second, the historical abuse of history was almost also certainly strategic. Habeas was at the center of so many English constitutional disputes in the seventeenth and eighteenth centuries[503] that there is reason to believe that histories of habeas corpus particularly are prone to politically-motivated arguments. Such arguments are likely to exaggerate how settled certain practices were in order to justify a specific position.[504]

C. The Circularity of History

The justifications for turning to history discussed earlier suggest that history ought to be consulted primarily as to actualize certain democratic ideals and to promote determinism in the law.[505] This further implies that history's most reasonable usage is in establishing practice or principles. But our tendency to view history in terms of progress, as argued earlier, can have a distortionary and subversive effect on these other uses of history.[506] Consider, in the habeas context, the question of how to find the antecedents to the *ad subjiciendum* writ. Cohen has argued that the medieval history of habeas ought to consist of "an investigation into the source and development of that unique [Latin] expression habeas corpus as it makes its appearance in the English law."[507] Those early forms of habeas had more to do with moving bodies with respect to civil litigation than they did with protecting people from unlawful detention.[508] Tracing the words "habeas corpus" might make intuitive sense, but it also might not provide particular insights into the development of the Great

[503] *See supra* Chapter 3, Part I(E)(3).
[504] *Cf. supra* note 190 (describing this argument in the context of Magna Carta).
[505] *See supra* Chapter 1, Part I.
[506] *See supra* Chapter 1, Part III.
[507] Cohen, *Considerations*, *supra* note 130, at 103 (footnote omitted).
[508] *See supra* Chapter 3, Part I(A).

Writ in any meaningful way, since habeas litigation in the civil context was still common at the time of the *ad subjiciendum* writ's development.[509]

In contrast, one could also look for other judicial writs that could be used to secure the liberty of the subject—*de homine replegiando*, *de odio et atia*, *manucaptio*, and so on.[510] Doing so assumes the object of our search; it presumes that habeas is and always has been about the protection of liberty, and thus searches for antecedent protectors of liberty. The tautology does not make for an objective history. The same is true of Halliday's argument regarding antecedents to the *ad subjiciendum* writ, when he writes, "To find antecedents, we need to be less concerned with the capture and release of bodies than with the location of ultimate supervisory authority among the kingdom's magisterial institutions."[511] Here, too, we must assume from the beginning that there is a particular characteristic of habeas that defines the writ, and we search for antecedents that also hold such a characteristic.

Each of those analyses could yield fruitful insights. History is about drawing connections, and different emphases, even when discussing the same period of time and the same topics, can yield completely different stories.[512] As Butterfield has written, "Working upon the same system the whig historian can draw lines through certain events . . . ; and if he is not careful he begins to forget that this line is merely a mental trick of his; he comes to imagine that it represents something like a line of causation."[513] This is not to say that history is a tautological endeavor. Rather, it is to say that the idea of a "right" history is incoherent because the history one finds is often a function of the question that one seeks to answer.

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[509] *See supra* notes 273 and 295 and accompanying text.
[510] *See supra* Chapter 3, Part I(A).
[511] HALLIDAY, *supra* note 23, at 17.
[512] *Cf.* SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD, at xi (2018) ("What can make the study of history exciting is that its infinity of sources and our change in perspective can allow two books on the same topic by the same person to bear almost no resemblance to each other . . . .").
[513] BUTTERFIELD, *supra* note 133, at 12.

Legal questions are often posed at a high level of specificity. For example, in *Boumediene*, the majority explained of the role of history in its analysis:

> The broad historical narrative of the writ and its function is central to our analysis, but we seek guidance as well from founding-era authorities addressing the specific question before us: whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation's security, may assert the privilege of the writ and seek its protection.[514]

Asking questions of at this level of specificity could easily be asking too much of history. As Halliday and White have admonished, "[W]e need to guard against using history to answer questions it cannot definitively answer. Making reflexive analogies between past and present can be an intellectually lazy exercise."[515] At worst, problematic histories might be invoked in a way that does not meaningful constrain the judge, allowing law to write history rather than the opposite while legitimating the judge's decision making. At that point, history has failed at its primary purpose—to provide an objective criterion with which to determine law. In other scenarios, history may be effectively useless, stripped of its ability to provide persuasive authority because it cannot answer certain questions.[516] Indeed, the majority's reading of history in *Boumediene* illustrates this dynamic exactly, given its conclusion that "the unique status of Guantánamo Bay and the particular dangers of terrorism in the modern age" rendered the historical record indefinite as to the question of whether the writ could issue to the Guantánamo detainees.[517]

II. Faithful History, Faithful Law

[514] Boumediene v. Bush, 553 U.S. 723, 746 (2008).
[515] Halliday & White, *supra* note 25, at 588.
[516] *Cf.* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 103 (2d ed. 1986) ("No answer is what the wrong question begets . . . .").
[517] *Boumediene*, 553 U.S. at 752. *See also* Vladeck, *supra* note 132, at 966 ("[T]he Court spent eight pages deciding that English legal history, on this critical constitutional question, was essentially useless"); *id.* at 968 ("[W]hat is perhaps most frustrating about *Boumediene* is how close the Court came to doing right by English history only to miss the forest for a want of trees.").

The invocation of history for understanding law is probably inevitable. This Chapter opened with the observation that Suspension Clause cannot be understood without reference to history. No matter how much we critique the relevance of history to law, law cannot reasonably purge its reliance on history. Nevertheless, this Chapter's analysis of how history can inform law is suggestive that jurists and scholars ought not place too much emphasis on history. Recall that the core normative justifications for a reliance on history were that history could help fix the meaning of the law and complement democratic processes (both by cabining judicial discretion and enforcing the law as it was enacted by the people).[518] But these central ambiguities—relating to the translation of historical practice into new context, the misuse of history, and the way that historical analysis is driven by the way historical questions are posed—suggest that history cannot perform what we ask of it, which is to provide a neutral standard with which to judge.

Indeed, in many ways, history is no different than normal common law adjudication. As Alfred Kelly noted over half a century ago,

> When a court ascertains the nature of the law to be applied to a case through an examination of a stream of judicial precedent, after the time-honored Anglo-American technique, it plays the role of historian. A historian might well say that in this process the court goes to the "primary sources."[519]

Many of the same ambiguities identified with history in the context of habeas also exist in the context of common law adjudication. A core aspect of judicial decision making is reasoning by analogy—by considering examples in previous cases, abstracting principles, and seeking to apply them to present circumstances. The translation problem in the history of habeas is exactly such a problem. Similarly, the misuse of history identified earlier—in particular, the ways in which the Whiggish sensibilities of Coke or Blackstone distorted the historical record on habeas—is exactly

[518] *See supra* Part Chapter 1, Part I.
[519] Kelly, *supra* note 132, at 121.

the same as when previous cases distort *their* precedents. The fact that case law is so often cited for *historical* propositions in judicial opinions is good reason to believe that history, too, often gets distorted through the process of common law adjudication.[520] Finally, the ambiguity in how to pose questions when conducting historical analysis—and the way in which the outcome of one's analysis crucially depends on the question one asks—is also equally applicable in the context of common law adjudication based on, for example, the body of case law one seeks to cite.

If history is prone to many of the same problems as reasoning from precedents generally, then we might conclude that history should not have a privileged role in constitutional decision making. But, at least to some—and with some interpretive methodologies—history does hold such a privileged position.[521] And as an ostensibly neutral metric, history has a legitimating role in decision making. Decisions grounded in history seem objective. But this can be deceiving, for history often has been used to induce drastic change in American constitutional law.[522] More specifically, as Kelly has argued, history can be used as a "precedent-breaking instrument," because reliance on the original meaning of the Constitution (when it differs with contemporary judicial understandings) is a way "to declare that in breaking with precedent [the Court is] really maintaining constitutional continuity."[523] In these ways, privileging history may be counterproductive given our original justifications for turning to history—cabining judicial discretion and promoting democratic ideals.

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[520] *See supra* note 194.
[521] *See generally, e.g.*, Scalia, *supra* note 116.
[522] *See, e.g.*, AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 109–11 (1st ed. 2015) (discussing reliance on originalist literature for constitutional change in the context of *United States v. Lopez*, 514 U.S. 549 (1995)); Kelly, *supra* note 132, at 131 (describing how "the reformist activists on the Court" in the mid-twentieth century "initiated a new era of historically oriented adjudication" out of "search of some adequate guiding principle upon which to support their libertarian interventionism in the social order").
[523] Kelly, *supra* note 132, at 125.

We might rightly privilege history, then, in very narrow circumstances: when there are comparatively few other sources on which to base a decision (e.g., in cases of first impression), such that determinism is a meaningful justification for turning to history; when the historical record is full, and therefore historical conclusions can be well-grounded; and when there are meaningful historical analogues to contemporary legal questions, such that the way that history is to be applied is clear. In other scenarios, history may be helpful, but it probably should not serve as the crux for decision making given, as this Chapter has argued, that history can easily be distortionary. This is not to indict history as a discipline, for there are surely better and worse histories—more and less truthful ways of telling the past for its own sake.[524] But it is to say that lawyers can easily find the present in the past, such that law writes history rather than history informing law. For history, understood as progress, easily bleeds into analyses of history that are intended only to examine practice or a theory of politics. And when judges write the present into the past and from there create law, the limiting ability of history is lost. In the vast majority of contexts, then, history cannot do more than precedents, or any other sources of legal interpretation, to constrain judges.

We seek to a find neutral means of constitutional adjudication, where decisions are driven by objective considerations with minimal discretion for judges to displace democratic enactments. History is an unlikely tool for guaranteeing those virtues. Perhaps what is necessary with applying history to law—as with any other method of constitutional interpretation—is that judges act with humility,[525] maintain an awareness of their institutional context, and seek to apply their methodological commitments faithfully.

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[524] *Cf.* BUTTERFIELD, *supra* note 133, at 10 ("[T]he chief aim of the historian is the elucidation of the unlikenesses between past and present and his chief function is to act in this way as the mediator between other generations and our own. It is not for him to stress and magnify the similarities between one age and another, and he is riding after a whole flock of misapprehensions if he goes to hunt for the present in the past. Rather it is his work to destroy those very analogies which we imagined to exist.").

[525] Consider, for example, Laurence Tribe's critique of both Ronald Dworkin's and Justice Scalia's interpretation of the First Amendment:

> Both of them err, I think, in the confidence of their conclusions about how various people in fact understood particular phrases a century or two ago; in their certitude about whose understanding counts as decisive; and, above all, in their insistence that they know how that historical fact bears on whether the relevant text expressed a concrete rule or an abstract principle.

Laurence Tribe, *Comment*, *in* A MATTER OF INTERPRETATION *supra* note 144, at 65, 72 (footnote omitted).

CONCLUSION: THURAISSIGIAM, HABEAS CORPUS, AND THE POLITICS OF HISTORY

Vijayakumar Thuraissigiam has been detained in Otay Mesa Detention Center in San Diego, California, for over two years by the time of the writing of this Thesis.[526] Given his negative credible fear determination, his last line of defense is habeas review. For under federal regulations, the immigration judge's decision is "final,"[527] and his removal is stayed only pending the appeal of his case.

This concluding Chapter considers his case at the Supreme Court. I outline the three, core legal questions posed by *Thuraissigiam*. With each question, I explore the key arguments raised in the briefing with an eye toward how history is invoked. From intuition, we might expect the government and its amici to focus narrowly on history as practice—to emphasize the lack of precise historical parallels between the *Thuraissigiam*'s case and previous uses of habeas—whereas Thuraissigiam might be expected to emphasize history at a higher level of generality, in terms of a principle-based reading of the historical record, to provide a more capacious reading of the Suspension Clause's protections. I argue that many, but not all, of the parties' invocations of history follow along these lines. And because many of the parties' arguments are based in plausible readings of the historical record, I argue that any decision the Court might make can easily be dressed in the garbs of history while not being meaningfully constrained by history.

I. The Nexus Questions Presented by *Thuraissigiam*

Thuraissigiam's case raises three interlocking legal questions that are within the scope of this Thesis.[528] First, is Thuraissigiam protected by the Suspension Clause? Embedded within this question

[526] *See* Habeas Petition, *supra* note 18, at 13.
[527] 8 C.F.R. § 1208.30(g)(2)(iv)(A) (Westlaw through 85 F.R. 21305).
[528] Substantial amounts of the briefing discuss post-Framing era history as well as more recent precedents from the Court. I focus here on the arguments that pertain to the history of habeas at English common law and the Framing of

are considerations about the *coverage* of the Clause (i.e., the degree to which the Clause's protections are linked to the status of an individual petitioner) and the *substance* of the Clause (i.e., whether the habeas privilege is limited to enforcing other rights, such as a petitioner's rights under the Due Process Clause, or whether the Suspension Clause contains its own protections). Second, is the relief that Thuraissigiam seeks one that the Suspension Clause guarantees? Third, does Section 1252(e)(2), which allows for habeas review of three questions—whether the petitioner is a noncitizen, whether he or she was ordered deported, and whether he or she is an asylee, refugee, or legal permanent resident[529]—constitute an adequate substitute for the privilege of habeas corpus, if that privilege is guaranteed to Thuraissigiam? We consider these questions in turn.

A. Whom the Suspension Clause Protects

The government argues that Thuraissigiam, as an unlawful entrant who was apprehended twenty-five yards from the border, does not have rights under the Suspension Clause.[530] It rests its argument on two propositions: first, that noncitizens seeking admission lack constitutional rights because Congress's authority to exclude people is plenary;[531] and second, that Thuraissigiam ought to be treated as if he were seeking initial admission.[532] One of its amici—the Criminal Justice Legal Foundation (CJLF)—advances a different argument with the same conclusion: that, according to the original understanding of the Constitution, noncitizens "who are 'part of the population' are entitled to the same privileges as citizens, but many with more attenuated connection to the country are not."[533]

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the Constitution.
[529] *See* 8 U.S.C. § 1252(e)(2) (Westlaw through Pub. L. No. 116-138).
[530] *See* U.S. Brief, *supra* note 6, at 16–17.
[531] *See id.* at 21–23.
[532] *See id.* at 23–27.
[533] Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioners at 10, Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. Dec. 16, 2019) [hereinafter CJLF Amicus Brief].

Thuraissigiam responds by contending that habeas rights under the Suspension Clause are separate from other rights, such as procedural or substantive rights under the Due Process Clauses,[534] and that, regardless of Thuraissigiam's status as an unlawful entrant apprehended near the border, the habeas privilege at its heart concerns the legality of government restraint on individuals' liberties, regardless of whose liberty is at issue.[535] Amici in support of Thuraissigiam similarly argue that the "historic function" of the writ was "to ensure that those acting in the King's name did not abuse their power[ ]"; thus, they argue that Thuraissigiam's status as an unlawful entrant is irrelevant[536] and that habeas review was historically available even for people at the border.[537]

At the heart of many of these arguments is a claim about the history of habeas—some more persuasive than others. The government's claims about the scope of the Suspension Clause's coverage are grounded in the Court's precedents about the constitutional rights of noncitizens attempting to gain entrance into the United States. But one of Thuraissigiam's core responses is about the historical nature of habeas at common law.[538] He argues that because the Suspension Clause is a "structural constraint on the power of the Executive and the Legislature[,]" then it "in no way hinges on whether one has . . . other constitutional rights."[539] This proposition, in turn, follows from a citation to *Boumediene* that habeas at common law "served to enforce 'the *King's* prerogative to inquire into the authority of a jailer to hold a prisoner[,]'"[540] and was therefore concerned

[534] *See* Respondent Brief, *supra* note 38, at 33–37.
[535] *See id.* at 25–28.
[536] *See* Legal Historians' Amicus Brief, *supra* note 121, at 2.
[537] *See* ABA Amicus Brief, *supra* note 97, at 11.
[538] Thuraissigiam also cites finality-era cases, which are the subject of an extensive amount of debate among the briefs. *Compare* Respondent Brief, *supra* note 38, at 11–22, *with* U.S. Brief, *supra* note 6, at 38–40, *and* Reply Brief for the Petitioners at 11–15, Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. Feb. 14, 2020) [hereinafter U.S. Reply Brief].
[539] Respondent Brief, *supra* note 38, at 35.
[540] *Id.* at 34 (quoting Boumediene v. Bush, 553 U.S. 723, 741 (2008)) (emphasis from the Respondent Brief).

with monitoring the actions of jailers, not the rights of detainees.[541] History, here, is not invoked to show a particular practice was established at the Framing; rather, history serves to expound a theory of politics, a principle upon which to base future adjudication. Because the Suspension Clause is concerned with the actions of jailers, it follows that whether Thuraissigiam has rights under the Due Process Clause is irrelevant.[542]

The CJLF, an amici in support of the government's position, also makes an argument grounded in history. Its brief proceeds by claiming that "a petitioner's alien status is not irrelevant[,]"[543] and then cites five cases from early American law or English common law.[544] Its analysis, however, is surprising because it rests on inferences that seem outside of the confines of its authorities. For example, the brief seeks to show that whether classes of noncitizens are protected by the Suspension Clause at the time of the Framing depended on whether they were "part of the population"[545] or, in other words, whether they had "sufficient connection to the country . . . ."[546] It cites James Somerset's case[547] and argues that the writ issued to him because "he had been brought into the British Empire legally and permanently[and thus] could be considered a 'part of its population' . . . even if not a citizen."[548] Yet it cites no authority—not even from Lord Mansfield's opinion itself—for such a reading of the case. It next cites Saartje Baartman's case, a Khoikhoi woman who was taken from South Africa and paraded around England as a spectacle to gawk at,[549] and the brief speculates that King's Bench "regarded her as a resident of a British protectorate

[541] *Id.* (quoting Halliday & White, *supra* note 25, at 644).
[542] *See id.* at 35 ("Consistent with this history, the Court's decisions leave no doubt the reach of the Suspension Clause does not hinge on whether one has due process rights.").
[543] CJLF Amicus Brief, *supra* note 533, at 7 (citing Hamburger, *supra* note 484, at 1921–22).
[544] *See id.* at 10–13.
[545] *Id.* at 10.
[546] *Id.* at 13.
[547] Somerset v. Stewart (1772) 98 Eng. Rep. 499, 499 (K.B.).
[548] CJLF Amicus Brief, *supra* note 533, at 10.
[549] *Case of the Hottentot Venus* (1810) 104 Eng. Rep. 344 (K.B.).

and a person within the protection of the Crown."[550] But again it cites no evidence to justify that claim or to show that her perceived residency was even a legally relevant consideration.[551]

The next three cases it cites all deal with prisoners of war, where the CJLF brief contends that prisoners of war were "aliens with weaker connections" who were thus "turned away by the courts."[552] As explained earlier, these cases showcase uses of habeas to distinguish between prisoners of war and those who owed allegiance to the king; when King's Bench found these petitioners to be properly held as prisoners of war, it remanded them because they were not covered by the protection of the king.[553] It is at best debatable historically whether remands as such are evidence that, as a matter of law, habeas would not extend to such persons[554]—after all, King's Bench *did* order bail and discharge for wrongly imprisoned sailors,[555] and its review of properly classified prisoners of war who contested their status as such was nevertheless a form of judicial review, just like its inspection of Thomas Darnel's imprisonment when he was remanded to London's Fleet Prison merely because he was ordered jailed on special command of the king.[556] Indeed, the core reasoning from the case reports began with the fact that the habeas petitioners were concededly prisoners of war, and thus, King's Bench lacked the authority to discharge them.[557]

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[550] CJLF Amicus Brief, *supra* note 533, at 10–11.
[551] The amicus brief of legal historians is even more dismissive of these two citations. *See* Legal Historians' Amicus Brief, *supra* note 121, at 15 n.7 ("The case reports [ ] contain absolutely no evidence that the status of the detained person was a prelude to the use of habeas corpus in either of these cases.").
[552] CJLF Amicus Brief, *supra* note 533, at 11.
[553] *See supra* text accompanying notes 438–440.
[554] *Compare* Vladeck, *supra* note 132, at 968 ("We may obsess over the distinction between jurisdiction and the merits today, but to King's Bench in the eighteenth century, the latter was the exclusive concern when it came to writs of habeas corpus."), *with* Legal Historians' Amicus Brief, *supra* note 121, at 15 ("CJLF's argument that 'the petitioner[s]' in these cases were 'not . . . entitled to habeas corpus is at best ambiguous and at worst misleading.' Though denied habeas relief on the merits, the petitioners in these cases obtained judicial review of the facts and law underlying their detention despite their limited connection to the Crown.") (internal citations omitted) (quoting ERIC FREEDMAN, MAKING HABEAS WORK 10 (2018)).
[555] *See supra* text accompanying notes 438–440; *see also* Legal Historians' Amicus Brief, *supra* note 121, at 14 (arguing that King's Bench denied writs for prisoners of war "because, at that time, prisoners of war could be released only through prisoner exchanges.").
[556] Darnel's imprisonment is discussed above in Chapter 3, Part I(E)(3)(iii).
[557] For example, its quotation of *Schiever's Case* (1759) 96 Eng. Rep. 1249 (K.B.) includes the statement: Schiever "is the King's prisoner of war, and we have nothing to do in that case, *nor can we grant an habeas corpus to remove*

The CJLF's brief represents a reading of history as progress. It approaches history with an eye toward the present. It expounds a theory based on twentieth-century Supreme Court cases[558] and then seeks to justify that theory by connecting disparate eighteenth- and nineteenth-century cases without proper historical context[559] and reading context into specific cases without any authority or evidence from the case reports themselves (in its analyses of *Somerset's Case* and the *Case of the Hottentot Venus*, Baartman's case). Moreover, its invocation of history is, read in its best light, an attempt to establish principles from history—it attempts, in other words, to use history to establish a political theory, one where connections to England are dispositive of whether someone was eligible for the habeas privilege. The result of its principle-bound argument is that, even on its own terms, the brief is insufficient to show that Thuraissigiam ought to lose. If its analysis were completely correct, it would have shown that noncitizens who had "requisite hostility" were unable to access habeas: specifically, those who were *properly classified as prisoners of war*, or, as it states in a footnote, those who were enemies in "an undeclared war against a nonstate entity, such as the Barbary pirates."[560] The application of the principles that the brief identifies to Thuraissigiam is not obvious.[561]

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prisoners of war. His being a native of a nation not at war does not alter the case . . . ." *See* CJLF Amicus Brief, *supra* note 533, at 12 (quoting *Shiever's Case*, 96 Eng. Rep. at 1249). That the case explicitly notes that Schiever's allegiance to a nation "not at war" would suggest that it was his status as a *prisoner of war*—and not as an alien—that justified denying him the writ. Its other two case citations, similarly, both reason from the fact that the petitioner was a prisoner of war to come to the conclusion that they should be denied the writ. *See id.* at 11.

[558] Specifically, the key language it cites is from *Yamataya v. Fisher*, 189 U.S. 86 (1903), and *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which purportedly put forth a rule that aliens who are "part of the population" have access to habeas in the same way as citizens. CJLF Amicus Brief, *supra* note 533, at 10.

[559] Its failure to read cases in context are shown in, for example, the brief's failure to acknowledge why King's Bench lacked authority to bail properly classified prisoners of war and its brief's failure to draw a distinction between jurisdictional judgments and judgments on the merits of habeas petitions.

[560] CJLF Amicus Brief, *supra* note 533, at 13 n.5.

[561] *See id.* at 13 (concluding that "[t]he original understanding, then, is that some aliens had sufficient connection to the country to be entitled to the same habeas corpus privilege as citizens and some did not. This understanding is consistent with the assessment of Johnson v. Eisentrager, 339 U. S., at 770, that the rights of aliens lie on a scale which increases as they 'increase[ ] [their] identity with our society.'") (alterations from the CJLF brief).

The government's brief does more of the work in applying the connections-based test to Thuraissigiam's case. It notes,

As analyses of history, Thuraissigiam's arguments are substantially more compelling than the CJLF brief's. They establish that the Suspension Clause was primarily concerned with the actions of jailers rather than the status of detainees and that habeas would in fact issue to even enemy aliens to establish their eligibility for relief. Two arguments, however, mean that these historical considerations are not dispositive of Thuraissigiam's case.

First, as deployed by Thuraissigiam, these arguments persuasively show that the Suspension Clause applies to Thuraissigiam. They do not prove that the Clause guarantees him relief, which is the subject of the next section. Second, because they rely on history as a theory of politics, they can always be discarded—like similar ones were in *Boumediene*—by factual distinctions arguing that the historical record is inapposite or incomplete. For example, subjecthood, to the early modern English lawyer, was substantially more malleable than American citizenship today, which Thuraissigiam's amici note.[562] Historical practices concerning foreign sailors captured in wartime can be easily distinguishable when compared with a concededly noncitizen petitioner who was barred from admission by Congress exercising its plenary authority to exclude certain classes of people. Just like in *Boumediene*, when the majority claimed that the historical record could not speak to "the *unique status of Guantanamo Bay* and the *particular dangers of terrorism in the modern age*,"[563] the majority here could emphasize the unique challenges of the United States' immigration policy to argue that the historical record is inapposite.

> No dispute exists that respondent entered the country surreptitiously, without inspection or admission by an immigration officer and without a visa or other required documentation. Respondent, moreover, had never previously lived in the United States. And while Congress has made the judgment that an alien unlawfully present for up to two years does not develop the necessary legitimate ties to the country, that judgment applies *a fortiori* to respondent: He was apprehended 25 years from the U.S.-Mexico border, almost immediately upon crossing that border. His sole connection to the United States was that he had been physically present for the time that it takes to walk 25 yards—by any measure insufficient "to have become, in any real sense, a part of our population."

U.S. Brief, *supra* note 6, at 27 (citing *Yamataya*, 189 U.S. at 100).

[562] *See* Legal Historians' Amicus Brief, *supra* note 121, at 7 n.3.

[563] Boumediene v. Bush, 553 U.S. 723, 752 (2008) (emphases added).

B. What Relief the Suspension Clause Guarantees

The next primary argument—and the one where the government deploys most of its historical analysis—concerns the question whether Thuraissigiam's requested relief is "the type of relief that the [Suspension] Clause protects."[564] In the government's telling, Thuraissigiam "seeks additional proceedings relating to his admission to the United States. But no Founding-era evidence supports the use of the writ as a mechanism to challenge decisions relating to an alien's admission, in contrast to challenges to detention as such."[565] The argument comprises two separate claims: one, that the Suspension Clause does not protect certain kinds of review (in particular, it does not apply to reviews of facts);[566] and two, that the Suspension Clause, which concerns detention, does not allow for relief in the form of additional process.[567]

On the first claim, regarding whether fact-intensive review on habeas is allowable, Thuraissigiam argues both that he is contesting the application of law to facts rather than contesting the facts themselves[568] and his amici argue that habeas review would extend beyond purely legal questions.[569] This debate is, in fact, a relatively simple one to resolve as a historical enterprise. Its

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[564] U.S. Brief, *supra* note 6, at 17.
[565] *Id.* at 18.
[566] *See id.* at 38 ("[A]ny judicial review of the determination that respondent lacked a credible fear would be highly fact-based, and any review of his assertions that the asylum officers or IJ failed to follow procedures would require examination of the record and the application of law to the facts and circumstances of this particular case. The Suspension Clause has never required such fact-intensive review . . . .").
[567] *See id.* at 35 ("[R]espondent seeks to invoke habeas both to protect a purported interest (the ability to seek admission to the United States) and to pursue a type of remedy (additional proceedings concerning relief or protection from removal) that would have been unknown at the time of the Founding."). An amicus of the government makes a similar argument. *See* Brief *Amicus Curiae* of Immigration Law Reform Inst. in Support of Petitioners at 15, Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (Dec. 16, 2019) [hereinafter ILRI Amicus Brief] ("[*H*]*abeas* is a due-process procedural device to prevent detention in violation of other substantive laws. Here, the relevant substantive laws are the [Immigration and Nationality Act] and the Due Process Clause, and the Government has not violated either of them. . . . *Habeas* seeks *release*, not systemic review.").
[568] *See* Respondent Brief, *supra* note 38, at 50–51.
[569] *See* Legal Historians' Amicus Brief, *supra* note 121, at 19 ("The historical record refutes the idea that only pure legal questions—or only the narrow questions over which the statute at issue here permits review—would be reviewable.").

answer requires only an appeal to history as practice, and persuasive evidence showing that courts did, in fact, investigate mixed questions of law and fact would be sufficient.[570,571] And as a matter of history, the government's case is weak; its cited authority is a single statement from *St. Cyr* and its own analysis of a different statement from *St. Cyr*,[572] whereas a multitude of persuasive examples, including habeas writs issued by Chief Justice Marshall, are provided by Thuraissigiam's amici on this question.[573] Regardless of my assessment of the historical evidence, however, it is clear that this is a question that *can* be answered from history—and relatively straightforwardly, too.

On the question of whether the common law writ could order further proceedings in the deportation context, the debate is much more complex. The government cites a significant number of authorities (primarily American case law) for the proposition that habeas is about challenging custody and that its remedy is therefore release.[574] It further notes the lack of historical usages of the writ in challenging a decision to exclude a noncitizen.[575] It is in part a powerful argument because it is clearly grounded in habeas practice (i.e., many uses of habeas, and certainly its archetypal usage, was in challenging detention), giving it firm legal authorities, and because it challenges Thuraissigiam to find historical analogues that are difficult.

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[570] Indeed, note that the government's brief does not actually argue that Thuraissigiam is contesting facts; rather, its argument is in the context of how *St. Cyr* specifically authorized habeas review of "pure question[s] of law," which Thuraissigiam is not raising. *See* U.S. Brief, *supra* note 6, at 38 (quoting INS v. St. Cyr, 533 U.S. 289, 298 (2001)).
[571] It is worth noting that some of Thuraissigiam's amici argue that there was actual legal error associated with his asylum officer interview. *See, e.g.*, Immigration & Human Rights Organizations Amicus Brief, *supra* note 5, at 19 ("It was legal error to deny Mr. Thuraissigiam's credible fear claim in light of the country conditions evidence alone.").
[572] *See* U.S. Brief, *supra* note 6, at 38 ("The Suspension Clause has never required such fact-intensive review, as noted in *St. Cyr* itself. See [*St. Cyr*, 533 U.S.] at 306 (explaining that in immigration cases 'the courts generally did not review factual determinations made by the Executive'); see also U.S. Br. at 42, *Guerrero-Lasprilla* v. *Barr*, No. 18-776 (Oct. 21, 2019) (explaining that the phrase '"application * * * of statutes"' in *St. Cyr*, 533 U.S. at 302, means 'the purely legal question of a statute's coverage or scope').").
[573] *See* Legal Historians' Amicus Brief, *supra* note 121, at 19–21.
[574] *See* U.S. Brief, *supra* note 6, at 28–30.
[575] *Id.* at 18.

Thuraissigiam brings a litany of responses. First, he argues that he is detained during his appeal, and thus his petition "requests an entirely ordinary habeas remedy: conditional release pending a lawful adjudication."[576] Second, he claims that habeas at common law could block deportations and extraditions, citing multiple decisions from King's Bench (including James Somerset's case).[577] Third, he argues that deportation "requires a restraint of physical liberty—including detention."[578] Fourth, Thuraissigiam's amici note the essential flexibility of habeas,[579] which I earlier traced as a core aspect of the writ throughout its history.[580] His amici argue that the question the government poses—i.e., whether there is a precise historical analogy to Thuraissigiam's invocation of habeas—is "ahistorical" because "[i]n eighteenth century practice, the authority of English judges to review habeas petitions was not constrained by past decisions."[581] Instead, Thuraissigiam's amici argue that "common law courts displayed creativity in crafting remedies appropriate to the facts of each case."[582]

The historical debate here becomes difficult. If one intends to use history to establish practice, then it is relatively easy to argue that Thuraissigiam is essentially challenging, through habeas, a refusal to admit him—and that, at common law, while habeas could be used to challenge *deportation*, it was not necessarily used to challenge the *decision whether* one was admissible. On the other hand, his physical presence within the United States might suggest that his case is better viewed as testing deportation rather than exclusion (which is a variant of the argument discussed

[576] Respondent Brief, *supra* note 38, at 29.
[577] *See id.* at 27–28.
[578] *Id.* at 32.
[579] *See* Legal Historians' Amicus Brief, *supra* note 121, at 17–18.
[580] *See supra* Chapter 3, Part I.
[581] *See* Legal Historians' Amicus Brief, *supra* note 121, at 5.
[582] *Id.* at 18.

earlier[583]). But the government's argument that he is essentially indistinguishable from someone stopped at the border has force.[584]

The broader argument brought by Thuraissigiam's amici—that habeas was not strictly rule bound—is strong but perhaps proves too much. The flexibility of the writ seems to be a dual-edged sword. If historical precedents are understood to be malleable, then it follows that the political theory put forth by the amici (i.e., the claim that habeas was used broadly "to ensure that officials responsible for discharging the crown's power did not abuse that authority"[585]) could also be subject to change given new circumstances—such as, for example, Congress's decision to circumscribe habeas review because it judged administrative efficiency to be more important than habeas review for a certain class of people. Indeed, consider the following dicta from *Boumediene*: "the Suspension Clause does not resist innovation in the field of habeas corpus. Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ."[586] Tyler has argued that *Boumediene*'s "process-oriented inquiry" can have the effect of "weaken[ing] the substantive limitations histori-

[583] *See supra* Conclusion, Part I(A).
[584] *See supra* note 561. Indeed, the strongest arguments against the government's position are probably ones about the feasibility of its test for determining whether a person is sufficiently far from the border to become distinguishable from the case of the noncitizen stopped at the border. *Compare* U.S. Brief, *supra* note 6, at 25 (advocating for the proposition that "constitutional protections in the application of the immigration laws are not conferred instantaneously upon the alien's illegal entry into the country, but instead require lawful admission and residence for some meaningful period"), *and* U.S. Reply Brief, *supra* note 538, at 9 ("[Thuraissigiam] contends . . . that treating some unlawful entrants as applicants for initial admission would fail to provide a workable rule. But Congress has selected a two-year limit on the period of unlawful presence during which DHS may place an alien in expedited removal."), *with* Respondent Brief, *supra* note 38, at 43 ("Other than repeating that Mr. Thuraissigiam was in the country only 25 yards, the government does not explain the criteria the Court should use: How long would one have to be here or how far into the country before due process attached? . . . The government's open-ended, destabilizing test invites endless litigation."), *and* ABA Amicus Brief, *supra* note 97, at 12 ("Limiting habeas protections for certain noncitizens based on such arbitrary distinctions additionally replaces a categorical rule—habeas is available to all within the United States—with an imprecise and case-specific alternative that will necessitate future litigation. Courts will wrestle to understand the boundary of the Suspension Clause for other aliens with a more 'meaningful' presence in the United States than Respondent in this case.").
[585] Legal Historians' Amicus Brief, *supra* note 121, at 5.
[586] Boumediene v. Bush, 553 U.S. 723, 795 (2008).

cally at the core of the Suspension Clause," because, in her reading, the Suspension Clause constitutionalized "a prohibition of certain kinds of detention in the absence of suspension . . . ."[587] Her critique really comes down to the fact that *Boumediene*'s analysis looked to the totality of circumstances to find the DTA's review provisions to be inadequate[588] rather than taking a bright-line approach. So too with Thuraissigiam's amici, whose arguments about the malleability of precedent may have the counterproductive effect of discounting key historical practices by abstracting the debate based on an overarching theory that habeas was a flexible and adaptable remedy, so that the Suspension Clause begins to lack fixed guarantees.[589]

The historical record here, as applied to Thuraissigiam, is mixed. The government's arguments are strongest by making a claim to history to establish practice, whereby habeas at common law was primarily used to test detention and deportation, but never the *decision* to exclude. Thuraissigiam must either argue that his case is better analogized to deportation, or he must invoke history as a theory of politics, arguing that lacking a precise historical analogy is irrelevant because of the broader animating force behind habeas (i.e., the king's prerogative interest in inspecting all manners of restraint on his subject's liberty).

C. Whether Section 1252(e)(2) Is an Adequate Substitute

[587] TYLER, *supra* note 120, at 275–76.
[588] *See id.* at 275 ("*Boumediene* was about exploring what procedural rights attach in habeas proceedings.").
[589] That being said, the Court has, since *St. Cyr*, hinted at a so-called "one-way ratchet" theory of the Suspension Clause, where historical practice as it existed in 1789 is a constitutional floor but not necessarily a ceiling. *See* INS v. St. Cyr, 533 U.S. 289, 301 (2001). This was, of course, a bitterly contested argument in *St. Cyr*. *See id.* at 341–42 (Scalia, J., dissenting) ("It could be contended that Congress 'suspends' the writ whenever it eliminates *any* prior ground for the writ that it adopted. . . . The Suspension Clause, in other words, would be a one-way ratchet that enshrines in the Constitution every grant of habeas jurisdiction. This is, as I say, too absurd to be contemplated, and I shall contemplate it no further."). It remains so. *See* U.S. Brief, *supra* note 6, at 26 ("Expanding Suspension Clause protections beyond the scope of habeas at common law would risk turning the Clause into a 'one-way ratchet that enshrines in the Constitution every grant of habeas jurisdiction' that Congress extends by statute.").

The third primary contention in *Thuraissigiam* is about whether the relevant habeas jurisdiction provision—which limits habeas review to whether the petitioner (1) is an alien; (2) was ordered removed; or (3) is an asylee, refugee, or legal permanent resident[590]—acts as an adequate substitute for habeas, assuming Thuraissigiam has Suspension Clause rights. The government stakes its claim based on a balancing test sanctioned by *Boumediene*; it argues that Thuraissigiam has a "minimal" liberty interest given that he was afforded a "multilevel administrative review process" compared to Congress, which has "a compelling interest in preserving the integrity and workability of the expedited-removal system."[591] In response, Thuraissigiam advances two primary claims: first, that the expedited-removal process is "patently insufficient" because it permits errors and does not meet the Suspension Clause's "separation-of-powers requirement that legal claims be *judicially* reviewable";[592] and second, that the Suspension Clause does not authorize balancing habeas review away.[593]

History intersperses in, but probably does not control the outcome of, this debate. The claim that the Suspension Clause does not allow for balancing is quite strong as a matter of history and text. As noted earlier, the meaningful debate at the Constitutional Convention was not over whether to provide for habeas, but under what circumstances (if any) it should ever be suspended; the answer given by the Suspension Clause is that suspension is meant to be circumscribed.[594] Here, however, the invocation of the text of the Suspension Clause is tautology, because it assumes that the privilege has already been suspended—which is exactly the question at hand (i.e., whether a narrowing of the privilege is *in effect* a suspension).

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[590] *See* 8 U.S.C. § 1252(e)(2) (Westlaw through Pub. L. No. 116-138).
[591] U.S. Brief, *supra* note 6, at 19.
[592] Respondent Brief, *supra* note 38, at 11.
[593] *Id.* at 48.
[594] *See supra* Chapter 3, Part II(B).

Thuraissigiam's first argument about the separation-of-powers issue with expedited removal is stronger but rests on precedent, not per se history. *Boumediene* found the separation of powers to be, as a matter of history, a foundational principle underlying the scope of the Suspension Clause.[595] I argued earlier that it is not clear how habeas (as a tool of the king's prerogative) was to be translated into the context of a government premised on the separation of powers.[596] But because *Boumediene* established that principle as a matter of legal precedent, that guiding principle (once derived from history but now firmly embedded in legal doctrine) is surely persuasive in future adjudication. Thus, the question whether Section 1252(e)(2) is an adequate substitute will, as with the other questions in *Thuraissigiam*, be implicated by history. But it likely will not be decided by history.

II. The Rule of History and the Rule of Law

Thuraissigiam's case raises foundational questions in constitutional law: about the scope of Congress's immigration authority compared with the courts' authority to issue writs of habeas;[597] about the Constitution's application to non-citizens at the border;[598] about how to balance between responding efficiently and flexibly to perceived crises and guaranteeing procedural fairness and justice.[599] This Thesis has reviewed a narrow question—the question of how history has been, and

[595] *See* Boumediene v. Bush, 553 U.S. 723, 743–46 (2008).
[596] *See supra* Chapter 4, Part I(A).
[597] *See, e.g.*, Mizel, *supra* note 478, at 271 (framing *Castro*, the Third Circuit's review of a similar Suspension Clause challenge, as pitting "the power of the political branches against the power of the judiciary in a sphere where each is traditionally at its peak").
[598] *Compare* U.S. Brief, *supra* note 6, at 23–27 (arguing that Thuraissigiam ought to be treated as if he were apprehended at the border, and thus, has limited constitutional rights), *with* Respondent Brief, *supra* note 38, at 38–45 (arguing against expanding the "entry fiction" doctrine). *See generally* SMITH, *supra* note 5, at 4–6 (providing background on the "entry fiction" doctrine); Brief of *Amici Curiae* Immigration Scholars in Support of Respondent 7–21, Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. Jan. 22, 2020) (same).
[599] *Compare, e.g.*, U.S. Brief, *supra* note 6, at 40–48 (arguing that the balance tips against Thuraissigiam's petition), U.S. Reply Brief, *supra* note 538, at 20–23 (same), *and* Arizona et al. Amicus Brief, *supra* note 100, at 12–14 (emphasizing the administrative difficulties associated with allowing habeas review for Thuraissigiam's case), *with* Respondent Brief, *supra* note 38, at 45–51 (arguing in favor of procedural protections), *and* Illinois et al. Amicus Brief,

will continue to be, used in the development of Suspension Clause jurisprudence. As applied to the Court's review of *Thuraissigiam*, I argue that history will play an important component in the Court's decision even though it will not dictate its outcome.

A central motivation in this Thesis, and in contemporary debates over constitutional interpretation, is how to actualize certain normative ideals in judicial decision making. This Thesis has assumed that court-induced policy change is, for the most part, undesirable given contemporary democratic ideals. Thus, it has expounded justifications for invoking history that view history as a tool for limiting judicial discretion, rendering legal decision making based on objective methodologies rather than the subjective whims of judges.[600] In critiquing the use of history, however, I have emphasized the way that the lawyer's predispositions can lead to bias in using history to write law.[601] I strive to show that history, when wielded by lawyers, is subject to the same kinds of manipulation as any other traditional tool of legal interpretation. Indeed, judging, as a human enterprise, will necessarily involve a kind of discretion that cannot be excised; the search for a model of judging that renders decision making a scientific enterprise is a Sisyphean endeavor. One lesson from this Thesis, therefore, is that history is neither normatively desirable nor undesirable as a tool of constitutional adjudication. It is just like any other traditional source of legal authority—in both good and bad ways. If our goal is to minimize constitutional disruption at the hands of unelected judges, I suggest we should seek judges with a certain temperament rather than a particular methodological commitment.

Because this Thesis has largely been preoccupied with the question of how to use history to write law, it has emphasized history as an academic endeavor—as a tool with which to determine

supra note 102, at 4–19 (same).
[600] *See supra* Chapter 1, Part I.
[601] *See supra* Chapter 1, Part III; Chapter 2; Chapter 4, Part I(C).

the meaning of text or to theorize about politics. In doing so, I have stressed the importance of approaching the past "for the sake of the past," in the words of Butterfield.[602] And I have been skeptical of writing history with a view toward the present—what I have called writing history as progress—for doing so can distort the complexities of the past, thereby allowing law to write history rather than history to inform law.[603] But, of course, history is worth telling not only to make law. In closing, I want to remark on the role of history in imparting on us the wisdom of the past.

Properly written, history allows us to understand the complexity of the people and institutions that came before us. The enticing history of habeas corpus is one that depicts habeas as the Great Writ, emphasizing its ability to free all those who have been wronged. From enslaved men seeking release from servitude to battered wives searching for liberty from domestic violence, the writ did much to preserve the freedom of sixteenth- and seventeenth-century detainees. But the writ was, and continues to be, the archetypal *legal* device. Those who are lawfully confined cannot secure their liberty through habeas, no matter how unjust their detention is. Nor could those accused of treason find freedom through the writ in times of suspension. Thomas Darnel understood these realities, just as foreign prisoners of war and American revolutionaries captured during the 1777 suspension did.

The formalization of suspension embodied in the Suspension Clause was a recognition not only that liberty should be preserved through law, but also that process must sometimes give way to exigencies. Thus, Judge Increase Sumner at the Massachusetts ratification convention said in the same breath that the privilege of habeas was "essential to freedom" and also that "the state . . . might be involved in danger; the worst enemy may lay plans to destroy us, and so artfully as to prevent any evidence against him, and might ruin the country, without the power to suspend the

[602] BUTTERFIELD, *supra* note 133, at 16.
[603] *See supra* Chapter 1, Part III; Chapter 4, Part I(B).

writ was thus given."[604] James Madison, realistic about the prospects of "parchment barriers" constraining "overbearing majorities,"[605] believed that limited suspension authority was crucial to preserving the overall rule of law, writing to Thomas Jefferson,

> I am inclined to think that *absolute* restrictions in cases that are doubtful, or where emergencies may overrule them, ought to be avoided. The restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public, and after repeated violations in extraordinary cases they will lose even their ordinary efficacy. Should a Rebellion or insurrection alarm the people as well as the Government, and a suspension of the Hab. Corp. be dictated by the alarm, no written prohibitions on earth would prevent the measure. . . . The best security agst these evils is to remove the pretext for them.[606]

Similarly, Alexander Hamilton and Madison, writing in *The Federalist*, argued that "[t]yranny has perhaps oftener grown out of the assumptions of power called for, on pressing exigencies, by a defective constitution, than out of the full exercise of the largest constitutional authorities."[607] The failure to provide the national government sufficient powers, they claimed, would paradoxically result in greater governmental aggrandizement.[608] For, as Hamilton wrote elsewhere,

> [N]ations pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society. Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable.[609]

These Federalists' views, of course, were not adopted wholesale by the Framing generation. Many of these arguments were used in response to the call for a Bill of Rights.[610] These arguments proved

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[604] 2 ELLIOT, *supra* note 239, at 109.
[605] Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 5 THE WRITINGS OF JAMES MADISON 269, 272 (Gaillard Hunt ed., 1904).
[606] *Id.* at 274.
[607] THE FEDERALIST NO. 20, *supra* note 249, at 90 (Alexander Hamilton & James Madison).
[608] Adrian Vermeule has termed this the "Publius Paradox." *See generally* Adrian Vermeule, *The Publius Paradox*, 82 MODERN L. REV. 1 (2019).
[609] THE FEDERALIST NO. 25, *supra* note 249, at 120 (Alexander Hamilton).
[610] *See, e.g.*, Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *supra* note 605, at 271 ("My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be

to be losing arguments,[611] and Madison would spearhead the writing of a Bill of Rights.[612] Moreover, in the habeas context, a vocal minority of delegates at the Constitutional Convention, and throughout the ratification debates, would argue that suspension should be categorically prohibited.[613]

This is the context with which we, as political animals, ought to approach the debate in *Thuraissigiam* between his plea for judicial review[614] and the government's arguments about administrative efficiency.[615] The question Thuraissigiam poses is one that is well-trodden in debates over habeas, for the *ad subjiciendum* writ, at its core, has always been about judicial review of a body's confinement. His petition asks for greater process, process that may be onerous and strain governmental resources. But in a government of separated powers with co-equal branches, administrative efficiency has necessarily been balanced against attempts to prevent government overreach.[616] And in the habeas context, Tyler has persuasive argued, the Constitution has already

included in the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by *subsequent* amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and if properly executed could not be of disservice. I have not viewed it in an important light . . . .").

[611] *See* Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 617 (2014) ("[N]o matter what the Convention delegates may have thought, the broader public decisively rejected the idea that the enumeration would limit Congress well enough to make a Bill of Rights unnecessary. Yes, people like Hamilton, Madison, and Wilson defended their work with that argument. But they utterly failed to persuade the public.") (footnote omitted).

[612] *See* TYLER, *supra* note 120, at 136 (summarizing Madison and Jefferson's views on suspension and its relationship to their debates on the need for a bill of rights).

[613] *See supra* Chapter 2, Part II(B).

[614] *See* Respondent Brief, *supra* note 38, at 47 ("A habeas theory that would permit Executive Branch oversight over its own actions to displace judicial review is patently inconsistent with the Suspension Clause as an 'indispensable mechanism for monitoring the separation of powers.'") (quoting Boumediene v. Bush, 553 U.S. 723, 765 (2008).

[615] *See* U.S. Brief, *supra* note 6, at 48 ("The unprecedented influx of asylum claims, including a 'large number of meritless asylum claims,' 'places an extraordinary strain on the nation's immigration system' and has exacerbated the current crisis at the southwest border.") (quoting 84 Fed. Reg. 33,829, 33831 (July 16, 2019)).

[616] *Cf.* THE FEDERALIST NO. 51, *supra* note 249, at 254 (James Madison) ("[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition.").

performed that balance, "categorically favoring liberty in all but the most extreme circumstances[,]" i.e., those of formal suspension.[617] Whether her invocation of history is appropriate to answer any specific legal question is debatable.[618] But that conclusion is the right theory of politics to draw from the history.[619]

The history of habeas corpus should be compelling for us, also, as a lens through which we can think about how law is made by people—emotional, affected people. Reading the language of the *ad subjiciendum* writ is telling; it was an order to have a detainee's body in court to "undergo and receive" (*ad subjiciendum et recipiendum*) that which the court thought was right.[620] Perhaps the equitable nature of the writ arose from the "core principle," in Halliday's words, of the writ—"*that* the judge judges."[621] Forcing the prisoner to be sent into court with identification of the precise reasons for his or her detention has a long pedigree[622] because hearing individual stories matters to us as social beings. Narratives deeply shape our thinking.[623] That the work of the Great Writ is premised on bringing the story of an individual's detention to a judge cannot be mere coincidence. What is powerful about habeas is that it requires individualized examination into a body's detention. And when judges are provided the latitude to do right onto the bodies before them, the miraculous work of the writ becomes possible.

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[617] TYLER, *supra* note 120, at 275.
[618] I have argued, for example, that invoking this logic in *Thuraissigiam*'s case is tautological. *See supra* Conclusion, Part I(C).
[619] *Cf.* HALLIDAY, *supra* note 23, at 8 ("Throughout its history, the central purpose of habeas corpus has been to provide the means by which the judge might find the place at which liberty and physical security could be protected simultaneously by ensuring that subjects were imprisoned only according to law.").
[620] *See supra* Chapter 3, Part I(E).
[621] HALLIDAY, *supra* note 23, at 7 (emphasis original).
[622] *Acts* 25:27 ("For it seemeth to me unreasonable to send a prisoner, and not withal to signify the crimes laid against him."); HALLIDAY, *supra* note 23, at 1 (citing the Biblical depiction of Paul and Festus in *Acts* 25); Chafee, *supra* note 95, at 160–61 (same).
[623] *Cf.* SAMANTHA POWER, THE EDUCATION OF AN IDEALIST 440–43 (2019) (discussing the story of Jackson Niamah, a Liberian health worker responding to the Ebola crisis, and noting how his testimony "made an abstract threat strikingly human and real[,]" *id.* at 441); *id.* at 522 ("[P]eople were more likely to respond when they could focus on a specific individual . . . .").

Outside of the legal questions posed by Thuraissigiam's case, then, are political ones posed to us as voyeurs of his story, a story that we have examined as synecdoche for the experiences of hundreds of thousands of migrants who are deported through expedited removal each year. Thuraissigiam has been detained at Otay Mesa Detention Center, in San Diego, California, for three years waiting to have his story heard by an impartial judge.[624] He is confined in a time of crises. The government cites the huge administrative crisis in immigration enforcement to oppose his petition.[625] But there is also a pandemic that puts him at particular risk, given that Otay Mesa is the detention center with the largest outbreak of the novel coronavirus at the time of the writing of this Thesis.[626] Thuraissigiam stays confined even though, as the government emphasizes, he is "free to go[.]"[627]

Instead, Thuraissigiam turns to the Great Writ. He asks to be considered beyond the confines of those statistics and broader crises. He pleas for an impartial examination into the merits of his story, his experiences. His petition arises in a context quite alien to those in which the justices of King's Bench would have examined bodies on habeas review. The likes of Coke or Hale would have been astounded by the scale of the American immigration enforcement system and its complex system of administrative review. They would have been mystified by the questions of whether Section 1252(e)(2)'s jurisdiction-limiting provision is an adequate substitute for habeas and whether the U.S. Constitution applies to an unlawful entrant apprehended twenty-five yards from the border.[628]

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[624] *See* Habeas Petition, *supra* note 18, at 13.
[625] *See* U.S. Brief, *supra* note 6, at 46–48; *see also, e.g.*, Arizona et al. Amicus Brief, *supra* note 100, at 4–8 (noting, among other statistics, that there are over 900,000 pending immigration court cases).
[626] *See* Alejandro Lazo & Zusha Elinson, *Inside the Largest Coronavirus Outbreak in Immigration Detention*, WALL ST. J. (Apr. 30, 2020, 2:18 pm), https://www.wsj.com/articles/inside-the-largest-coronavirus-outbreak-in-immigration-detention-11588239002?mod=searchresults&page=1&pos=1 (last visited May 1, 2020).
[627] U.S. Brief, *supra* note 6, at 37 ("[U]nlike the habeas petitioners in *Boumediene*, [Thuraissigiam] is free to go: He would be removed to and released in Sri Lanka absent his habeas petition.").
[628] *Cf, e.g.*, Legal Historians' Amicus Brief, *supra* note 121, at 15 (describing as "anachronistic" the question whether

But his petition also would have been familiar, because he asks for a familiar form of review. He pleas for the writ, for a judge to examine the application of law to his individual circumstances, just as Walter Witherley, Mary Lady Rawlinson, James Somerset, and Thomas Darnel did centuries ago. The history of habeas corpus demonstrates that its protections have been ever fluctuating within the wider context of politics and law, because habeas is merely a means for enforcing law. At times, the writ has been vigorous. At other times, its flame has been extinguished by the blanket of suspension. That history can guide us as we grapple with today's legal questions. But history cannot determine what is right, just, or lawful in Thuraissigiam's case. Those are questions for us to decide.

"the common law writ would have extended to aliens detained for deportation").

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- Amicus briefs in support of Petitioner:
    - Brief *Amicus Curiae* of Immigration Law Reform Institute in Support of Petitioners (Dec. 16, 2019).
    - Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioners (Dec. 16, 2019).
    - Brief for *Amici Curiae* the States of Arizona, Alabama, Alaska, Arkansas, Indiana, Louisiana, Nebraska, South Carolina, South Dakota, and Texas in Support of Petitioners (Dec. 16, 2019).
- Brief for Respondent (Jan. 15, 2020).
- Amicus briefs in support of Respondent:
    - Brief for Amici Curiae Immigration and Human Rights Organizations in Support of Respondent (Jan. 22, 2020).

- Brief for Scholars of the Law of Habeas Corpus as Amici Curiae Supporting Respondent (Jan. 22, 2020).
- Brief for the States of Illinois, California, Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington and the District of Columbia as *Amici Curiae* in Support of Respondent (Jan. 22, 2020).
- Brief of American Bar Association as *Amicus Curiae* in Support of Respondent (Jan. 22, 2020).
- Brief of *Amici Curiae* Asylum Law Professors in Support of Respondent (Jan. 22, 2020).
- Brief of *Amici Curiae* Immigration Scholars in Support of Respondent (Jan. 22, 2020).
- Brief of Legal Historians as *Amici Curiae* in Support of Respondent (Jan. 22, 2020).
- Brief of Professors of Sri Lankan Politics as Amici Curiae in Support of Respondent (Jan. 22, 2020).

- Reply Brief for the Petitioners (Feb. 14, 2020).
- Transcript of Oral Argument (Mar. 2, 2020).
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