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ARTICLE

The Great Writ of Popular Sovereignty

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Abstract. American habeas corpus, long conventionally known as the Great Writ of Liberty, is more properly understood as the Great Writ of Popular Sovereignty—a tool for We the People to insist that when our agents in government exercise our delegated penal powers, they remain faithful to our sovereign will. Once we grasp this conceptual shift, the implications for the law of habeas are profound.

In the past fifteen years, novel archival research has shown the Great Writ of Liberty's founding myth to be ahistorical—that ideas about sovereignty, rather than individual liberty, drove the common-law writ's development in the centuries of English history running up to its reception into American law. Given widespread consensus that English history should and does drive American habeas jurisprudence, and that the sovereigntist account of that history should now be treated as authoritative, it is puzzling that American courts and scholars have continued to cling to libertarian frameworks. Meanwhile, American habeas law is in crisis, with an ideologically cross-cutting array of scholars and jurists criticizing it as intellectually incoherent, practically ineffectual, and extravagantly wasteful. Over the Supreme Court's past four Terms, Justice Neil Gorsuch has led a charge to hollow out federal postconviction habeas almost entirely, arguing that habeas courts should ask only whether the sentencing court was one of general criminal jurisdiction—

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and not whether it violated federal constitutional law en route to entering the petitioner's judgment of conviction.

An accurate understanding of the English history, soundly translated into the logic of American popular sovereignty, demands reconceptualizing the American writ as a Great Writ of Popular Sovereignty. By following that imperative, we just might save American habeas jurisprudence from its present crisis. Most critically, the popular-sovereigntist theory allows us to make coherent sense of the historical question at the heart of Justices Gorsuch and Kagan's recent debates over the fate of postconviction habeas review. Paradoxically, shifting from a libertarian to a popular-sovereigntist conception of the writ might render habeas doctrine more capable of protecting individual liberty. Such a shift would point toward novel solutions to countless otherwise inscrutable questions in the theory and doctrine of American habeas.

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Introduction

The fundamental purpose of American habeas corpus is the vindication not of individual liberty, but of popular sovereignty.[1] We should reconceptualize the American writ as a legal instrument through which We, the sovereign People, interrogate the fidelity of those state actors who exercise our delegated penal power and demand that if *our* agents are to imprison bodies in *our* name, they do so consistent with *our* sovereign will.

We cling desperately to the mythos of the Great Writ of Liberty, the conventionally libertarian way of conceptualizing the writ's basic logic, even as we are confronted with overwhelming evidence that the narrative undergirding that myth turns out to be totally ahistorical. Indeed, so committed are we to the libertarian mythos of American habeas that even the scholar most responsible for bringing that evidence to light has disclaimed its seemingly natural implication. That implication being that if the English common-law writ we "borrow[ed]"[2] for American law turns out to have "ar[isen] not from ideas about liberty, but from sovereignty as it was understood [in early modern England],"[3] then we ought to start thinking about the *American* writ in terms of ideas about sovereignty as understood in *our* political order—namely, the sovereignty of We the People.[4]

Perhaps our clinging to that ahistorical myth could be justified as a sort of "noble lie"[5] if it held up a coherent, well-functioning system of American habeas law. But it does not. Jurists and scholars from across the ideological spectrum have described the present state of American habeas jurisprudence as an "intellectual disaster area,"[6] an "aimless and chaotic exercise in futility,"[7] a

1. I intend for this claim to be bold, but not Manichean. I do not mean to denigrate the important *effects* that habeas can have in serving the ends of individual physical liberty. But I *do* mean to suggest that habeas can only serve those ends through the work of sovereignty—that paradoxically, conceptualizing the writ exclusively in terms of liberty renders it *less* capable of protecting liberty, while conceptualizing the writ first and foremost in terms of popular sovereignty would yield doctrine that is *more* protective of individual liberty. *Compare infra* Part I.E, *with infra* Part III.B.

2. Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 942 (2011) (reviewing PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010)).

3. HALLIDAY, *supra* note 2, at 7.

4. *See infra* Part III.A.

5. *See generally* Allan Bloom, *Interpretive Essay*, *in* PLATO, THE REPUBLIC OF PLATO 365-69 (Allan Bloom trans., 2d ed. 1968) (expounding the idea of the "noble lie").

6. Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 553 (2006) (quoting Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731, 1756 (2000)).

7. Jones v. Hendrix, 143 S. Ct. 1857, 1898 (2023) (Jackson, J., dissenting).

"jurisprudential disaster,"[8] and a betrayal of the Magna Carta[9]—"broken,"[10] "compromised to the point of ineffectuality,"[11] "unworkable and perverse,"[12] and "so unstable as to be practically incoherent."[13] To put it more concretely, our extant habeas system "grants relief to almost nobody," and "[a]t enormous expense."[14] Indeed, over the past quarter century, just one-third of one percent of federal habeas petitions have resulted in the release of the petitioning prisoner.[15]

Against that backdrop, the extant habeas regime is under immense strain. Justice Gorsuch has been planting the seeds in recent concurring opinions and dicta for an argument to gut postconviction habeas review almost entirely.[16] Whereas the status quo model allows habeas courts to review the merits of alleged constitutional errors by the court of conviction, Justice Gorsuch would limit the scope of postconviction habeas review to simply asking whether the court of conviction was one of general criminal jurisdiction. In *Brown v. Davenport*, he garnered a six-Justice majority to sign on to an opinion whose dicta argued just that, over a vigorous dissent from Justice Kagan.[17] And while Justice Gorsuch's calls to gut postconviction habeas have provoked outcry from some liberal scholars,[18] similar calls have in fact been voiced from the left.[19]

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8. Micah S. Quigley, *Article III Lawmaking*, 30 GEO. MASON L. REV. 279, 337 (2022) (citing Edwards v. Vannoy, 141 S. Ct. 1547, 1571-72 (2021) (Gorsuch, J., joined by Thomas, J., concurring)).
9. *See* Jed S. Rakoff, *The Magna Carta Betrayed?*, 94 N.C. L. REV. 1423, 1430 (2016).
10. Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 3 (2010).
11. *See* Rakoff, *supra* note 9, at 1426, 1430.
12. Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 42 (2002).
13. *See* Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (with an Emphasis on the* Teague *Rule Against New Rules in Habeas Corpus Cases)*, 88 NW. U. L. REV. 1046, 1059 (1994).
14. Primus, *supra* note 10, at 4.
15. *See* Rakoff, *supra* note 9, at 1428.
16. *See, e.g.*, Edwards v. Vannoy, 141 S. Ct. 1547, 1566-73 (2021) (Gorsuch, J., concurring); Brown v. Davenport, 142 S. Ct. 1510, 1520-24 (2022) (Gorsuch, J.); *cf.* Jones v. Hendrix, 143 S. Ct. 1857, 1871-73 (2023) (articulating this argument in a majority opinion authored by Justice Thomas and joined by five other Justices including Justice Gorsuch).
17. *Compare Davenport*, 142 S. Ct. at 1520-24 (Gorsuch, J., joined by Roberts, C.J., Alito, Gorsuch, Kavanaugh & Barrett, JJ.), *with id.* at 1531-35 (Kagan, J., dissenting).
18. *See, e.g.*, Jonathan R. Siegel, *Habeas, History, and Hermeneutics*, 64 ARIZ. L. REV. 505, 524-32 (2022); Lee Kovarsky, *Habeas Myths, Past and Present*, 101 TEX. L. REV. ONLINE 57, 67-79 (2022).
19. *See, e.g.*, Joseph L. Hoffmann & Nancy J. King, Essay, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 796-97, 819 (2009).

Many more of the most basic, rudimentary points of habeas law are also now unsettled and subject to bitter debate. For example: Does postconviction habeas review exist to address *legal* errors in the criminal investigation, prosecution, and adjudication that led to the petitioner's conviction, or is its proper role more limited (as a Fifth Circuit panel recently suggested) to situations where a petitioner is *factually* innocent of the conduct for which she was convicted?[20] If postconviction habeas review *is* to be limited to petitions alleging "jurisdictional defects" (as Justice Gorsuch has advocated),[21] then should the inquiry be limited to whether the court of conviction "possess[ed] general criminal jurisdiction" (as Justice Thomas suggests),[22] or should "the term 'jurisdictional' [as] used by habeas courts 'mean[] something much broader'" (as Justice Jackson suggests)?[23] Can a prisoner use habeas to challenge the conditions of her confinement (as six circuits have held), or instead, only the binary *fact* of her confinement (as the other six circuits have held)?[24] Do the history and fundamental logic of habeas require (as a split D.C. Circuit panel recently found itself unable to decide) that habeas proceedings be presumptively open to the public?[25]

Each of these doctrinal debates implicates a deeper conceptual question about the very soul of the writ: What is habeas *for*?[26] And in that way, each has been shaped—or rather, constrained—by our conventional baseline assumption that "the protection of individual liberty" is indeed what habeas is "for."[27]

I would argue, as one other scholar has,[28] that this assumption is to blame for much of the intellectual incoherence and practical ineffectuality of our extant habeas regime. More to the point, this assumption is simply wrong. Again, the principal purpose of American habeas is the vindication not of individual physical liberty, but of popular sovereignty. More simply put, we should understand American habeas as a Great Writ of Popular Sovereignty.

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20. *See* Crawford v. Cain, 68 F.4th 273, 286-88 (5th Cir. 2023), *reh'g en banc granted, opinion vacated*, 72 F.4th 109 (5th Cir. 2023), *aff'd en banc on other grounds*, 122 F.4th 158 (5th Cir. 2024) (per curiam).

21. *Davenport*, 142 S. Ct. at 1520-24.

22. Jones v. Hendrix, 143 S. Ct. 1857, 1871-73 (2023).

23. *Id.* at 1898 (Jackson, J., dissenting) (quoting Kovarsky, *supra* note 18, at 75).

24. *See infra* notes 262-63 (collecting cases).

25. *See* Dhiab v. Trump, 852 F.3d 1087, 1091-96 (D.C. Cir. 2017).

26. *See generally* Aziz Z. Huq, *What Good Is Habeas?*, 26 CONST. COMMENT. 385 (2010) (posing this question).

27. Boumediene v. Bush, 553 U.S. 723, 743 (2008).

28. *See* Primus, *supra* note 10, at 3 (observing that "the federal habeas system is broken largely *because of* its resolute focus on individual petitioners" (emphasis added)).

And when we do so, otherwise inscrutable questions in American habeas jurisprudence will come into clearer, more coherent view.[29]

At first blush, this suggestion to reconceptualize the so-called Great Writ of Liberty as a Great Writ of Popular Sovereignty might seem wildly radical. After all, we are conventionally told that habeas corpus not only *is* the Great Writ of Liberty, but that it *has been* so from time immemorial.[30] And so, against the backdrop of a Supreme Court that has increasingly called to "return[] the Great Writ closer to its historic office,"[31] it might seem a nonstarter to suggest that we place some concept other than liberty in the conceptual foreground of American habeas jurisprudence.

But upon more careful reflection, the suggestion is anything but radical. An accurate understanding of the relevant history, coupled with a sound application of that history, *demands* that we reconceptualize American habeas around ideas about popular sovereignty. Indeed, it is the conventional libertarian conception of American habeas that turns out to be premised on untenably flawed interpretations of early modern English legal history, the American Constitution's bedrock political theory, or both. All the building blocks of that argument are hiding in plain sight. They simply haven't been pieced together yet.

The most important of those building blocks is the work of Paul Halliday,[32] whose unprecedentedly rigorous deep dive into the archives of the Court of King's Bench "reset the scholarly consensus"[33] on how we imagine English jurists to have conceptualized habeas in the critical centuries running up to the American Founding, when the English common-law writ was inherited into American law through the Suspension Clause[34] and the Judiciary Act of 1789.[35] The core, overarching insight of Halliday's work is that the writ's development in early modern England in fact "arose not from ideas

29. *See infra* Part II.

30. *See infra* Part I.A.3.

31. Brown v. Davenport, 142 S. Ct. 1510, 1523 (2022) (quoting Edwards v. Vannoy, 141 S. Ct. 1547, 1570 (2021) (Gorsuch, J., concurring)).

32. *See generally* HALLIDAY, *supra* note 2 (presenting findings from Halliday's archival research on habeas writs issued by the Court of King's Bench between 1500 and 1800); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008) (same).

33. Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753, 759 & n.18 (2013).

34. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

35. *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (codified as amended at 28 U.S.C. § 2241).

about liberty, but from *sovereignty*."[36] To borrow Halliday's pithy phrasing, the justices of King's Bench wielded habeas as "a power more concerned with the wrongs of jailers than with the rights of prisoners"—namely, "wrongs" against the King and his final, ultimate, indivisible authority over both the actions of his franchisees and the bodies of his subjects.[37] More prosaically put, the English writ was understood as an instrument for vindicating the King's sovereign will vis-à-vis those agents who exercised his delegated penal power.[38] And among American courts and scholars alike, there is firm consensus both (1) that the history of the writ's origins in early modern England is directly relevant to contemporary American habeas jurisprudence,[39] and (2) that Halliday's revisionist account of that history has finally gotten it right.[40]

The seemingly natural implication of Halliday's "New Habeas Revisionism,"[41] then, is nothing less than seismic: If we synthesize the true English understanding of habeas as recovered by Halliday (namely, as a tool for vindicating the King's sovereignty), with the canonical understanding of the political theory of the American Founding (namely, as having relocated sovereignty from the King to "We the People of the United States"),[42] it follows that American habeas is a tool for vindicating the *People*'s sovereignty—that is, a Great Writ of Popular Sovereignty.

Yet no one has put those pieces together and recognized that most seismic American implication of the New Habeas Revisionism.[43] Some scholarship—Halliday's own 2008 *Virginia Law Review* article being the prime example[44]—has resisted that implication on account of concerns that the English and American conceptions of sovereignty differ in ways that would render it analytically impossible to transpose Halliday's revisionist insights onto the

36. HALLIDAY, *supra* note 2, at 7 (emphasis added).

37. *Id.* at 14; *see id.* at 7.

38. *See id.* at 11-38.

39. *See infra* Part I.A.3. To be clear, this consensus includes scholars and jurists who have expressly opposed originalism. *See, e.g.*, Kovarsky, *supra* note 33, at 759-60 ("I am not an originalist . . . . I simply join an emerging consensus that pre-Revolutionary English writ practice does shed some interpretive light on questions [of modern habeas doctrine] . . . ."); *see also infra* notes 80-81 and accompanying text (contrasting Justice Stevens's general skepticism of originalism with his insistence upon history's paramount importance in habeas jurisprudence).

40. *See infra* Part I.C.

41. Vladeck, *supra* note 2, at 943 (coining this term for Halliday's work).

42. *See infra* Part III.A.

43. *See infra* Part I.D.

44. *See* Halliday & White, *supra* note 32, at 691 & n.360; *see also infra* notes 299-307 and accompanying text.

frameworks of the American legal order.[45] Other scholarly responses to Halliday's work have resisted its seemingly natural implication on the apparent basis of concerns that reconceptualizing the so-called Great Writ of Liberty around the concept of sovereignty would be normatively undesirable.[46] Also lurking in the background of the scholarly failure to engage the work of "Americanizing" the New Habeas Revisionism is a concern that Halliday's revisionist insights into the logic of English habeas are simply historically irrelevant—that is, the relevant American legal texts have supplanted the sovereigntist logic of the English writ with a logic of individual liberty.[47] But each of these concerns, as I will argue, is premised on unexamined and ultimately faulty assumptions.

The import of this persistent scholarly failure to connect the dots from the New Habeas Revisionism to a popular-sovereigntist theory of the American writ is not just academic. It has left American courts—even as they otherwise engage deeply with the most minute details of Halliday's scholarship—to miss the forest of that scholarship for its trees. That is, they haven't availed themselves of the most significant and potentially illuminating takeaway from Halliday's work: that when they're thinking through hard problems in habeas law—whether in England or America—they should be thinking first and foremost in the conceptual register of sovereignty.

If American courts *were* to start thinking about the first principles of American habeas in this way, it would shed new, much-needed light on the hardest, most consequential doctrinal questions with which they are currently wrestling. Most importantly, the popular-sovereigntist theory could mediate the aforementioned Kagan-Gorsuch debates by making sense of the otherwise inscrutable line of late-nineteenth- and early-twentieth-century case law on which they turn—thus saving federal postconviction habeas review (or at least much of it) from crusades to hollow it out.[48] Likewise, this novel theory could help us assess the originalist bona fides of various reform proposals for separating out the wheat from the chaff of postconviction habeas petitions. For example, it would cast doubt on the soundness of a recent Fifth Circuit panel's proposal to impose a factual-innocence requirement on the availability of habeas review,[49] while furnishing a new originalist defense of Eve Brensike Primus's proposal to prioritize petitions alleging systemic state violations of

45. *See infra* Part III.A.

46. *See infra* Part III.B.

47. *See infra* Part III.C.

48. *See infra* Part II.A.1.

49. *See infra* Part II.A.2.

federal constitutional norms over those alleging more individualized, idiosyncratic errors.[50]

Beyond illuminating these broad debates over the scope of the postconviction writ, the popular-sovereigntist theory also points toward ideologically cross-cutting answers for a variety of more discrete questions in habeas doctrine[51]: whether the First Amendment furnishes a presumptive right of public access to habeas proceedings (yes),[52] whether habeas is a proper vehicle for challenges to felony disenfranchisement and conditions of confinement (yes and yes),[53] whether newly announced rules of constitutional criminal procedure should ever apply retroactively on habeas (no),[54] whether the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[55] is unconstitutional (no),[56] and whether the Constitution imposes a requirement of habeas juries (quite possibly),[57] to name just a few.

* * *

The remainder of this Article proceeds in three Parts:

Part I lays out the status quo of American habeas jurisprudence, sheds light upon the incoherence and theoretical gaps by which it is beset, and builds toward the Article's core conceptual argument that reconceptualizing American habeas as the Great Writ of Popular Sovereignty is the key to solving such problems. At the outset, I unpack the conceptual claims embedded in the conventionally accepted mythos of the Great Writ of Liberty. I then demonstrate how Halliday's work undermines the historical underpinnings of those claims and points toward a new popular-sovereigntist theory of American habeas. Next, I illustrate how American scholars and courts—despite their widespread agreement that Halliday has gotten the English legal history right—have persistently failed to recognize the popular-sovereigntist conception of the writ as a natural implication of Halliday's New Habeas Revisionism. I then close Part I by tying this conceptual status quo into the on-the-ground reality of modern habeas law, homing in on the immense strain that our recalcitrant clinging to the libertarian theory places on the doctrine.

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50. *See infra* Part II.A.3.

51. *See infra* Part II.B.

52. *See infra* text accompanying notes 255-60.

53. *See infra* text accompanying notes 261-72.

54. *See infra* text accompanying notes 273-74.

55. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

56. *See infra* text accompanying notes 276-82.

57. *See infra* text accompanying notes 283-93.

Part II revives the stillborn project of "Americanizing" the New Habeas Revisionism, exploring the ways in which a popular-sovereigntist theory might help make sense of—and make good on—our intellectually and practically broken habeas system. I focus principally upon the theory's implications for today's broad debates over the proper scope of the postconviction writ: the Kagan-Gorsuch debates over the "jurisdictional-defects-only" maxim, the recent Fifth Circuit panel's proposal to impose a factual-innocence requirement on the availability of postconviction habeas review, and Primus's legislative-reform proposal for implementing a "structural vision of habeas." I then briefly preview several of the additional concrete payoffs that the popular-sovereigntist theory might have for more discrete questions of habeas doctrine.

Part III circles back to the question of whether the conceptual shift from Great Writ of Liberty to Great Writ of Popular Sovereignty is justified in the first place, using the takeaways from the previous Part to argue that it is. Namely, I endeavor to "reverse engineer" and rebut each of the three principal objections that appear to be driving scholars' hesitation to embrace a popular-sovereigntist theory of the American writ: that such a theory would face problems of analytical impossibility, normative undesirability, or historical irrelevance.

Finally, the Conclusion looks ahead to the work yet to be done in the broader project of reconceptualizing American habeas as the Great Writ of Popular Sovereignty.

I. The Conceptual Shift: From Great Writ of Liberty to Great Writ of Popular Sovereignty

The status quo theory of American habeas jurisprudence—the theory bound up with the mythos of the Great Writ of Liberty—is untenable on two distinct levels. First, it is premised on assumptions about the writ's historical origins that we now know to be false. Second, it yields a model of federal postconviction habeas review that is neither practically workable nor theoretically coherent. The status quo theory must yield to a theory of American habeas as the Great Writ of Popular Sovereignty.

This Part sets the stage for that conceptual shift by shedding light on the cracks and gaps that are already present in the status quo theory. To that end, the first order of business is simply to treat the Great Writ of Liberty theory of habeas as a falsifiable *theory* like any other: to unpack its core conceptual claims about the purpose and logical structure of American habeas, as well as the way in which it rests the authority of those claims on assumptions about the historical understanding of the English writ. The second order of business is to show how revisionist historical work done in the past fifteen years—principally, the work of Paul Halliday—has undermined the historical

assumptions upon which the libertarian view's core conceptual claims are premised. The next task is to illuminate the disconnect that has emerged in the years since Halliday's intervention between how we look at the libertarian myth's historical claims about the English writ and how we look at its conceptual claims about the American writ. Namely, everyone seems to agree that Halliday is right about the English history: that ideas about sovereignty, rather than liberty, were the conceptual touchstone of the English writ.[58] But no one, Halliday included, has reconceptualized the *American* writ to account for his revisionist insights about its English origins—or even meaningfully considered that such insights might create an imperative to reconceptualize American habeas as an instrument of popular sovereignty. Finally, before delving into the doctrinal payoffs of shifting to a popular-sovereigntist theory, it will bear considering the enormous strains that our stubborn attachment to the libertarian conception of the American writ places upon federal postconviction habeas review.

A. The Myth—and the Theory—of the Great Writ of Liberty

For American lawyers, it is second nature to think about habeas in the conceptual vocabulary of individual liberty. Judges and scholars from across the ideological spectrum have long used triumphantly libertarian language to characterize the writ, calling it "the symbol and guardian of individual liberty,"[59] "the best and only sufficient defence of personal freedom,"[60] "[t]he most important human rights provision in the Constitution,"[61] "the fundamental instrument for safeguarding individual freedom,"[62] "the 'highest safeguard of liberty,'"[63] one of the "'great' 'right[s]'" of "free and natural-born subjects,"[64] and—most famously—the "Great Writ of Liberty."[65] Tellingly, the

58. *See infra* Part I.C (discussing the judicial and scholarly consensus around Halliday's work).

59. Peyton v. Rowe, 391 U.S. 54, 58 (1968) (Warren, C.J.).

60. *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 95 (1868) (Chase, C.J.).

61. Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143, 143 (1952).

62. Harris v. Nelson, 394 U.S. 286, 290 (1969) (Fortas, J.).

63. Lonchar v. Thomas, 517 U.S. 314, 322 (1996) (Breyer, J.) (quoting Smith v. Bennett, 365 U.S. 708, 712 (1961) (Clark, J.)).

64. McDonald v. City of Chicago, 561 U.S. 742, 818 (2010) (Thomas, J., concurring in part and concurring in the judgment) (alteration in original) (first quoting Continental Congress, Address to the Inhabitants of Quebec (1774), *in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 221, 222-23 (Bernard Schwartz ed., 1971); and then quoting 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 68 (Worthington Chauncey Ford ed., 1904)).

65. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 619 (1842) (Story, J.) (capitalization altered).

appellation of "Great Writ of Liberty" is often shortened simply to the "Great Writ"[66]—as if to convey that it would be beyond the pale to imagine habeas as a Great Writ of any norm, value, or concept *other than* liberty. This libertarian framing of American habeas is so pervasive, so uncontested, that it is no exaggeration to say that "habeas corpus is *universally* known and celebrated as the 'Great Writ of Liberty.'"[67]

1. The purposive claim

Most obviously, the Great Writ of Liberty theory stakes a purposive claim about what habeas corpus is *for*. It asserts that the writ's principal purpose is to vindicate the individual's right to bodily liberty against unlawful detention. This functionalist, purposive component of the libertarian theory is well captured in the Supreme Court's characterizations of habeas as "the fundamental instrument *for* safeguarding individual freedom against arbitrary and lawless state action,"[68] and as "a procedure *to* regain liberty lost through criminal process."[69] Embedded in the purposive claim is really an assertion about the particular *kind* of freedom the Great Writ is concerned with protecting: negative rather than positive freedom (that is, freedom *from* unlawful detention, rather than freedom *to* actualize some affirmative vision of the good),[70] individual rather than communitarian rights,[71] physical rather than political liberty.[72]

2. The structural claim

As a corollary of its purposive claim, the libertarian theory also entails a claim about the *adversarial structure* whereby habeas proceedings operationalize the ostensibly libertarian purpose of the writ: as a direct confrontation between the prisoner whose personal liberty has been deprived and the jailer[73]

66. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 401 (1963) (Brennan, J.).

67. ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 1 (2001) (emphasis added).

68. Harris v. Nelson 394 U.S. 286, 290-91 (1969) (Fortas, J.) (emphasis added).

69. Smith v. Bennett, 365 U.S. 708, 712 (1961) (Clark, J.) (emphasis added).

70. *See generally* ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY (1958) (distinguishing negative and positive conceptions of liberty).

71. *See* Primus, *supra* note 10, at 3-4 & nn.21-28 (discussing the "individualist" premise at the root of conventional contemporary theories of habeas).

72. *See* Huq, *supra* note 26, at 394-95 (distinguishing between the "physical" and "fundamental political sense[s]" of liberty (quoting Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring))).

73. Throughout this Article, I use the term "jailer" metonymically to refer not only to the actor actually *holding* the habeas petitioner in allegedly unlawful detention, but also to

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who must justify that deprivation vis-à-vis the legal rights of the prisoner—and between the two of them alone. On this framing, the legal rights asserted by the prisoner are essentially conceived of as *natural* rights, as opposed to rights conferred by some other actor with a cognizable interest in the proceeding. Thus, the jailer's alleged wrong is conceptualized as a wrong solely unto the prisoner, rather than a wrong against the authors of the rules or norms the jailer is alleged to have violated. Likewise, the hallmark of the judge's role in the habeas proceeding is her "independen[ce]" (as between prisoner and jailer), rather than her alignment with the authors of the rules and norms at issue.[74] Meanwhile, the role of the public qua public is limited to that of mere spectator, lacking any legally cognizable interest distinct from the jailer's official interest in ensuring the prisoner's ongoing detention.

3. The historical meta-claim

The libertarian purposive and structural claims—claims about what American habeas *is*—rest their sense of authority on an historical claim about what Anglo-American habeas *always has been*. Wherever we encounter judicial dicta waxing poetic on the writ's fundamentally libertarian *nature*, we can be almost sure to find adjacent passages waxing equally poetic on its libertarian *legacy*—commenting, for example, that "[t]he great writ of *habeas corpus* has been *for centuries* esteemed the best and only sufficient defence of personal freedom,"[75] that "[i]t was brought to America by the colonists, and claimed as among the *immemorial* rights *descended to them from their ancestors*,"[76] or that "*[o]ver the centuries* it has been the common law world's 'freedom writ.'"[77]

This mythos serves a profound legitimating function for the libertarian conceptual claims about the American writ, for it is axiomatic that habeas is not a novel creation of American law, but rather a device that "the Founders meant to *borrow*" from the common law of England[78]—and that accordingly,

any trial judge, public prosecutor, or other state actor alleged to have committed a legal wrong that *resulted* in the habeas petitioner's detention.

74. *E.g.*, *Ex parte* Smith, 22 F. Cas. 373, 377 (C.C.D. Ill. 1843) (No. 12,968) (Pope, J.) ("Magna Charta established the principles of liberty; the habeas corpus protected them. It matters not how great or obscure the prisoner, how great or obscure the prison-keeper, this munificent writ, wielded by an independent judge, reaches all.").

75. *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 95 (1868) (Chase, C.J.) (emphasis added).

76. *Id.* (emphasis added).

77. Smith v. Bennett, 365 U.S. 708, 712 (1961) (Clark, J.) (emphasis added).

78. Vladeck, *supra* note 2, at 942 (emphasis added); *see also, e.g.*, William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1469 (2024) (noting that the Suspension Clause "should be understood in light of centuries of law about the writ" because "the Constitution was not creating or defining [its] terms for the first time, but rather using the legal terminology and legal infrastructure of the

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American jurists "shall have to look to history" to ascertain "the essentials of the Great Writ."[79] Recently, the Supreme Court has only ratcheted up this emphasis on history, repeatedly calling for habeas to be better understood in light of its early modern English origins. Strikingly, these calls have been joined by Justices not otherwise disposed to originalist (or otherwise history-intensive) methodology—most notably Justice Stevens,[80] who in *INS v. St. Cyr* called for the Court's habeas jurisprudence to be regrounded in a more historically faithful account of "the writ 'as it existed in 1789.'"[81]

And so, the Great Writ of Liberty myth's implicit argument goes: *Because* the libertarian conception of habeas is a historically accurate depiction of "the writ as it existed in 1789," so too must it be accepted as a legally authoritative account of the writ as we analyze it today.

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day"); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93-94 (1807) (Marshall, C.J.) ("[F]or the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law . . . ."); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §§ 1333, 1335 (Boston, Hillard, Gray & Co. 1833) ("[T]he common law [of habeas] was deemed by our ancestors a part of the law of the land, brought with them upon their emigration . . . ."), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 341, 341-42 (Philip B. Kurland & Ralph Lerner eds., 1987).

79. Brief for the Respondent at 33, United States v. Hayman, 342 U.S. 205 (1952) (No. 23) (brief filed by Paul Freund); *see, e.g.*, Boumediene v. Bush, 553 U.S. 723, 746 (2008) ("The broad historical narrative of the writ and its function is central to our analysis . . . ."); McNally v. Hill, 293 U.S. 131, 136 (1934) ("To ascertain its meaning and the appropriate use of the writ [of habeas corpus] in the federal courts, recourse must be had to the common law . . . ."), *overruled by* Peyton v. Rowe, 391 U.S. 54, 58 (1968); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 1999 (1992) ("[A] proper determination of the Great Writ's future requires an accurate understanding of its past."); Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1079 & n.2 (1995) (collecting Supreme Court habeas cases in which history has been "a defining factor").

80. *See generally* John Paul Stevens, *Originalism and History*, 48 GA. L. REV. 691 (2014) (critiquing originalism). *But cf.* Diane Marie Amann, *John Paul Stevens, Originalist*, 106 NW. U. L. REV. 743, 750-51 (2012) (arguing, in a self-conscious "break from conventional wisdom," that Justice Stevens was indeed a kind of originalist).

81. INS v. St. Cyr, 533 U.S. 289, 301 (2001) (quoting Felker v. Turpin, 518 U.S. 651, 664 (1996)), *superseded by statute*, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, *as recognized in* Nasrallah v. Barr 140 S. Ct. 1683 (2020). To be sure, Justice Stevens appears to embrace the relevance of eighteenth-century habeas history only insofar as it would exert *outward* force on the scope of the Suspension Clause under modern doctrine. That is, he says that the Suspension Clause, "*at the absolute minimum*," protects the writ as it existed at the Founding. *Id.* (emphasis added). In his view, while original understanding doesn't "defin[e] the ceiling" of the Clause's reach, it still "may identify a floor." Stevens, *supra* note 80, at 693.

B. Halliday's Intervention: The New Habeas Revisionism

About fifteen years ago, the legal historian Paul Halliday uprooted the false myth that has long undergirded the libertarian theory of habeas. In his seminal 2010 monograph, *Habeas Corpus: From England to Empire*,[82] and a 2008 *Virginia Law Review* article coauthored with constitutional law scholar G. Edward White[83] (which served as both a precursor to the 2010 monograph and a de facto amicus brief in *Boumediene v. Bush*[84]), Halliday's overarching thesis is that the common-law writ's development in early modern England "arose not from ideas about liberty, but from sovereignty."[85]

Then, as now, a writ of habeas corpus allowed judges to call up the body of a prisoner and inquire into whether his detention was in accordance with the law of the land.[86] But the animating concern was not that lawless detention would be an affront to the liberty of the prisoner. Rather, it was that lawless detention would constitute an affront to the sovereignty of the King, whose will was expressed through the laws of the land. Thus, as Halliday pithily puts it, habeas was "a power more concerned with the wrongs of jailers than with the rights of prisoners."[87] And those "wrongs," to be patently clear, were understood as wrongs not against prisoner, but against the King—and his "indivisible, final, and unlimited" authority[88] over the bodies of his subjects[89] and the actions of his franchisees (i.e., lesser governmental officers who "acted by [his] grace").[90]

82. HALLIDAY, *supra* note 2.

83. Halliday & White, *supra* note 32.

84. 553 U.S. 723 (2008); *see infra* notes 113-18 and accompanying text.

85. HALLIDAY, *supra* note 2, at 7. To be sure, while ideas about liberty were "absent from the discussion" in sixteenth- and early-seventeenth-century habeas jurisprudence, *see id.* at 185, "a new language of liberty would increasingly be heard" in the later seventeenth and eighteenth centuries, *id.* at 197. *See also id.* at 177-212. But even when extralegal "ideas about liberties" started working their way into English habeas discourse, that was "a sedimentary process, in which new ideas layered on old ones, never entirely obscuring them from view." *Id.* at 179. Thus, where habeas had the *effect* of vindicating individual petitioners' liberties, it was because "judges . . . could rely on . . . prerogative arguments," i.e., on "franchise theory—not natural rights claims." *Id.* at 185, 212. And where reformers pushed for "habeas corpus [to] break out of the bounds of national law to answer transcendent demands . . . on behalf of the individual's liberty," they ultimately "would fail." *Id.* at 179, 193. Thus, even "[a]t its greatest," English habeas remained, above all, "an instrument used by judges," aligned with the King, "to watch other magistrates and officers." *Id.* at 212.

86. *See id.* at 1-2.

87. *Id.* at 14.

88. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1430 (1987) (summarizing the early modern English understanding of sovereignty thusly).

89. *See* Halliday & White, *supra* note 32, at 602-03.

90. *Id.* at 637.

Halliday thus arms us to strike at the analytical heart of the Great Writ of Liberty theory, showing that neither its purposive nor structural claims accurately describe habeas as practiced and theorized in English common law throughout the centuries running up to its reception into American law.

1. Undermining the libertarian theory's purposive claim

For starters, Halliday shows that the principal purpose of early modern English habeas was decidedly not to vindicate the liberties of prisoners.[91] The point is made vivid by the frequent incidence of King's Bench issuing habeas writs for the express purpose of transferring prisoners into the custody of even *harsher* authorities than those that had initially confined them.[92] Halliday highlights one such case, in which habeas was used to take jurisdiction over convicted traitors whose punishment Queen Mary took a personal interest in administering and observing:

> [I]n 1554, Queen's Bench[93] used two writs to bring ninety-seven of Thomas Wyatt's companions to trial for their rebellion at the outset of Mary's reign. In the margin of the enrolled copies of their writs we can still read the clerk's simple notes that they should hang, then endure all the other horrors performed on the bodies of traitors. It is unlikely any of the prisoners thought of habeas corpus as a writ of liberty as they approached their executioners.[94]

In dramatic fashion, this anecdote undermines the libertarian theory's purposive claim. The motivation behind this use of the writ was not simply *other than* the ideal of personal liberty; it stood in direct tension with that ideal.

But if not the vindication of individual liberty, what *was* the affirmative purpose of habeas corpus as conceptualized and practiced in early modern England? In short: to vindicate the King's sovereign will vis-à-vis his agents and franchisees. It was to ensure that franchisal jailers, to whom the King had delegated power to imprison his subjects in his name,[95] did not "injur[e]" the King's ultimate sovereignty by exercising his power contrary to his sovereign

91. To be sure, habeas proceedings *could* produce the effect of releasing a prisoner from a jailer's detention, as they in fact did in 53% of the habeas proceedings studied by Halliday. HALLIDAY, *supra* note 2, at 29. Yet even so, individual rights were regarded as at most incidental in the early modern English conception of habeas. *See id.* at 14.

92. *Cf.* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 146 (4th ed. 2002) ("It is not a little ironic . . . that [the writ's] original purpose was not to release people from prison but to secure their presence in custody.").

93. Note here, the institution originally established as the Court of King's Bench was known as Queen's Bench during the reigns of female monarchs. For continuity and clarity, I use "King's Bench" for all general references to this tribunal.

94. HALLIDAY, *supra* note 2, at 29 (footnote omitted).

95. *See id.* at 41.

will as expressed through the laws of the land.[96] Thus, as the justices of King's Bench developed the writ, their overarching "aim was to review delegated power" and regulate principal-agent relationships between the King and his franchisees, "mak[ing] sure [they] operated in a manner consistent with the king's moral duty."[97] As such, we would be better served to think about King's Bench habeas practice as serving a structural principle of governance, as opposed to a framework of rights.

Insofar as one were to insist on shoehorning Halliday's account of English habeas into the language of rights and freedom,[98] it would bear recognizing that English habeas was concerned with a paradigmatically different kind of freedom than that contemplated by the libertarian theory—namely, positive rather than negative freedom.[99] The functional urgency to release an unlawfully detained prisoner drew not from the inherent good of *freeing him*, but from the instrumental good of *freeing him up to serve the Crown*, militarily or otherwise. "'The reason why the common law [of habeas corpus] has such great regard for the body of a man,' Chief Justice Sir John Popham declared in 1605, 'is so that he may be ready to preserve the king.'"[100]

2. Undermining the libertarian theory's structural claim

In a similar way, Halliday also undermines the libertarian theory's structural claim. Per his revisionist account, the basic relational paradigm of habeas proceedings before King's Bench was that of a confrontation between *King* and jailer (qua franchisee),[101] with their dispute over the King's *authority* taking center stage—and the prisoner, and the issue of his physical liberty, fading into the background.

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96. *See id.* at 79 (quoting EDWARDO COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 71 (London, M. Flesher 1644)); *see also* Halliday & White, *supra* note 32, at 601-02 (explaining that the King's sovereign prerogative was understood to be exercised both "through and upon law").

97. DAVID CHAN SMITH, SIR EDWARD COKE AND THE REFORMATION OF THE LAWS: RELIGION, POLITICS AND JURISPRUDENCE, 1578-1616, at 269 (2014).

98. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 740 (2008) (commenting that English habeas "was used to protect not the rights of citizens but those of the King and his courts").

99. *Cf.* BERLIN, *supra* note 70, at 7 (distinguishing positive and negative conceptions of liberty).

100. Halliday & White, *supra* note 32, at 600 (quoting Reports of Cases, ca. 1625, second foliation, at f. 85v (unpublished manuscript) (on file with the Harvard Law School Library as MS 105), https://perma.cc/GQ82-BF8K).

101. *See id.* at 643 ("[A]ll franchises arose from the prerogative . . . . For this reason, the behavior of all franchisees was subject to constant monitoring to ensure that the king's franchises were used for the common weal.").

This relational paradigm is reflected in the wording of a typical writ issued by King's Bench: "We command you that you have the body of Nicholas Lowe, who is detained in *our* prison under *your* custody . . . before us at Westminster."[102] In Halliday's analysis, the choice of possessive pronouns in this construction is a telling recognition of the fact "that anyone who held the bodies of the king's subjects was empowered by the king to act in his name,"[103] and that accordingly, the ensuing proceeding would constitute an "inspect[ion]" of the jailer's fidelity to the terms of the "personal relationship . . . between the king and [the jailer himself], to whom the king had delegated authority to hold people in [the king's] name . . . according to the king's laws."[104] Beyond that, the use of "we," "our," and "us" makes clear that in this confrontation between King and franchisee, the justices of King's Bench understood themselves to be acting not as disinterested adjudicators,[105] but as acting *in alignment with* the King (who was theoretically present whenever they transacted court business).[106] The important takeaway from the standard language of King's Bench habeas writs is that the King qua sovereign was conceptualized as a real party in interest to every habeas proceeding.

The corollary to the surprising role that the King *did* play within the "adversarial structure" or "relational paradigm" of English habeas proceedings, is the role that the prisoner generally *did not* play. Halliday's archival research reveals that habeas petitioners generally remained "silent" throughout their whole appearances before King's Bench, while the justices argued with the recipient of the writ (again, typically a franchisal jailer).[107] This, too, is starkly at odds with the oft-invoked image of the "heroic" habeas petitioner storming the court to demand his rightful liberty.[108] In this way, the actual social practice of King's Bench habeas proceedings reflected the regnant[109] theory of habeas in early modern England: a confrontation between the sovereign and a franchisee who exercised his delegated penal power.

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102. HALLIDAY, *supra* note 2, at 39, 41 (quoting writ issued October 11, 1605).

103. *Id.* at 41.

104. *Id.* at 42-43.

105. *Cf.* Frederick Bernays Wiener, *Tracing the Origins of the Court of King's Bench*, 59 AM. BAR ASS'N J. 753, 754, 756 (1973) (explaining that King's Bench was explicitly constituted—contra the Article III norm of judicial independence—as a court whose jurisdiction concerned all matters in which the King had a personal interest, and whose justices were expected to protect and advance the King's interests).

106. The justices of King's Bench presided *coram rege* ("in the presence of the King himself")—as a literal matter until roughly 1300, and through a legal fiction until 1876. *See* BAKER, *supra* note 92, at 39.

107. *See, e.g.*, HALLIDAY, *supra* note 2, at 13.

108. *Id.*

109. No pun intended.

C. The Reception of Halliday

Almost immediately, Halliday's revisionist account of early modern English habeas practice garnered a more or less universal "consensus" among American "courts, lawyers, and academics."[110] As Lee Kovarsky—who quite literally wrote the textbook on habeas[111]—put it, "Halliday's work has secured a status as the definitive historical account of the pre-Revolutionary writ."[112]

The most consequential member of this consensus was the Supreme Court, which gave Halliday its imprimatur in *Boumediene v. Bush*.[113] Whereas the *St. Cyr* Court had called for a more rigorous account of habeas history in which to reground its Suspension Clause jurisprudence,[114] the *Boumediene* Court enthusiastically embraced Halliday's response to that call, citing and examining Halliday and White's 2008 article extensively.[115] Critically, the Court cited with approval Halliday's thesis that "conceptually[,] the writ arose from a theory of power rather than a theory of liberty."[116] Scholars such as Kovarsky and Eric Freedman have credited "the historical data unearthed by Professor Halliday and subsequently presented in [his 2010 monograph]" as being the catalyst that "drove *Boumediene*'s result."[117] The import is clear: "*Boumediene* reset the scholarly consensus the Supreme Court uses to describe habeas

110. Lee Kovarsky, *Habeas Verité*, 47 TULSA L. REV. 13, 14 (2011) (reviewing HALLIDAY, *supra* note 2).

111. *See generally* BRANDON L. GARRETT & LEE KOVARSKY, FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION (2d ed. 2023) (widely used casebook on habeas corpus).

112. Kovarsky, *supra* note 110, at 14.

113. 553 U.S. 723, 740, 747, 752 (2008) (discussing Halliday and White's 2008 article).

114. *See supra* note 81 and accompanying text; *see also* Halliday & White, *supra* note 32, at 581 (invoking *St. Cyr*'s call).

115. *Boumediene*, 553 U.S. at 740, 747, 752.

116. *Id.* at 740 (quoting Halliday & White, *supra* note 32, at 586).

117. Eric M. Freedman, *Habeas Corpus in Three Dimensions: Dimension III: Habeas Corpus as an Instrument of Checks and Balances*, 8 NE. U. L.J. 251, 302 n.259 (2016) (quoting Kovarsky, *supra* note 33, at 759). *But see* Vladeck, *supra* note 2, at 966 (characterizing *Boumediene* as treating Halliday's historical research as instructive but "ultimately . . . inconclusive"). Notwithstanding quibbles over whether Halliday's work played a dispositive or merely instructive role in driving *Boumediene*'s reasoning, Freedman's assessment is more or less right. The question in *Boumediene* was whether detainees at Guantanamo Bay were "entitled to the privilege of the writ or the protections of the Suspension Clause." 553 U.S. at 735-36. And the crux of the parties' disagreement was whether that question should turn on the status of the habeas petitioners (non-American nationals, imprisoned outside American territory) or the status of their jailers (agents of American sovereignty). *See id.* at 739, 745-46. Halliday's influence in shifting the focus of the jurisdictional inquiry from the former to the latter is unmistakable.

practice in England and America before 1787," and "Halliday is the academic most responsible for th[at]."[118]

The consensus around Halliday's work is well justified by its unprecedented rigor.[119] Before Halliday, the conventional American historiography of English habeas—that is, the historiography that gave rise to the libertarian myth—had long been rife with methodological flaws. For one, it had been "a model example of 'whig history,' in which contemporary commentators impose[d] their current preconceptions on their pasts" and "dr[e]w lines through [historical] events . . . to modern liberty," but tended "to forget that this line is merely a mental trick."[120] Moreover, the conventional habeas historiography had relied almost exclusively on *printed* primary sources, which is problematic given that "law in early modern England was still deeply shaped by learning that remained in manuscript or which was transmitted only orally."[121] Halliday, by contrast, dove into the archives of King's Bench—where the longhand manuscript records from every habeas proceeding adjudicated between 1500 and 1800 had been collecting dust—and built his revisionist history from the ground up.[122] Indeed, "as a work of archival research, Halliday's monograph is first-rate."[123]

D. The Unheralded Implication: American Habeas as Great Writ of Popular Sovereignty

The insights of the New Habeas Revisionism demand to be "Americanized." Much as St. George Tucker "translat[ed]" the insights of Blackstone's *Commentaries on the Laws of England* into a new American context,[124] we must now do the same for Halliday's paradigm-shifting revisionist insights into early modern English habeas. On my read, those

118. Kovarsky, *supra* note 33, at 759 & n.18.

119. *See generally* Halliday & White, *supra* note 32, at 588-93 & nn.36-37 (discussing the methodology of Halliday's underlying archival research).

120. *Id.* at 581 n.12 (quoting H. BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY 12 (Charles Scribner's Sons, 1st Am. ed. 1951) (1931)).

121. *Id.* at 589 (footnote omitted).

122. *See* HALLIDAY, *supra* note 2, at 2-6, 28-29 (describing his methodology).

123. Vladeck, *supra* note 2, at 943.

124. Kurt T. Lash, *Originalism All the Way Down?*, 30 CONST. COMMENT. 149, 157-58 (2015) (reviewing JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013)) (characterizing Tucker's *Notes* on Blackstone as a project of "translation"). *See generally* 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 (Philadelphia, William Young Birch & Abraham Small 1803) (providing commentary on the American implications of Blackstone's *Commentaries*).

insights demand reassessing the libertarian theory's core conceptual claims. First, we must reconceptualize the purpose of the American writ as vindicating the sovereignty of We the People vis-à-vis those of our agents who exercise our delegated penal power. Likewise, we must reconceptualize the adversarial structure of American habeas proceedings as confrontations between We the People and an agent alleged to have exercised such delegated power contrary to our sovereign will. Yet that most seismic American implication of Halliday's work remains profoundly undertheorized. Of the many American jurists and scholars who have engaged with Halliday's work, none has embraced—or even engaged meaningfully with—the possibility that it might demand reconceptualizing American habeas as Great Writ of Popular Sovereignty.

Starting at the source, Halliday and White *themselves* brush off that implication. To be sure, they do not deny that their historical insights *have* American implications; "American Implications" appears right in the title of their article.[125] And they vigorously argue that the concept of sovereignty should be at the forefront of American jurists' minds when thinking about the extraterritorial reach of the Suspension Clause at Guantanamo Bay (i.e., the specific question teed up in *Boumediene*).[126] But they stop short of suggesting that sovereignty should replace liberty as the concept at the forefront of American jurists' minds in any other context. In fact, they affirmatively suggest that the libertarian theory remains the appropriate way to conceptualize the fundamental logic and purpose of the American writ—notwithstanding that we would be "derelict as historians" to assume that early modern English jurists had conceptualized the English writ in that way.[127] Namely, Halliday and White remark, more or less in passing, that the transition between the English and American constitutional orders somehow served to "translate[] a prerogative writ whose principal justifications were the divine mercy of the king and his concern for *salus populi* into one whose principal justifications were its foundational status as a device for protecting the liberties of individuals."[128] (As I will argue in short order,[129] that "translat[ion]"[130] is premised on a fundamental misunderstanding of the nature and locus of sovereignty as understood in the bedrock political theory of the American Founding.)

125. Halliday & White, *supra* note 32, at 575; *cf. id.* at 581 (discussing the relevance of habeas mythology to Americans today).

126. *See id.* at 586-88, 699-714; *supra* note 117.

127. HALLIDAY, *supra* note 2, at 3-4.

128. Halliday & White, *supra* note 32, at 691. To be clear, Halliday and White credit this putative "translat[ion]" to Robert Goodloe Harper, *id.*, though they strongly imply their own agreement with Harper's view, *see id.* at 689-93.

129. *See infra* Part III.A.

130. Halliday & White, *supra* note 32, at 691.

In their responses to Halliday's work, many scholars have repeated the mistake of focusing so myopically on its implications for Guantanamo-specific questions as to miss the possibility that it might have implications for how we think about the soul of American habeas more generally—and especially for more workaday contexts of domestic, postconviction habeas.[131] Many others have repeated the mistake of more or less uncritically *assuming* that "ideas about liberty" still provide the proper framework in which to think about American habeas, even now that we've learned that such ideas were largely absent from early modern English jurists' conception of the writ as they developed it into the form we inherited in 1789.[132]

Other reviews of and responses to Halliday's work have been more willing to acknowledge the severity of the blow it dealt to the libertarian mythos. In so doing, however, they have focused narrowly on Halliday's implications for the *myth* of the Great Writ of Liberty, as opposed to the *theory* of the Great Writ of Liberty—that is, on the rhetorical *atmospherics* associated with the libertarian view, rather than the more concrete conceptual *claims* it posits about the fundamental logic and purpose of the American writ. For example, Stephen Vladeck characterizes Halliday as displacing "a narrative of habeas that [is] normatively attractive."[133] Adrian Vermeule lauds Halliday for revealing common-law habeas to have originated from "far less elevated judicial motivations[] than its libertarian celebrants recognize."[134] Longtime Supreme Court commentator Dahlia Lithwick casts Halliday's book as "a challenge to legal historians and their sacred-cow interpretations of the foundations of personal liberty."[135] Kovarsky praises it as an exposé of the writ's "seamy underbelly" and writes that it "contains many bitter-pill propositions for [our]

131. *See, e.g.*, Bruce Corey, Note, *At Writ's End: Using the Law of Nations to Decide the Extraterritorial Reach of the Suspension Clause*, 78 GEO. WASH. L. REV. 374, 384-86 & nn.66, 69, 73, 78-79, 84 (2010); Paul Diller, *Habeas and (Non-)Delegation*, 77 U. CHI. L. REV. 585, 593-94 & nn.35, 41-42, 45 (2010).

132. *See, e.g.*, Eric M. Freedman, *Habeas Corpus Past and Present*, FED. LAW., May 2012, at 40, 40, 42 & nn.11-13 (citing and discussing Halliday, yet maintaining that habeas is "first and foremost a symbol of th[e] political creed . . . . that all persons are [presumptively] entitled to be at liberty"); Douglas A. Berman, *Making the Framers' Case, and a Modern Case, for Jury Involvement in Habeas Adjudication*, 71 OHIO ST. L.J. 887, 897-99, 898 n.43 (2010) (citing and discussing Halliday, while also bemoaning that "the historic[al] . . . role of habeas corpus as a Great Writ of Liberty" is "now largely unfulfilled" (capitalization altered)).

133. *See* Vladeck, *supra* note 2, at 945.

134. Adrian Vermeule, *States of Detention*, NEW REPUBLIC (Feb. 28, 2010), https://perma.cc/HX5Z-DYYS (reviewing HALLIDAY, *supra* note 2).

135. Dahlia Lithwick, *Writ and Wrongs: A New Study Reveals the Penal Origins of a Fundamental Right*, BOOKFORUM (Apr.-May 2010), https://perma.cc/NS9U-MXVM (reviewing HALLIDAY, *supra* note 2).

legal culture."[136] Leah Litman draws "parallels" between "Halliday's history of the common law writ in England" and the American writ's historical use "as a vehicle for the racialization and subordination of disadvantaged groups and for normalizing excesses of government power"—casting both histories as "*complicat[ing]*" the conventional "story of habeas" as the Great Writ that "protects individual liberty and checks government power."[137]

For commentators in this camp, the import of Halliday's work is merely to cast a dark cloud over the hypocrisy and bluster of the rhetoric and mythos that attend judicial dicta endorsing the Great Writ of Liberty theory. The import, in other words, is first and foremost to *problematize* habeas, and to pipe down some of the more extravagantly triumphalist rhetoric about the writ's standing at the vanguard of "liberty's march through history."[138] But the import stops short of planting seeds for an affirmative counter-theory of American habeas as ordered toward some good *other than* individual physical liberty.

To be sure, a few scholars in the years following Halliday *have* proposed, or at least gestured toward, such affirmative counter-theories. But even those few have fallen short of connecting all the dots of a theory of American habeas as a Great Writ of Popular Sovereignty.

Primus, for instance, has proposed a "structural" model of postconviction habeas[139] that would, incidentally, fit comfortably with such a popular-sovereigntist theory.[140] But she has explicitly framed that proposal as a purely prudential policy argument, rather than as a fulfillment of what habeas intrinsically *is*. Indeed, she candidly airs concerns that her proposed legislation might be attacked as a Suspension Clause violation.[141] The irony is that if we follow through on the most important implications of Halliday's work—which Primus cites only in passing[142]—it becomes clear that such a model is not only *consistent with*, but perhaps even *demanded by* the Suspension Clause.

Kovarsky, meanwhile, has put forth an affirmative *constitutional* theory of habeas corpus that, drawing on Halliday's revisionist insights, would situate American habeas in a conceptual framework of "power[s]," rather than "individual rights."[143] But his theory would "conceptualize 'habeas' as a form of

136. *See* Kovarsky, *supra* note 110, at 13-14.

137. Leah M. Litman, *The Myth of the Great Writ*, 100 TEX. L. REV. 219, 220, 222, 280-81 (2021) (emphasis added).

138. Kovarsky, *supra* note 110, at 13.

139. *See* Primus, *supra* note 10, at 26-39.

140. *See infra* Part II.A.3.

141. *See* Primus, *supra* note 10, at 39-40.

142. *See id.* at 13 & n.75.

143. Kovarsky, *supra* note 33, at 754 (emphasis omitted).

Article III power belonging to *judges*," rather than the sovereign People.[144] Likewise, Kovarsky would theorize the constitutional "role" of habeas as "allocating power *among* government institutions—certain courts versus others, judiciaries versus other branches, and the federal government versus the states"[145]—rather than between governmental actors and the principals, outside those institutions, whom they serve as agents.

Finally, Aziz Huq has perhaps come closest to hitting on a popular-sovereigntist theory of American habeas.[146] Indeed, he explicitly *recognizes* the full line of reasoning that would point to such a theory; he simply backs away from its conclusion. First, citing Halliday, Huq observes that English habeas was "a means for the king to rein in potentially wayward vassals," that is, "a mechanism for reducing the cost of agency slack for the government's sole principal—the monarch."[147] Next, he rightly observes that "[t]he principal in the American model is obviously no longer a king or central executive, but 'the people.'"[148] But then, puzzlingly, he walks away from the conclusion that would seem to follow syllogistically from those two observations: that *American* habeas is a "mechanism" to "control agency costs" that "ar[i]se" in "this new model [of American popular sovereignty] from unavoidable slack between the people's instructions and their representatives' actions."[149]

Why the about-face? On Huq's read, "habeas plays" a "striking[ly] . . . marginal . . . role . . . in the Federalist Papers' canonical account of the separation of powers"—which was itself "[de]emphasized" as a merely "'auxiliary' design feature to dampen the misuse of power," taking a back seat to elections as the preferred "tools to enable popular monitoring and control of elected agents."[150] Thus, Huq concludes, "American habeas" is simply "less significant than its English cousin . . . . [E]ven if habeas was significant to the Framers, the writ was not a central architectural feature of the new Constitution's dispersion of powers, as least as described in the Federalist

144. *Id.* (emphasis added). While this distinction might be one without a difference in the English context, it has real bite in the American context. Whereas the justices of King's Bench were closely *aligned* with the corresponding sovereign, the same cannot be said of American judges, whom we deliberately style as *independent*. *See supra* note 105 and accompanying text (discussing divergent conceptions of institutional roles of King's Bench and Article III courts).

145. Kovarsky, *supra* note 110, at 19 (emphasis altered).

146. *See* Huq, *supra* note 26, at 388-90.

147. *Id.* at 388-89 & nn.13, 15.

148. *Id.* at 389.

149. *Id.* at 388-89.

150. *Id.* at 389-90 (quoting THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961)).

Papers."[151] The remainder of Huq's article then goes off in a wholly different direction, examining empirical data on the extent to which post-*Boumediene* habeas cases have fulfilled the writ's putative purpose of "protecti[ng] . . . physical liberty."[152] Another near miss.

Judges have fared no better than scholars on this front. The many American courts engaging with Halliday's work have persistently missed its forest for its trees. In all, Halliday's work has been cited, discussed, and relied upon by twenty-nine judicial opinions since first gaining the Supreme Court's stamp of approval in *Boumediene*—four by U.S. Supreme Court Justices,[153] twelve by federal appellate judges,[154] four by federal district courts,[155] five by state supreme court justices,[156] and four by lower state courts.[157] While many

151. *Id.*

152. *Id.* at 421.

153. *See* Jones v. Hendrix, 143 S. Ct. 1857, 1897 n.24 (2023) (Jackson, J., dissenting); Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1969 & n.12, 1972 & nn.16, 18, 1974 & n.20 (2020) (Alito, J.); *id.* at 1984, 1986 (Thomas, J., concurring); *id.* at 1999, 2002 (Sotomayor, J., dissenting).

154. *See* Crawford v. Cain, 68 F.4th 273, 287 (5th Cir. 2023) (Oldham, J.), *reh'g en banc granted, opinion vacated*, 72 F.4th 109 (5th Cir. 2023), *aff'd en banc on other grounds*, 122 F.4th 158 (5th Cir. 2024) (per curiam); Al-Hela v. Biden, 66 F.4th 217, 271 (D.C. Cir. 2023) (en banc) (Randolph, J., concurring in the judgment and dissenting in part); Pacheco v. Habti, 62 F.4th 1233, 1242 (10th Cir. 2023) (Hartz, J.), *cert. denied*, 143 S. Ct. 2672 (2023); Beras v. Johnson, 978 F.3d 246, 254 n.2 (5th Cir. 2020) (Oldham, J., concurring); Ragbir v. Homan, 923 F.3d 53, 78 (2d Cir. 2019) (Droney, J.), *vacated sub nom.* Pham v. Ragbir, 141 S. Ct. 227 (2020); Thuraissigiam v. U.S. Dep't of Homeland Sec., 917 F.3d 1097, 1105-06 (9th Cir. 2019) (Tashima, J.), *rev'd sub nom.* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020); Jauch v. Choctaw Cnty., 874 F.3d 425, 433 n.6 (5th Cir. 2017) (Reavley, J.); Dhiab v. Trump, 852 F.3d 1087, 1093-94 (D.C. Cir. 2017) (Randolph, J.); *id.* at 1100 (Rogers, J., concurring in part and concurring in the judgment); *id.* at 1105 (Williams, J., concurring in part and concurring in the judgment); Omar v. McHugh, 646 F.3d 13, 29 (D.C. Cir. 2011) (Griffith, J., concurring in the judgment); Abdah v. Obama, 630 F.3d 1047, 1050-51 (D.C. Cir. 2011) (Griffith, J., dissenting from denial of rehearing en banc).

155. *See* Skinner v. Maruka, No. 19-00528, 2021 WL 277813, at *3 (S.D. W. Va. Jan. 27, 2021); Perotti v. Erdos, No. 18-cv-477, 2019 WL 2289273, at *3 & n.1 (S.D. Ohio May 29, 2019), *adopted*, 2019 WL 3430910 (S.D. Ohio July 29, 2019); Hamidullah v. Obama, 899 F. Supp. 2d 3, 8 (D.D.C. 2012), *remanded sub nom.* Maqaleh v. Hagel, 738 F.3d 312 (D.C. Cir. 2013), *vacated as moot sub nom.* Amanatullah v. Obama, 575 U.S. 908 (2015) (mem.); *In re* Davis, No. CV409-130, 2010 WL 3385081, at *41 n.33 (S.D. Ga. Aug. 24, 2010).

156. *See* Nonhuman Rts. Project, Inc. *ex rel.* Happy v. Breheny, 197 N.E.3d 921, 942-43, 946 & n.10, 948, 964 (N.Y. 2022) (Wilson, J., dissenting); Patterson v. State, 504 P.3d 92, 111, 113-15, 115 n.21 (Utah 2021); Sabisch v. Moyer, 220 A.3d 272, 297 & n.10 (Md. 2019); Smith v. Brown, 781 S.E.2d 744, 747 (Va. 2016); Luurtsema v. Comm'r of Corr., 12 A.3d 817, 829 (Conn. 2011).

157. *See* Banks v. Jones, 197 So. 3d 1152, 1178 n.10 (Fla. Dist. Ct. App. 2016) (en banc) (Makar, J., dissenting), *quashed*, 232 So. 3d 963 (Fla. 2017); Barrett v. Peters, 360 P.3d 638, 644 & n.10 (Or. Ct. App. 2015), *aff'd*, 383 P.3d 813 (Or. 2016); Ingram v. Commonwealth, 741 S.E.2d 62, 69 n.8 (Va. Ct. App. 2013); Hicks v. Clarke, 87 Va. Cir. 208, 209 (2013), *aff'd*, 768 S.E.2d 415 (Va. 2015).

of those opinions engage deeply with various granular details that Halliday unearthed about English habeas practice, none has so much as gestured toward the notion that ideas about popular sovereignty might play an important role—or any role—in the conceptual makeup of American habeas. Indeed, many have doubled down on the rhetoric and conceptual perspective of the Great Writ of Liberty in the very same opinions as their invocations of Halliday.[158]

All of this hesitancy to embrace a theory of the Great Writ of Popular Sovereignty appears to be animated by concerns that it would be either analytically impossible, normatively undesirable, or historically irrelevant to "Americanize" the sovereigntist English conception of the writ that Halliday has recovered. As I will ultimately argue, each of those concerns is misbegotten—largely for reasons that might better be explained with reference to the concrete doctrinal implications that the popular-sovereigntist theory would produce. Thus, after exploring a few of those implications in Part II, I will circle back in Part III to "reverse engineer" and rebut the rationales that appear to be driving the resistance to embracing the theory in the first place.

E. Where Things Stand: The Great Writ of Liberty in Crisis

Halliday observes that when "we have been derelict as historians," what tends to follow is that we are "derelict in our jurisprudence."[159] I would posit that the same holds true when we have been derelict as *translators* of history. While Halliday has now stepped in to correct our dereliction as historians of habeas, we have remained derelict as translators of that history. And indeed, we are now deeply derelict in our habeas jurisprudence.

Of course, it is hardly novel to observe that American habeas jurisprudence is in a state of dereliction. Amidst all the rancorous debate in habeas today,[160] that view—like the view that the English history matters, or that Halliday has gotten that history right[161]—is one of the few that commands consensus across ideological lines.[162] What *is* novel is the notion that our

158. *See, e.g.*, *Jones*, 143 S. Ct. at 1892 (Jackson, J., dissenting) (referring to "the writ of habeas corpus" as a "protect[ion]" for "core liberty interests"); *Dhiab*, 852 F.3d at 1102 (Rogers, J., concurring in part and concurring in the judgment) (characterizing habeas as a "vital instrument for the protection of individual liberty" (quoting Boumediene v. Bush, 553 U.S. 723, 743 (2008)); *id.* at 1094 (Randolph, J.) (reciting Blackstone's description of habeas as "the bulwark of English liberties" (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 133 (Oxford, Clarendon Press 1765)).

159. HALLIDAY, *supra* note 2, at 3-4.

160. *See supra* notes 16-25 and accompanying text.

161. *See supra* Parts I.A.3, I.C.

162. *See supra* notes 6-14 and accompanying text.

stubborn attachment to the conceptual framework of the libertarian mythos might bear the blame for the incoherent and ineffectual state of American habeas law. To my knowledge, the only scholar to suggest as much is Primus, who has conjectured that "the federal habeas system is broken largely *because of* its resolute focus on individual petitioners" and "individual rights," as opposed to "structural or systemic processes of governance."[163] I believe she is right. Put slightly differently, I believe our dereliction as translators of Halliday's American implications is a direct cause of the dereliction in our habeas jurisprudence.

Putting aside executive-detention habeas (for example, cases like *Boumediene*) for the moment,[164] let us focus on postconviction habeas, which accounts for "an overwhelming majority" of the federal courts' habeas docket[165] and which is under siege in a way that executive-detention habeas is not.[166]

The extant "model" of federal postconviction habeas review has been aptly described by Professor Jonathan Siegel as one of "habeas as constrained certiorari substitute," whose basic "starting point is that the habeas court may grant relief whenever the Supreme Court might have vacated the sentencing court's decision in the petitioner's case on direct review via certiorari."[167] In other words, the extant model is—by design—a model of redundancy.[168] A habeas court, modeled thusly, is not tasked with doing anything categorically different from the kind of error correction that the first round of appellate courts was tasked with doing on direct appeal. Postconviction habeas proceedings, modeled thusly, are exercises in *relitigation*, with habeas courts

163. Primus, *supra* note 10, at 3 (emphasis added).

164. Whereas "postconviction" habeas refers to the use of the writ by persons in custody pursuant to a state or federal court's judgment of conviction, "executive-detention" habeas refers to its use by pretrial detainees and others detained by the executive without judicial process (such as the Guantanamo Bay detainees in *Boumediene*). *See generally* GARRETT & KOVARSKY, *supra* note 111, at 39-47 (explaining this distinction). The most salient implications of this Article's argument for a popular-sovereigntist conception of the American writ are in the postconviction context.

165. *See* Primus, *supra* note 10, at 8 & n.43.

166. *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1566-73 (2021) (Gorsuch, J., concurring) (casting pretrial- and executive-detention challenges as the "historic office" of the writ, and postconviction challenges as an ahistorical "innovation"); Brown v. Davenport, 142 S. Ct. 1510, 1520-24 (2022) (same); Jones v. Hendrix, 143 S. Ct. 1857, 1870-73 (2023) (same); *see also infra* Part II.A (employing a popular-sovereigntist theory of American habeas to mediate Justices Gorsuch and Kagan's debates over the historical legitimacy of federal postconviction review).

167. Siegel, *supra* note 18, at 513 (capitalization altered).

168. *See* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 648, 654-56, 654 n.51, 680 (1981) (defending redundancy as a positive feature of the extant habeas-as-relitigation model).

passing on the same legal and factual questions that were passed on (or could have been passed on) by other courts on direct appeal and, even before that, by the sentencing court itself.[169] (Indeed, what Siegel terms the "habeas-as-constrained-certiorari-substitute" model could just as well be termed the "habeas-as-relitigation" model.) In this regard, the extant model "is obviously in tension with ordinary principles of preclusion doctrine."[170] Normally, once the losing party in a trial court proceeding has exhausted her direct appeals, the trial court's judgment becomes final and precludes any subsequent relitigation of issues and claims therein decided. But not so with federal postconviction habeas. The most "[c]ritically important" doctrinal feature of the habeas-as-relitigation model, then, is to *suspend* the otherwise generally applicable principles of preclusion.[171] It is also the most criticized.[172]

As both proponents and critics of this model have recognized, the internal logic of its suspension of preclusion principles is tightly bound up with the libertarian conception of the writ. For example, Siegel, defending the extant model, has argued that "[h]abeas's avoidance of preclusion is . . . supported by" the "key policy consideration[]" that "habeas concerns human liberty."[173] Consequently, he argues, "[t]he uniquely powerful interest in liberty justifies the application of different preclusion rules than those that apply when only monetary interests are at stake."[174] On the other side of the debate, the late Paul Bator similarly recognized that postconviction habeas's exemption from preclusion is driven by concerns for individual physical liberty. Before "we . . . write an irrevocable *finis* on the page" of the criminal processes through which "those condemned become . . . subject to . . . loss . . . of liberty," Bator notes, our impulse is to "make doubly, triply, even ultimately sure that the particular judgment is just, that the facts as found are 'true' and the law applied 'correct.'"[175]

But the habeas-as-relitigation model born out of this deep, admirable, and fundamentally well-intentioned concern for human liberty is immensely difficult to defend, on both practical and theoretical levels.

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169. *Cf. Edwards*, 141 S. Ct. at 1569 (Gorsuch, J., concurring) (bemoaning that "habeas [has] bec[o]me little more than an ordinary appeal with an extraordinary Latin name").

170. Siegel, *supra* note 18, at 513.

171. *Id.* (citing Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 401 (1996)).

172. *See, e.g.*, *Edwards*, 141 S. Ct. at 1568-69 (Gorsuch, J., concurring); Brown v. Allen, 344 U.S. 443, 536-48 (1953) (Jackson, J., concurring in the result).

173. Siegel, *supra* note 18, at 514.

174. *Id.*

175. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 441, 443 (1963).

As a practical matter, the federal courts simply are flooded with far more § 2254 petitions than they have the resources (or, at least, the will) to entertain in any meaningful fashion. "Given [such] limited resources, complete relitigation of state court criminal cases on federal habeas is not feasible."[176] That creates immense hydraulic pressure for courts to find, to lobby Congress for, or to simply *invent* procedural off-ramps to avoid engaging in meaningful merits review. And they have been remarkably successful. This should hardly come as a shock, for similar hydraulic dynamics have been observed across countless other areas of law: The more "expansively" certain rights or rights-securing procedures are "construed," the more susceptible they will often become to "[j]udicial retrenchments" and "demands for further repression."[177] The result is that, "[a]t enormous expense, the system grants relief to almost nobody."[178] Simply put, "federal habeas review has become unworkable."[179]

As a more theoretical matter, the normative thrust of the habeas-as-relitigation model is rife with self-contradiction. The "demand for [wholesale] relitigation of constitutional questions on habeas corpus" ostensibly rests on the "fundamental assumption" that "a detention may not be considered lawful unless the proceedings leading to it were, in some ultimate sense, free of error"—that is, "unless the facts as found were 'really' true and the law 'really' correctly applied."[180] Yet "on this underlying premise," as Bator powerfully argued,

> The conclusion is inescapable that no detention can *ever* be finally determined to be lawful . . . . After all, there is no ultimate guarantee that *any* tribunal arrived at the correct result; the conclusions of a habeas corpus court . . . are [themselves] not infallible; if the existence *vel non* of mistake determines the lawfulness of the judgment, there can be no escape from a literally endless relitigation of the merits because the possibility of mistake always exists.[181]

To be sure, Bator's theoretical critique is susceptible to criticism. As a matter of rigid logical abstraction, he is of course right that it is self-contradictory to think that a habeas court could ever say with finality whether a judgment of conviction was in some objective sense "correct," when our impetus for providing habeas review in the first place was epistemic doubt about some earlier court's ability to reach a truly and objectively "correct"

176. Primus, *supra* note 10, at 5.

177. *E.g.*, Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 478 (1985).

178. Primus, *supra* note 10, at 4.

179. *Id.*

180. Bator, *supra* note 175, at 446.

181. *Id.* at 446-47 (first emphasis added).

verdict. But in the day-to-day trenches of law and human experience, we tend not to think about the pursuit of truth in so rigid a fashion: We tend to think that objective truth is most apt to emerge—or at least, to be approached most closely—from the percolation of dialectic, from the repeated, iterative testing of conflicting positions on what the objective truth is. Yet then again, perhaps Bator's critique is saved by its own appeal to practical wisdom: Even if each successive round of relitigation really *can* bring us closer to the objective, infallible "truth" of whether the judicial decision that occasioned a deprivation of liberty was factually and legally "correct," each successive round of relitigation is also not without real, human costs of its own. For instance, such long-protracted relitigation may well "undermine[]" the "educational and deterrent functions of the criminal law" by "defin[ing] the processes leading to just punishment [such] that it can really never be finally imposed at all."[182] It could also undermine "the aim of rehabilitating offenders," for "[t]he first step in achieving that aim may be a realization by the convict that he is justly subject to sanction, that he stands in need of rehabilitation."[183] It also tends to undermine the "[r]epose" that "is a psychological necessity in a secure and active society," insofar as it indulges "a perpetual . . . anxiety that there is a possibility that error has been made in every criminal case in the legal system."[184] Ultimately, though, it matters little whether I, or any other academic, fully "buys" Bator's theoretical critique of the habeas-as-relitigation model. What *does* matter is that several sitting Supreme Court Justices very evidently *do*.[185]

Thus, the practical and theoretical flaws of the extant habeas-as-relitigation model have placed the whole endeavor of postconviction habeas review on the chopping block. Again, it bears noting that calls to scrap that whole endeavor are coming from legal thinkers on *both* sides of the ideological divide: from Justices Gorsuch and Thomas on the right, from King and Hoffmann on the left.[186]

As I have tried to illustrate in the preceding paragraphs, the libertarian theory of the American writ is the *prima causa* of this crisis for postconviction habeas: Our fixation on ideas about individual, physical liberty is what has shaped the very features of the extant model that have made it practically unworkable and theoretically incoherent. But I would go a step further: Not

182. *Id.* at 452.

183. *Id.*

184. *Id.* at 452-53.

185. *See* Kovarsky, *supra* note 18, at 64-66 (observing that Bator's view "ha[s] found a new champion in Justice Neil Gorsuch"); *see also* Brown v. Davenport, 142 S. Ct. 1510, 1520-24 (2022) (six-Justice majority signing on to Justice Gorsuch's Bator-esque critique of the habeas-as-relitigation model); Jones v. Hendrix, 143 S. Ct. 1857, 1871-73 (2023) (same six-Justice majority signing on to Justice Thomas's Bator-esque critique).

186. *See supra* notes 16-19 and accompanying text.

only has the libertarian theory played a central role in *creating* such problems, but it has also constrained—nay, *smothered*—our ability to imagine solutions to them.

Siegel's recent article defending the extant model is illustrative of this point. As he frames the stakes of the Kagan-Gorsuch debate,[187] there are two, and only two, models of postconviction habeas on the table. One is the "current model," defended by Justice Kagan, of "habeas as constrained certiorari substitute."[188] The other is the "Thomas-Gorsuch model" of postconviction habeas as, well, *nothing*[189]—at least, nothing more than an all-but-empty exercise in rubber-stamping the status of the court of conviction as a "court of general criminal jurisdiction" (as opposed to, say, a justice of the peace, a small claims court, or a court-martial attempting to try a civilian).[190] Behind that framing are tacit ontological and teleological assumptions about *what habeas irreducibly is*, at a level of its hardwired conceptual DNA: that habeas, generally, is an instrument for vindicating individual physical liberty; and that in the postconviction context, habeas fulfills those ends by allowing an individual, deprived of her liberty pursuant to a judgment of conviction, to relitigate that conviction until we are satisfied that it was, in some ultimate sense, correct. These assumptions drive the binary choice teed up in the Kagan-Gorsuch debate as presently framed: Either postconviction can fulfill that putatively hardwired ontology and teleology (in which case the extant model should persist), or it cannot (in which case the whole endeavor of federal postconviction should be scrapped altogether).

Yet our recalcitrant attachment to the mythos of the Great Writ of Liberty has obscured the possibility that postconviction habeas might actually be ordered—at least principally—toward some affirmative ends *other than* the vindication of individual, physical liberty. Of course, the central thrust of this Article is to explore precisely such a possibility: to contend that American habeas is ordered, first and foremost, toward the vindication of popular sovereignty. There is good reason to think that adopting the popular-sovereigntist conceptual lens would yield a postconviction habeas system that was more practically workable, more theoretically coherent, and, most critically, safe from the chopping block. If, instead of aspiring futilely to correct *every* deprivation of liberty that might be premised on *any* legal or factual error, our habeas system maintained a narrower-but-thicker focus on

187. *Cf. infra* Part II.A (analyzing such debate in greater detail and bringing popular-sovereigntist theory to bear thereupon).

188. Siegel, *supra* note 18, at 513, 516 (capitalization altered); *see also Davenport*, 142 S. Ct. at 1531-35 (Kagan, J., dissenting).

189. Siegel, *supra* note 18 (capitalization altered).

190. *Jones*, 143 S. Ct. at 1871-73, 1873 n.8.

cases where official wielders of penal power have betrayed their fiduciary duties[191] to We the People in a more brazen, intentional, or systemic way, it might—however paradoxically—produce legal doctrine that is *more* effective in protecting liberty. In the following Part, I will aim to demonstrate just that.

II. Putting the Great Writ of Popular Sovereignty to Work: Doctrinal Implications

A. Broad Debates over the Scope of the Postconviction Writ

The practical and theoretical strains on the status quo model of postconviction habeas are now driving heated debates over the proper scope of the writ—over what kinds of legal wrongs should, and should not, be cognizable in habeas. For example, Justices Kagan and Gorsuch have recently debated the latter's suggestion that the postconviction habeas courts should ask only whether the court of conviction was one of general criminal jurisdiction (rather than review the merits of constitutional errors it allegedly committed). A Fifth Circuit panel recently suggested that federal postconviction habeas should be available only in cases where the petitioner colorably alleges her *factual* innocence (rather than a prejudicial legal error or even her outright legal innocence). Several years ago, Primus proposed that our regime of federal habeas review of state convictions should be legislatively overhauled to prioritize cases alleging *systemic* state violations of federal constitutional law (rather than those alleging more idiosyncratic, one-off constitutional errors). Once again, each of these debates cuts to the deeper question of what habeas is *for*. And in that sense, we can make far more coherent sense of them if we theorize American habeas as an instrument *for* vindicating the sovereignty of We the People vis-à-vis disobedience by the agents who exercise our delegated penal power.

1. The Kagan-Gorsuch debate: "jurisdictional defects only"

As alluded to throughout the previous Part, the most vexing of these debates—and surely the most consequential—is between two radically different views of the rightful scope of federal postconviction habeas review. Justice Kagan would preserve the "current model" of "habeas as constrained certiorari substitute," allowing federal habeas courts to reach the merits of essentially any alleged error of federal law in the sentencing court's underlying

191. *See infra* note 230 (discussing the role of analogies to corporate and agency law in the popular-sovereigntist theory of the American writ).

proceedings.[192] Justice Gorsuch would limit the habeas inquiry to asking whether "the court of conviction lacked jurisdiction over the defendant or his offense."[193]

This debate has unfolded across cases from three of the Supreme Court's past four Terms. Justice Gorsuch first articulated the "jurisdictional-defects-only" position in his concurrence in *Edwards v. Vannoy*, which only Justice Thomas joined.[194] In *Brown v. Davenport*, Justice Gorsuch reiterated the same position—but this time, in the dicta of a 6-3 opinion of the Court, and over a vigorous dissent by Justice Kagan (joined by Justices Breyer and Sotomayor).[195] In *Jones v. Hendrix*, Justice Gorsuch passed the baton to Justice Thomas, who doubled down on the jurisdictional-defects-only position in the dicta of another 6-3 majority opinion, with Justice Ketanji Brown Jackson criticizing such dicta in a solo dissent that echoed Justice Kagan's from a year prior.[196]

It seems fair to say that all the dicta on the jurisdictional-defects-only theory bore almost "no . . . relevan[ce] . . . to the issue[s] before [the Court]" in any of those three cases, which were relatively "small and legally mundane."[197] At most, the jurisdictional-defects-only theory was relevant in that it would have saved the Court from having to consider those "small and legally mundane" questions in the first place: Insofar as Edwards, Davenport, and Jones were all using habeas to allege constitutional errors in their convictions by state or federal "court[s] of general criminal jurisdiction," the Gorsuch-Thomas view was that "[w]hen the Suspension Clause was adopted," their constitutional claims "would not have been cognizable in habeas at all."[198] In turn, it also seems fair to suggest that the authors of such dicta were "perhaps hoping that the seeds it sow[ed] [would] yield more succulent fruit in cases to come."[199] Perhaps Justice Gorsuch's dicta is a "cross-branch exhortation" for "Congress to return habeas practice to a mythical steady state during which federal judges did no more than audit the jurisdiction of the

192. *See* Siegel, *supra* note 18, at 513, 516 (capitalization altered); *Davenport*, 142 S. Ct. at 1531-35 (Kagan, J., dissenting).

193. Edwards v. Vannoy, 141 S. Ct. 1547, 1567 (2021) (Gorsuch, J., concurring); *see also id.* at 1563 (Thomas, J., concurring) ("[T]he black-letter principle of the common law [was] that the writ was simply not available at all to one convicted of crime by a court of competent jurisdiction." (alteration in original) (quoting Bator, *supra* note 175, at 466)).

194. *See Edwards*, 141 S. Ct. at 1566-73 (Gorsuch, J., concurring).

195. *Compare* 142 S. Ct. 1510, 1520-24 (2022) (Gorsuch, J.), *with id.* at 1531-38 (Kagan, J., dissenting).

196. *Compare* 143 S. Ct. 1857, 1871-73 (2023) (Thomas, J.), *with id.* at 1894-98 (Jackson, J., dissenting).

197. *Davenport*, 142 S. Ct. at 1531 (Kagan, J., dissenting).

198. *Jones*, 143 S. Ct. at 1871.

199. *Davenport*, 142 S. Ct. at 1531 (Kagan, J., dissenting).

convicting court"; perhaps it is "seeding a structuralist argument" for the Court *itself* to hold in a future case "that broad habeas power over state convictions is unconstitutional."[200] Either way, the bottom line would spell the end of postconviction habeas as a vehicle for reviewing alleged federal constitutional violations. For prisoners confined pursuant to a state court conviction, it would mean no federal forum *whatsoever* in which to air such allegations (unless they were among the infinitesimally lucky few to have their cases taken up by the Supreme Court on direct appeal).

And so, with the stakes of the debate clear, let us turn to its merits—and the role a theory of the Great Writ of Popular Sovereignty might play in mediating it.[201] The debate has largely centered around what to make of the maxim, often recited by late-nineteenth- and early-twentieth-century American courts, that postconviction habeas review is limited to considering so-called "jurisdictional defects" on the part of the committing court.[202] Justice Gorsuch would impute to the term "jurisdictional" the same, narrow meaning that we understand it to carry today: "jurisdiction over the defendant or his offense" *ab initio*, as sharply distinguished from "the merits of the case."[203] On his telling, the Warren Court's decision in *Brown v. Allen*[204] marked a sharp, unprecedented, and unjustified departure from the jurisdictional-defects-only rule, making "[f]ull-blown constitutional error correction . . . the order of the day."[205] Justice Gorsuch thus suggests that in order to "return[] the Great Writ . . . to its historic office,"[206] either Congress or the Court should limit the scope of postconviction habeas to a simple inquiry into whether the sentencing court was one of general criminal jurisdiction.[207]

Justice Kagan has responded that "jurisdiction," as invoked in the context of that turn-of-the-century maxim, was "used . . . to mean something different from what it does today"—namely, something "broad[]" enough "to 'encompass review of constitutional error' in criminal proceedings."[208] In support of her view, Justice Kagan points to a bevy of pre-*Brown* habeas cases in which the

200. Kovarsky, *supra* note 18, at 67, 79.

201. For a more thoroughgoing analysis of how a popular-sovereigntist theory of habeas might resolve the current Justices' debate over the jurisdictional-defects-only maxim, see generally William M.M. Kamin, A More Luminous Beacon (Jan. 28, 2025) (unpublished manuscript), https://perma.cc/3DP5-SWY6.

202. *See, e.g.*, *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830).

203. Edwards v. Vannoy, 141 S. Ct. 1547, 1567 (2021) (Gorsuch, J., concurring).

204. 344 U.S. 443 (1953).

205. Brown v. Davenport, 142 S. Ct. 1510, 1522 (2022).

206. *Id.* at 1523 (quoting *Edwards*, 141 S. Ct. at 1570 (Gorsuch, J., concurring)).

207. *See* Kovarsky, *supra* note 18, at 67, 79.

208. *Davenport*, 142 S. Ct. at 1533 (Kagan, J., dissenting) (quoting Schlup v. Delo, 513 U.S. 298, 317-18 (1995)).

Court recited the jurisdictional-defects-only maxim—but then proceeded to cast (what would strike modern eyes as) mere errors of constitutional law as "jurisdictional defects," and in turn, to review the merits of convictions that unquestionably had been entered by courts of general criminal jurisdiction.[209] Her evidence, then, shows that whatever late-nineteenth- and early-twentieth-century habeas courts might have meant by "jurisdictional defects," it can't be quite as narrow as Justice Gorsuch suggests.

On the other hand, that evidence does not quite justify Justice Kagan's seemingly unqualified equation of "jurisdictional defects" with "constitutional errors"[210]—or the assertions, offered by several of her defenders in the academy, that the jurisdictional-defects-only rule was nothing more than a "fiction," that is, that constitutional defects "fictionally deemed to be jurisdictional . . . really had nothing to do with jurisdiction."[211] For there *were* a number of pre-*Brown* cases in which the Supreme Court gave real bite—not mere lip service—to the jurisdictional-defects-only maxim.[212] To that end, Bator rightly says that pre-*Brown* case law "do[es] not establish the proposition that collateral inquiry was thought appropriate *whenever* the committing tribunal [had] ruled on an issue of constitutional law."[213] And so, what Justice Kagan lacks—or has lacked thus far—is an affirmative explanation for *why* the Court would nevertheless have paid such dutiful lip service to the jurisdictional-defects-only maxim, or a theory of *why* they would have conceptualized (at least some) substantive and procedural constitutional errors as "jurisdictional" defects.

But a popular-sovereigntist conception of the writ can fill in those missing explanations. The logic of common-law habeas, as unearthed by Halliday, has always been a logic of regulating principal-agent relations between a sovereign and the lesser governmental officials who exercise that sovereign's delegated

209. *See id.* at 1533 & n.1 (citing *Ex parte* Wilson, 114 U.S. 417, 429 (1885); Callan v. Wilson, 127 U.S. 540, 547, 557 (1888); *In re* Nielsen, 131 U.S. 176, 185 (1889); and Johnson v. Zerbst, 304 U.S. 458, 468 (1938)). For other cases supporting Justice Kagan's argument, see, for example, *Ex parte Lange*, 85 U.S. 163 (1873); *Ex parte Bain*, 121 U.S. 1 (1887); *In re Snow*, 120 U.S. 274 (1887); and *Ex parte Siebold*, 100 U.S. 371 (1880).

210. *See Davenport*, 142 S. Ct. at 1533 (Kagan, J., dissenting).

211. *E.g.*, Siegel, *supra* note 18, at 527-28, 528 n.141 (citing Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y. L. SCH. J. HUM. RTS. 375, 409 (1998)); Kovarsky, *supra* note 18, at 75 n.133 (same). *But see* Micah S. Quigley, *What Is Habeas?*, 173 U. PA. L. REV. (forthcoming 2025) (manuscript at 38-55), https://perma.cc/7VPH-Q47F (arguing against the "legal fiction" interpretation).

212. *See, e.g.*, *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830); *Ex parte* Parks, 93 U.S. 18 (1876); *Ex parte* Yarborough, 110 U.S. 651 (1884); *Ex parte* Bigelow, 113 U.S. 328 (1885); *In re* Belt, 159 U.S. 95 (1895); *In re* Moran, 203 U.S. 96 (1906).

213. Bator, *supra* note 175, at 472 (emphasis added).

penal power.[214] Where King's Bench found that a franchisal jailer had exercised penal power contrary to the will of the King, it conceptualized such exercise as ultra vires action—as action outside the bounds of the *jurisdiction* that the sovereign had delegated to the franchisee.[215] In that sense, it is altogether coherent for a habeas court to say that when a criminal conviction was obtained in a fashion contrary to the commands of the relevant sovereign, that conviction was *jurisdictionally* defective. Now, consider that constitutional lawmaking is the means by which We the People of the United States speak in *our* sovereign capacity—that the Constitution is the repository of sovereign commands we have issued to our agents in government, upon which we have conditioned our delegation of powers to them.[216] With these understandings in place, the practice surrounding pre-*Brown* habeas courts' invocation of the jurisdictional-defects-only maxim becomes intelligible. Within the internal logic of the Great Writ of Popular Sovereignty, a conviction entered in violation of the sovereign commands that We the People have expressed in our Constitution *is* a jurisdictionally defective conviction: It is, again, ultra vires action.[217]

This formulation, however, requires maintaining a razor-thin line between constitutional "violations" and constitutional "errors." For it cannot be that *every* criminal conviction infected with a constitutional error is void of jurisdiction: That possibility is foreclosed by the line of cases in which the Court refused to treat such errors as jurisdictional.[218] And it would do no good to say that those cases were simply wrongly decided or at odds with the original meaning of American habeas. They were interpreting not the Suspension Clause, but federal habeas statutes that Congress has since amended and/or recodified several times over.[219] As Micah Quigley has persuasively argued, those amendments and recodifications "seem[] to have ratified existing judicial interpretations of the 1867 [Habeas Corpus] Act by reenacting [its] key statutory phrase[s]."[220] And so, we must draw a line between those

214. *See supra* Part I.B.

215. *See* HALLIDAY, *supra* note 2, at 80, 140, 146-47.

216. *See infra* note 318 and accompanying text (discussing this proposition).

217. In fact, the idea of unconstitutional state actions as ultra vires, and therefore void of jurisdiction, was remarkably common in other areas of nineteenth-century American law as well. *See* James E. Pfander, *Zones of Discretion at Common Law*, 116 NW. U. L. REV. ONLINE 148, 157-69 (2021); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 409-22 (1987).

218. *See supra* note 212 (collecting such cases).

219. *See infra* text accompanying notes 374-76, 399-401 (discussing such amendments and recodifications).

220. Quigley, *supra* note 211, at 58; *see id.* at 55-69.

constitutional violations that implicate jurisdiction and those constitutional errors that do not.

In Bator's analysis, "[t]he strict jurisdictional test in fact continued to govern except in two categories of cases: where the allegation was that the conviction was had under an unconstitutional statute, and where the Court viewed the problem in terms of the illegality of the sentence rather than that of the judgment."[221] And yet, as he himself acknowledged, "it is hard to see" any "reason of principle" to coherently "justif[y]" treating *these* categories of constitutional errors as jurisdictional while declining to do the same for *other* categories that would similarly "take[]" the "concept of 'jurisdiction' . . . beyond the question of the court's competence to deal with the class of offenses charged and the person of the prisoner."[222] (That is all the more true given that, as Bator further conceded, "the usefulness of th[e] principle" that "made the availability of habeas turn on whether the error related to the sentence rather than the judgment of conviction itself" was critically "undermined as soon as the Court expanded it to pass not only on the validity of the *sentence as such* but [also] to reach questions such as the need for indictment."[223]) In other words, these putative "except[ions]" to a putatively "strict jurisdictional test" provide "a less than luminous beacon" for determining "[h]ow . . . to tell which errors cause a court to lose jurisdiction and which do not."[224] The most Bator is able to say is that, "viewed in a historical context," "these categories . . . are *not completely unintelligible*."[225] On the basis of that rather modest claim, he urges that "it would be a mistake" and an "anachronism" to "throw up one's hands" and infer from the absence of a limiting principle *intelligible to our modern eyes* that there *is no* limiting principle on the categories of constitutional error that may be regarded as "jurisdictional"—that is, for us to "see the history as reflecting merely a steady softening and expansion of the concept of 'jurisdiction' so as to allow collateral attack on an open-ended basis wherever the courts deemed it appropriate."[226]

Bator's cautionary point is a fair one. And within its rubric, one could fairly criticize Justice Kagan's unqualified equation of "jurisdictional defects" with "constitutional errors"[227] as "throw[ing] up [her] hands" and "engag[ing] in the anachronism" of failing to meaningfully consider *why* these "categories"

221. Bator, *supra* note 175, at 471.

222. *Id.* at 470-71.

223. *Id.* at 471 (emphasis added) (citing *Ex parte* Wilson, 114 U.S. 417 (1885); and *Ex parte* Bain, 121 U.S. 1 (1887)).

224. *Id.* at 470-71.

225. *Id.* at 471 (emphasis added).

226. *Id.* at 471-72.

227. *See* Brown v. Davenport, 142 S. Ct. 1510, 1533 (2022) (Kagan, J., dissenting).

were "intelligible to their propounders and regarded by them as [a] meaningful and useful" limiting principle on constitutional errors' potential to render judgments void of jurisdiction.[228] But on the flip side of that very same coin, Justice Gorsuch is perhaps even *more* guilty of anachronism and of throwing up his hands, insofar as he refuses *altogether* to engage with the categories of cases in which the pre-*Brown* Court recognized that potentiality.[229]

At this juncture, the popular-sovereigntist conception of the writ might once again provide a more "luminous beacon" to assess why some constitutional errors count as "jurisdictional" for purposes of the jurisdictional-defects-only maxim, and others do not. For example, we might hypothesize that while certain kinds of constitutional error rise to the level of a genuine *affront to the sovereignty* of We the People, others are more aptly conceptualized as *incidental mistakes* on the part of sentencing courts earnestly endeavoring to be faithful to our sovereign commands—and that only errors of the former sort would be cognizable as "jurisdictional defects" in the sense invoked throughout the case law debated by Justices Kagan and Gorsuch. In turn, we might hypothesize that the distinction between "affronts to sovereignty" and "incidental mistakes" could be analogized to corporate and agency law's distinction between breaches of the duties of loyalty and care,[230] or perhaps turn on a mens-rea-like standard or an inquiry into whether the alleged constitutional error is systemic or merely idiosyncratic.[231]

Of course, these hypotheses will need to be fine-tuned and tested against the body of case law in which the Court has variously cast or refused to cast particular constitutional errors as "jurisdictional" defects for purposes of habeas review,[232] and such testing is far beyond the scope of this Article. For

228. Bator, *supra* note 175, at 471-72.

229. *See* Kovarsky, *supra* note 18, at 71-74 ("Unlike Professor Bator, Justice Gorsuch puts little effort into addressing the problems that these . . . cases pose for a strict, jurisdictional-error-only rule. He asserts breezily that [they] all . . . involved something 'akin' to a jurisdictional defect." (quoting Edwards v. Vannoy, 141 S. Ct. 1547, 1568 (2021) (Gorsuch, J., concurring))).

230. The law of corporations and agency could be an especially appropriate source of insights for "doctrinalizing" the intuitions of a popular-sovereigntist theory of American habeas, given the prominent role that explicit analogies to corporate law played in the development of the American idea of popular sovereignty. *See* Amar, *supra* note 88, at 1432-37 (chronicling that role); ANDREW C. MCLAUGHLIN, THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 39-45 (1932) (same); GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION 4 (2017) (arguing that the Constitution is best interpreted as creating a framework of fiduciary duties owed by government actors to We the People).

231. *See infra* Part II.A.3.

232. *See supra* notes 209, 212 (collecting cases on both sides of this line). *But cf.* Quigley, *supra* note 211, at 74 (arguing that "[t]he Supreme Court's applications of [the concept of
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present purposes, the point is not to offer a definitive resolution to the Kagan-Gorsuch debate, but rather to use it as proof of concept for the urgency of starting to think about American habeas in terms of popular sovereignty and teasing out the implications of such a conceptual shift.

2. The Fifth-Circuit equitable proposal: "factual innocence only"

Whereas Justices Gorsuch and Kagan have framed their debate over the scope of postconviction habeas as an all-or-nothing proposition, various lower courts and scholars have posed and debated somewhat more modest reforms to the status quo model. These debates, too, come into sharper relief when viewed through the lens of a popular-sovereigntist conception of the American writ.

For example, a three-judge panel of the Fifth Circuit recently staked out its own proposal for ameliorating "[f]ederal courts['] struggle[s] with an exploding caseload of habeas petitions from state prisoners" by "adjust[ing] the scope of the writ in accordance with equitable and prudential considerations."[233] Namely, the panel saw a need to implement some threshold culling mechanism to winnow that pool of cases down to the most constitutionally urgent or serious ones.[234] Drawing on the influence of a classic 1970 law review article by Judge Henry Friendly,[235] the panel proposed "[r]equiring a state prisoner to show *factual* innocence in his federal habeas petition"—as opposed to "mere legal insufficiency," "prejudicial error," or even outright "legal innocence"—as

'jurisdiction' that animated the pre-*Brown* case law] are evidence of what that concept entailed, but they are not conclusive evidence").

233. Crawford v. Cain, 68 F.4th 273, 287 (5th Cir.) (first alteration in original) (quoting Brown v. Davenport, 142 S. Ct. 1510, 1522-23 (2022)), *reh'g en banc granted, opinion vacated*, 72 F.4th 109 (5th Cir. 2023), *aff'd en banc on other grounds*, 122 F.4th 158 (5th Cir. 2024) (per curiam).

234. *See id.* at 288 ("Federal courts desperately need[] 'new rules aimed at separating the meritorious needles from the growing haystack.' After all, '[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.'" (second alteration in original) (citation omitted) (first quoting *Davenport*, 142 S. Ct. at 1523; and then quoting Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in the result)).

235. *See id.* at 287-88, 288 n.5 (citing Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142, 151, 157 & n.81 (1970)).

the appropriate such mechanism.[236] The popular-sovereigntist theory suggests that is the wrong approach.[237]

To be sure, I share the panel's apparent intuition that, in the face of scarce institutional resources and concerns about undermining the finality of criminal judgments, the § 2254 cases that most deserve the federal courts' attention are those involving the most egregious of alleged legal wrongs. But the Fifth Circuit panel *also* appears to assume that egregiousness should be assessed from the perspective of *the rights of the prisoner*—which are of course violated most egregiously when the prisoner is factually innocent of the conduct for which she was convicted. Yet as Halliday has shown, the historic focus of the common-law writ was always "more concerned with the wrongs of jailers [vis-à-vis the sovereign] than with the rights of prisoners."[238] And

236. *Id.* at 287-88 (emphasis added) (quoting Bousley v. United States, 523 U.S. 614, 623 (1998)); *see also id.* at 288 (clarifying that "[f]actual innocence is an assertion by the defendant that he did not commit the *conduct* underlying his conviction" and that, "[b]y contrast, affirmative defenses do *not* implicate factual innocence; they implicate *legal* innocence"). After taking up *Crawford* for rehearing, the en banc Fifth Circuit agreed with the original panel's bottom-line ruling that the particular habeas petitioner in that case was ineligible for relief, but abandoned (without discussion) the panel's suggestion to impose a categorical factual-innocence bar, *see* 122 F.4th at 160, instead resolving the matter on narrower and more technical grounds, *see id.* at 160-62. Thus, as of this Article's publication, the factual-innocence bar's status under binding Fifth Circuit precedent remains up in the air. Indeed, even after the *Crawford* panel opinion was formally vacated upon the grant of en banc rehearing, district courts within the Fifth Circuit continued to cite it favorably. *See, e.g.*, Rubio v. Lumpkin, 729 F. Supp. 3d 616, 684 (S.D. Tex. 2024) (citing *Crawford*, 68 F.4th at 289).

237. While *Crawford* is (as of this Article's publication) the most recent and prominent flashpoint in the debate over imposing an equitable factual-innocence bar on the availability of § 2254 review, it bears noting that *Crawford* is neither the beginning nor likely to be the end of that debate. As discussed above, its origins predate the three-judge panel opinion in *Crawford* by over fifty years. *See* Friendly *supra* note 235, at 142, 151, 157 & 157 n.81. And it is primed to keep raging on even now, after the three-judge panel opinion in *Crawford* has been vacated, *see* 72 F.4th 109, and superseded by an en banc opinion that declined to reach Louisiana's argument for such a bar, *see* 122 F.4th at 160-62. For, as noted above, the validity of the categorical factual-innocence bar remains an open question in the Fifth Circuit. *See supra* note 236. Moreover, insofar as the original *Crawford* panel opinion's reasoning largely entailed reading the tea leaves of recent Supreme Court dicta, there is every reason to think that other circuits will soon be presented with occasions to interpret those same tea leaves. *See Crawford*, 68 F.4th at 287 (relying on *Davenport*'s conclusion that "'guilt[]' is the primary consideration in evaluating whether 'law and justice' require the writ" (alteration in original) (quoting *Davenport*, 142 S. Ct. at 1523)). Indeed, within the week following the September 2023 en banc oral arguments in *Crawford*, two different district judges within the Eighth Circuit applied the original *Crawford* panel's factual-innocence bar. *See* Cody v. Mesmer, No. 20-cv-00857, 2023 WL 6214817, at *5 n.5 (E.D. Mo. Sept. 25, 2023); Shockley v. Crews, 696 F. Supp. 3d 589, 706-07 (E.D. Mo. 2023), *appeal dismissed*, No. 24-1024, 2024 WL 3262022 (8th Cir. Apr. 2, 2024).

238. HALLIDAY, *supra* note 2, at 14.

viewed from *that* perspective, it is anything *but* intuitive to impose a "colorable-claim-of-factual-innocence requirement"[239] as the gateway prerequisite for obtaining § 2254 review. It is the egregiousness of the "jailer's" (i.e., the committing court's) affront to the will of the sovereign People—not to the liberty of the individual petitioner—by which we should measure the egregiousness of the relevant legal wrong alleged in a habeas petition. And so, if we must impose a threshold limitation on the availability of postconviction habeas review, one faithfully "rooted in the writ's history" *should* "not focus on factual innocence but on the significance of the error"[240] qua affront to popular sovereignty.

3. The Primus statutory-reform proposal: "systemic error only"

Primus, meanwhile, has proposed a slate of whole legislative reforms to § 2254 that could accomplish just that. "If we must limit federal habeas review," she argues, "we should do it on the basis of the prevalence of the constitutional violation at issue"—that is, "on whether there is a *systemic* state violation of criminal defendants' rights."[241] To that end, her proposed reforms would (1) relax exhaustion requirements for habeas class actions,[242] (2) create fast-track review for habeas petitions alleging systemic state violations,[243] (3) *heighten* procedural barriers to review of habeas petitions alleging idiosyncratic (i.e., nonsystemic) errors,[244] and (4) redirect the institutional resources thereby conserved to create a team of Justice Department attorneys to investigate and litigate systemic state violations.[245]

Primus frames this proposal as one driven solely by prudential and normative considerations—"limiting waste, respecting state autonomy, and improving protection for the rights of defendants"[246]—rather than as a fulfillment of the Constitution's theory of what habeas intrinsically *is*. In a similar vein, she candidly acknowledges concerns that her proposed "model for systemic habeas review" would be vulnerable to constitutional attack on the ground that it "[w]ould violate the Constitution's Suspension Clause by failing to provide [adequate] *individualized* review."[247] But a theory of the Great Writ

239. *Crawford*, 68 F.4th at 288.

240. *Contra id.* (criticizing the prejudicial-error standard for maintaining such a "focus").

241. Primus, *supra* note 10, at 5.

242. *See id.* at 14-16, 52-53.

243. *See id.* at 7, 32-33.

244. *See id.* at 7, 27-29.

245. *See id.* at 36-39, 51-52.

246. *Id.* at 7.

247. *Id.* at 26, 39 (emphasis added) (footnote omitted). Primus's concerns appear to be premised on the view that the Suspension Clause affirmatively requires federal

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of Popular Sovereignty provides for an originalist defense of the constitutionality of Primus's proposed legislation.

For if we conceptualize American habeas in terms of popular sovereignty and principal-agent theory, there are indeed sound reasons to regard systemic violations of federal norms as more urgent than idiosyncratic violations—and to insist that "[t]he Privilege of the Writ of Habeas Corpus"[248] can be said to run *only* when it provides effective means of addressing the former, even if we have no choice but to accept the inevitability that some of the latter will fall through the cracks. To borrow the vocabulary of agency and corporate law,[249] that is because government officials' *idiosyncratically* running afoul of constitutional (or applicable federal statutory) norms may be theorized as mere breaches of the *duty of care* they owe to We the People, whereas their *systematic* violations of such norms are better understood as breaches of their *duty of loyalty*. And for good reason, courts of equity have long enforced the duty of loyalty exponentially more stringently than the duty of care.

As most famously and poetically evoked by then-Chief Judge Cardozo, the duty of loyalty is "something stricter than the morals of the market place"—"[n]ot honesty alone, but the punctilio of an honor the most sensitive"—to be

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postconviction habeas review of state court convictions, that is, what we now know as § 2254 review. I am dubious of that apparent premise, which runs counter to Chief Justice Marshall's canonical dicta that "the power to award the writ by any of the courts of the United States[] must be given by written law"—that is, by "statute." *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94 (1807) (Marshall, C.J.). To be sure, some scholars have interpreted *Boumediene* as holding that the Suspension Clause directly mandates at least *some* federal court habeas jurisdiction—namely, jurisdiction over such federal executive-detention habeas petitions as would now be brought under § 2241. *See, e.g.*, ERIC M. FREEDMAN, MAKING HABEAS WORK: A LEGAL HISTORY 105-09 (2018); *see also infra* note 371 (discussing this debate in greater detail). But I am aware of only one scholarly work that has directly confronted the question of whether *§ 2254* jurisdiction is constitutionally mandated, and its authors—even while arguing that "state prisoners have a constitutional right to a [postconviction habeas] remedy in *state* court"—concede that "it is difficult to conclude that *the Constitution* entitles state prisoners to an additional opportunity to enforce such a claim in the lower federal courts." Carlos M. Vázquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 VA. L. REV. 905, 939-40 (2017). Of course, if the premise that the Suspension Clause mandates § 2254-style review is indeed incorrect, then Primus's concerns about the constitutionality of her proposal would seemingly become moot. After all, if Congress could constitutionally strip the federal courts of jurisdiction to perform *any* such review, it would follow a fortiori that Congress could also constitutionally limit that jurisdiction to cases alleging systemic rather than idiosyncratic errors. Nevertheless, in this Subpart, I accept that premise arguendo.

248. U.S. CONST. art. I, § 9, cl. 2.

249. *See supra* note 230 (explaining why analogies to corporate law may be particularly appropriate to draw upon in unpacking implications of Great Writ of Popular Sovereignty theory).

enforced by courts with "[u]ncompromising rigidity."[250] In sharp contrast, the duty of *care* traditionally demands only that an agent exercise her principal's delegated powers "with the care that an *ordinarily prudent* person would reasonably be expected to exercise in a like position and under similar circumstances."[251] In fact, in the real-world practice of modern corporate law, the duty of care is all but never enforced,[252] yet no one would seriously suggest that amounts to the system of American corporate law being fundamentally broken, or its basic function being "suspended." Yet if Delaware courts were to stop enforcing corporate directors' and officers' duty of *loyalty* to their shareholders, we would surely hear loud and well-justified cries to that effect.

And so might it go with habeas. Between the fallibility of the human condition, the sheer volume of habeas petitions filed in American courts, and the reality of scarce judicial resources, it seems an unavoidable fact of life that—much as corporate directors are apt to make careless business judgments—the officials who administer local, state, and federal criminal systems in the name of We the People will make multitudes of legally cognizable errors each day, on the basis of simple carelessness. It would be unworkable to take the position that the Suspension Clause is violated by virtue of the bare, practical fact that the U.S. District Courts lack the bandwidth necessary to fully rehear and "correct" every such case on habeas review. But invidious and systematized defiance of the sovereignty of We the People of the United States, by administering criminal justice contrary to the norms We have enacted, is an entirely different story. Our system of habeas can feasibly be configured to neutralize defiance of this sort; to the extent that it is not so configured, at any given time, it may arguably be *suspended*. And whereas the basic functioning of American corporate law is not constitutionally protected from "suspension," the basic functioning of American habeas law of course is.[253] Therefore, it might follow as a matter of constitutional imperative—and not just prudential or normative intuition—that the federal habeas system *must* be reformed so as to resuscitate the "lost purpose" of "forc[ing] defiant state courts to obey federal constitutional law."[254]

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250. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, C.J.).

251. AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01(a) (1994) (emphasis added) (defining "Duty of Care").

252. *See* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1667-69 (1988) (discussing how the rise of the business judgment rule has functionally precluded directors' and officers' liability for alleged breaches of care).

253. *See* U.S. CONST. art. I, § 9, cl. 2.

254. Primus, *supra* note 10, at 6, 17. Of course, this conclusion would only follow if one accepted the premise that the Suspension Clause affirmatively requires federal court postconviction habeas review for state prisoners—a premise of which I am, again,

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B. Previewing Implications for Discrete Doctrinal Questions

Beyond its implications for these broad debates over the scope of federal postconviction habeas, the popular-sovereigntist conception of habeas also points toward answers for a broad range of more discrete doctrinal questions that are vexing and important in their own right. While a full exploration of those implications is beyond the scope of this Article—for which my aim is simply to make the initial case for the popular-sovereigntist theory and familiarize the reader with it as a new way of looking at American habeas—I will briefly "preview" several of the discrete doctrinal implications that I plan to explore in future scholarship.

Consider, for example, whether the First Amendment guarantees a presumptive right of public access to habeas proceedings—as it does for some, but not all, other classes of judicial proceedings.[255] In *Dhiab v. Trump*, the D.C. Circuit confronted that question as a matter of first impression, but was unable to resolve it.[256] The crux (and ultimate sticking point) of the split panel's debate was what to make of the statistic—pulled from none other than Halliday's 2010 monograph—that while about 80% of King's Bench habeas proceedings from 1500-1800 were held in open court at Westminster, the other 20% were adjudicated in individual Justices' private chambers or homes.[257] Whereas the panel vigorously debated whether that 80% constitutes a "nearly uniform" Anglo-American tradition of public access,[258] a theory of the Great

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dubious. *See supra* note 247. For if one instead took the more conventional view that the very existence of § 2254 is purely a matter of legislative grace, it would seemingly follow that Congress has more-or-less unfettered discretion to tinker with its contents. Yet all the same, I *do* think the popular-sovereigntist theory helps to show that Primus's statutory-reform proposal—even if not strictly required by the Constitution—is squarely in line with the current Court's repeated calls to "return[] the Great Writ closer to its historic office." Brown v. Davenport, 142 S. Ct. 1510, 1523 (2022) (quoting Edwards v. Vannoy, 141 S. Ct. 1547, 1570 (2021) (Gorsuch, J., concurring)).

255. *See* Jonathan L. Hafetz, *The First Amendment and the Right of Access to Deportation Proceedings*, 40 CAL. W. L. REV. 265, 281-88 & nn.193-97 (2004) (discussing Burger Court decisions that first recognized such a right and chronicling lower federal courts extending it to other classes of judicial proceedings).

256. *See* 852 F.3d 1087, 1091 (D.C. Cir. 2017) (Randolph, J.) (answering in the negative); *id.* at 1098 (Rogers, J., concurring in part and concurring in the judgment) (answering in the affirmative); *id.* at 1102 (Williams, J., concurring in part and concurring in the judgment) (casting the deciding vote to resolve the case on narrower grounds).

257. *See id.* at 1093-94 (citing HALLIDAY, *supra* note 2, at 54, 56-57).

258. *Compare id.* at 1094 (Randolph, J.) (answering in the negative), *with id.* at 1100 (Rogers, J., concurring in the judgment) (answering in the affirmative), *and id.* at 1106 (Williams, J., concurring in the judgment) (declining to answer and bemoaning the indeterminacy of the Supreme Court's "*near* uniform historical practice" standard (alteration omitted) (quoting Press-Enterprise Co. v. Super. Ct., 478 U.S. 1, 10 (1986))).

Writ of Popular Sovereignty would suggest that the 80% figure is really a red herring. For purposes of habeas, the relevant analogue to the American public is not the English public but the English *sovereign*. And the defining institutional feature of King's Bench was that both the court and each of its individual justices presided *coram rege* ("in the presence of the King himself")[259]—as a literal matter until Edward I's reign, and thereafter as a legal fiction taken with utmost seriousness.[260] Thus, in contemplation of English law, the King was present (whether literally or fictively) at every English habeas proceeding from 1500-1800, including those adjudicated by individual justices in their private homes or chambers. The popular-sovereigntist theory, then, would appear to suggest that a presumptive right of public access *should* attach in habeas proceedings.

Or take the persistent circuit split over whether prisoners' challenges to the *conditions* of their confinement (as opposed to the binary *fact* of their confinement) are cognizable in habeas. While the Supreme Court has persistently declined to resolve that question,[261] six circuits have answered it in the affirmative,[262] while the other six have answered it in the negative.[263] The popular-sovereigntist theory makes available a powerful argument that habeas *is* an appropriate vehicle for conditions-of-confinement challenges. The circuits that have held to the contrary have reasoned that conditions-of-confinement claims "do[] not fall within 'the core of habeas.'"[264]

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259. *See supra* note 106; *see also* BAKER, *supra* note 92, at 39 (noting that "the full designation of a judge of the court was 'one of the justices assigned to hold the pleas before the [King] [him]self'").

260. *See* SMITH, *supra* note 97, at 269-70 (discussing the seriousness with which English jurists took the *coram rege* fiction, and the conceptual importance they attributed to it, even after the King's literal presence at sessions of King's Bench ceased to be regular).

261. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 527 n.6 (1979) ("[W]e leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself."); Boumediene v. Bush, 553 U.S. 723, 792 (2008) (declining to discuss the same question). *But cf.* Nance v. Ward, 142 S. Ct. 2214, 2219 (2022) (holding that the proper vehicle for certain method-of-execution challenges—which are arguably analogous to conditions-of-confinement challenges—is § 1983 rather than habeas).

262. *See* Aamer v. Obama, 742 F.3d 1023, 1032 (D.C. Cir. 2014); United States v. DeLeon, 444 F.3d 41, 59 (1st Cir. 2006); Thompson v. Choinski, 525 F.3d 205, 209 (2d Cir. 2008); Woodall v. Fed. Bureau of Prisons, 432 F.3d 235, 241-42, 242 n.5 (3d Cir. 2005); McNair v. McCune, 527 F.2d 874, 875 (4th Cir. 1975) (per curiam); Adams v. Bradshaw, 644 F.3d 481, 483 (6th Cir. 2011) (per curiam).

263. *See* Cook v. Hanberry, 592 F.2d 248, 249 (5th Cir. 1979) (per curiam); Graham v. Broglin, 922 F.2d 379, 381 (7th Cir. 1991); Spencer v. Haynes, 774 F.3d 467, 470-71, 470 n.6 (8th Cir. 2014); Nettles v. Grounds, 830 F.3d 922, 933 (9th Cir. 2016) (en banc); McIntosh v. U.S. Parole Comm'n, 115 F.3d 809, 812 (10th Cir. 1997); Hutcherson v. Riley, 468 F.3d 750, 754 (11th Cir. 2006).

264. *Nettles*, 830 F.3d at 935 (quoting Skinner v. Switzer, 562 U.S. 521, 535 n.13 (2011)).

Why? Because they do not "seek[] what can fairly be described as a quantum change in the level of custody"[265]—namely, in the extent of the deprivation of liberty—insofar as they "would not necessarily lead to [the petitioner's] immediate or earlier release from confinement."[266] Implicit in such reasoning is the premise that the "core" of the writ's purpose is restoring the physical liberty of individuals who have been unlawfully deprived of it.[267] In fact, that same premise has animated most habeas petitioners' "assert[ions]" that courts *do* "have [habeas] jurisdiction" over their challenges to conditions of confinement, which they have cast as "restraint[s] on individual liberty."[268] Where such arguments have failed, it has been because judges remained convinced that even if harsh conditions of confinement could be cast as "restraints" on "liberty interest[s]" in some sense, they "fall[] short" of implicating the *particular* kind of "liberty protected by habeas"[269]—principally, "outright freedom" from confinement.[270] And where they have succeeded, it has been because they persuaded judges of the view that "*[a]ny* unlawful restraint of personal liberty may be inquired into on habeas corpus."[271] But the paradigm flips if we conceptualize habeas as a legal instrument whose foremost conceptual focus is not individual liberty but the principal-agent relationship between the sovereign People and their agents in government. On *that* paradigm, the critical question is simply whether those agents have exercised the People's delegated penal power contrary to the People's sovereign will. It matters naught whether the People's will is alleged to be violated by a court's unconstitutional *imposition* of criminal judgment, or by a prison warden's unconstitutional *execution* of that judgment.

In a similar vein, the popular-sovereigntist theory also suggests that habeas is an appropriate vehicle for challenging felony disenfranchisement. Current doctrine is unclear on the question of whether an individual who has already completed terms of imprisonment *and* parole, but remains disenfranchised on account of an underlying felony conviction, has standing in habeas to challenge the validity of that conviction.[272] On the conventional libertarian

265. *Graham*, 922 F.2d at 381.

266. *Nettles*, 830 F.3d at 935.

267. *See id.* (quoting *Skinner*, 562 U.S. at 535 n.13).

268. *See, e.g.*, Aamer v. Obama, 742 F.3d 1023, 1049-50 (D.C. Cir. 2014) (Williams, J., dissenting) (quoting Brief of Appellants at 26-27, *Aamer*, 742 F.3d 1023 (D.C. Cir. 2014) (No. 13-5223)).

269. *Id.*

270. *Graham*, 922 F.2d at 381.

271. Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) (emphasis added).

272. Wajdi Mallat, The Great Writ and the Great Right: Using Habeas to Restore Felons' Voting Rights 2 (Jan. 18, 2019) (unpublished note) (on file with author) (describing the extent of case law's lack of clarity on this question).

theory of the writ, the answer should seem to be "no": that a denial of voting rights is different in kind from legal wrongs that habeas exists to protect—namely, ongoing deprivations of individual physical liberty. But the popular-sovereigntist theory suggests that when state actors employ unconstitutional means to secure the felony conviction of an American citizen, they inflict a *twofold* injury on the sovereignty of the People: not only have they acted contrary to our sovereign will, they have *also* excluded the felon from her rightful place as a member of the voting public, thus amputating a limb, a member, of the sovereign body politic. That is, they have deprived We the People of our prerogative to exercise our sovereignty as a *rightly constituted whole*. That injury to popular sovereignty persists, even after the felon has satisfied her terms of incarceration and parole, until her voting rights are restored. It would thus seem to be an independently adequate ground for habeas standing.

And while the doctrinal implications that I have previewed up to this point would likely appeal more to those on the political left than those on the political right, it bears noting the potential doctrinal implications of the popular-sovereigntist theory really are ideologically cross-cutting. For example, the popular-sovereigntist theory helps to justify the Roberts Court's recent 6-3 decision in *Edwards v. Vannoy*,[273] which closed off one of the last remaining exceptions from *Teague v. Lane*'s[274] general rule that newly announced rules of constitutional criminal procedure cannot be retroactively applied on habeas.[275] Indeed, a popular-sovereigntist conception of the writ casts serious doubt on the theoretical coherence of having *any* exceptions from *Teague*'s nonretroactivity rule. For if the Supreme Court hadn't yet *told* state courts that the Constitution commands them to observe a given procedural right by the time they had resolved a petitioner's direct appeals, then it cannot be considered an affront to sovereignty that the state courts failed to abide that then-yet-unexpressed command.

Along similar lines, the popular-sovereigntist theory could furnish a more coherent defense of AEDPA's state-exhaustion requirement[276] and the "corollary" doctrine of procedural default[277] in the face of historical and ongoing attacks on the Act's constitutionality.[278] This theory, after all, would

273. 141 S. Ct. 1547 (2021).

274. 489 U.S. 288 (1989).

275. *Edwards*, 141 S. Ct. at 1559-60.

276. *See* 28 U.S.C. § 2254(b)(1).

277. *See* Davila v. Davis, 582 U.S. 521, 527 (2017).

278. *See, e.g.*, Robert M. Black, *Proving AEDPA Unlawful: The Several Constitutional Defects of § 2254(d)(1)*, 54 WILLAMETTE L. REV. 1, 26-31 (2017); Brian Stull, *Horseshoes, Hand Grenades, and Habeas*, ACLU (May 6, 2010), https://perma.cc/N2ZB-4WW6; Lyle
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theorize the kinds of state court legal errors that are to be cognizable in habeas as disobedience of sovereign commands, and the habeas power as a coercive tool to effectively *punish* state courts for such disobedience. The habeas remedy, then, is strong medicine, which federal courts restrain from administering until state courts have been given a full and fair opportunity to obey the sovereign commands of federal constitutional law. The same basic argument would also apply to AEDPA's rule that habeas only reaches state court judgments that were "contrary to . . . *clearly established* Federal law."[279] If we are to conceptualize habeas proceedings as effectively putting the sentencing court on trial—as the popular-sovereigntist theory would have us do[280]—then the familiar criminal law principle of legality counsels that sentencing courts are indeed entitled to such clear statements of the sovereign commands they must abide.[281] In that sense, the justification for AEDPA's "clearly-established" rule sounds not merely in federalism values unique to interjurisdictional habeas under 28 U.S.C. § 2254, but rather in due process values equally applicable to postconviction habeas and "habeas-like" challenges of *federal* court convictions under 28 U.S.C. §§ 2241 and 2255, respectively.[282]

Finally, the popular-sovereigntist theory could also raise some interesting new questions about issues long thought to have been settled. Consider, for instance, the idea of *habeas juries*. We take it as a given that "[m]odern habeas review of convictions and sentences involves judges, and judges only, conducting 'judicial inquisitions' and then resolving factual and legal disputes without any jury input."[283] Indeed, "[d]espite much commentary and general *Sturm und Drang* concerning *how* federal habeas corpus petitions are considered and resolved, there has been little real consideration given to *who* considers and resolves these petitions."[284] The popular-sovereigntist theory, however, raises the question of whether it should instead be juries who consider and resolve habeas petitions. Namely, it would seemingly point to both a historical

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Denniston, *Is AEDPA Unconstitutional?*, SCOTUSBLOG (May 5, 2005, 6:11 PM), https://perma.cc/8T5J-3MCV.

279. 28 U.S.C. § 2254(d)(1) (emphasis added). *See generally* Black, *supra* note 278 (arguing the unconstitutionality of this rule).

280. *See* HALLIDAY, *supra* note 2, at 11-38 (explaining that English habeas proceedings were largely conceptualized thusly).

281. *See, e.g.*, Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926) ("[A law] which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.").

282. *See* Hill v. United States, 368 U.S. 424, 427 (1962) (noting that § 2255 "was enacted . . . simply to provide . . . a [statutory] remedy exactly commensurate with that which had previously been available by habeas corpus").

283. Berman, *supra* note 132, at 888.

284. *Id.* at 907 (emphasis in original).

argument and a structural argument[285] for the proposition that the Suspension Clause actually *requires* habeas juries.[286] The historical argument would go something like this: The only English court with general jurisdiction to issue and adjudicate habeas writs was King's Bench;[287] the defining institutional feature of that court (and the justification for its exclusive general jurisdiction over habeas) was that it sat *coram rege*;[288] and the closest American equivalent of sitting *coram rege* is sitting with a jury.[289] Meanwhile, the structural argument would go something like this: It is in the conceptual DNA of common-law habeas to vindicate sovereignty not only *through*, but also *upon*, the extant laws of the land.[290] Unlike the justices of King's Bench (whose institutional role expressly aligned them with "the [K]ing's own interests" and prerogatives),[291] Article III judges (whose institutional role instead demands impartiality and independence) are ill situated to impose the will of the relevant sovereign *upon* the laws of the land.[292] Therefore, habeas juries are necessary for American habeas to operationalize the latter mode of popular sovereignty, insofar as they could employ their nullification power to enforce popular norms beyond the letter of extant law.[293]

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285. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 9-24, 74-92 (1982) (describing historical and structural "modalities" of constitutional argumentation).

286. Whereas Berman has argued that the Framers "[]likely . . . would have endorsed" the idea of habeas juries, Berman, *supra* note 132, at 888, the popular-sovereigntist theory goes a step further in suggesting that they might have *actually imposed* a requirement of habeas juries.

287. *See* Halliday & White, *supra* note 32, at 598 & n.49.

288. *See supra* notes 106, 259-60.

289. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 234 (2005) (marshalling historical evidence that the Framers viewed juries as equivalent, "in a sense, [to] the people themselves").

290. *See* Halliday & White, *supra* note 32, at 601-02; HALLIDAY, *supra* note 2, at 29.

291. Wiener, *supra* note 105, at 754.

292. *See, e.g.*, THE FEDERALIST No. 79 (Alexander Hamilton), *supra* note 150, at 474 (discussing "the necessary independence of the judicial character"—that is, "independence" from popular politics).

293. To be sure, either modal variation of the originalist case for constitutionally mandated habeas juries would be face serious counterarguments. Insofar as postratification practice is probative of "liquidated meaning," *see* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 37-39 (2019), it's a significant problem that there have never been habeas juries (as far as I am aware) at any point in American legal history. Moreover, the historical argument may prove too much: Its logic would seem to suggest that the Constitution imposed a jury requirement in *any* case wherein a federal court is issuing or adjudicating any one of the "prerogative" writs over which King's Bench had had exclusive jurisdiction in England—including, for example, such writs as certiorari and mandamus. *See* Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523, 527 (1923). The ostensible implications of that suggestion—that juries are

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The popular-sovereigntist theory might also cast new doubt on the rightness of *Ableman v. Booth*'s holding that state courts may not issue writs of habeas corpus for prisoners in federal custody.[294] This critique of *Ableman*, much like the theory's arguments in favor of habeas juries, is an outgrowth of one of the trickier points in "translating" the sovereigntist account of King's Bench habeas jurisprudence onto the structures and institutional arrangements of American law: We the People of the United States do not have any judges who are "*ours*" in quite the same way that the King's justices on King's Bench were "*his*." And while habeas juries provide one potential solution for closing that gap in translation, elected state judiciaries may provide another. For when state judges are elected rather than appointed—as many of course are—they are directly accountable to at least a subset of the sovereign People.[295]

To be sure, even the discrete doctrinal implications that I have sketched in this Subpart are just the tip of the iceberg. The theory of the Great Writ of Popular Sovereignty offers a fundamentally and dramatically different way of conceptualizing the very soul of American habeas than that to which we have long clung; it therefore stands to reason that that theory will shake up the way we look at doctrinal questions in just nearly every corner of American habeas jurisprudence. Given the disastrous state in which that jurisprudence presently finds itself—both intellectually and practically[296]—such a shake-up is long overdue.

III. Justifying the Shift to the Great Writ of Popular Sovereignty: Answering Objections

Having offered a taste of a few of the doctrinal payoffs of a theory of the Great Writ of Popular Sovereignty, I now circle back to the merits of the theory itself. Namely, I confront the question of whether the conceptual shift from a libertarian to a popular-sovereigntist conception of American habeas is justified in the first place: If the latter really is the "natural" implication of Halliday's New Habeas Revisionism, as I have suggested throughout this Article, then how could it be that no one (again, Halliday himself included) has recognized as much in the fifteen years since Halliday and White's *Virginia Law Review* article and its endorsement by the *Boumediene* Court?

The answer is not immediately apparent, for no scholar (with the lone exception of Aziz Huq) has explicitly engaged with even the *possibility* that

constitutionally required whenever the Supreme Court hears a case on writ of certiorari or a federal district court considers a mandamus petition—would strain credulity.

294. 62 U.S. (21 How.) 506, 523-24 (1859).

295. *Cf.* Amar, *supra* note 88, at 1509-10 (criticizing *Ableman* on different grounds).

296. *See supra* notes 6-15 and accompanying text.

Halliday's work might point toward a popular-sovereigntist theory of American habeas.[297] And even Huq addresses that possibility only in passing, cursory fashion, before reverting back to a more conventionally libertarian framing of the soul of the American writ.[298] The upshot is that no one has made an explicit argument *against* the popular-sovereigntist theory that we could address head-on here.

Nevertheless, I think the principal objections to the novel theory can be "reverse engineered," either by reading between the lines of Halliday's work and the scholarly responses to it, or otherwise simply by intuitive conjecture. By my lights, there are three such objections worth taking on here. One, implicit in Halliday and White's 2008 article, is that translating their insights into an American context would be *analytically impossible*, due to fundamental differences between the English and American conceptions of sovereignty. Another objection, implicit in many of the scholarly responses to Halliday, is that such a translation would be *normatively undesirable*, insofar as sovereignty might at first blush appear to be a less attractive norm, compared to liberty, around which to order a conceptual framework for American habeas jurisprudence. A third concern, less apparent in the existing literature but no less important to grapple with, is that such a translation could be *historically irrelevant*, insofar as the framers of the Suspension Clause and the federal habeas statutes might in fact have held the libertarian view of the English common-law writ that Halliday has now shown to be ahistorical. Let us now turn to examining whether these objections hold water.

A. Analytical Impossibility

In the epidemic of scholars missing Halliday's most profound implication for American habeas, "patient zero" is Halliday and White's own 2008 article.[299] It also exemplifies the misbegotten concern that the English and American conceptions of sovereignty differ in ways that would make it analytically impossible to reconceptualize the American writ in terms of "ideas about . . . sovereignty."[300]

Buried deep in their tour de force against American jurists' anachronistic tendency to impose ideas about liberty onto early modern *English* habeas jurisprudence, Halliday and White drop an odd passing reference to the proposition that such ideas *still* provide the appropriate framework for conceptualizing the soul of *American* habeas. The transition between the

297. *See supra* Part I.D.

298. *See supra* notes 146-52 and accompanying text (discussing Huq).

299. *See* Halliday & White, *supra* note 32, at 691.

300. HALLIDAY, *supra* note 2, at 7.

English and American constitutional orders, they remark, served to "translate[] a prerogative writ whose principal justifications were the divine mercy of the king and his concern for *salus populi* into one whose principal justifications were its foundational status as a device for protecting the liberties of individuals."[301]

This strange about-face appears to be bound up with confusion over the nature and locus of American sovereignty. Halliday and White credit the putative "translat[ion]" of the writ's "principal justifications" to Robert Goodloe Harper's oral argument in *Ex parte Bollman*, stating that Harper facilitated it "[b]y transposing the sovereignty of the king into the sovereignty of the United States."[302] They make a point to quote Harper's attribution of American sovereignty to "the United States, in *their* collective capacity,"[303] praising his "careful use" of the plural possessive pronoun to "signal[] . . . that the federal union *has been forged from the states*."[304] In other words, Halliday and White appear to ascribe to Harper, and to endorse for themselves, a view of American sovereignty as located not in a person or collectivity of persons ("We the People of the United States"[305]), but in a disembodied institutional abstraction—and moreover, not in a metaphysically unitary abstraction ("the United States," singular), but in a disaggregated set of metaphysically separate abstractions (the "states," plural).

If that view of American sovereignty were correct, it would indeed create a serious analytical roadblock to transposing the true English conception of the writ—as an instrument for vindicating the *will* of a sovereign—onto the American context. For in order to possess a will, a sovereign must be conceptualized as both *embodied* and *indivisible*. After all, central to Halliday's account of the conceptual makeup of habeas power exercised by the justices of King's Bench is the observation that it "arose . . . from ideas about . . . sovereignty as it was understood three and four centuries ago: as *embodied* in an actual person."[306] The King's quality of embodiedness, and his attendant possession of a volitional *will*, was the raison d'être for a legal instrument built around the idea of protecting the will of a principal (the King) from usurpation by the wills of the principal's agents (his franchisees). Given that volitional will is a peculiarly *human* quality, it follows that only a sovereignty residing in *persons*, rather than abstract ideals or institutions, could be said to possess a

301. Halliday & White, *supra* note 32, at 691.

302. *Id.* (citing *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 82 (1807) (argument of Harper)).

303. *Bollman*, 8 U.S. (4 Cranch) at 82 (emphasis added).

304. Halliday & White, *supra* note 32, at 691 n.360 (emphasis added).

305. U.S. CONST. pmbl.

306. HALLIDAY, *supra* note 2, at 7 (emphasis added); *see also* Halliday & White, *supra* note 32, at 603 n.64.

"sovereign prerogative."[307] Likewise, if the locus of sovereignty were disaggregated across multiple, metaphysically separate "volitional entities"—be they persons *or* institutional abstractions—then we could not coherently speak of there being *a* sovereign will for habeas to vindicate. The theory of American sovereignty that Halliday and White appear to endorse is of course disembodied *and* disaggregated. On that view, it might indeed be analytically impossible to graft the sovereigntist English understanding of the writ onto the American legal order: It would make no coherent sense to think of the American writ as one of sovereign prerogative if the American sovereign *had* no volitional will to be vindicated.

But the view of American sovereignty that Halliday and White attribute to Harper (and rely upon in disclaiming the popular-sovereigntist theory as an implication of their revisionist historical insights) is wholly anticanonical. It is settled beyond peradventure that American sovereignty is *embodied* in We the People—and not in thirteen or fifty separate state peoples, but in the *indivisible*, "Unitary People" of the United States.[308] A host of great historians and constitutional scholars (chiefly, Akhil Amar, Edmund Morgan, Gordon Wood, Bernard Bailyn, and Andrew Cunningham McLaughlin) have spilled copious ink demonstrating that the Constitution's text, history, and structure converge on this conclusion.[309] Countless other scholars have recognized it as canonical.[310] So have the Supreme Court and several individual Justices—repeatedly.[311] To be sure, the Court has also sown unfortunate confusion on this point, referring to the state and federal governments as dual

307. *Cf.* THE FEDERALIST No. 15 (Alexander Hamilton), *supra* note 150, at 112 (identifying sovereignty with volitional will).

308. Amar, *supra* note 88, at 1455.

309. *See id.* at 1429-66; *see also, e.g.*, AMAR, *supra* note 289, at 3-39, 105-06; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 344-89 (1998); EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 55-93, 174-287 (1988); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 198-229 (2017); MCLAUGHLIN, *supra* note 230, at 39-45.

310. *See, e.g.*, CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 5 (2008); Nathan Tarcov, *Popular Sovereignty (In Democratic Political Theory)*, *in* 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1426, 1426 (1986); John V. Jezierski, *Parliament or People: James Wilson and Blackstone on the Nature and Location of Sovereignty*, 32 J. HIST. IDEAS 95, 95-100 (1971).

311. For examples of cases citing Amar, *supra* note 88, with approval, see *Boumediene v. Bush*, 553 U.S. 723, 743 (2008); *New York v. United States*, 505 U.S. 144, 163 (1992); *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 54 (1994) (Stevens, J., concurring); *California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring in the judgment); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 24 (1989) (Stevens, J., concurring); *Seminole Tribe v. Florida*, 517 U.S. 44, 111, 152-55, 163 (1996) (Souter, J., dissenting); and *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting).

"sovereigns,"[312] or as possessing "sovereign" immunity,[313] in a clumsy manner that might *appear* to suggest that they (rather than the Unitary People) are the locus of American sovereignty in the sense relevant here. To a careful reader, it would have been clear that with these phrases, the Court really meant something more akin to "dual *governments*," or "*governmental* immunity"; after all, the central thrust of the American Founding's political theory was to "dr[i]ve an analytic wedge" between day-to-day governing authority and "true sovereignty."[314] Thankfully, just a few Terms ago, the Court explicitly confirmed as much.[315] And so, on this canonical understanding of the nature and locus of American sovereignty, it is perfectly coherent to conceptualize American habeas as the Great Writ of Popular Sovereignty—that is, an instrument for vindicating the sovereign will of "'the people of the United States considered' as 'one great body politic.'"[316]

To be sure, one might still object that, even if there is nothing strictly *incoherent* in conceptualizing American habeas in terms of popular sovereignty, it might be practically *infeasible* to adopt a sovereigntist model of habeas in the context of a diffuse democratic republic where the will of the People is not so easily ascertainable as the will of the King. This subtler variation of the analytical-impossibility objection, too, can be answered. Here, as in England, the sovereign will is exerted both through and upon the laws of the land.[317] As for the "through," it is fairly well accepted that We the People speak in our full sovereign capacity when (and only when) we engage in constitutional lawmaking (as distinct from "ordinary politics").[318] Thus, the corpus of

312. *See, e.g.*, Heath v. Alabama, 474 U.S. 82, 87-92 (1985).

313. *See* Amar, *supra* note 88, at 1426 nn.7-8 (collecting examples).

314. *Id.* at 1435-36; *see also, e.g.*, THE FEDERALIST No. 46 (James Madison), *supra* note 150, at 294 ("The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers . . . . [U]ltimate authority . . . resides in the people alone . . . .").

315. *See* Gamble v. United States, 139 S. Ct. 1960, 1968 (2019).

316. AMAR, *supra* note 289, at 35 (quoting Robert Yates, *Essays of Brutus (XII)*, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 422, 424-25 (Herbert J. Storing ed., 1981)).

317. *See, e.g.*, Halliday & White, *supra* note 32, at 601-02 (making this point about the English conception of sovereignty); HALLIDAY, *supra* note 2, at 29 (same); 4 THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 9 (Jonathan Elliot ed., Washington, D.C., Jonathan Elliot 2d ed. 1836) (statement of James Iredell) (explaining that the sovereignty of the American People entails not only the prerogative to have "[t]hose in power" act as "their servants and agents," but also the prerogative to "new-model their government whenever they think proper").

318. *See, e.g.*, 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6-7, 32-33, 165-99 (1991) (articulating a theory of "dualist democracy"); Amar, *supra* note 88, at 1459 (characterizing constitutional lawmaking as the means of "expressing direct popular sovereignty"). *But see* Randy E. Barnett, *We the People: Each and Every One*, 123 YALE L.J.

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American constitutional law is the corpus of expressions of We the People's sovereign will. Granted, less well settled is the question of precisely *which* lawmaking processes count as "constitutional lawmaking"—whether only Article V's procedures for state ratifying conventions,[319] or perhaps also nationwide popular referenda,[320] or even popular engagement in more diffuse and informal Ackermanian "constitutional moment[s]."[321] But that debate is extrinsic to—and well upstream of—the habeas inquiry. Whatever commands and directives have been "clearly established" as federal constitutional law, "as determined by the Supreme Court,"[322] are the sovereign commands of We the People that courts of first instance must obey in criminal trials and sentencings, and that habeas courts must then hold them accountable to.[323] As for exertions of the People's sovereign will "upon" extant law, that feature of the English sovereigntist model of habeas is admittedly more difficult to transpose onto the American judicial system—wherein by design, no court is empowered to directly enforce the will of the People in quite the same way that King's Bench was charged with enforcing the will of the King.[324] But that difficulty is not insurmountable: As I suggested in the previous Part, implementing habeas juries and overturning *Ableman* could both be means of closing that gap in translation.[325]

2576, 2605 (2014) (arguing that constitutional lawmaking "is not a way for the people 'to speak'").

319. *See, e.g.*, Barnett, *supra* note 318, at 2587-91.

320. *See, e.g.*, Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 457, 500, 502-03 (1994).

321. *See, e.g.*, 1 ACKERMAN, *supra* note 318, at 266-94.

322. 28 U.S.C. § 2254(d)(1); *see supra* notes 279-82 and accompanying text (arguing that under popular-sovereigntist theory, AEDPA's "clearly-established" rule should perhaps apply to postconviction habeas challenges to state court *and* federal court convictions).

323. To be sure, it bears noting that our extant federal habeas statutes allow federal courts to issue writs of habeas corpus when a person "is in custody in violation of the Constitution *or laws or treaties* of the United States." 28 U.S.C. §§ 2241(c)(3), 2254(a) (emphasis added). To the extent that we might conceptualize federal statutes, regulations, and treaties as something less than full-fledged expressions of the People's sovereign will, *cf., e.g.*, 1 ACKERMAN, *supra* note 318, at 230-94 (expressing ambivalence on this question), the popular-sovereigntist theory of American habeas could arguably cast doubt on whether the writ should extend to detentions in violation of such nonconstitutional sources of federal law. But the question of federal statutes', regulations', and treaties' status as expressions of the sovereign will—much like the question of the legitimacy of "constitutional lawmaking" outside the strictures of Article V—is well beyond the scope of this Article.

324. *See supra* text accompanying notes 290-95 (discussing this difference in institutional arrangements).

325. *See supra* text accompanying notes 283-95.

B. Normative Undesirability

Other scholars have hesitated to reconceptualize American habeas as an instrument of (popular) sovereignty on the apparent basis of concerns that doing so would be normatively undesirable. This concern is an unmistakable subtext of the many reviews of Halliday that have cast his work principally as an exposé of the "seamy underbelly"[326] and "less elevated judicial motivations"[327] of the writ's true English origins.[328] Whereas the analytical-impossibility objection stems from worries that the American conception of sovereignty is too different from its English counterpart, the normative-undesirability objection is founded in worries that it is *not different enough*. That is, there seems to be a visceral concern that the very concept of sovereignty might be an inherently tyrannizing one, no less so when relocated from the King of England to We the People of the United States.[329]

And so, the objection would go that even if "modern habeas" has not actually lived up to all the "reverential[]"[330] and "triumph[ant]"[331] rhetoric about its status "as a snow-driven-pure monument . . . to liberty's march through history," it is still more responsible to cling to the libertarian *conceptual framework* associated with such concededly "gauzy" rhetoric[332] than to replace it with one centered around ideas about sovereignty. That, even if we must acknowledge that our extant habeas regime "has failed to protect its *purported* goal [of] liberty,"[333] dropping the pretense and reconceptualizing American habeas as an instrument for vindicating popular sovereignty would yield a new regime even *less* worthy of reverence and triumph. That discarding the libertarian theory of the American writ—however historiographically flawed its foundations might be[334]—would push our habeas jurisprudence toward the wrong end of an imagined spectrum between "liberat[ing] virtuous prisoners,"[335] at one pole, and "normalizing excesses of government power,"[336] at the other.

326. Kovarsky, *supra* note 110, at 13.

327. Vermeule, *supra* note 134.

328. *See supra* notes 133-38 and accompanying text.

329. *Cf.* Amar, *supra* note 88, at 1425-26 (observing that "'sovereignty' has become an oppressive concept in our courts"—one, like "federalism," that "[v]ictims of government-sponsored lawlessness have come to dread").

330. Kovarsky, *supra* note 110, at 13.

331. Vladeck, *supra* note 2, at 944 (quoting HALLIDAY, *supra* note 2, at 2).

332. Kovarsky, *supra* note 110, at 13.

333. *Id.* (emphasis added).

334. *See supra* Part I.A.3.

335. Kovarsky, *supra* note 18, at 57-58, 57 n.3.

336. Litman, *supra* note 137, at 222, 280-81.

Yet this line of objection to reconceptualizing American habeas as the Great Writ of Popular Sovereignty is premised on unexamined and ultimately flawed assumptions. Namely, it takes an oversimplistic view of the instrumental relationship between popular sovereignty and individual liberty, undervaluing the extent to which ideas about the former might serve the functional ends of the latter.

For starters, the normative-undesirability objection fails to reckon with the sober reality that we really have nothing left to lose. For all the dicta imposing upon habeas a *conceptual overlay* of ideas about "the protection of individual liberty,"[337] 99.7% of present-day American habeas petitioners *in fact* find no protection for their liberty in our extant habeas regime,[338] which has become such a colossal waste that jurists and scholars on the left *and* right are prepared to simply do away with it altogether.[339] Against that backdrop, *any* new way of looking at American habeas that might save it from the chopping block—and the state of ineffectuality that put it there—is probably worth considering. The ironic fact that 53% of the habeas proceedings studied by Halliday resulted in petitioners' release from custody[340] should suggest at least a possibility that reconceptualizing the so-called Great Writ of Liberty around "ideas about . . . sovereignty"[341] might have *precisely* that paradoxical effect.

Sure enough, once we actually engage in the light of day with the potential doctrinal implications of the popular-sovereigntist theory, that possibility is borne out. As I have laid out here, its implications for our day's biggest, most urgent debates over the scope of the postconviction writ decidedly *do* turn out to be normatively desirable. It may well save federal postconviction habeas from Justice Gorsuch's efforts to hollow it out.[342] It would throw a wrench in the *Crawford* panel's proposal to impose a factual-innocence requirement on the availability of postconviction habeas review[343]—a proposal condemned as normatively intolerable from the very same corners of the legal commentariat that have tacitly expressed the normative-undesirability objection to conceptual shifts away from the Great Writ of Liberty mythos.[344] It would furnish a new originalist defense for the constitutionality of Primus's

337. Boumediene v. Bush, 553 U.S. 723, 743 (2008).

338. *See* Rakoff, *supra* note 9, at 1428.

339. *See, e.g.*, Brown v. Davenport, 142 S. Ct. 1510, 1520-22 (2022) (Gorsuch, J.); Hoffmann & King, *supra* note 19, at 796-97, 819.

340. *See* HALLIDAY, *supra* note 2, at 29.

341. *Id.* at 7.

342. *See supra* Part II.A.1.

343. *See supra* Part II.A.2.

344. *See, e.g.*, Ian Millhiser, *America's Trumpiest Court Doesn't Care If Your Right to a Fair Trial Was Violated*, VOX (Dec. 20, 2022, 4:30 AM PST), https://perma.cc/PTQ3-VHV4.

legislative-reform proposal for making our federal postconviction habeas system both more effective and less wasteful.[345] Moreover, it seems fair to say that many of the popular-sovereigntist theory's potential implications for more discrete doctrinal questions in habeas law[346] would likewise be normatively attractive to those otherwise inclined to assume that Americanizing the insights of Halliday's New Habeas Revisionism would yield more "bitter-pill propositions" than constructive solutions.[347] Take, for example, the arguments that it might furnish to justify the appropriateness of habeas as a vehicle for conditions-of-confinement or felony-disenfranchisement challenges, or the rationales it might offer for habeas juries or a constitutionally protected presumption of public access to habeas proceedings.[348]

In that vein, it bears emphasizing that when I say these doctrinal, operational payoffs of the popular-sovereigntist theory are "normatively desirable," I mean they are normatively desirable *from the internal perspective* of those who would maintain libertarian aspirations for the writ and its role in the American criminal-justice system. That is, they constitute (preliminary) "data" to support the hypothesis—however paradoxical and counterintuitive it may be—that shifting the *conceptual* focus of American habeas jurisprudence from ideas about liberty to ideas about popular sovereignty might indeed yield on-the-ground *results* that are actually far more protective of individual, physical liberty.[349]

C. Historical Irrelevance

One last objection to consider, this one perhaps the most challenging: Even if it is both analytically possible and normatively desirable to reconceptualize the American writ in a way that accounts for Halliday's revisionist insights

345. *See supra* Part II.A.3.

346. *See supra* Part II.B.

347. Kovarsky, *supra* note 110, at 14.

348. *See supra* notes 261-72, 283-86 and accompanying text.

349. To be sure, some other potential doctrinal implications of the Great Writ of Popular Sovereignty might *not* be so normatively attractive when viewed from that perspective—for example, the defenses it would furnish for AEDPA's constitutionality and the rightness of *Edwards*'s holding. *See supra* notes 273-74 and accompanying text. Yet I do think that *on balance*, the theory's doctrinal implications would be a net benefit to individuals seeking to use habeas to vindicate their liberties. More fundamentally, I believe it to be a "feature," not a "bug," that its doctrinal implications are ideologically cross-cutting. For "good movement narrative" tends to be "poor history"—regardless of which "movement" it may be "good" *for*. Kovarsky, *supra* note 18, at 67. We should resist the "whiggish" impulse to "spin[] a messy doctrinal past into a tidy" and "simplistic" story to "ratify normative preferences"—regardless of which "preferences" we might hold. *Id.* at 63, 67.

into the conceptual makeup of the English writ, there remains a question of how *historically relevant* those insights are in light of intervening developments in American law.

Allow me to explain: We know the writ of habeas corpus was "borrowed" into American law from the common law of England in the late 1780s,[350] through both the Constitution's Suspension Clause[351] and the Judiciary Act of 1789's provision for the new lower federal courts to issue writs of habeas corpus.[352] We now know how the English common-law writ was *actually understood* at that time: as an instrument for vindicating the sovereign's will vis-à-vis the franchisees who exercised his delegated penal power.[353] But we *also* know that at some point between 1789 and the present, that true English understanding of habeas was lost to American audiences who became enamored with the anachronistic view of English habeas as the Great Writ of Liberty[354]—not to be recovered for American audiences until Halliday unearthed it in the late 2000s. Indeed, there is reason to wonder if that loss may have occurred even *before* 1787-1789. For as Halliday notes, Sir William Blackstone was one of the major propagators of the Great Writ of Liberty myth,[355] and of course, his *Commentaries* was read widely among the jurists of the American Founding.[356] And so, it bears asking whether, either at the Founding or some subsequent moment in American legal history, the basic, hardwired conceptual DNA of the English common-law writ was *reencoded*, fundamentally *altered*, to strip out the logics of sovereignty and insert in their place the logics of liberty.

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350. *See supra* Part I.A.3.

351. U.S. CONST. art. I, § 9, cl. 2.

352. ch. 20, § 14, 1 Stat. 73, 81 (codified as amended at 28 U.S.C. § 2241)

353. *See supra* Part I.B.

354. *See supra* Part I.A.

355. *See* HALLIDAY, *supra* note 2, at 266 & n.28; Halliday & White, *supra* note 32, at 589 & nn.28-30; Vladeck, *supra* note 2, at 943-45 & n.14.

356. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 538 (1969) (noting that "Blackstone's *Commentaries* was widely circulated in the Colonies"). *But see* Martin Jordan Minot, Note, *The Irrelevance of Blackstone: Rethinking the Eighteenth-Century Importance of the Commentaries*, 104 VA. L. REV. 1359, 1362 (2018) ("[T]he 'unchallenged historical consensus that the *Commentaries* was the most widely read law book in late eighteenth-century America' is predicated on tenuous assumptions." (quoting Jessie Allen, *Reading Blackstone in the Twenty-First Century and the Twenty-First Century Through Blackstone*, *in* REINTERPRETING BLACKSTONE'S *COMMENTARIES*: A SEMINAL TEXT IN NATIONAL AND INTERNATIONAL CONTEXTS 215, 226 (Wilfrid Prest ed., 2014))); *id.* at 1398 ("[C]ontrary to the modern consensus, the widespread influence of Blackstone . . . was not instantaneous . . . . While [the Founding generation] may have read the work and viewed it favorably, the full force of the *Commentaries*' influence would not be felt until subsequent generations.").

To put the question in the parlance of modern originalist theory: It is "remarkably common" that "[t]he content of the [Founders' law] just happens to involve a cross-reference to the law of an earlier time; our law *tells* us to look up past law, so we do."[357] And the Suspension Clause's oblique invocation of "[t]he privilege of the writ of habeas corpus" is widely accepted as a paradigmatic "example" of such a cross-reference, where "the Constitution was not creating or defining these terms for the first time, but rather using the legal terminology and legal infrastructure of the day."[358] Yet as Stephen Sachs has observed, not all cross-references to law of the past are to be treated alike. Usually, the Constitution instructs us to treat the cross-referenced "law of the past" as "something found, not made," the "best explanation" for the "existence and content" of which "makes no reference to American society."[359] In such situations, we treat the Constitution's "cross-references" simply as directions "to apply" the law of the past—not as claims to have "change[d] it."[360] But in other situations, "[o]ur law . . . require[s] us to ignore what past law actually was, in favor of what we now say it was."[361]

For an example of the latter kind of scenario, take *Burnham v. Superior Court*, a case where Justice Scalia (for the Court) explicitly considered how originalists should deal with contradictions between "[a]ccurate" understandings of relevant "English tradition" and such mistaken "understanding[s]" that were held "by American [jurists] at the crucial time . . . when the [pertinent American legal text] was adopted."[362] At issue there was the "principle[] of personal jurisdiction . . . that the courts of a State have jurisdiction over nonresidents who are physically present in the State," which antebellum- and Reconstruction-era American jurists had "*believed* . . . to be firmly grounded in English tradition."[363] Justice Scalia deemed it irrelevant that "[r]ecent scholarship ha[d] suggested that English tradition [of due process] was not as clear as [those American jurists had once] thought."[364] Rather, what mattered was the "understanding" of the "English tradition" that "was shared

357. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 846-47 (2015).

358. Baude & Leider, *supra* note 78, at 3.

359. Sachs, *supra* note 357, at 846 (alterations omitted) (quoting Leslie Green, *Legal Positivism*, *in* STAN. ENCYCLOPEDIA PHIL. (Jan. 23, 2003), https://perma.cc/3VVM-T4ZA).

360. *Id.* (quoting Green, *supra* note 359).

361. *Id.* at 848.

362. 495 U.S. 604, 611 (1990).

363. *Id.* at 610-11 (emphasis added).

364. *Id.* at 611.

by American[s] . . . when the Fourteenth Amendment was adopted"—whether "[a]ccurate or not."[365]

So, which kind of instructions are American legal texts' cross-references to the English common-law writ of habeas corpus? Are they directing us to simply "to look up past law" and "apply . . . it" in the same way we might apply rules of "logic, mathematics, principles of statistical inference, or English grammar"—namely, without reference to how it might have been (mis-)understood at the pertinent times in "American society"?[366] Or are they directing us "to ignore what past law actually was, in favor of what we now say it was"?[367] Should we be concerned with the "[a]ccurate" understanding of how the English writ was conceptualized by the early modern jurists who developed it in the centuries running up to when we borrowed it into our own law?[368] Or must it yield to whatever misunderstandings of the English history might have been "shared by American[s] . . . at the crucial time[s]" in our own history?[369]

To further complicate matters, as I have already alluded to, the "crucial time for" *our* "present purposes"[370] is not limited to the Founding. For it is hornbook law that the Suspension Clause is not the affirmative source of federal court habeas jurisdiction, but merely a check on the political branches' power to *suspend* the writ once it is already up and running; rather, federal habeas jurisdiction is and must be conferred by statute.[371] And while the

365. *Id.*

366. Sachs, *supra* note 357, at 847-48 (quoting Green, *supra* note 359).

367. *Id.* at 848.

368. *Burnham*, 495 U.S. at 611.

369. *Id.*

370. *Id.*

371. *See, e.g.*, BRIAN R. MEANS, POSTCONVICTION REMEDIES § 4:8 (2023) (noting that "[m]ost authorities rely upon the Judiciary Act of 1789 and its subsequent amendments" as the "source[] . . . for the federal courts' power to issue the writ of habeas corpus"; that "[f]ederal habeas jurisdiction is thus understood to be entirely statutory" (citing *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94 (1807) (Marshall, C.J.))); 7 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 28.2(a) (4th ed. 2023) (noting the same).

Yet notwithstanding its status as hornbook law, this view is not without its detractors. For instance, Justice Hugo Black, dissenting in *Johnson v. Eisentrager*, argued that habeas jurisdiction is affirmatively "written into the Constitution" and thus "cannot . . . be constitutionally abridged by Executive or by Congress." 339 U.S. 763, 798 (1950) (Black, J., dissenting). Indeed, a number of scholars have compellingly argued that *Boumediene* vindicated Justice Black's view, functionally abrogating Chief Justice Marshall's dicta from *Bollman*. *See, e.g.*, FREEDMAN, *supra* note 247, at 105-09 & nn.15-16 (2018) (citing Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantanamo: The* Boumediene *Decision*, 2008 SUP. CT. REV. 1, 17, 58; Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 378

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Judiciary Act of 1789 is the origin of the contemporary 28 U.S.C. § 2241 (the general federal habeas statute), the contemporary 28 U.S.C. § 2254 (the statute conferring federal habeas jurisdiction for "person[s] in custody pursuant to the judgment of a State court"[372]) has *its* origin in the Habeas Corpus Act of 1867.[373] And *both* modern federal habeas statutes have been amended and/or recodified by Congress several times since, most notably in 1948,[374] 1966,[375] and 1996.[376] Thus, 1787, 1789, 1867, 1948, 1966, and 1996 are *all* years for which we must ask whether the framers (and, for the Suspension Clause, the ratifiers) of the relevant American legal texts might have "reencoded" the conceptual DNA of the American writ to replace the English writ's conceptual focus on sovereignty with a new focus on liberty.

What I am calling the "historical-irrelevance" objection to embracing the popular-sovereigntist theory, then, is an objection premised on the assumption that, in one or another of those years, such a reencoding indeed took place.

A form of that objection appears in Huq's rationale for brushing off the possibility that the Suspension Clause might contemplate American habeas as a "mechanism" to "control [the] agency costs" that "ar[i]se from unavoidable slack between the people's instructions and their representatives' actions."[377] Namely, he seems to reason that, simply by giving habeas less proverbial airtime than elections and the horizontal separation of powers in the *Federalist Papers*' discussions of how the proposed Constitution would regulate the

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(2010); and Stephen I. Vladeck, *Common-Law Habeas and the Separation of Powers*, 95 IOWA L. REV. BULL. 39, 52-54 (2010)).

Of course, if Freedman, Meltzer, Fallon, and Vladeck are correct in their reading of *Boumediene*, then the historical-irrelevance objection to the Great Writ of Popular Sovereignty thesis would be weakened considerably. That is, if the Suspension Clause should now be read as an affirmative grant (and thus the true source) of federal court habeas jurisdiction—such that the habeas statutes of 1789, 1867, 1948, 1966, and 1996 were merely implementing its command—then it would become harder to argue that such statutes even *could* have "reencoded" the conceptual DNA of the English common-law writ. *See infra* text accompanying note 376. For purposes of this Article, however, I take no position on that question, instead following the more cautious approach of arguing that even if Congress could have effectuated such a "reencoding" in any of those years, it declined to do so.

372. 28 U.S.C. § 2254(a).

373. Habeas Corpus Act of 1867, ch. 27, § 1, 14 Stat. 385, 386 (1867).

374. Habeas Corpus Act, Pub. L. No. 773, 62 Stat. 869, 964-65 (1948) (codified as amended at 28 U.S.C. § 2241); Habeas Corpus Act, Pub. L. No. 773, § 2254, 62 Stat. 869, 967 (1948) (codified as amended at 28 U.S.C. § 2254).

375. Habeas Corpus Act, Pub. L. No. 89-711, 80 Stat. 1104 (1966) (codified as amended at 28 U.S.C. § 2244).

376. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of the U.S. Code).

377. Huq, *supra* note 26, at 388-89.

principal-agent relationship between the People and their governments, the Founders effected such a reencoding.[378] I disagree.

The historical record of Founding-era thinking on habeas is a mixed bag. To be sure, some jurists of that era echoed Blackstone, speaking of habeas in the language of individual rights and liberties.[379] But many others—including such leading lights as St. George Tucker, Chief Justice Marshall, and, in the decades immediately following the Founding, Justice Story—spoke of habeas as a judicial *power* for regulating agency slack among wielders of delegated penal power[380] in a way that closely resembles the sovereigntist conception of habeas recovered by Halliday.[381] And even among those who spoke of the writ and its importance in more libertarian terms, many signaled their recognition that the liberatory *effect* of habeas was bound up with its logic as a structural mechanism for regulating inter-institutional power dynamics.[382]

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378. *See id.* at 389-90; *see also supra* notes 146-52 and accompanying text (discussing Huq's rationale in greater detail).

379. *See, e.g.*, Letter from Thomas Jefferson to James Madison (July 31, 1788) (advocating that "the right of Habeas corpus" be protected in "a bill of rights"), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 476, 476 (Philip B. Kurland & Ralph Lerner eds., 1987); Debate in Massachusetts Ratifying Convention (Jan. 26, 1788) (statement of Francis Dana) (characterizing habeas as a "privilege" belonging to "the citizen"), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 78, at 328, 328; 16 ANNALS OF CONG. 402 (1807) (statement of Rep. Smilie) (characterizing English habeas as "the 'palladium of personal liberty'"), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 78, at 329, 335.

380. TUCKER, *supra* note 124 (recognizing English habeas's status as "a high prerogative writ" and characterizing American habeas as a judicial "power"), *reprinted in* 3 The FOUNDERS' CONSTITUTION, *supra* note 78, at 329, 329; 16 ANNALS OF CONG. 402 (1807) (statement of Rep. Elliot) (recognizing that "the nature and character of the [English] writ" is "considered in *two* great points of view, *as it respects the Monarch*, and as it respects the subject," and that "[a]s it respects the Monarch, [habeas] is . . . a writ of *prerogative*" (emphasis added)), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 78, at 329, 332; *id.* at 332-33 (statement of Rep. Eppes) (referring repeatedly to American habeas as a tool for regulating whose political "will" should be dispositive of citizens' liberty); *id.* at 336 (statement of Rep. Dana) (characterizing American habeas as operationalizing a structural principle for regulating the delegation of penal power to and among "the President," "other high officers," and lesser "person[s] acting under [them]"); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94-96, 98-101 (1807) (Marshall, C.J.) (repeatedly referring to habeas as a "power" wielded against "inferior courts"); 3 STORY, *supra* note 78, § 1335 ("In England [habeas] is a high prerogative writ, issuing out of the Court of King's Bench, . . . for it is said, that the king is entitled, at all times, to have an account[] why the liberty of any of his subjects is restrained.").

381. *See supra* Part I.B.

382. *See, e.g.*, WILLIAM RAWLE, A VIEW ON THE CONSTITUTION OF THE UNITED STATES (Philadelphia, Philip H. Nicklan 2d ed. 1829) (characterizing habeas as "the mode by which the *judicial power* speedily and effectually protects the personal liberty of every individual, and repels the injustice of . . . *despotic governors*" (emphasis added)), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 78, at 341, 341; 16 ANNALS OF CONG. 402 (1807) (statement of Rep. Elliot) ("[I]n its origin and true character [the writ] is viewed

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Most importantly, there was firm consensus that (1) the Suspension Clause and the 1789 Act contemplated the "writ of habeas corpus" as a direct and unadulterated inheritance from English common law; (2) neither of those early American texts was affirmatively speaking to—let alone *changing*—the substantive legal content of the writ, instead speaking only to American courts' jurisdiction to issue it and Congress's power to strip such jurisdiction; and (3) accordingly, there could be "no other way" to determine the "meaning" of the writ than by "recourse to the common law" of England.[383] Meanwhile, nothing in the historical record suggests that the Founding generation understood the enactments of the Suspension Clause or the 1789 Act to be altering the basic conceptual DNA of the writ as it had existed in England throughout the preceding centuries.

A careful parsing of the Suspension Clause's text confirms as much. That text 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."[384] First, as with the First Amendment's reference to "*the* freedom of speech,"[385] the Suspension Clause's (double) usage of the definite article "the" is telling. It suggests that the Suspension Clause "does not purport to create [something] new . . . but rather to recognize something pre-existing—apparently, '*the*' [privilege of '*the*' writ of habeas corpus] preceded even the [Suspension Clause]."[386] Contrast that with the object of Justice Scalia's analysis in *Burnham*[387]: the Fourteenth Amendment's Due Process Clause, which forbids "any State" from "depriv[ing] any person of life, liberty, or property, *without due process of law*"—as opposed to "[*the*] Due Process of Law."[388] The Fourteenth Amendment's omission of "the" suggests that it was *not* merely

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as a prerogative, exercised by the King [and his justices on King's Bench] . . . for the purpose of securing the Constitutional rights of the subject . . . ."), *reprinted in* 3 THE FOUNDERS' CONSTITUTION *supra* note 78, at 329, 332.

383. 3 STORY, *supra* note 78, §§ 1333, 1335 (1833) ("In order to understand the meaning of the term[] [habeas corpus as] used [in the Suspension Clause and 1789 Act], it will be necessary to have recourse to the common law; for in no other way can we arrive at the true definition of the writ of habeas corpus. . . . [T]he common law [of habeas] was deemed by our ancestors a part of the law of the land, brought with them upon their emigration . . . ."); *see also, e.g.*, *Bollman*, 8 U.S. (4 Cranch) at 93-94 ("[F]or the meaning of the term *habeas corpus,* resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.").

384. U.S. CONST. art. I, § 9, cl. 2 (emphasis added).

385. *Id.* amend. I, cl. 2 (emphasis added).

386. Akhil Reed Amar, *How America's Constitution Affirmed Freedom of Speech Even Before the First Amendment*, 38 CAP. U. L. REV. 503, 508 (2010).

387. *See* 495 U.S. at 610-11 (1990); *see also supra* text accompanying notes 362-65.

388. U.S. CONST. amend. XIV, § 1, cl. 3 (emphasis added) (capitalization altered).

recognizing a preexisting Anglo-American tradition of "the Due Process of Law," but rather announcing and fixing a *new* conception of what inheres in "due process of law." The Suspension Clause's *inclusion* of "the" suggests the converse—and in turn, that the Suspension Clause is *not* amenable to the interpretive move that Justice Scalia made with the Due Process Clause in *Burnham*. The same point finds support in the Suspension Clause's choice of passive verb—"shall not *be suspended*"—which further suggests that "[t]he Privilege of the Writ of Habeas Corpus" had already been operative, and its legal content fixed, long before the enactment of the Suspension Clause.[389]

Similarly telling is the Suspension Clause's conspicuous omission of a prefatory clause. Contrast that with the Second Amendment, for example, which provides: "*A well regulated Militia, being necessary to the security of a free State*, the right of the people to keep and bear Arms, shall not be infringed."[390] While the Second Amendment refers to a preexisting legal tradition to specify the content of its operative clause (namely, "*the* right of the people to keep and bear Arms"), it uses the prefatory clause to impose its own affirmative view of the *purpose* of that preexisting legal tradition.[391] The Suspension Clause, by contrast, refrains from using a prefatory clause to impose any new, affirmative view of the purpose of the preexisting English legal tradition of habeas. By negative implication, the Suspension Clause thus preserves that tradition's view of its own purpose.

But what about the 1867 Act? For starters, it is of course a statute, not a constitutional provision.[392] Under the dominant interpretive methodologies of the current Supreme Court, framers' subjective understandings have less of a role—if any—to play in statutory than constitutional interpretation.[393] Likewise, the Court has recognized a blanket presumption against construing statutes in derogation of the common law.[394] So, unless the text provides a clear statement of Congress's intent to depart from the common-law understanding of the writ, there should be a strong presumption against reading in such intent.

389. *Id.* art. I, § 9, cl. 2 (emphasis added).

390. *Id.* amend. II (emphasis added).

391. *Id.*

392. The same is true, of course, of the 1789 Act. Thus, although I have grouped my analyses of the Suspension Clause and 1789 Act together (due to the temporal proximity of their respective enactments), the following argument is equally applicable to the 1789 and 1867 Acts.

393. *See, e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020) ("[T]he limits of [a statute's] drafters' imagination supply no reason to ignore the law's demands.").

394. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318-21 (2012) (collecting Supreme Court cases applying this and the related presumption that "[a] statute that uses a common-law term, without defining it, adopts its common-law meaning").

And if anything, the text of the 1867 Act affirmatively suggests that the enacting Congress possessed a *more* "Hallidaian" view of the writ than that which passed the 1789 Act. Most prominently, the 1867 Act's text includes a direct nod to the coercive aspect of the writ's conceptual makeup, providing that if the recipient of a writ of habeas corpus refused to obey the writ, neglected or refused to make a return on the writ, or made a false return, she would "be deemed . . . guilty of a misdemeanor" and "punished" with a fine of up to $1,000 (over $20,000 in today's dollars) and/or imprisonment up to a year.[395] In a similar vein, the 1867 Act also provided for any state court criminal proceedings against a federal habeas petitioner to be enjoined until the federal courts had rendered their final judgment in her habeas case.[396] These coercive, structural elements of the 1867 Act are no coincidence, either. After all, the explicit aim of the Act was to expand federal court power to wield habeas corpus as a tool for vindicating the sovereignty of We the Unitary People of the United States in the face of Southern resistance—that is, for crushing the efforts of recalcitrant Southern state prosecutors and state courts to use their delegated police powers as an end-run around the sovereign commands of the Thirteenth Amendment.[397]

To be sure, one might *still* rejoin that, even if the coercive and structural elements of the writ's conceptual makeup were well appreciated by the Reconstruction Congresses, such appreciation was subsequently crowded out by the ascendancy of the libertarian myth—to the point that, by the turn of the millennium, it could fairly be said that "habeas corpus [had come to be] universally known and celebrated as the 'Great Writ of Liberty.'"[398] One might thus suggest that when Congress amended and/or recodified the federal habeas statutes in 1948,[399] 1966,[400] and 1996[401]—each time against the backdrop of an ever-more-ironclad judicial consensus around the libertarian myth—Congress was ratifying the corresponding libertarian theory and its ostensible displacement of sovereignty as the conceptual touchstone of habeas.

But the key word is "ostensible." I don't believe the Whig misunderstanding of the writ's English origins—even as its prominence among

395. Habeas Corpus Act of 1867, ch. 27-28, § 1, 14 Stat. 385, 386 (1867).

396. *See id.*

397. *See* Primus, *supra* note 10, at 13-16 & nn.81-83; Quigley, *supra* note 211, at 30-33.

398. FREEDMAN, *supra* note 67, at 1.

399. Habeas Corpus Act, Pub. L. No. 773, 62 Stat. 869, 964-68 (1948) (codified as amended at 28 U.S.C. § 2241).

400. Habeas Corpus Act, Pub. L. No. 89-711, 80 Stat. 1104, 1104-05 (1966) (codified as amended at 28 U.S.C. § 2244).

401. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of the U.S. Code).

judges has variously waned and waxed—has ever actually *altered* the writ's basic, hardwired conceptual DNA. On this point, the best proof is perhaps in the proverbial pudding. That is, even as the libertarian way of *speaking about* habeas has become conventional, the sovereigntist way of actually *doing* habeas jurisprudence has never gone away. As recent historical work has shown, habeas has functioned throughout American legal history to "legitimate government power"[402] and as a "tool of federal supremacy"—far "more responsive to th[ose] structural objective[s] than to any principled conception of liberty."[403] Likewise, many of the actual habeas doctrines that the Court continues to debate today are quite literally inscrutable when viewed through the conceptual lens of ideas about individual liberty, yet entirely coherent when viewed through that of ideas about popular sovereignty. The recent Kagan-Gorsuch debate over the jurisdictional-defects-only maxim, of course, is an especially vivid and high-stakes example.[404] The point is, our actual habeas doctrine has largely operated on popular-sovereigntist premises all along—even if sometimes unwittingly so.

Conclusion

Today's American habeas jurisprudence is an intellectually incoherent and practically ineffectual mess, rife with bitter disagreement over even the most seemingly rudimentary questions. Among the very few objects of consensus—beyond the observation that the jurisprudence we have built up around the so-called Great Writ of Liberty indeed *is* a mess, in need of fundamental and dramatic change in one form or another—are the propositions that history must play a central role in shaping modern doctrine, and that the new definitive starting point for such historical analysis should be Paul Halliday's paradigm-shifting account of the writ's origins in the Court of King's Bench. These three consensus propositions, in a way that American legal scholars have been puzzlingly unwilling or unable to recognize, converge in perfect harmony. If we synthesize Halliday's revisionist insights with the canonical understanding of American sovereignty, what emerges is an imperative to reconceptualize American habeas as the Great Writ of Popular Sovereignty: a legal instrument through which We the People interrogate and demand the fidelity of our agents in government who exercise our delegated penal power. This theory might provide us with the more "luminous beacon"[405] we so

402. Litman, *supra* note 137, at 222.

403. Kovarsky, *supra* note 110, at 15-16.

404. *See supra* Part II.A.1.

405. Bator, *supra* note 175, at 470.

desperately need to chart a course toward a more coherent, more functional jurisprudence of American habeas corpus.

While this Article's core conceptual claim is decidedly bold, its practical aim is more modest: I hope simply to familiarize my readers with the theory of the Great Writ of Popular Sovereignty as a new way of looking at American habeas, and to spark a long-overdue conversation around it. I fully anticipate that scholars who share my concern for the Great Writ may disagree with the particulars of how I have framed this theory, the doctrinal implications I have tentatively drawn from it, and/or my justifications for making the conceptual shift away from the conventional theory of the Great Writ of Liberty in the first place. Indeed, I would enthusiastically welcome such disagreement. For the present stakes could not be higher: Just three Terms ago, six Justices signed onto an opinion whose dicta seeded an argument for gutting federal postconviction habeas almost entirely.[406] Given those stakes, the one thing we cannot afford to do is altogether fail to consider ideas that might help save the Great Writ from such a fate.

In that same spirit, I close by looking ahead to the vast slate of future inquiry that this Article leaves to be done. Most obviously, there is much work to be done *downstream* of my core conceptual claim: more fully teasing out those of its doctrinal implications that I have previewed in cursory form here, as well as testing and fine-tuning those I *have* more fulsomely explored here. But there also remains significant work to be done within, upstream of, and adjacent to that core conceptual claim.

Within the core conceptual claim, there is a need to put more theoretical meat on the proverbial bones of the popular-sovereigntist theory that I have laid out in skeletal form here—namely, by tackling head-on some of the trickier points of translation in Americanizing the New Habeas Revisionism.[407]

Upstream of the core conceptual claim are more deeply theoretical dimensions of the dialogues to be had over potential objections to making the conceptual shift I have advocated here. One such dimension (of the canonical accounts of American popular sovereignty that I have invoked to rebut to the analytical-impossibility objection) is the central role that analogies to agency and corporate law played in the development of both the American theory of popular sovereignty[408] and the English theory of habeas as a prerogative writ.[409] With more focused analysis of these parallel roles played by agency-law analogies, we might better make use of such analogies in our own,

406. *See* Brown v. Davenport, 142 S. Ct. 1510, 1520-22 (2022); *see also supra* Parts I.E, II.A.1.

407. *See supra* text accompanying notes 290-95, 317-25 (discussing such points).

408. *See supra* note 230 (collecting sources discussing this idea).

409. *See* HALLIDAY, *supra* note 2, at 185, 212.

present-day work of unspooling and fine-tuning the popular-sovereigntist theory's doctrinal implications.[410] Another is a more theoretical dimension of answering the normative-undesirability objection: that the line of thinking behind that objection is not just incidentally wrong in its speculations about the kinds of doctrinal implications that a popular-sovereigntist theory of habeas might entail, but more fundamentally wrongheaded in its overly individualistic views of human freedom and American exceptionalism.

Finally, *adjacent* to the core conceptual claim are themes quietly interwoven through this Article that, while not strictly *part of* the project of reconceptualizing American habeas as Great Writ of Popular Sovereignty, are apt to shed light on that project. One such theme is the dynamic of "Guantanamo Exceptionalism" in the American habeas jurisprudence of the past twenty years: courts' tendency, exemplified in cases like *Boumediene* and *Dhiab*, to issue sweeping pronouncements about the nature of habeas qua habeas when their reasoning is apt to be distorted by the unique exigencies of the War on Terror moment (be it the exigencies of national security, on the right, or of international human rights, on the left). Another is the possibility, which I hope this Article might itself exemplify, of a fresh way of using originalism and legal history: as generative rather than constraining forces, as modes of mining the wisdom of the past for creative solutions to the legal problems of the present.

* * *

Yet for all of the scholarly work it leaves still to be done, this Article offers at least a new starting point for making sense of the "intellectual disaster area"[411] of modern American habeas jurisprudence. That starting point, again, is the novel theory of the Great Writ of Popular Sovereignty—the proposition that the American writ should be conceptualized principally as a tool for vindicating the sovereignty of We the People vis-à-vis our agents in government who exercise our delegated penal power. This proposition is the natural implication of consensus history. While scholars have until now resisted that implication on the basis of concerns that it would be analytically impossible, normatively undesirable, or historically irrelevant to reconceptualize American habeas thusly, those concerns turn out to be misbegotten.

And when we *do* embrace the popular-sovereigntist conception of American habeas, it allows us to make sense of the common-law maxim that postconviction habeas review reaches only "jurisdictional defects" in the court

410. *See, e.g.*, *supra* text accompanying notes 230, 248-54 (drawing upon corporate law's distinction between breaches of loyalty and care, in contexts of mediating the Kagan-Gorsuch debate and assessing Primus's proposal).

411. Yackle, *supra* note 6, at 553.

of conviction—the interpretation of that maxim, of course, lying at the heart of Justices Kagan and Gorsuch's high-stakes debates over the fate of meaningful federal habeas review of state court convictions. It suggests that, as necessity compels federal courts to implement doctrines for separating the wheat of § 2254 petitions from the chaff, the cases they prioritize should be those alleging the most egregious violations not of individual liberty, but of the People's sovereign commands. Most fundamentally, it furnishes a coherent account of postconviction habeas as something worth saving, something more worthwhile than a mere exercise in redundancy: not as relitigation of the petitioner's underlying trial for her alleged crimes, but as a wholly new and distinct "trial" of the jailer for his alleged affronts to the sovereignty of the People.