

A CONSTITUTIONAL THEORY OF HABEAS POWER

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INTRODUCTION

MODERN habeas corpus law generally favors an idiom of individual rights,¹ but the Great Writ's central feature is judicial *power*. Article I, Section 9, Clause 2 of the Federal Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The Suspension Clause exhibits frustrating syntax that recognizes a habeas privilege and a suspension power that are, at best, implied elsewhere in the Federal Constitution.² Assuming that the suspension power and its limits arise under Article I, then what constitutional language requires habeas process in the first place, and under what provision does any non-suspension power to restrict habeas arise?

The key to answering these questions is to conceptualize "habeas" as a form of Article III power belonging to judges,³ and not as some sort of right. The "privilege" ensures that prisoners can ask judges to exercise that power. Article III combines with the Suspension Clause to guarantee habeas process and to specify the exclusive conditions by which Congress may restrict it. This paper sets forth the two major principles of what I call "Habeas Power Theory," and the ultimate conclusion that Congress cannot restrict the prerogative of a federal judge to decide whether federal custody is "lawful." By cohering the new writ history, decisional law, and maxims of federal jurisdiction, I sketch a theory for how judges ought to use habeas to test different forms of federal pow-

¹ See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3084 n.20 (2010) (Thomas, J., concurring in part and concurring in the judgment) (describing habeas as an individual right); *Boumediene v. Bush*, 553 U.S. 723, 826 (2008) (Scalia, J., dissenting) ("[T]he Court confers a constitutional right to habeas corpus on alien enemies . . ."); *Rasul v. Bush*, 542 U.S. 466, 477–78 (2004) (describing the Suspension Clause repeatedly as securing a "right" to federal habeas review); *INS v. St. Cyr*, 533 U.S. 289, 311–12 (2001) (describing habeas corpus as a "right" following immigration orders) (quoting *Heikkila v. Barber*, 345 U.S. 229, 235 (1953)).

² See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 619–20 (1842) ("No express power is given to Congress to secure this invaluable right in the non-enumerated cases, *or to suspend the writ in cases of rebellion or invasion*. And yet it would be difficult to say . . . that it ought not to be deemed by necessary implication within the scope of the legislative power of Congress." (emphasis added)).

³ By treating the power as vesting in judges, rather than in courts, the theory presented herein remains consistent with the Madisonian Compromise (the rule that inferior Article III courts are not mandatory) and with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (ruling that Congress cannot accrete the Supreme Court's original jurisdiction). See *infra* Section II.C.

er—for immigration, military, and criminal custody. (For the reasons set forth in Section III.D, I do not reach the issue of state detention.)

Prior to *Boumediene v. Bush*⁴—probably the most thorough habeas decision in the United States Reports—the Supreme Court had suggested only indirectly that the Constitution guaranteed any habeas process at all.⁵ In 2008, however, *Boumediene* formally held that the Federal Constitution requires habeas to be available to prisoners at the U.S. military base in Guantánamo Bay, Cuba (“GTMO”).⁶ The Court failed to specify, with any consistency, exactly which constitutional provision required habeas access for GTMO detainees,⁷ and it made little attempt to reduce the military-detention rule to a more general principle of custodial review. Conceptualizing habeas process as an Article III power at least partially addresses both of those issues.

Before formally stating the two principles comprising my Habeas Power Theory, a short digression on nomenclature is in order. *Boumediene* describes statutory restrictions that disrupt steady-state habeas access as “unconstitutional suspensions.”⁸ The term “unconstitutional suspension,” however, is both unfortunate and revealing. The term is unfortunate because the salient question involves what the habeas privilege entails *when Congress does not invoke its power to suspend*.⁹

⁴ 553 U.S. 723.

⁵ Compare, e.g., *INS v. St. Cyr*, 533 U.S. at 304 n.24 (observing in dicta that the Clause was intended to preclude any possibility that congressional inaction would cause “the privilege [to] be lost” (citation omitted) (internal quotation marks omitted)), with *id.* at 337 (Scalia, J., dissenting) (“Indeed . . . four of the state ratifying conventions [objected] that the Constitution failed affirmatively to guarantee a right to habeas corpus.”). See also *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) (“[T]he power to award the writ by any of the courts of the United States, must be given by written law.”).

⁶ 553 U.S. at 798; see also Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 *Colum. L. Rev.* 537, 538 (2010) (“*Boumediene v. Bush* is a central pillar of constitutional law . . . because [it technically held] that Congress had violated the Suspension Clause by denying someone an adequate judicial remedy for unlawful detention.” (footnote omitted)).

⁷ The Court did hold that the Suspension Clause “has full effect at” GTMO. *Boumediene*, 553 U.S. at 771. That ruling only clarifies that the Suspension Clause contains limits that extend to GTMO, and it does not isolate a constitutional provision that entitles the prisoners to the writ in the first place.

⁸ See, e.g., *Boumediene*, 553 U.S. at 733 (“Therefore § 7 of the Military Commissions Act of 2006 operates as an unconstitutional suspension of the writ.” (internal citations omitted)).

⁹ See *id.* at 745 (“[The Suspension Clause] ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty.” (citation omitted)); see

The term is revealing because the Court anchored the rule against restricting the privilege to Article I, Section 9, a section devoted to limits on legislative power. The Supreme Court's language may be a clumsy formulation of a more rigorously stated rule that Article I, Section 9 contains the *exclusive* Congressional means to restrict habeas review of federal custody—formal suspension.¹⁰

That GTMO detainees must enjoy access to habeas process is a specific application of Habeas Power Theory. The Theory has two global principles: (1) that the Constitution entitles all federal prisoners to some quantum of habeas (or substitute) process before an Article III judge;¹¹ and (2) that, absent a formal suspension, the Constitution does not permit Congress to restrict judicial power to determine what constitutes “lawful” custody. *Boumediene* was followed by a valuable burst of academic literature involving constitutionally-required habeas process for military confinement,¹² but there remains no broader theory of how habeas power might apply to other forms of civil, criminal, administrative, or military custody.¹³

also Amanda L. Tyler, Suspension as an Emergency Power, 118 Yale L.J. 600, 608 (2009) (observing that *Boumediene* endorses a more robust view of the Suspension Clause).

¹⁰ Cf. Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 1160 (6th ed. 2009) [hereinafter Fallon et al., Hart and Wechsler] (“[W]hether a limitation on habeas jurisdiction . . . constitutes a suspension is bound up with the question of what scope of habeas corpus review is recognized by the Suspension Clause.”).

¹¹ But see *Swain v. Pressley*, 430 U.S. 372, 383 (1977) (stating that, because non-Article III judges could decide federal crimes, there need be no Article III adjudication of a habeas claim).

¹² See, e.g., Paul Diller, Habeas and (Non-)Delegation, 77 U. Chi. L. Rev. 585, 585 (2010) (considering whether *Boumediene* can be justified as a non-delegation decision); 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, 352 (2010) (exploring how political science can illuminate the Court's decision-making in War on Terror cases); Philip Hamburger, Beyond Protection, 109 Colum. L. Rev. 1823, 1823 (2009) (discussing, among other things, habeas process for foreign terrorists under American law); Daniel J. Meltzer, Habeas Corpus, Suspension, and Guantánamo: The *Boumediene* Decision, 2008 Sup. Ct. Rev. 1, 59 (2008) (contending that *Boumediene*'s ultimate impact will depend on how the administrative process in which enemy classifications are made functions); Stephen I. Vladeck, The New Habeas Revisionism, 124 Harv. L. Rev. 941, 966–78 (2011) (considering what *Boumediene* and the historical scholarship on which it relies mean for military detainees at GTMO and at other facilities).

¹³ Some articles do touch on how post-*Boumediene* habeas law might apply in other contexts. See, e.g., Lumen N. Mulligan, Did the Madisonian Compromise Survive Detention at Guantánamo?, 85 N.Y.U. L. Rev. 535, 535 (2010) (arguing that parts of *Boumediene* are inconsistent with the Madisonian Compromise); Neuman, *supra* note 6, at 559–61 (2010) (setting forth a theory of *Boumediene*'s application to immigration proceedings, and briefly

As a first step in explaining the Theory, I should disaggregate several concepts that are improperly used as synonyms for a habeas corpus power. Habeas authority actually involves: (1) power to entertain a prisoner's request that the court direct a habeas writ to a custodian (we might think of the right to make the request as "the privilege" of habeas corpus); (2) power to issue a habeas writ instructing a custodian to produce the prisoner and justify detention; (3) power to decide the lawfulness of custody; and (4) power to order discharge or set bail.¹⁴ When the Court observes either that the Federal Constitution protects "the writ as it existed in 1789" or that jurisdictional restrictions are constitutional if they are "within the compass" of the writ's complex evolution,¹⁵ what habeas powers is it even talking about? Moreover, if the second principle is that judges should decide how prior process proves that custody is "lawful," then are legislative restrictions on post-conviction challenges constitutional?

Part I provides a pre-Revolutionary writ history showing that, if American habeas power over federal custody is restricted, then those restrictions do not derive from English common law. The habeas authority of King's Bench (and other English judges) included each of the powers specified above, along with the power to punish noncompliance with contempt citations. Although habeas power was subject to statutory innovation, legislative developments were supplemental, not restrictive. Even "suspension" statutes never curtailed all habeas power—English suspension legislation usually combined a provision authorizing certain custody with a provision stripping judges of discharge and bail-setting power.¹⁶ A durable function of common-law habeas process was to allow *judges* to determine the extent to which a custodian over which a court had personal jurisdiction could show lawfulness by proxy of prior process. In fact, the authority of a judge to determine what counted as

mentioning some implications for post-conviction review); Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 *Notre Dame L. Rev.* 2107, 2115 (2009) (suggesting that Justice Kennedy's *Boumediene* opinion may be explained as a response to the distinct injury to federal courts in denial-of-access cases).

¹⁴ See *infra* Section I.A.

¹⁵ *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" (footnote omitted)); *Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("The added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process . . .").

¹⁶ See *infra* Section I.C.

“lawful” custody was perhaps the signal feature of the habeas writ that emerged from the seventeenth-century English Civil Wars.

In Part II, I make the normative argument,¹⁷ grounded in the structure of federal jurisdiction, for the first principle of habeas power: that Article I, Section 9 references a *federal* judicial authority to review *federal* custody, and the only way the federal government may restrict that power is through formal suspension. The Supreme Court’s two-century struggle to define the inter-sovereign features of habeas power reflected the Court’s failure to distinguish the constituent elements of that authority. After *Boumediene*, however, theories that the Suspension Clause protects the authority of *state* judges to scrutinize *federal* custody have become even more difficult to reconcile with constitutional text and the structure of the habeas privilege.

In Part III, I present the normative argument in favor of the second principle of habeas power: that Congress cannot strip jurisdiction of federal judges to decide how much process underlying a federal custody determination proves that it is lawful. If a court has what we might think of as personal jurisdiction over a custodian, then what we might think of as subject matter jurisdiction necessarily includes power to entertain almost all challenges to a criminal conviction. Proof of custodial process, including a federal criminal conviction, is simply *evidence* of lawfulness. Federal judges can develop legal rules that limit relief, but habeas restrictions may not be creatures of legislation.

The Habeas Power Theory is consistent with a muscular habeas writ, but I do not envision unrestricted habeas access for federal prisoners. My objection is to the institutional source of habeas restrictions, rather than to restrictions per se. Habeas has always been an instrument of judicial power, and judges—not Congress—should dictate its limits. Moreover, Congress should retain power to specify the substantive and procedural terms of custody determinations, but it should not be able to blunt the habeas remedy.

¹⁷ In using the term “normative” I do not mean to delve into the weightiest issues of legal philosophy, nor to plumb the outer registers of Dworkinian theory. I use “normative” simply to signal that I am prescribing rather than describing behavior. In this respect, my “normative” theory is uninteresting; judges should follow the legal-process norms of judging. They should interpret authority in ways that are most consistent with other bodies of law, which are in turn expressed in authoritative texts, judicial decisions, and accepted behavior. Those interested in lengthy justifications for such a prescriptive approach should read Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189 (1987).

I. PARSING ENGLISH COMMON-LAW WRIT “JURISDICTION”

Boumediene reset the scholarly consensus the Supreme Court uses to describe habeas practice in England and America before 1787.¹⁸ New historical data drove *Boumediene*'s result,¹⁹ and it changes how we understand the relationship between Article III and the Suspension Clause. The Clause bars suspension of the “privilege” of habeas writ, and I want to focus on the judicial powers to which the privilege guarantees access. Specifically, Part I conveys two ideas about the English common-law writ, and each figures prominently in the normative positions I take in Parts II and III.

First, habeas power at English common law actually subdivides into at least four different types of judicial authority: to entertain petitions, to send the writ, to adjudicate the lawfulness of custody, and to fashion appropriate relief.²⁰ A failure to parse habeas power obscures the distinction between features of judicial authority that Congress may restrict and those that it may not.

Second, English judges used the habeas writ to consolidate power to decide what counted as lawful custody throughout the Realm.²¹ Whether habeas corpus was described formally as a writ, a remedy, a right, or a privilege, it served functionally as an instrument of English judicial power. The defining feature of habeas power was that it allowed *judges*—not legislators or monarchs—to determine how much custodial process rendered detention lawful.²²

Part I presents the historical backbone of my argument, but I am not an originalist. I do not believe, for tough constitutional questions, that

¹⁸ Professor Paul D. Halliday is the academic most responsible for this work. See Paul D. Halliday, *Habeas Corpus: From England to Empire* (2010) [hereinafter Halliday]; Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L. Rev. 575 (2008) [hereinafter Halliday & White]. Professor Halliday examined King's Bench files, rolls, and rulebooks every fourth year, from 1592 to 1708. See Halliday, *supra*, at 319. This process yielded data on 2757 prisoners. See *id.* *Boumediene* relied on this survey heavily. See *Boumediene*, 553 U.S. at 740, 747, 752 (citing Halliday & White, *supra*).

¹⁹ See *Boumediene*, 553 U.S. at 740, 747, 752 (citing Halliday & White, *supra* note 18).

²⁰ See *infra* Section I.A.

²¹ See *infra* notes 33–40 and accompanying text.

²² Cf. Lee Kovarsky, *Custodial and Collateral Process: A Response to Professor Garrett*, 98 Cornell L. Rev. Online 1 (2013), <http://cornell.lawreviewnetwork.com/files/2013/02/Kovarskyformatted.pdf> (explaining how the Supreme Court has contributed to the confusion about which constitutional provisions require what kind of process).

assessment of perfect historical data yields interpretive clarity.²³ I simply join an emerging consensus that pre-Revolutionary English writ practice does shed some interpretive light on questions for which the historical record is robust.²⁴ To the extent that the Federal Constitution adopted features of the English writ, any serious discussion of the Suspension Clause and its limits must recognize that central to the habeas power of a sovereign's judges was the power to decide the lawfulness of that sovereign's custody. And the power to decide the lawfulness of custody in a given case included the power to decide, more abstractly, what the concept of lawful custody meant. I do not present evidence about the writ's original function because the Court should always interpret the Federal Constitution this way, but because many habeas decisions already do.²⁵

A. Subdividing Habeas "Power"

Magna Carta pronounced that no person could be unlawfully imprisoned,²⁶ and habeas eventually developed into the primary security for that decree.²⁷ The early connection between Magna Carta and habeas

²³ For many interpretive questions, the idea of original meaning is theoretically and practically unknowable. See William N. Eskridge, Jr. et al., *Legislation and Statutory Interpretation* 222 (2d ed. 2006); Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 547–48 (1983); Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 Nw. U. L. Rev. 145, 148 (2009); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 Int'l Rev. L. & Econ. 239, 249–50 (1992).

²⁴ See, e.g., Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 Cornell L. Rev. 47, 60–63 (2012) (distinguishing, by reference to newly-available historical data, the concept of habeas process from the process supporting the underlying custody order); Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 Harv. L. Rev. 901, 922–23 (2012) (arguing that clear evidence in the historical record should inform modern interpretation of the habeas privilege).

²⁵ See, e.g., *Boumediene*, 553 U.S. at 746 (“But the analysis may begin with precedents as of 1789, for the Court has said that ‘at the absolute minimum’ the Clause protects the writ as it existed when the Constitution was drafted and ratified.” (citation omitted)); *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (“[A]t the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’” (citation omitted)); *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996) (“But we assume, for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789.”).

²⁶ See Ralph V. Turner, *Magna Carta: Through the Ages* 231 (2003).

²⁷ See 3 William Blackstone, *Commentaries* *131 (stating that habeas corpus “run[s] into all parts of the king’s dominions: for the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted” (footnote omitted)); *The Federalist* No. 84, at 577 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (quoting William Blackstone’s reference to habeas corpus as “the Bulwark of the British constitution”). There were actually different types of common-law habeas writ, but what we refer to as modern habeas corpus is *habeas corpus ad subjiciendum*—the “Great Writ.”

process, however, is exaggerated.²⁸ Until the seventeenth century, courts used different types of habeas writs to move prisoners routinely through courts and jails.²⁹ The earliest common law *habeas ad subjiciendum* writs allowed King's Bench, a judicial agent of the Crown (at which the monarch was always technically deemed present), to review the custody when a jailor detained a prisoner under color of the royal franchise (usually by a Justice of the Peace).³⁰ For centuries after Magna Carta, *habeas corpus ad subjiciendum* was more an instrument of Royal brand management than it was a font of individual liberty.

England did not hierarchically vest judicial power in a pyramid of national courts; different courts exercised varied territorial and subject matter jurisdiction.³¹ Moreover, the jurisdiction of each tribunal was not fixed: different courts used different devices to establish different authority at different times. King's Bench was (along with the Courts of Common Pleas and Exchequer) one of the three highest common-law courts sitting at Westminster Hall.³² During the fifteenth and sixteenth centuries, the Bench's workload and jurisdiction were threatened by the Court of Chancery—and by the efficiency of the Chancery's equitable process.³³ To combat the insurgent jurisdiction of equity courts, the Bench streamlined its process and adopted a series of reforms designed to protect and expand its common-law authority.³⁴ The Bench deployed writs of *habeas corpus ad subjiciendum* to aggrandize its power, using the writ to decide the “lawfulness” of detentions ordered in matters otherwise beyond its territorial or subject-matter jurisdiction.³⁵ Custodians

See Trevor W. Morrison, Suspension and the Extrajudicial Constitution, 107 Colum. L. Rev. 1533, 1535 (2007).

²⁸ See Halliday, *supra* note 18, at 15; Daniel John Meador, Habeas Corpus and Magna Carta: Dualism of Power and Liberty 5 (1966).

²⁹ See R.J. Sharpe, *The Law of Habeas Corpus* 1–2 (1976).

³⁰ See Eve Brensike Primus, A Structural Vision of Habeas Corpus, 98 Calif. L. Rev. 1, 13 (2010).

³¹ See Blackstone, *supra* note 27, at *37–56, *68–70; 1 Sir William Holdsworth, *A History of English Law* 194–264, 395–476 (7th ed. rev. 1956).

³² See Blackstone, *supra* note 27, at *41, *47, *56.

³³ See J.H. Baker, *An Introduction to English Legal History* 47 (3d ed. 1990).

³⁴ See *id.* at 48; see also 2 Sir William Holdsworth, *A History of English Law* 456 (4th ed. 1936) (observing that competition from chancery alerted “even the most conservative common lawyer to the necessity of endeavouring to meet [the] demands” of an evolving society).

³⁵ See Halliday, *supra* note 18, at 9; Halliday & White, *supra* note 18, at 630; James E. Pfander, Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government, 91 Nw. U. L. Rev. 899, 917–20 (1997).

that did not comply with the writ were jailed or fined.³⁶ By providing a means to declare what custody was “lawful,” habeas became an awesome instrument of judicial power. Any judicial officer could issue a writ,³⁷ but the degree of expected compliance was, unsurprisingly, directly proportional to the judicial officer’s ability to enforce it.³⁸ As a result, King’s Bench justices, backed by Royal prerogative,³⁹ deployed the writ most extravagantly.⁴⁰ And they deployed it to custodians against whom they could enforce the laws most effectively—namely, those over whom the Bench had what we think of as personal jurisdiction.

When modern courts and theorists talk about habeas jurisdiction, they could be talking about the judicial power to do several different types of things: the power to entertain a habeas petition, the power to send a habeas writ, the power to adjudicate the lawfulness of detention, and the power to order relief from an unlawful detention. Collapsing those powers, which were distinct at English common law, confuses the question as to which powers the American habeas privilege guarantees and which ones Congress may restrict.

At this juncture, I should briefly describe the way habeas procedure worked at English common law.⁴¹ After the Norman Conquest in 1066, English courts began to use standard forms—writs—to order people to appear in court or to do other things. English courts did not want to write new writs every time someone asked for judicial process, so the courts began to use standardized writs that naturally dictated the types of relief that English subjects could request. Royal courts were not the only judicial instrumentalities operating in English territory, and so a judicial writ from a court exercising the Crown’s power was considered a privilege of English subjects. A habeas writ was a type of judicial order directed to entities that exercised custody over a prisoner. A prisoner asked a court

³⁶ See Halliday, *supra* note 18, at 11–14, 83.

³⁷ For example, Barons of Exchequer and Justices in Common Pleas could issue the writ. See Edward Jenks, *The Prerogative Writs in English Law*, 32 *Yale L.J.* 523, 525 n.7 (1923).

³⁸ See Halliday & White, *supra* note 18, at 598 n.49.

³⁹ The royal prerogative was a set of rights and authority that the Crown alone could exercise and enjoy. Prerogative writs issued in the name of the monarch and to the Crown’s courts. 1 Blackstone, *supra* note 27, *245.

⁴⁰ See Halliday, *supra* note 18, at 64–95 (explaining how King’s Bench used the Crown’s prerogative to consolidate power over custody); Halliday & White, *supra* note 18, at 599 n.54.

⁴¹ For a more thorough explanation of the evolution of the habeas writ during this period, see generally Brandon Garrett & Lee Kovarsky, *Habeas Corpus: Executive Detention and Post-Conviction Litigation* (forthcoming 2013).

or judicial officer to issue a habeas writ by petitioning or otherwise asking for it, and a court or judge “sent” the writ to a custodian. The custodian produced the prisoner and a “return” that would state the authority under which the prisoner was detained. The judge or court to which the habeas writ was returnable could then adjudicate the lawfulness of custody and, upon a finding that the custody was unlawful, fashion relief—including orders that the prisoner be bailed or discharged. Above all, the writ was adaptable, and judges developed procedures to pierce any jurisdictional formalities involved in the process just described.⁴²

Petitioning for the Writ. By the start of the seventeenth century, the habeas process began when the prisoner or someone acting on the prisoner’s behalf would make a request, usually by affidavit, that the writ be sent to the prisoner’s custodian. The writ issued as a matter of discretion, however, so the affidavit or other supporting material usually had to set forth the merits of the cause before a judge or court would send it. At least as early as the seventeenth century, judges began to use orders *nisi*—to show cause—in order to obtain the custodian’s response before deciding to send the writ.⁴³

Sending the Writ. Upon good cause shown, an English judicial officer then “sent” the habeas writ to a custodian, and the writ generally required the custodian to produce the prisoner in court, to state the cause of detention, and sometimes—particularly after the November 1627 *Case of the Five Knights* discussed in Subsection I.B.1—to provide the cause of arrest. Along with the increasing focus on the cause for arrest came a focus on the jurisdiction of any tribunal that ordered detention.⁴⁴ The writ could be sent to courts, jailors, and other public officials; recipients faced contempt for noncompliance.⁴⁵

The Return to the Writ. The writ acted *in personam* on the jailor.⁴⁶ It specified a recipient who was required to submit a written return and to produce the prisoner before a court or judge that could assess whether the jailor was exercising lawful custody. Habeas writs were literally pieces of paper, and so were the returns. The return might contain a jail-

⁴² See Diller, *supra* note 12, at 638 (describing habeas as a “protean” remedy).

⁴³ See Halliday, *supra* note 18, at 112–13 (detailing *nisi* procedure in a variety of habeas contexts); Kevin Costello, *Habeas Corpus and Military and Naval Impressment, 1756–1816*, 29 *J. Legal Hist.* 215, 216–18 (2008) (collecting rule *nisi* cases).

⁴⁴ See Halliday, *supra* note 18, at 53.

⁴⁵ See Halliday & White, *supra* note 18, at 599.

⁴⁶ See *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 494–95 (1973).

or's defense that common law, statute, or custom authorized the custody.⁴⁷ An order of custody pursuant to a criminal judgment usually proved that defense.

Disposition on Custody. Contrary to some accounts of common-law habeas practice, the existence of a valid warrant in the return was not enough to terminate the habeas inquiry—except in early cases of Crown-ordered detention.⁴⁸ English judges frequently looked past the return to scrutinize the legality of the substantive rule authorizing the detention.⁴⁹ Bench justices often considered facts outside the return, notwithstanding statutes arguably inconsistent with that practice.⁵⁰ English judges relieved unlawful detention using bail or discharge orders, but they could condition relief on almost anything.⁵¹ They infrequently awarded relief to criminally-confined prisoners because, on most occasions and under

⁴⁷ See Garrett, *supra* note 24, at 62.

⁴⁸ Compare, e.g., Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 *Notre Dame L. Rev.* 1079, 1147 n.311 (1995) (restating a rule that the “defendant” could not controvert facts in the return), with Halliday & White, *supra* note 18, at 610 (“In practice, however, justices of King’s Bench often considered facts that had not been asserted in the return, and even facts that appeared to contradict those in the return, especially when doing so assisted the scrutiny of detentions the justices seem to have disliked.”). In *Boumediene*, the Court observed that “the black-letter rule that prisoners could not controvert facts in the jailer’s return was not [consistently] followed . . . in such cases.” 553 U.S. at 780 (citations omitted); see also Halliday, *supra* note 18, at 107, 111, 117–19 (detailing case after case disproving the “rule” that facts in the return cannot be controverted).

⁴⁹ See Halliday & White, *supra* note 18, at 610.

⁵⁰ See Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 *Harv. L. Rev.* 2029, 2102 (2007) (“[C]ourts occasionally permitted factual inquiries when no other opportunity for judicial review existed.”); Eric M. Freedman, *Habeas Corpus in Three Dimensions: Dimension I: Habeas as a Common Law Writ*, 46 *Harv. C.R.-C.L. L. Rev.* 591, 595 (2011) (“[J]udges routinely considered extrinsic evidence such as in-court testimony, third party affidavits, documents, and expert opinions to scrutinize the factual and legal basis for detention. Employing a variety of procedural devices, they simply nullified the legalism that the custodian’s return to a writ of habeas corpus was conclusive as to the facts it contained.” (footnote omitted) (internal quotation marks omitted)); Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 *Mich. L. Rev.* 451, 457 (1966) (“[W]hen a prisoner applied for habeas corpus before indictment or trial, some courts examined the written depositions . . . and others even heard oral testimony to determine whether the evidence was sufficient to justify holding him for trial.” (footnotes omitted)); see also Halliday, *supra* note 18, at 111–12 (“[T]he return was not on record until filed. . . . Until then, and even before the writ issued, anything might be done to adduce facts. . . . The simplest way to explore all available facts . . . was to do so earlier in the process.”).

⁵¹ See David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 *Notre Dame L. Rev.* 59, 87 (2006) (citing Blackstone, *supra* note 27, at *134).

then-prevailing legal norms, a conviction was sufficient to show prior process that rendered custody lawful. There is no indication that Bench justices lacked *power* to inspect the custody of a convicted inmate,⁵² and there is no reason to believe other judges—limited by their ability to punish noncompliance—fashioned some quasi-jurisdictional limit on relief.

B. “Lawfulness” and Proof of Prior Process

The fundamental use of habeas at English common law was as a means to determine how much process in the underlying custody determination rendered it lawful.⁵³ The writ evolved most rapidly towards an instrument of judicial power during the bloody seventeenth-century English Civil Wars.⁵⁴ Judicial power to decide what counted as lawful detention was not a collateral detail in this legal change; judicial power to decide what lawful custody entailed was at the center of it. After a court obtained personal jurisdiction over a custodian, the court decided what lawful custody meant.

1. Judges Seizing the Prerogative

The fluid relationship between judges and sovereign power courses through the *Case of the Five Knights* (sometimes called *Darnel’s Case*)—one of the more significant disputes in English legal history, decided in 1627.⁵⁵ *Five Knights* centered on a dispute over whether a statement of Royal prerogative was sufficient to prove that custody was lawful.⁵⁶ Before the seventeenth century, habeas enabled judicial inquiry into the cause of *detention*, which was considered to be distinct from the cause of *arrest*. For that reason, a return indicating that the prisoner was held on the Crown’s instruction was sufficient to show the lawfulness of detention. Judges could much more effectively pierce the Royal prerogative if they could use habeas writs to demand that a custodian show

⁵² Cf. Halliday, *supra* note 18, at 308 (“[T]here had been little postconviction use of the writ in felony. But the writ had always been at its most effective when judges used it to address new problems.”).

⁵³ See *id.* at 7–8, 313–16; see also Garrett, *supra* note 24, at 57–63; Hamburger, *supra* note 12, at 1906–08.

⁵⁴ See *infra* Subsection I.B.1.

⁵⁵ See *The Case of the Five Knights*, (1627) 3 How. St. Tr. 1, 50 (K.B.).

⁵⁶ See Jared A. Goldstein, *Habeas Without Rights*, 2007 Wis. L. Rev. 1165, 1184 (2007).

cause for arrest; judges could order the prisoner released for having committed no specific legal wrong.⁵⁷

Five Knights was decided amidst military conflict and domestic political strife. To finance unpopular wars against France and Spain, King Charles I bypassed parliamentary funding and imprisoned various English subjects who refused to “repay” coerced Royal loans.⁵⁸ The Privy Council (the ancestor of the Cabinet) was the institution through which Charles detained those subjects, and five imprisoned knights sought habeas writs from King’s Bench.⁵⁹ The Conciliar return stated only that the knights were detained “by his majesty’s special commandment,” and provided no cause for the arrest.⁶⁰ The Bench held that a habeas writ commanding its recipient to disclose the cause of detention—which was lawful if ordered by the Crown—did not imply an order to show the cause of arrest.⁶¹ The idea that habeas bowed so easily to the Crown’s prerogative sparked public outrage, leading to two notable events in 1628. First, habeas writs sent from King’s Bench began to instruct custodians to show cause for the prisoner’s arrest,⁶² which in turn allowed judges to order relief in cases where cause was lacking.⁶³ In other words, judges increased the scope of review simply by placing more demands in the writ. Second, Parliament passed and Charles I assented to the Petition of Right.⁶⁴ The Petition of Right diminished the Royal prerogative, decreeing that no prisoner could be held “contrary to the Lawes and Franchise of the Land.”⁶⁵ These events accelerated the English struggle over the writ and, by implication, the power to craft and decide what constituted lawful custody under Magna Carta. These seventeenth-

⁵⁷ See Halliday, *supra* note 18, at 49.

⁵⁸ See Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 *Va. L. Rev.* 1421, 1424–25 (1999).

⁵⁹ See Robert J. Reinstein, *The Limits of Executive Power*, 59 *Am. U. L. Rev.* 259, 272 n.49 (2009).

⁶⁰ See Eric Schnapper, *The Parliament of Wonders*, 84 *Colum. L. Rev.* 1665, 1669 (1984) (reviewing *Commons Debates 1628* (Robert C. Johnson et al. eds., 1977)).

⁶¹ See *Five Knights*, 3 *How. St. Tr.* at 58–59.

⁶² See James S. Hart, Jr., *The Rule of Law, 1603–1660: Crowns, Courts and Judges* 129–30 (2003).

⁶³ See Halliday, *supra* note 18, at 51.

⁶⁴ See *Petition of Right, 1628*, 3 *Car.*, c. 1, §§ 1–11 (Eng.); see also *Boumediene*, 553 U.S. at 742 (explaining that the Petition of Right was a result of an “immediate outcry” over the *Five Knights* case).

⁶⁵ See *Petition of Right, 1628*, 3 *Car.*, c. 1, §§ 1–11 (Eng.).

century struggles transformed the writ from a means of enforcing the Crown's power into a judicial check on it.⁶⁶

Charles I violated the Petition of Right almost immediately, and he dissolved Parliament in 1629.⁶⁷ During the decade that followed—the “Personal Rule” or, less subtly, “The Eleven Years’ Tyranny”—Charles used the Royal prerogative to suppress religious minorities and political opposition.⁶⁸ To secure funding necessary to fend off the invading Scots, he again consented to a reallocation of power in 1640. He ceded royal authority to summon and dissolve Parliament,⁶⁹ abolished the Star Chamber,⁷⁰ and agreed that habeas returns asserting the Crown's prerogative specify the “true cause” of detention.⁷¹ Charles's 1649 regicide marked the inception of the short-lived Commonwealth of England. After Lord Protector Oliver Cromwell's death, Parliament restored Charles II to the throne in 1660.⁷² Charles II had only illegitimate sons, and so his brother, James II, Duke of York, was next in the line of royal succession. Parliament, concerned over James's Catholicism, enrolled several bills seeking to prevent his ascension. To prevent passage of those bills, Charles II dissolved Parliament four times between 1679 and 1681. Many parliamentary allies opposing James's succession became (understandably) wary of the Crown's power to imprison political enemies.

The Habeas Corpus Act of 1679, largely the result of abusive civil detention without bail, established new procedures for granting certain types of habeas writs.⁷³ In many respects, however, courts and theorists have exaggerated the historical importance of the 1679 Act.⁷⁴ Most post-1679 habeas writs sprung from authority at common law, not from the

⁶⁶ See Robert S. Walker, *The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty* 88 (1960); Meltzer, *supra* note 12, at 14 n.57; Morrison, *supra* note 27, at 1544.

⁶⁷ See Esther S. Cope, *Politics Without Parliaments, 1629–1640*, at 11–12 (1987).

⁶⁸ See Reinstein, *supra* note 59, at 272.

⁶⁹ See Maurice Ashley, *The English Civil War: A Concise History* 23–28 (1990).

⁷⁰ See Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)*, 53 *Ohio St. L.J.* 497, 541 (1992).

⁷¹ See Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 *Harv. Nat'l Security J.* 85, 114 (2011).

⁷² See John Witte, Jr., *Prophets, Priests, and Kings: John Milton and the Reformation of Rights and Liberties in England*, 57 *Emory L.J.* 1527, 1535–36 (2008).

⁷³ Habeas Corpus Act, 1679, 31 *Car. 2*, c. 2 (Eng.).

⁷⁴ See Halliday & White, *supra* note 18, at 612–13.

statute.⁷⁵ After 1679, however, the King and the Privy Council could short-circuit statutory habeas process only if Parliament suspended the writ.⁷⁶ The first of many seventeenth- and eighteenth-century parliamentary suspensions began a decade later.⁷⁷

After Charles II died, James II assumed power in 1685. When James II had a “legitimate” son—creating the prospect of a dynastic Catholic reign—Protestant nobility invited William, Prince of Orange, to invade England.⁷⁸ James abdicated,⁷⁹ and the Prince became King William III. The “Glorious Revolution” culminated in the English Bill of Rights,⁸⁰ which again reformulated English sovereign power. It required: (1) that the Crown had to govern through consent of the people, as embodied by Parliament; (2) that the Crown could not interfere with law; and (3) that Roman Catholics could not sit on England’s throne.⁸¹ While habeas corpus both produced and reflected changes in the way English power was redistributed during the seventeenth century, the common-law habeas writ produced far more institutional change than was any remedy created by Parliament. Specifically, the common-law writ was the means by which judges redefined the concept of “lawful custody,” making it a more exacting requirement—necessitating that a jailor show more than simply that a prisoner was detained at the Crown’s request.

2. Attacks on Criminal Convictions

The notion that, at English common law, there was some jurisdictional barrier to using habeas for post-conviction review is one of the most

⁷⁵ The 1679 Act did not establish any new right, privilege, remedy, or other form of legal entitlement. See Henry Hallam, *The Constitutional History of England*, 430–31 (9th ed. 1905); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 *Colum. Hum. Rts. L. Rev.* 555, 563 (2002). Moreover, courts continued to conduct inquiries and grant relief in ways that the 1679 Act did not authorize. See Hallam, *supra*, at 431–32. They did so pursuant to common-law writ authority. See *id.* at 432.

⁷⁶ See Hamburger, *supra* note 12, at 1908–09. In 1689, the Declaration of Rights ended royal power to suspend laws. See *Declaration of Rights, 1 W. & M., c. 2* (Eng.).

⁷⁷ See 17 *Geo. 3, c. 9* (1777) (Eng.); 19 *Geo. 2, c. 1* (1745) (Eng.); 17 *Geo. 2, c. 6* (1744) (Eng.); 9 *Geo. 1, c. 1* (1722) (Eng.); 1 *Geo. 1, c. 8* (1714) (Eng.); 7 & 8 *Will. 3, c. 11* (1696) (Eng.); 1 *W. & M., c. 19* (1688) (Eng.); 1 *W. & M., cc. 2, 7* (1688) (Eng.).

⁷⁸ See Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 *BYU L. Rev.* 1385, 1413 (2004).

⁷⁹ He fled to France; Parliament determined that he had abdicated for the purposes of determining the new king. See James H. Kettner, *The Development of American Citizenship, 1608–1870*, at 169 (1978).

⁸⁰ *The Bill of Rights, 1 W. & M., c. 2* (1688) (Eng.); see Witte, *supra* note 72, at 1536.

⁸¹ *The Bill of Rights, 1 W. & M., c. 2* (1688) (Eng.).

pervasive falsehoods in the habeas literature.⁸² This feat has been accomplished—most spectacularly by Chief Justice Marshall in *Ex parte Watkins*⁸³—by overstating the importance of the Habeas Corpus Act of 1679, which had language excluding convicted inmates from its coverage.⁸⁴ The common-law writ, however, was subject to no such limitation.⁸⁵ The historical evidence that the Supreme Court treated as authoritative in *Boumediene* punctures the enduring myth that English judges did not use habeas writs to collaterally review criminal convictions.⁸⁶

Although habeas took center stage during the mid-seventeenth-century conflict between King's Bench and the Crown, in an earlier age it was used against local Justices of the Peace ("JPs"), to cure overzealous use of the summary conviction process and to void associated orders to jail inmates.⁸⁷ King's Bench used habeas to review numerous facets of post-conviction imprisonment, both by JPs and by other courts, including: the factual accuracy of the return; the authority of a convicting court; the technicalities of a sentence; the findings pertaining to mental health; the severity of noncapital sentences; and the presence of extenuating circumstances.⁸⁸ Judges even used habeas to attach conditions to sentences and pardons.⁸⁹

Habeas was particularly central to review of one type of conviction: murder. King's Bench used the writ to reduce sentences for otherwise wrongful deaths upon post-conviction showings of extenuating circum-

⁸² See *infra* note 241 and accompanying text.

⁸³ *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830). I discuss *Watkins* extensively in Section III.B, *infra*.

⁸⁴ See *Watkins*, 28 U.S. (3 Pet.) at 202 ("[T]he celebrated *habeas corpus* act of the 31st of Charles II was enacted, for the purpose of securing the benefits for which the writ was given. . . . It enforces the common law. This statute excepts from those who are entitled to its benefit . . . persons convicted or in execution. The exception of persons convicted applies particularly to the application now under consideration.").

⁸⁵ See *infra* notes 250–55 and accompanying text (explaining that Chief Justice Marshall confused the 1679 Act's supplementary habeas provisions with limits on the common-law writ).

⁸⁶ See Vladeck, *supra* note 12, at 981 ("[T]he statutory writ was just one piece of the puzzle, and there was ample evidence that King's Bench could issue the *common law* writ to consider the validity of convictions, whether by courts-martial or courts of record. Relying solely on the Habeas Corpus Act of 1679 provides a decidedly truncated lens through which to examine English practice. Whether he misunderstood English history or misrepresented it, Chief Justice Marshall thereby perpetuated a critically incorrect assumption about the scope of common law habeas corpus at the Founding." (footnotes omitted)).

⁸⁷ See Halliday, *supra* note 18, at 106–07, 117, 149.

⁸⁸ See *supra* notes 48–49 and accompanying text.

⁸⁹ See Halliday, *supra* note 18, at 118.

stances.⁹⁰ After conviction, it used habeas to police the distinction between murder and homicide.⁹¹ Moreover, much of this post-conviction review was also post-judgment.⁹² The more questionable the process that produced judgments of conviction, the more intense the habeas scrutiny conducted by King's Bench.⁹³ Although habeas review was most aggressive for JP convictions and homicide offenses, King's Bench also used the writ to conduct post-conviction review of a number of other crimes, such as burglary and treason.⁹⁴ By the outbreak of war in the American colonies, the writ's most salient characteristic was that it could be used to scrutinize detention of any form: criminal convictions, military imprisonment, naval impressment, slavery, and apprenticeship, to name a few.⁹⁵ Its function was to help judges decide how much and what kind of custodial process produced lawful detention.

C. Suspension

Even parliamentary suspension affected only the requirement that a custodian respond to the writ and the power of judges to order bail or discharge, and only for a specified time period. Nothing about judicial activity during suspension suggests a limit on non-suspended habeas power.

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See Neuman, *supra* note 75, at 612 (“[C]ommon law courts of general jurisdiction were sparing in using [the habeas writ] against each other, particularly after judgment in a criminal case. Nonetheless, the common-law inheritance in 1789 included precedents in which it had been used, and statements concerning when it might be used, that contradicted or qualified other statements of its unavailability.”); see also Halliday, *supra* note 18, at 119 (“Using habeas corpus, King’s Bench reviewed *judgments* and attached increasingly creative demands to offers to reduce sentences, *just as they did when offering bail prior to conviction.*” (emphasis added)).

⁹³ See Halliday, *supra* note 18, at 119–20 (“In summary process, there were no indictments, no presentments, no pleadings, no juries: JPs’ orders, by themselves, produced legal convictions. Habeas corpus was the chief means for reviewing such summary convictions. Summary conviction cases demonstrated how far the justices of King’s Bench would go in entering and monitoring another jurisdiction, especially the jurisdiction of these amateur judges.”).

⁹⁴ See *Rex v. Collyer*, (1752) 96 Eng. Rep. 797 (K.B.) (granting habeas discharge after conviction at quarter session, on the ground that the inmate could not remain “in prison under the illegal parts of this judgment, until they can obtain a reversal of those parts upon a writ of error”); Halliday, *supra* note 18, at 118–19.

⁹⁵ See Halliday, *supra* note 18, at 120–21.

By 1689, habeas procedure was a creature of both common law and statute.⁹⁶ Power to issue the writ could arise under either source,⁹⁷ although the common-law writ was by a wide margin the greater authority. Because England had no written constitution, the pre-1679 restrictions on suspension were rooted in norm and custom—not in positive law.⁹⁸ The Crown’s suspension authority was one of the things that parliamentary allies sought most aggressively to wrest from royal control, and, by 1689, Parliament had secured its own monopoly over the power.⁹⁹ Parliament, however, was hardly judicious with suspension authority. It suspended the writ three times that year,¹⁰⁰ and nine more times before the outbreak of war in the American colonies.¹⁰¹ For my purposes, the types of practices the “suspension power” impaired and when it impaired them are important because the habeas powers that judges retained during and after suspensions disclose much of what the steady-state privilege entailed.

The formalism of pre-eighteenth century suspension statutes contrasts starkly with the fluidity of habeas process.¹⁰² First, even describing these parliamentary enactments as “habeas suspension statutes” is a bit misleading—not a single one of them used the terms “suspend” or “habeas

⁹⁶ See supra notes 67–79 and accompanying text.

⁹⁷ See Robert Searles Walker, *Habeas Corpus Writ of Liberty: English and American Origins and Development* 107 (2006) (noting that, notwithstanding important statutes such as Magna Carta and the 1679 Habeas Corpus Act, English law could not “point to a single, supreme originating instrument” that restricted parliamentary authority); Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process, and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 Va. L. Rev. 1361, 1368 (2010) (“Despite the ‘spiritual importance’ of both the Magna Carta and the writ of habeas corpus to the foundations of the unwritten British constitution, the documents’ mandates . . . were never deemed legally binding on Parliament.”).

⁹⁸ See Shapiro, supra note 51, at 83; Tyler, supra note 9, at 616.

⁹⁹ See John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 47, 49 (2001).

¹⁰⁰ See 1 W. & M., c. 19 (1688) (Eng.); 1 W. & M., c. 7 (1688) (Eng.); 1 W. & M., c. 2 (1688) (Eng.).

¹⁰¹ See 20 Geo. 2, c. 1 (1747) (Eng.); 19 Geo. 2, c. 17 (1746) (Eng.); 19 Geo. 2, c. 1 (1746) (Eng.); 17 Geo. 2, c. 6 (1744) (Eng.); 9 Geo. 1, c. 1 (1722) (Eng.); 1 Geo. 1, c. 30 (1715) (Eng.); 1 Geo. 1, c. 8 (1714) (Eng.); 6 Ann., c. 15 (1707) (Eng.); 7 & 8 Will. 3, c. 11 (1695–1696) (Eng.).

¹⁰² See 34 Geo. 3, c. 54 (1794) (Eng.) (authorizing detention of certain persons “without Bail or Mainprize, until the first Day of *February* one thousand seven hundred and ninety-five”); A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 230 (10th ed. 1964) (noting that “every [suspension] has been an annual Act, and must, therefore, if it is to continue in force, be renewed year by year”).

corpus.” Instead, they created royal authority for the exercise of two familiar but conceptually distinct powers—to arrest and to detain.¹⁰³ The statutes empowered the Crown to lawfully apprehend (arrest) and imprison without “bail or mainprize” (detain). Nothing in these acts actually interrupted the habeas “power” to hear a habeas motion, to issue a writ, or to hear the cause upon the return. Certain officials did not have to provide a return, and individuals for whom the Parliament suspended the privilege would not be released, but judges could (and did) issue common-law habeas writs for exercises of power beyond the statutory authorization.¹⁰⁴

Second, the suspension statutes always specified a sunset date, and the average duration of a suspension period was five months.¹⁰⁵ Each suspension statute provided that, when it expired, subjects imprisoned under the act would have the benefit of any law or statute providing for their liberties.¹⁰⁶ This language restored all statutory procedure under the 1679 Habeas Act, as well as any common-law privileges that the suspension acts might have diminished. By subjecting both the arrest and the detention powers to sunset provisions, prisoners arrested pursuant to the expanded suspension authority could still be discharged after the suspension period lapsed.¹⁰⁷

English suspension statutes applicable in American colonies were different from the seventeenth- and early-eighteenth-century statutes used to preserve the continuity of the English empire during its civil wars. Most notably, the event necessitating the colonial suspension statute was not a rebellion or invasion. The statute recited that it was “inconven-

¹⁰³ See Tyler, *supra* note 9, at 665 (“One need only think back to the English suspensions of the sixteenth and seventeenth centuries and the pre-Convention suspensions in the colonies, which by their terms ‘authorized and empowered’ the executive to arrest and detain certain classes of persons.”).

¹⁰⁴ See Halliday, *supra* note 18, at 249 (noting that judges sent common-law habeas writs during periods of suspension); *id.* at 250 (“[T]he common law writ persisted throughout, ready for use, at least on the king’s behalf, even during suspensions.”).

¹⁰⁵ Halliday & White, *supra* note 18, at 622.

¹⁰⁶ See, e.g., 7 & 8 Will. 3, c. 11 (1695–1696) (Eng.) (“Provided always, [t]hat from and after the said [date the statute expired], the said Persons soe [sic] committed shall have the Benefitt [sic] and Advantage of . . . [all] Laws and Statutes any way relating to or providing for the Liberty of the Subjects of this Realme [sic] . . .”).

¹⁰⁷ See Halliday, *supra* note 18, at 250 (observing that Chief Justice Sir John Holt’s court released eighty percent of the prisoners brought before it in the period immediately following the 1689 suspension, as well as all prisoners detained pursuant to conciliar warrant in the period immediately following 1696 suspension: “[W]hen suspension ended, the writ sprang immediately back to life, as usage on the first day of term after each suspension shows”).

ient . . . to proceed . . . to the Trial of such Criminals, and at the same Time of evil Example to suffer them to go at large.”¹⁰⁸ The Framers responded to that recitation pointedly, providing that the writ could not be suspended except in times of rebellion or invasion.

Nothing about the statutory writ or the suspension power affected habeas authority outside the suspension period. Even as to habeas authority within that period, a suspension only (1) relieved custodians of the obligation to provide a return to the writ in certain cases, and (2) curtailed the habeas power of common-law judges to bail or discharge prisoners to whom the suspension applied. To whatever extent America inherited English writ law, that inheritance did not include anything like a jurisdictional limit on the types of custody judges could review or on the forms such review could take. Moreover, the most important feature of the English common-law writ was that it allocated to judges the power to decide what process rendered custody lawful.

II. PRINCIPLE 1: HABEAS AS FEDERAL JUDICIAL POWER TO REVIEW FEDERAL CUSTODY

Part I showed that courts and theorists should not treat modern habeas restrictions as pond-hopping limits native to English common law. The Framers, however, did not just adopt the English writ; they reconstituted habeas process in a new constitutional environment of dual sovereignty, separated powers, and limited judicial authority. Part II presents a structural argument in favor of the first principle of habeas power—that, in the absence of suspension, Article III ensures *federal* habeas process for *federal* prisoners.¹⁰⁹ Habeas power means a sovereign judicial officer’s authority to review custody pursuant to some other order of that same sovereign.¹¹⁰

Part II responds to two theories that are inconsistent with the principle that Article III vests and the Suspension Clause protects the power of a

¹⁰⁸ 17 Geo. 3, c. 9 (1777) (Eng.).

¹⁰⁹ If the Federal Constitution guarantees any habeas access, the question of whether the Suspension Clause would protect the power of state or of federal judicial officers is a “standard crux in the federal courts literature.” Neuman, *supra* note 6, at 557. Much of my discussion in Part II deals with the argument that the Suspension Clause might protect the authority of state judges to grant habeas relief, particularly to federal prisoners.

¹¹⁰ If the Federal Constitution guarantees some habeas process in federal court for state prisoners or in state court for federal prisoners, then that principle must arise under a combination of the Suspension Clause, Article III, and some other constitutional provision. See *infra* Section III.D.

federal judge to review federal custody. What I call the “Null Power Hypothesis” is the idea that the Constitution guarantees no federal habeas power at all. What I call the “Inter-sovereign Habeas Hypothesis” treats the Suspension Clause as a guarantee of *state* habeas power to consider *federal* custody. Both theories are inconsistent with: the historical record, the idea that suspension conditions restrict a sovereign’s rules for its own judges, and with *Boumediene v. Bush* itself.

A. Conceptualizing Habeas as Article III Judicial Power

Whatever the formal denomination of a habeas writ—as a right, a privilege, or a remedy—prisoner access to that process is secured by the combination of automatically-vested Article III judicial power and the Suspension Clause. I do not argue that the Federal Constitution automatically vests all Article III power in federal courts,¹¹¹ that state courts cannot adjudicate Article III subject matter,¹¹² that federal courts derive any jurisdiction from common law,¹¹³ or that Congress must create and vest any other Article III Judicial Power in an Article III court.¹¹⁴ I present a theory of power that is specific to habeas authority, and it is not applicable to other forms of federal jurisdiction.

¹¹¹ Notwithstanding the Article III, Section 2 directive that the United States’ judicial power “shall be vested” in the Supreme and inferior federal courts, Congress has never vested all Article III power in federal courts; a rule that all judicial power automatically vests would be wildly incompatible with substantial precedent. See Martin H. Redish & Curtis E. Woods, Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis, 124 U. Pa. L. Rev. 45, 46–47 (1975).

¹¹² State courts are often permitted, or even required, to adjudicate certain Article III subject matter. See *infra* note 228. Indeed, because the Madisonian Compromise meant that Congress was not required to ordain and establish lower federal courts, there are certain permissible configurations of judicial power in which state courts are the primary enforcers of federal law. Moreover, even in the world where inferior federal courts do exist, they have some power to award relief against federal officials. See, e.g., *Scranton v. Wheeler*, 179 U.S. 141, 151–52 (1900) (assuming that state courts can eject federal officers); *Buck v. Colbath*, 70 U.S. (3 Wall.) 334, 346–47 (1866) (sustaining jurisdiction in case alleging tortious conduct against federal officials).

¹¹³ I only mean to say that common law, of its own force, does not create federal jurisdiction. The common law may, of course, supply various rules of decision in cases where the Federal Constitution or a statute creates federal jurisdiction.

¹¹⁴ See Francis Paschal, *The Constitution and Habeas Corpus*, 1970 Duke L.J. 605, 607 (setting forth a similar set of caveats).

I argue that habeas power vests in an Article III judge without enacting legislation.¹¹⁵ I do not, therefore, subscribe to the “Obligation Theory” that Chief Justice Marshall announced in *Ex parte Bollman*:

Acting under the immediate influence of [the Suspension Clause], [the Framers] must have felt . . . the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.¹¹⁶

The Chief Justice is making a case for why the Court should read Section 14 of the 1787 Judiciary Act to include habeas jurisdiction, and he did so by raising the specter of a “lifeless” writ in the absence of such a statutory reading. The availability of process may be contingent on some antecedent congressional action—ordaining and establishing courts and populating them with Article III judicial officers¹¹⁷—but the availability of such process requires no further statutory authorization.¹¹⁸ Professor Francis Paschal has made a similar “automatically-vesting” argument, although Professor Paschal (1) believed that habeas power was enjoyed by all superior courts of record and for all custody (whether state or fed-

¹¹⁵ Several have argued in favor of a broader idea that judicial power vests automatically in Article III courts. See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 327–37 (1816); 2 Joseph Story, *Commentaries on the Constitution of the United States* 395–97 (Thomas M. Cooley ed., 4th ed., Boston, Little, Brown, and Co. 1873); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 *Colum. L. Rev.* 1515, 1521–23 (1986).

¹¹⁶ *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807). The term obligation theory refers more generally to the idea that Congress had to vest most or all of Article III jurisdiction in federal courts. See Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 *Mich. L. Rev.* 862, 873 (1994).

¹¹⁷ See U.S. Const. art. III, § 1. Professor Paul Freund took the position that “[t]here must, to be sure, be courts legislatively created before the writ of habeas corpus can be employed. But having established Federal courts Congress would be powerless to deny the privilege of the writ. Otherwise Article I, section 9 would be reduced to a dead letter.” Brief for Respondent at 29, *United States v. Hayman*, 342 U.S. 205 (1952) (No. 23) [hereinafter Freund, *Hayman Brief*].

¹¹⁸ Cf. *INS v. St. Cyr*, 533 U.S. 289, 304 n.24 (2001) (arguing that there would be constitutional defects with a judiciary constituted without habeas access, notwithstanding Chief Justice Marshall’s language in *Bollman*). The Supreme Court does not require an enabling statute to exercise its original jurisdiction. See *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 300 (1888).

eral), and (2) attributed that result primarily to the Suspension Clause.¹¹⁹ I ultimately disagree with both of those propositions.

Boumediene has language supporting the idea that Article III automatically vests habeas jurisdiction in federal judges appointed with the advice and consent of the Senate. It expressly recognizes that the Federal Constitution protects “liberty” by vesting a limited suspension power in Article I, but also by vesting *judicial power* to grant habeas relief in the first place: “The Clause protects the rights of the detained by affirming the *duty and authority of the Judiciary* to call the jailer to account.”¹²⁰ The Court does not say that the habeas power springs from the Suspension Clause—locating the source of a core judicial power in Article I would be a little strange—but says that the Clause affirms the power of the judiciary to use habeas proceedings to review sovereign custody. *Boumediene* expressly applies the “Suspension Clause mandate” at GTMO,¹²¹ but the Supreme Court’s holding—that the federal detainees had constitutionally-required access to the writ—makes sense only if the Court also applied whatever constitutional provision created the habeas authority to begin with. (Article I, Section 9 contains only suspension conditions.) *Boumediene*’s “Suspension Clause mandate” phrasing must be inadvertent, unless the Court intended an unlikely holding that the pertinent “duty and authority of the judiciary” arises only under Article I of the Federal Constitution.¹²² What the Court accomplishes by applying

¹¹⁹ See Paschal, *supra* note 114, at 607.

¹²⁰ *Boumediene*, 553 U.S. at 745 (emphasis added); see also *id.* at 787 (“[W]hen the *judicial power* to issue habeas corpus properly is invoked the *judicial officer* must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner’s release.” (emphasis added)).

¹²¹ *Id.* at 771; see also *id.* at 746 (citing *St. Cyr*, 533 U.S. at 300–01); *id.* at 739 (“In deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or *invoking the protections of the Suspension Clause . . .*” (emphasis added)).

¹²² Some scholars have apparently embraced the idea that the Suspension Clause is the source of the habeas guarantee. See Neuman, *supra* note 6, at 541 (“[*Boumediene*] expounded the Suspension Clause as guaranteeing the preservation of habeas corpus jurisdiction or an equivalent means of judicial inquiry into the lawfulness of detention.”). A more precise opinion might say that the Suspension Clause provides the exclusive legislative authority for restricting legislative power, but in that case the “protections” of the prisoners arise from some other part of Article I, not § 9. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting).

the Suspension Clause is to prohibit Congress from restricting habeas power *except by means of suspension*.¹²³

Consistent with eighteenth- and nineteenth-century law, the habeas power vests in judges, not just courts. English common-law judges could, in their individual capacities, entertain the petition, award the writ to adjudicate lawfulness, and order discharge.¹²⁴ The 1789 Judiciary Act authorized both judges and courts to issue the writ, and was arguably far more concerned with the power of the judicial officer than the power of the court itself.¹²⁵ Habeas statutes in 1833 and 1842 granted to federal judges a limited habeas power over state custody.¹²⁶ The 1867 Habeas Act, which statutorily provided for federal habeas review of state custody, specifies the power of both courts and judges. The modern habeas statute permits both Supreme Court Justices and other federal judges to grant the writ,¹²⁷ and authorizes the Justices to transfer declined habeas applications to district courts.¹²⁸ None of this is to say that individual judges could exercise the types of habeas power that judicial officers have historically enjoyed without any review, but it is to say that the habeas powers of courts and of judges were distinct.¹²⁹ Earlier scholars emphasizing the role of judges have argued that the “Suspension Clause” is not violated if individual Supreme Court Justices retain authority to grant the writ.¹³⁰ My position differs in at least three respects. First, the habeas powers described herein belong primarily to judicial officers, and only secondarily to courts. Second, these powers automatically vest in all Article III judges, not just Supreme Court Justices. Third,

¹²³ The Court was more precise when it stated, “If the privilege of habeas corpus is to be denied to [the GTMO detainees], Congress must act in accordance with the requirements of the Suspension Clause.” *Boumediene*, 553 U.S. at 771.

¹²⁴ See supra notes 35–40 and accompanying text.

¹²⁵ Describing exactly how much power the 1789 Act gave the Supreme Court remains a matter of academic dispute. See infra Section II.C. To summarize, however, I find Chief Justice Marshall’s argument in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807)—that § 14 of the 1789 Judiciary Act authorized the Supreme Court to grant habeas writs—unpersuasive. That authority was plainly given to individual justices, however.

¹²⁶ See Act of Aug. 29, 1842, ch. 257, 5 Stat. 539; Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634–35.

¹²⁷ See 28 U.S.C. § 2241(a) (2006).

¹²⁸ See id. § 2241(b).

¹²⁹ See Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. Rev. 251, 271–76 (2005) (providing historical overview of habeas power exercised by individual judges).

¹³⁰ See id. at 289–90.

under the Habeas Power Theory, a non-suspending restriction would violate Article III, not just the Suspension Clause.

B. Founding Support for the First Principle

For the Founding generation, habeas was not an obscure artifact of English writ practice. The American colonists were intimately familiar with the privilege and suspension. King George III suspended the writ, pursuant to parliamentary authorization, six times during the Revolutionary War.¹³¹ American colonists followed habeas proceedings during these suspension periods closely.¹³² Newspapers extensively covered cases where Americans were bailed after habeas proceedings.¹³³ George Washington stated as a public grievance that the British Suspension Acts were means by which the King secured arbitrary imprisonment.¹³⁴ No less public an authority than Edmund Burke published a pamphlet, broadly circulated in America, that attacked the suspension statutes as an affront to ancient English tradition.¹³⁵

The Framers shared the public's nuanced understanding of the relationship between the privilege and suspension authority. In every colony, prisoners enjoyed a habeas privilege—usually the common-law variety—although at least one colony modeled a statutory privilege on the Habeas Corpus Act of 1679.¹³⁶ American colonists were extraordinarily familiar with Blackstone's Commentaries, which contained what were perceived as canonical statements about the writ, its relationship to Magna Carta, and suspension.¹³⁷ Moreover, the Framers were familiar

¹³¹ See 22 Geo. 3, c. 1 (1782) (Eng.) (renewal); 21 Geo. 3, c. 2 (1781) (Eng.) (renewal); 20 Geo. 3, c. 5 (1780) (Eng.) (renewal); 19 Geo. 3, c. 1 (1779) (Eng.) (renewal); 18 Geo. 3, c. 1 (1778) (Eng.) (renewal); 17 Geo. 3, c. 9 (1777) (Eng.).

¹³² See Justin J. Wert, *Habeas Corpus in America: The Politics of Individual Rights* 33 (2011).

¹³³ See Halliday, *supra* note 18, at 253.

¹³⁴ See George Washington, *Manifesto of General Washington, Commander in Chief of the Forces of the United States of America, in Answer to General Burgoyne's Proclamation*, *Continental J. & Wkly. Advertiser*, Mar. 5, 1778, at 3, *cited in* Halliday & White, *supra* note 18, at 649.

¹³⁵ See Edmund Burke, *Speech on Conciliation with the Colonies in the House of Commons* (Mar. 22, 1775), *in* Edmund Burke: *Selected Writings and Speeches 176–222* (Peter J. Stanlis ed., 2009).

¹³⁶ See generally Garrett & Kovarsky, *supra* note 41 (collecting supporting authority and describing English privilege as "received" through colonial statutory or decisional law).

¹³⁷ See 1 Blackstone, *supra* note 27, at *134–36; 4 Blackstone, *supra* note 27, at *129; 5 Blackstone, *supra* note 27, at *438.

with the Massachusetts Suspension Clause, which served as a model for Article I, Section 9 clause 2.¹³⁸ Unlike the Federal Suspension Clause, the Massachusetts language expressly required that the habeas privilege be enjoyed “in the most free, easy, cheap, expeditious and ample manner.”¹³⁹ With the Massachusetts constitution in mind, South Carolinian Constitutional Convention Delegate Charles Pinckney proposed a Suspension Power using a clause worded to acknowledge a habeas privilege. The proposal ultimately went to the Committee on Detail, where several members supported language that would have categorically barred suspension.

According to James Madison’s chronicle, on August 20, 1787, Pinckney’s draft constitution provided that: “The privileges and benefit of the Writ of Habeas corpus shall be enjoyed in this Government in the most expeditious and ample manner; and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding __ months.”¹⁴⁰

On August 28: Pinckney urged the approval of similar language from Madison’s August 20 entry (omitting language of an affirmative guarantee); John Rutledge sought to have habeas declared inviolable because Congress would never have to suspend the privilege across the whole country; Committee on Style and Arrangement Chair Gouverneur Morris moved that the language be, “The privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it”; and James Wilson questioned whether there needed to be any authority to suspend, in light of the fact that judges retained the ultimate discretion regarding conditions of release.¹⁴¹ When Pinckney initiated proceedings on August 28, he did not include an enjoyment clause in the proposed Suspension Clause text, apparently because he thought it was unnecessary. He introduced his proposal by “urging the propriety of securing the benefit of the Habeas Corpus in the most ample manner.”¹⁴² Significantly, on August 28, the

¹³⁸ See Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 972 (1998).

¹³⁹ Mass. Const. pt. 2, ch. VI, art. VII.

¹⁴⁰ See James Madison, *Notes on the Constitutional Convention* (Aug. 20, 1787), in 2 *The Records of the Federal Convention of 1787*, at 341 (Max Farrand ed., 1966).

¹⁴¹ See *id.* at 438.

¹⁴² William F. Duker, *A Constitutional History of Habeas Corpus* 129 (1980); see also Paschal, *supra* note 114, at 610 (“Clearly, as to Pin[c]kney, reliance on the negative phraseology did not connote any retreat.”).

Committee was already very familiar with the Madisonian Compromise, the principle that Congress would not have to create lower courts.¹⁴³ The fact that they were familiar with the Madisonian Compromise when they accepted the extant wording of the Suspension Clause ends up being a significant piece of evidence in favor of the first principle of habeas power.

All ten states voting on Morris's proposed text agreed to the portion preceding the word "unless"—that "[t]he privilege of the writ of Habeas Corpus shall not be suspended."¹⁴⁴ The remainder of Morris's proposed language, "unless where in cases of Rebellion or invasion the public safety may require it," was approved 7-3, with Georgia, North Carolina, and South Carolina voting no.¹⁴⁵ (Some time between that vote and the final draft of the Clause, the word "where" was changed to "when.")¹⁴⁶

There were a number of changes between Pinckney's version of the Clause that appeared in Madison's August 20 notes and the version that the Convention ultimately approved, but the elimination of the explicit reference to enjoyment does not mean that the Framers did not intend to guarantee the privilege. In fact, quite the opposite seems true. The three states voting against the second part of Morris's formulation wanted there to be no suspension power whatsoever.¹⁴⁷ In other words, some states wanted that guarantee made express, but the Framers appeared to agree unanimously that express language was not necessary to secure the desired meaning.¹⁴⁸

The "yes" votes also suggest that the Federal Constitution created a habeas power. Wilson, in a speech to the Pennsylvania Convention, stated that he meant "to show the reason why the right of habeas corpus was secured by a particular declaration in its favor."¹⁴⁹ In Federalist 83, Hamilton stated that the Habeas Corpus Act was "provided for . . . in the

¹⁴³ The Madisonian Compromise was affirmed by the Convention on July 18 and reaffirmed by the Committee on Detail on August 6. See Edmund Randolph, Suggestion for Conciliating the Small States (July 10, 1787), *reprinted in* 3 Farrand, *supra* note 140, at 55–56; 2 Farrand, *supra* note 140, at 183, 186, 188 (Wilson-Rutledge draft of final Committee Report).

¹⁴⁴ See 2 Farrand, *supra* note 140, at 438.

¹⁴⁵ See *id.*

¹⁴⁶ See *id.* at 596.

¹⁴⁷ See Paschal, *supra* note 114, at 611.

¹⁴⁸ See *id.* at 608–09, 611.

¹⁴⁹ 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 108–09 (Jonathan Elliot ed., 1861), *cited in* Paschal, *supra* note 114, at 611 n.23 [hereinafter Elliot's Debates] (emphasis omitted).

plan of the convention.”¹⁵⁰ In Federalist 84, he wrote that “[t]he establishment of the writ of *habeas corpus*, the prohibition of *ex post facto* laws, and of titles of nobility, to which we have no corresponding provisions in [the New York] constitution, are perhaps greater securities to liberty and republicanism than any it contains.”¹⁵¹ Federalist 84, in fact, was almost entirely dedicated to the idea that the failure to enumerate specific rights in the constitution should not be interpreted as a failure to provide for or recognize them.¹⁵²

To be clear, I doubt that the Framers, the ratifying conventions, and the broader body politic shared a fixed understanding of the way the Suspension Clause interacted with the rest of the Federal Constitution. There is nevertheless considerable historical evidence that the Constitution created habeas power for federal judicial officers to scrutinize federal custody.

C. Competing Theories

Resistance to the idea that the Federal Constitution guarantees some quantum of habeas process partially reflects a riddle involving *Marbury v. Madison*¹⁵³ and the Madisonian Compromise.¹⁵⁴ According to these theories, a constitutionally-vested Article III habeas power would be difficult to reconcile with the following maxims of federal jurisdiction: (1) that Congress cannot add to the original jurisdiction of the Supreme Court (*Marbury*) and (2) that inferior federal courts are optional (the Madisonian Compromise).¹⁵⁵ In a world where there are no lower courts and where the Supreme Court could not exercise original jurisdiction in habeas cases, the argument is that there can be no federal habeas power. The implication is that there can be no constitutional prohibition on legislation stripping the habeas jurisdiction of federal courts and judicial officers.

There are two major theories trafficking in this riddle. According to the first, what I call the “Null Power Hypothesis,” the Federal Constitu-

¹⁵⁰ The Federalist No. 83, at 562–63 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961).

¹⁵¹ The Federalist No. 84, at 577 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

¹⁵² See *id.*

¹⁵³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹⁵⁴ See Hartnett, *supra* note 129, at 275–89; Stephen I. Vladeck, *The Riddle of the One-Way Ratchet: Habeas Corpus and the District of Columbia*, 12 *Green Bag 2d* 71, 71–72 (2008).

¹⁵⁵ See Neuman, *supra* note 6, at 557.

tion guarantees no habeas access whatsoever. According to the second, what I call the “Inter-Sovereign Habeas Hypothesis,” the Federal Constitution provides for no *federal* habeas power and the Suspension Clause prohibits interference only with *state* habeas power. Both of these theories are implausible, albeit for slightly different reasons.

1. The Null Power Hypothesis

The Null Power Hypothesis goes something like this: If Article I does not require Congress to establish inferior federal courts (what the Madisonian Compromise says), and if the Supreme Court cannot issue habeas writs pursuant to its original jurisdiction (what *Marbury* and *Ex parte Bollman* say),¹⁵⁶ then the Constitution cannot guarantee any habeas access at all. In a world with no inferior Article III courts, there would be no court with jurisdiction to issue the writ. The most prominent decisional endorsement of the Null Power Hypothesis comes from Justice Antonin Scalia, in his *INS v. St. Cyr* dissent.¹⁵⁷ Justice Scalia, in turn, relied on an influential mid-century article by Professor Rex Collings, which selectively cited some of the aforementioned evidence regarding the Clause’s drafting history.¹⁵⁸ Justice Scalia remarked: “Indeed . . . four of the state ratifying conventions [objected] that the Constitution failed affirmatively to guarantee a right to habeas corpus.”¹⁵⁹ Justice Scalia is correct in the sense that ratifying conventions had those reservations, but he draws exactly the wrong conclusion. He seems to imply that the Suspension Clause was ratified because the states-in-favor wanted there to be no provision for enjoyment of the privilege. As Section II.B demonstrates, however, the reason that the Clause was passed over the objections was because the existence of the habeas privilege was presumed.¹⁶⁰ An affirmative reference to the privilege was almost certainly omitted so that the habeas remedy would not, by negative im-

¹⁵⁶ See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807); *Marbury*, 5 U.S. (1 Cranch) at 137. *Bollman* held that the Supreme Court could issue poorly denominated “original” habeas writs only pursuant to its *appellate* jurisdiction specified in Article III, § 2. See 8 U.S. (4 Cranch) at 101.

¹⁵⁷ See 533 U.S. 289, 337 (2001) (Scalia, J., dissenting) (“A straightforward reading of this text discloses that it does not guarantee any content to (or even the existence of) the writ of habeas corpus . . .”).

¹⁵⁸ See Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 Calif. L. Rev. 335, 341–42 (1952).

¹⁵⁹ See *St. Cyr*, 533 U.S. at 337 (Scalia, J., dissenting).

¹⁶⁰ See *supra* notes 144–52 and accompanying text.

plication, disparage any rights and immunities that the Constitution did mention.¹⁶¹

The Null Power Hypothesis also treats *Marbury* and *Ex parte Bollman*, canonical decisions by the Marshall Court, as dispositive evidence of what Article III, Section 2 meant when it was drafted and ratified.¹⁶² Whatever the influence those opinions continue to exert on habeas law, they are poor evidence of original meaning.

Article III, Section 2 subdivides the “judicial Power” into nine categories of cases (“heads”), designating six heads as the subject of the Supreme Court’s appellate jurisdiction and three heads as the subject of its original jurisdiction.¹⁶³ In *Marbury*, the Court held that Congress could not accrete or diminish the Court’s original jurisdiction.¹⁶⁴ Several years later, *Ex parte Bollman* decided the question of whether the Supreme Court could exercise jurisdiction over “original habeas petitions”—habeas petitions filed with the Court in the first instance.¹⁶⁵ Most assumed that *Bollman* would be the death knell for original habeas jurisdiction, but the Marshall Court held that, as long as *original* habeas authority was used to review some inferior judicial determination, it was a constitutionally permissible exercise of *appellate* power under Article III, Section 2.¹⁶⁶ *Bollman* was actually two holdings: (1) that any original habeas authority exercised had to be pursuant to a grant of appellate power; and (2) that the Judiciary Act of 1789 granted such jurisdiction. In making the first holding, the Court remarked that “for 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.”¹⁶⁷

That language has generated two centuries of confusion about whether the Federal Constitution guarantees habeas process or not. *Marbury* and *Bollman* should not straightjacket judicial power to conduct habeas process, for two reasons. First, I doubt that *Marbury* correctly captured how Section 2 permits Congress to distribute Article III judicial power. Article III was instead supposed to set a floor for original jurisdiction

¹⁶¹ See *supra* Section II.B.

¹⁶² See *supra* note 156.

¹⁶³ U.S. Const. art. III, § 2.

¹⁶⁴ See 5 U.S. (1 Cranch) at 174–78.

¹⁶⁵ 8 U.S. (4 Cranch) at 94–96.

¹⁶⁶ See *id.* at 100–01.

¹⁶⁷ *Id.* at 93–94.

and a ceiling for appellate jurisdiction, and Congress can move up from the floor or down from the ceiling using statutes.¹⁶⁸ Second, even *Marbury*'s strained Article III, Section 2 holding can be reconciled with a habeas power that vests in federal judges.¹⁶⁹

Marbury and Bollman as Evidence of Original Meaning. *Marbury* and *Bollman* do not read as strong evidence of original meaning. Chief Justice Marshall's opinions generally, as well as *Marbury* and *Bollman* specifically, are famous for having accomplished very important political and institutional objectives.¹⁷⁰ These objectives, however, meant the opinions were inconsistent with fairly unobjectionable understandings of the Constitution or the Judiciary Act of 1789.¹⁷¹ Section 13 authorized the Supreme Court to issue writs of mandamus, and *Marbury* held that such authority conflicted with Article III, Section 2 of the Constitution by impermissibly vesting the Court with original jurisdiction that the Constitution did not specify.¹⁷² The tension between the Judiciary Act of 1789 and Article III, Section 2 existed, *Marbury* reasons, because the requirement that the "supreme court shall have original jurisdiction" in several categories of cases logically required that the Court *shall not* have it in other cases.¹⁷³ I concur with a number of people who believe that the conflict between the Statute and the Constitution was manufactured to create the need for *Marbury*'s famous holding involving judicial review.¹⁷⁴

¹⁶⁸ See *infra* notes 170–77.

¹⁶⁹ Although I do not treat the possibility extensively here, *Marbury*'s integrity would be preserved if other constitutional provisions required the existence of lower federal courts, except during a habeas suspension.

¹⁷⁰ See 2 William Winslow Crosskey, *Politics and the Constitution in the History of the United States* 1040 (1953); Leonard W. Levy, *Original Intent and the Framers' Constitution* 75 (1988); Clinton, *supra* note 115, at 1561–62; see also James E. Pfander, *Marbury*, Original Jurisdiction, and the Supreme Court's Supervisory Powers, 101 *Colum. L. Rev.* 1515, 1516 & n.2 (2001) (collecting citations in support of the proposition that "an air of political expediency lingers over [*Marbury*]").

¹⁷¹ See sources collected *supra* note 170.

¹⁷² See *Marbury*, 5 U.S. (1 Cranch) at 175–78.

¹⁷³ See *id.* at 174 (citing U.S. Const. art. III, § 2).

¹⁷⁴ See, e.g., David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888*, at 67–68 (1985); James E. Pfander, *Principles of Federal Jurisdiction* 19 (2d ed. 2011) ("Many scholars have argued that Marshall created the conflict that led to his discussion of judicial review, a conflict he might have sidestepped."). Specifically, there was no reason to read § 13 of the Judiciary Act of 1789 as a freestanding grant of jurisdiction, and the Court could have read it as granting only authority that was auxiliary to appellate or original jurisdiction that it already had. See Currie, *supra*, at 67–68.

Instead, *Marbury*'s Article III, Section 2 rationale rests entirely on the proposition that, if Congress could augment original jurisdiction to include additional categories of judicial power, then the clause specifying that jurisdiction would be surplusage.¹⁷⁵ Such a proposition is obviously wrong. The Article III, Section 2 language subdividing jurisdiction into original and appellate categories would still have meaning if Marshall had interpreted it as a rule that Congress cannot *diminish* the former. Others have powerfully made the point that the Framers intended Article III, Section 2 to have precisely this meaning,¹⁷⁶ and I do not reprise those arguments here. I do, however, want to emphasize that *Marbury* contains no extrinsic evidence about what the Framers intended or what the public understood Article III, Section 2 to mean. And *Bollman* simply followed from *Marbury*. Many scholars believe that Chief Justice Marshall overlooked original habeas jurisdiction when he wrote *Marbury*, and that resting *Bollman* on a theory of appellate authority was the fiction necessary to avoid lopping off a power that the Framers plainly intended courts to have.¹⁷⁷ I am not suggesting that the Court overturn or otherwise revise *Marbury* and *Bollman*. I *am*, however, suggesting that those decisions are not probative of original meaning on other constitutional questions.

Habeas as a Power of Article III Judges. In reality, rejecting a Null Power Hypothesis might not require theorists to go near *Marbury* and *Bollman*. If habeas jurisdiction is an Article III power that vests in judg-

¹⁷⁵ See 5 U.S. (1 Cranch) at 174.

¹⁷⁶ See William W. Van Alstyne, A Critical Guide to *Marbury v. Madison*, 1969 Duke L.J. 1, 31–33 (arguing that Article III, § 2 simply provided a constitutional floor for original jurisdiction and that Congress could add types of constitutionally specified judicial power to the Court's original docket); see also Edward S. Corwin, The Doctrine of Judicial Review: Its Legal and Historical Bias and Other Essays 5–6 (1914) (same); Crosskey, *supra* note 170, at 1041–42 (same); 2 George L. Haskins & Herbert A. Johnson, History of the Supreme Court of the United States: Foundations of Power: John Marshall, 1801–1815, at 200–01 (Paul A. Freund ed., 1981) (same); Dean Alfange, Jr., *Marbury v. Madison* and Original Understandings of Judicial Review: In Defense of Traditional Wisdom, 1993 Sup. Ct. Rev. 329, 398–400 (same); Clinton, *supra* note 115, at 1516–19, 1523 (same). Some subsequent scholars have advanced alternative rationales for the holding, but none of the historical evidence in those accounts surfaces in *Marbury* itself. See, e.g., Akhil Reed Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 469–77 (1989) (justifying *Marbury*'s Article III holding as a rule about geographically inconvenient docketing in the Supreme Court).

¹⁷⁷ See Larry W. Yackle, Postconviction Remedies 78–79 (1981); Steiker, *supra* note 116, at 876–77.

es—which is entirely consistent with historical practice¹⁷⁸—then the tension with those cases vanishes.

If a Supreme Court Justice (a judge) can afford habeas process in an individual capacity, then one can recognize a constitutionally-vested habeas power without compromising the integrity of the Madisonian Compromise and the rule against accreting the Supreme Court's original jurisdiction. Even if there are no inferior federal courts and even if Congress reduces the number of Justices on the Court to one, there would be an Article III judicial officer with jurisdiction to grant habeas relief. If the Supreme Court's jurisdiction over the individual Justice's ruling in such a case could be denominated as appellate under Article III, Section 2, then there would be no conflict with *Marbury*.¹⁷⁹

2. *The Inter-Sovereign Habeas Hypothesis.*

Several prominent scholars have attempted to reconcile *Marbury* and *Bollman* with a constitutional guarantee of habeas access by interpreting the Suspension Clause as a prohibition against *federal* interference with *state* habeas privileges. The most influential exponent of that position is Professor William Duker.¹⁸⁰ The Inter-Sovereign Habeas Hypothesis centers on two cases bookending the Civil War, each holding that state habeas relief could not issue for federal custody: *Ableman v. Booth*¹⁸¹ and *Tarble's Case*.¹⁸² Under the Inter-Sovereign Habeas Hypothesis,

¹⁷⁸ See supra notes 31–42.

¹⁷⁹ Cf. Dallin H. Oaks, The “Original” Writ of Habeas Corpus in the Supreme Court, 1962 Sup. Ct. Rev. 153, 165–66 & n.56 (observing that Supreme Court review of an individual Justice's decision was commonplace during the early years of the American republic). In later dicta, the Supreme Court refused to denominate its power over judges of inferior courts as appellate jurisdiction over the inferior court itself. See *In re Metzger*, 46 U.S. (5 How.) 176, 191–92 (1847). *Metzger*, however, does not reach the issue of whether the Supreme Court's authority to review the decision of a circuit-riding Justice could be considered appellate.

¹⁸⁰ See Duker, supra note 142, at 126–80 (setting forth an argument that the Constitution protects state habeas for federal prisoners). Professor David Shapiro, coauthor of the leading federal courts casebook, also endorses this view of the relationship between the Suspension Clause and the Madisonian Compromise. See Shapiro, supra note 51, at 64 n.17 (citing Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 403–05 (6th ed. 2009)); see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1510 (1987) (contending that *Booth* and *Tarble's Case* should be read as “attributing to Congress a desire for exclusive federal court jurisdiction in habeas proceedings against federal officers”).

¹⁸¹ 62 U.S. (21 How.) 506, 526 (1859).

¹⁸² 80 U.S. (13 Wall.) 397, 411–12 (1872).

Booth and *Tarble's Case* were wrongly decided because: (1) historically speaking, state judges *did* issue habeas writs to federal jailors; and (2) a constitutional guarantee of habeas access could refer to such a practice.¹⁸³ I agree with (1) but not with (2); even though the cases ignore inconsistent historical evidence, the Federal Constitution does not protect any state habeas power over federal custody.

a. Booth and Tarble—Supremacy or Preemption?

The Fugitive Slave Act of 1793 provided for extraterritorial capture and rendition of slaves seized in northern states.¹⁸⁴ Some northern states responded with “personal liberty laws” that criminalized activity necessary to capture and rendition, such as slave kidnapping.¹⁸⁵ In *Prigg v. Pennsylvania*,¹⁸⁶ the Supreme Court invalidated a representative personal liberty statute,¹⁸⁷ but many northern states passed new legislation prohibiting the use of state law enforcement resources to implement federal law.¹⁸⁸ The Compromise of 1850 actually consisted of four statutes, one of which was effectively an 1850 Fugitive Slave Act that rendered the post-*Prigg* personal liberty laws inoperative.¹⁸⁹ The 1850 Fugitive Slave Act enraged abolitionists and provoked new legal theories of interposition.¹⁹⁰

Northern state judges used habeas to free federal prisoners convicted under the fugitive slave provisions, and the conflict between state and federal sovereigns came to a head in *Ableman v. Booth*.¹⁹¹ In 1854, United States Marshal Stephen Ableman arrested abolitionist Sherman Booth for aiding a fugitive slave’s escape to Canada.¹⁹² Aggressively challenging the constitutionality of the Compromise, the Wisconsin Supreme Court issued a habeas writ to free Booth,¹⁹³ even after he had been con-

¹⁸³ See Duker, *supra* note 142, at 181.

¹⁸⁴ See Fugitive Slave Act of 1793, ch. 7, § 4, 1 Stat. 302, 305.

¹⁸⁵ See generally Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780–1861* (1974) (collecting laws).

¹⁸⁶ *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

¹⁸⁷ See Wert, *supra* note 132, at 55.

¹⁸⁸ See Morris, *supra* note 185, at 107–27; Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story’s Judicial Nationalism*, 1994 *Sup. Ct. Rev.* 247, 284, 288.

¹⁸⁹ See Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462, 464.

¹⁹⁰ See Wert, *supra* note 132, at 61–62.

¹⁹¹ 62 U.S. (21 How.) at 507–08.

¹⁹² See *id.* at 507.

¹⁹³ See *id.* at 508–09.

victed in a federal district court.¹⁹⁴ The U.S. Supreme Court finally resolved *Booth* against Wisconsin four years later, in an intensely nationalistic opinion by Chief Justice Taney. The Court held that the Supremacy Clause prohibited a state court from ordering the release of a prisoner confined pursuant to a federal criminal judgment.¹⁹⁵

Until the Supreme Court decided *Tarble's Case* in 1871, many read *Booth* as barring only state habeas relief for criminally-convicted federal prisoners.¹⁹⁶ *Tarble* once again thrust habeas into the debate over national supremacy, and again involved a defiant Wisconsin court.¹⁹⁷ *Tarble* was a minor when he enlisted in the Union Army, but signed a document swearing that he was twenty-one.¹⁹⁸ He later deserted and was brought up for a military trial.¹⁹⁹ *Tarble's* father sought a habeas writ to challenge military custody on the ground that the father's consent was a condition for legally-operative enlistment.²⁰⁰ The Wisconsin Supreme Court might have justified an order releasing *Tarble* by invoking the distinction between military and post-conviction custody, but it was loaded for bear. It held that state courts could not use habeas to scrutinize any federal custody whatsoever.²⁰¹

Tarble treated *Booth* as a rule that federal power over *all* federal detention was exclusive.²⁰² With the wounds from the Civil War still fresh, the opinion recognized dual sovereignty, but also emphasized the need for "temporary supremacy" when a state and the federal government disagreed as to the lawfulness of a detention.²⁰³ On a practical note, the Supreme Court argued (persuasively, I think) that state habeas authority over federal detention would have compromised the efficacy of military operations.²⁰⁴

To the extent *Tarble* indicates that state habeas relief did not issue for federal prisoners, it is obviously wrong. Beginning in 1789, state courts

¹⁹⁴ See id. at 509–10.

¹⁹⁵ See id. at 526.

¹⁹⁶ See Fallon et al., Hart and Wechsler, supra note 10, at 402.

¹⁹⁷ 80 U.S. (13 Wall.) at 397–98.

¹⁹⁸ See id. at 398–99.

¹⁹⁹ Id. at 399.

²⁰⁰ Id. at 398.

²⁰¹ Id. at 411.

²⁰² Id. at 403–04.

²⁰³ Id. at 407.

²⁰⁴ See id. at 408–09.

frequently used the habeas writ to free people in federal custody.²⁰⁵ These cases usually involved military detention.²⁰⁶ During the Civil War, state judges from New York, Ohio, Iowa, and Maine granted habeas writs to federal military enlistees.²⁰⁷ Of course, just because state habeas writs had historically issued in such circumstances does not mean that *Tarble* was wrongly decided. The Supreme Court invalidates longstanding judicial practices all the time.²⁰⁸ The more important point is that *Tarble* involves a question about whether the Constitution *permitted* state courts to issue habeas writs to federal prisoners—not whether the Constitution *required* that they be able to do so.

b. Rejecting the Inter-Sovereign Habeas Hypothesis

Professor Duker argues that “the framers intended the clause only to restrict Congressional power to suspend state habeas for federal prisoners.”²⁰⁹ The appeal of the Inter-Sovereign Habeas Hypothesis, which treats *Booth* and *Tarble* as wrongly decided, is that it reconciles a habeas guarantee with *Marbury* and the Madisonian Compromise.²¹⁰ Even though it avoids some of the problematic logical commitments of the Null Power Hypothesis, the Inter-Sovereign Theory still suffers from many of the same flaws. For the Inter-Sovereign Habeas Hypothesis to work, the Federal Constitution would require that state judges have a habeas power over federal custodians. The only circumstances under which the federal government could interfere with this power would be when the suspension conditions (rebellion, invasion, and public safety) are satisfied.

First, the Inter-Sovereign Habeas Hypothesis is inconsistent with the constitutional concept of a “suspension.” A suspension statute authorizes

²⁰⁵ See Charles Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345, 353 (1930).

²⁰⁶ See Dallin H. Oaks, Habeas Corpus in the States—1776–1865, 32 U. Chi. L. Rev. 243, 288 (1965); Todd E. Pettys, State Habeas Relief for Federal Extrajudicial Detainees, 92 Minn. L. Rev. 265, 268–69, 272 (2007).

²⁰⁷ See Fallon et al., Hart and Wechsler, supra note 10, at 402–03 (citing Warren, supra note 205, at 357).

²⁰⁸ For example, the Supreme Court did so in *Bollman*. See supra notes 164–67 and accompanying text.

²⁰⁹ Duker, supra note 142, at 126.

²¹⁰ From time to time, authors will refurbish the State Habeas Hypothesis, relying on Professor Duker’s scholarship. See, e.g., Pettys, supra note 206, at 309–18 (putting a modern gloss on the State Habeas Hypothesis).

detention and strips some judicial power to grant bail or release.²¹¹ If the Inter-Sovereign Habeas Hypothesis is true, then prohibition in the Suspension Clause does not make sense. The Clause would have to mean that Article I, Section 9 barred Congress from stripping state judges of their authority to discharge federal prisoners. That reading of the clause is improbable; Article I, Section 9 bars Congress from certain actions that it would otherwise have power to take under Article I, Section 8. Article I, Section 8 does not appear to give Congress any authority to strip state habeas judges of their authority to order discharge.²¹² Congress would never have needed to pass a state-oriented suspension statute because any state judicial power to order discharge would be displaced by the preemptive effect of the federal statute that authorized detention to begin with. The Inter-Sovereign Habeas Hypothesis reads the Suspension Clause as a prohibition on a power that Congress does not otherwise have (and would not need to exercise if it did); it would thereby render the Article I suspension conditions superfluous.

Second, if the Suspension Clause was intended to recognize a state habeas power over federal custody, then one might expect to find some recognition of the habeas privilege in Article I, Section 10, which limits the powers of the Several States.²¹³ A clever advocate might argue that the Framers did not mention habeas in Article I, Section 10 because they intended there to be limits on federal suspension of a state privilege (expressed in Section 9) but not on state suspension. This distribution of habeas and suspension power, however, is particularly difficult to square with the previously-discussed evidence about how the Framers concep-

²¹¹ See *supra* Section I.C.

²¹² If Article I, § 8 does create a power to “suspend” the habeas privilege for federal prisoners in state court, that power would probably have to come from an authority to enact laws necessary and proper to provide for the common defense, to control naturalization, and to govern the land and naval forces. See U.S. Const. art. I, § 8, cl. 4, 12–16, 18. Professor Duker would argue that some preclusion of state habeas power might have been necessary and proper to the Article I, § 8 power to “suppress insurrection and repel invasion.” See Duker, *supra* note 142, at 131. Professor Duker, however, selectively edits the predicate enumerated power. The relevant clause enumerates a federal power to “*provide for calling forth the Militia* to execute the Laws of the Union, suppress Insurrections and repel Invasions.” U.S. Const. art. I, § 8, cl. 15 (emphasis added). The more plausible understanding of a suspension power is as auxiliary to the Article I, § 8 power to constitute the federal judiciary.

²¹³ The Framers could have put habeas language in both places. For example, §§ 9 and 10 both forbid sovereigns from passing bills of attainder and ex post facto laws, as well as from granting titles of nobility. U.S. Const. art. I, §§ 9–10. Only § 9, however, contains a suspension provision.

tualized the privilege. Why would the Framers have permitted state governments to freely suspend review over federal custody—for whatever reason—when the federal government could not? State habeas power is in some tension with the location of the reference to the habeas privilege in Article I.²¹⁴

Third, and most importantly, in much the same way that proponents of the Null Power Hypothesis draw precisely the wrong conclusions from the historical evidence, so does Professor Duker. For example, he discusses an instance where Alexander Hamilton, writing as “Publius” in the *Federalist Papers*, referred to the “establishment of the writ of habeas corpus.”²¹⁵ Professor Duker explains that Hamilton’s comment does not reflect a belief that the Federal Constitution contained a federal habeas power, arguing that it instead referenced a habeas power arising under the New York State Constitution. Whether Professor Duker is right or wrong about that particular snippet, the rest of the historical record, including many other parts of *Federalist* 83 and 84, shows that Hamilton believed the Federal Constitution created a federal habeas power to secure the privilege.²¹⁶

Other Founding-era evidence that Professor Duker’s monograph cites is not strong. For example, in Massachusetts, Judge Increase Sumner explained to the State Convention that the Suspension Clause was only a restriction on Congress, and that a state prisoner would be entitled to the writ.²¹⁷ That explanation is perfectly consistent with a federal habeas power—and with the idea that states could also empower judges to grant relief for state custody. Similarly, Professor Duker observes that, in Pennsylvania, the ratifying convention was told that “the right of habeas

²¹⁴ Professor Duker suggests gingerly that the Article I, § 9 placement of the Clause *supports* the Inter-Sovereign Habeas Hypothesis. See Duker, *supra* note 142, at 131–32. His logic is that several clauses in Article I, § 9 restrict the power of the federal government *vis-à-vis* the Several States. See *id.* But certainly not *all* Article I, § 9 clauses are legislative restrictions of this sort. Why, if the Suspension Clause were intended to preserve state habeas power, would the relevant clause not say so expressly? Compare, for example, U.S. Const. art. I, § 9, cl. 5 (“No Tax or Duty shall be laid on Articles exported from any State.”), with *id.* art. I, § 9, cl. 6 (“No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.”).

²¹⁵ See Duker, *supra* note 142, at 132–33.

²¹⁶ See *supra* Section II.B.

²¹⁷ See 2 Elliot’s Debates, *supra* note 149, at 108–09, *cited in* Duker, *supra* note 142, at 134.

corpus was secured by a particular declaration in its favor.”²¹⁸ That statement appears incorrect (unless the Suspension Clause is the express statement), but it does not suggest that the power secured was that of state judges. As Professor Duker grudgingly admits, the statement is probably one made with “studied ambiguity.”²¹⁹

Various other states—including Virginia, Rhode Island, North Carolina, and New York—all expressed doubts about a theory of “implied” power upon which, in their view, enjoyment of the privilege under the Federal Constitution depended.²²⁰ The extended colloquies in these debates do mention that state constitutions secured the privilege, but not in ways that suggest the speakers thought a state privilege was ever amenable to federal suspension. The speakers were generally asking either (1) why the Federal Constitution was being read to contain an implied suspension power or (2) why it did not contain an express power to issue the writ.²²¹ Moreover, Duker omits the most important piece of information about the conventions that voiced these questions—that they were ultimately convinced by the argument that the Federal Constitution *did* sufficiently imply a federal habeas power.²²² Proponents of the implied exclusivity variation might respond that the variation is indeed inconsistent with the language of *Tarble*, but that the variation is the way out of the riddle that does the least violence to other established principles of constitutional structure. I hope that my principles of habeas power show that a more elegant solution is possible.

3. *Rejecting the Implied Exclusivity Variation*

Other scholars who are unwilling to reject pertinent language in *Tarble* or *Marbury* have set forth more nuanced theories of habeas power.²²³

²¹⁸ Id. at 455, *cited in* Duker, *supra* note 142, at 133.

²¹⁹ See Duker, *supra* note 142, at 133.

²²⁰ 1 Elliot’s Debates, *supra* note 149, at 243, 328, 344, *cited in* Duker, *supra* note 142, at 161 nn.60–61, 162 nn.62–67; *id.*, vol. 2, at 399, 403, 407, *cited in* Duker, *supra* note 142, at 161 nn.60–61, 162 nn.62–67; *id.*, vol. 3, at 449, 461, 464, 658, *cited in* Duker, *supra* note 142, at 161 nn.60–61, 162 nn.62–67.

²²¹ See Duker, *supra* note 142, at 135.

²²² See *supra* Section II.B.

²²³ I commit most of this subsection to the most prominent of such positions, but I want to briefly touch on theories advanced by Professors Edward Hartnett and Stephen Vladeck. The gist of Professor Hartnett’s theory is that an enjoyment principle can be reconciled with *Marbury*, *Tarble’s Case*, and the Madisonian Compromise because Supreme Court Justices could issue writs in their individual capacities. See Hartnett, *supra* note 129, at 271–89. Supreme Court Justices are vested with habeas power, but I also argue (under a very different

The most prominent theory salvages *Tarble* as an “implied exclusivity” case.²²⁴ Stated pithily, the implied exclusivity theory posits that the Federal Constitution does guarantee some federal habeas power; it reads *Tarble* as a sub-constitutional holding that state habeas power was simply preempted by the extant federal habeas statute. The extraordinary academic pedigree of the theory notwithstanding,²²⁵ the implied exclusivity rationale cannot be reconciled with the habeas language in *Tarble*.²²⁶ (The implied exclusivity argument, however, remains a viable means of evaluating other grants of federal judicial power to federal courts.)

constitutional theory) that all Article III judges are so vested. Professor Vladeck argues that the Superior Court of the District of Columbia may exercise common-law habeas jurisdiction over federal detention. See Vladeck, *supra* note 154, at 71–72. Professor Vladeck’s argument is a variant of the implied preemption theory that I discuss in the above-line text, and it is susceptible to many of the same objections that I specify there. Moreover, a constitutional theory of habeas power predicated on such a prominent role for the Supreme Court of the District of Columbia should probably yield to other theories that would retain the centrality of the inferior federal courts, the Supreme Court, or its Justices.

²²⁴ See Neuman, *supra* note 75, at 596.

²²⁵ See, e.g., Fallon et al., Hart and Wechsler, *supra* note 10, at 405 (suggesting that *Tarble* might “be justified on the ground that federal statutes (and not the Constitution of its own force) impliedly establish habeas corpus for persons in federal custody as a domain of exclusive federal jurisdiction”); Amar, *supra* note 180, at 1510 (“[*Booth* and *Tarble*] can be justified only if they are understood simply as attributing to Congress a desire for exclusive federal court jurisdiction in habeas proceedings against federal officers.”); Michael G. Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis. L. Rev. 39, 102–03 (1995) (“[I]t is possible to read *Tarble* . . . as merely expressing an implicit congressional preference for federal statutory exclusivity in federal officer habeas cases”); Redish & Woods, *supra* note 111, at 101 (articulating an implied exclusivity rule that “can be overcome only by a carefully considered, conscious decision by Congress”); Amanda L. Tyler, Is Suspension a Political Question?, 59 Stan. L. Rev. 333, 400 (2006) (“[*Tarble*’s most defensible reading] is that the Court interpreted Congress’s provision for federal court habeas jurisdiction with respect to federal petitioners as impliedly exclusive of state courts.”); Seth P. Waxman & Trevor W. Morrison, What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause, 112 Yale L.J. 2195, 2227 (2003) (arguing that *Tarble* is predicated on the idea that the habeas statutes “reflected an implicit congressional determination that state jurisdiction was not appropriate”).

²²⁶ I want to distance myself from those who argue that *Tarble* is incorrect simply because of the more generalized idea that Article III contemplates concurrent state jurisdiction over federal questions. See, e.g., Pettys, *supra* note 206, at 298–99 (treating habeas as subject to the same preemption rules as other Article III subject matter); see also *id.* at 295 n.174 (collecting sources identifying the constitutional reading of *Tarble* as inconsistent with the principle of concurrent state and federal jurisdiction over Article III subject matter). That proposition is certainly true, but it ignores the unique constitutional configuration of habeas power and the unique implications that state habeas scrutiny of federal custody has for federal supremacy.

In the period between *Booth* and *Tarble*, many assumed *Booth* barred only state habeas review of federal convictions.²²⁷ As a result, Judge Field wrote *Tarble* in particularly categorical terms, and— notwithstanding the opinion’s tortured take on concurrent state and federal jurisdiction over Article III subject matter²²⁸—the opinion (like *Booth*) is littered with language that appears inconsistent with any implied exclusivity rationale.²²⁹ For example, the Court observed that there was a legislative remedy for excessive federal habeas process, indicating by negative implication that no such federal legislative remedy could solve excessive state habeas process.²³⁰ Moreover, the Court believed that recognition of a state habeas power to scrutinize military custody would necessarily imply a state habeas power to scrutinize *any* federal custody.²³¹ No such slippery slope would merit consideration if Congress could simply preempt state habeas process for enclaves of federal custody. *Tarble* and *Booth* are categorical holdings against state habeas power.²³²

²²⁷ See Duker, *supra* note 142, at 153.

²²⁸ I join the overwhelming consensus in affirming, contrary to some readings of *Tarble*, that states have a pivotal role in administering federal law generally. *Tarble* repeatedly implies that Article III subject matter is not justiciable in state court. See, e.g., *Tarble*, 80 U.S. (13 Wall.) at 407 (“[N]either [state nor federal government] can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority.”). The idea that state courts would be integrally involved in the adjudication of some Article III subject matter is almost universally accepted. See *The Federalist* No. 82, at 555 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 *Harv. L. Rev.* 1362, 1401 (1953).

²²⁹ See, e.g., 80 U.S. (13 Wall.) at 405 (“[Habeas jurisdiction must derive] either from the United States or the State. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the State to confer it, even if it had attempted to do so; for no State can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent government.” (quoting *Booth*, 62 U.S. (21 How.) at 515–16)).

²³⁰ See *id.* at 409.

²³¹ See *id.* at 402. A similar slippery-slope argument appears in *Booth*. See 62 U.S. (21 How.) at 514–15.

²³² *Tarble* does observe that the prisoner would have a federal forum for his claim. See 80 U.S. at (13 Wall.) 410. That language could support the argument that the ruling was contingent upon the availability of a federal forum.

III. PRINCIPLE 2: LAWFULNESS AS JUDICIAL PREROGATIVE

The *raison d'être* of habeas power is, in effect, the opposite of a political question; it is the authority of judges to consider what it means for detention to be lawful. It is federal judicial power to determine whether a federal prisoner's custody is unconstitutional, not authorized by law, or procedurally defective—as well as power to decide what each of those terms means. Congress may not break this prerogative under legislative saddle; it may not require courts to treat any prior process as dispositive proof of lawfulness. Federal courts—and ultimately the Supreme Court—must determine the presumptive weight prior custody determinations should carry.

A. *Boumediene as a Habeas Power Case*

In *Boumediene v. Bush*, no Justice argued that the Federal Constitution left habeas access entirely unguaranteed.²³³ Moreover, *Boumediene* partially embraces the second principle of habeas power, that federal judges *always* decide how much prior process proves federal custody to be lawful. *Boumediene* specified the constitutional test for a non-suspension restriction: whether the alternative means to test custody is an “adequate substitute” for the writ.²³⁴

Whether a statutory scheme is a suitable habeas substitute obviously necessitates an underlying sense of what habeas process requires. *Boumediene's* discussion of adequacy is really just a proxy for the Court's belief about what habeas must, at its core, do. *Boumediene* specifies two core features of habeas power: the power to consider whether custody is lawful, and the power to order discharge.²³⁵ *Boumediene* also emphasizes that the protected scope of habeas review—specifically, whether the Federal Constitution guarantees other features of habeas

²³³ See Neuman, *supra* note 6, at 538–39 (“Prior holdings had told us what the Suspension Clause does not protect, or what the Suspension Clause might possibly protect. *Boumediene* clarifies, in the concrete way that only a holding can in a system that privileges precedent, what the Suspension Clause does protect.”).

²³⁴ See 553 U.S. at 771 (“In light of this holding the question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus.”).

²³⁵ See *id.* at 779 (“[T]he privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law. And the habeas court must have the power to order the conditional release of an individual unlawfully detained” (citation omitted) (internal quotation marks omitted)).

consideration—turns on the degree of legal process (judicial and non-judicial) informing the underlying custody determination.²³⁶ For example, in an extended passage, *Boumediene* contrasted its scrutiny of the Combatant Status Review Tribunal (“CSRT”) detention with deference owed to a criminal judgment issued after a full-blown trial.²³⁷ Whatever the form of custody, *Boumediene* held, there is a judicial power to issue habeas writs; it entails that a judicial officer have authority to “make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner’s release.”²³⁸

One could read the passage contrasting CSRT determinations and criminal convictions as a substantive point that the Federal Constitution, of its own force, requires that federal courts owe heightened deference to criminal judgments.²³⁹ One can also read the passage as a rule, which the Supreme Court decides *prudentially*, that the same deference applies. I doubt very seriously that the Court considered this question, but the prudential reading is more consistent with the traditional role of the judge in habeas adjudication. *Boumediene* can and should be read as a rule with a large institutional caveat. A criminal judgment can trigger a presumption that custody is lawful; the deference to the custodial determination may be greater than that afforded to prejudgment, executive, or military detention—but *courts* get to decide the scope of the presumption.²⁴⁰ As it turns out, that reading of *Boumediene* helps make sense of the erratic precedent that the decision had to synthesize.

B. Watkins and the Fallacy of Restricted Habeas Power

One objective I have here is to unify the disparate habeas treatment of executive and judicially-ordered detention. As the *Boumediene* passages appearing in Section III.A suggest, there is an oversubscribed theory that the permissibility of statutory habeas restrictions varies with respect to

²³⁶ See *id.* at 781–83 (articulating a sliding-scale test for proof of lawfulness). The specific examples the Court uses to illustrate the variables dictating the degree of collateral scrutiny are a right to introduce exculpatory evidence and a right to correct errors in the proceeding that resulted in a custody order. See *id.* at 786.

²³⁷ See *id.* at 781–83.

²³⁸ *Id.* at 787.

²³⁹ See *id.* at 782.

²⁴⁰ In discussing post-conviction review, however, the Court mentioned that the judicially created abuse-of-the-writ distinction remained valid even after it was codified by statute. See *id.* at 774.

the type of underlying federal custody. That theory travels closely with an argument that the Constitution allows Congress to entirely foreclose collateral scrutiny of a federal criminal conviction—a position that has never quite been accepted wisdom, but has enjoyed something approaching that status.²⁴¹ The argument’s central case is *Ex parte Watkins*,²⁴² another canonical opinion by Chief Justice Marshall. Like other opinions by Chief Justice Marshall, however, *Watkins* was more about institutional realities than it was about fidelity to the historic office of the writ it considered.²⁴³

²⁴¹ See, e.g., *Swain v. Pressley*, 430 U.S. 372, 385 (1977) (Burger, C.J., concurring) (“The writ in 1789 was not considered a means by which one court of general jurisdiction exercises post-conviction review over the judgment of another court of like authority.” (internal quotation marks omitted)); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202–03 (1830) (“The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it.”); Forsythe, *supra* note 48, at 1098 (“Thus, the rule under the common law provided that persons convicted were excluded from the privileges of the writ. This rule was part of the Act of 1679 and was incorporated into early American state statutes.”); David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. Ill. U. L. Rev. 91, 104–05 (2000) (“In fact, the writ of habeas corpus is not used in Britain to secure the release of a defendant whose detention is erroneous (as opposed to unlawful) where the person taking it, although it’s within his power to do, has made a procedural error, has misunderstood the relevant law, has failed to take account of relevant matters, has taken into account irrelevant matters, [or] has acted perversely.” (footnote omitted) (internal quotation marks omitted)); Matthew J. Mueller, *Handling Claims of Actual Innocence: Rejecting Federal Habeas Corpus as the Best Avenue for Addressing Claims of Innocence Based on DNA Evidence*, 56 Cath. U. L. Rev. 227, 227 n.3 (2006) (“The writ of habeas corpus that allows state prisoners to attack their conviction in federal court is legislatively and judicially derived and differs immensely from the ‘Great Writ’ (a pretrial remedy for testing the propriety of one’s incarceration by the government).”); Oaks, *supra* note 206, at 244–45 (“At common law and under the famous Habeas Corpus Act of 1679 the use of the Great Writ against official restraints was simply to ensure that a person was not held without formal charges and that once charged he was either bailed or brought to trial within a specified time. If a prisoner was held by a valid warrant or pursuant to the execution or judgment of a proper court, he could not obtain release by habeas corpus.”); Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 Colum. L. Rev. 888, 931 (1998) (“[T]he reference to habeas corpus in the Constitution is to the writ as it was known at common law. . . . [The writ] was not available to collaterally attack the final judgment of a court of general jurisdiction.”).

²⁴² 28 U.S. (3 Pet.) 193 (1830).

²⁴³ Cf. Eric M. Freedman, *Just Because John Marshall Said It, Doesn’t Make It So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 Ala. L. Rev. 531, 570 (2000) (characterizing *Marrbury* and *Bollman* as similar exercises in realpolitik).

Tobias Watkins was convicted by the Federal Circuit Court for the District of Columbia—a superior court of general jurisdiction²⁴⁴—and petitioned for a habeas writ from the United States Supreme Court.²⁴⁵ He attached his indictment and the federal judgment to his petition, arguing that the District charged and convicted him of a crime not punishable in federal court.²⁴⁶ The Supreme Court decided *Watkins* in 1830, when there was no writ-of-error review for criminal judgments decided in the lower federal courts.²⁴⁷ The appellate relief Watkins sought in the Supreme Court was an “original” habeas writ; he did not (and could not) appeal or seek writ-of-error review of his federal conviction.²⁴⁸

For some of the reasons set forth below, many courts and legal scholars have read *Watkins* as a rule against habeas review of criminal judgments,²⁴⁹ citing Chief Justice Marshall’s English writ history:

[Habeas] is . . . known to the common law It is in the nature of a writ of error, to examine the legality of the commitment. . . . To remedy [monarchical excess,] the celebrated [1679 Habeas Corpus Act] was enacted, for the purpose of securing the benefits for which the writ was given. This statute may be referred to as describing the cases in which relief is, in England, afforded by this writ to a person detained in custody. It enforces the common law. This statute excepts from those who are entitled to its benefit, persons committed for felony or treason plainly expressed in the warrant, as well as persons convicted or in execution.

The exception of persons convicted applies particularly to the application now under consideration. . . .

²⁴⁴ See *Watkins*, 28 U.S. (3 Pet.) at 197 (“The circuit court is a court of general criminal jurisdiction in cases within the local law, and within the law of Maryland.”). The term “superior court” has a separate meaning in this context. An inferior court can only decide a narrow category of cases that is frequently defined by statute. A superior court, by contrast, has wide-ranging “general jurisdiction” to decide many different types of cases. See Ann Woolhandler, *Demodeling Habeas*, 45 *Stan. L. Rev.* 575, 588–89 (1993). For those who subscribe to the belief that habeas cannot be used to scrutinize a criminal conviction, the prohibition only extends to custody ordered by superior courts of general jurisdiction. See *id.* at 590 nn.90–93 and accompanying text.

²⁴⁵ See *Watkins*, 28 U.S. (3 Pet.) at 194.

²⁴⁶ See *id.* at 194–95.

²⁴⁷ Outside of specialized contexts (for example, capital cases), Congress did not create general writ-of-error review for federal criminal convictions until 1891. Judiciary Act of 1891, ch. 517, §5, 26 Stat. 826, 827.

²⁴⁸ See *Watkins*, 28 U.S. (3 Pet.) at 201 (excerpted in text accompanying note 259, *infra*).

²⁴⁹ See *supra* note 241 (collecting sources).

. . . The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be.²⁵⁰

This passage is rife with mistakes. The English common-law writ did extend to criminal convictions.²⁵¹ Whatever Chief Justice Marshall meant when he wrote that the 1679 Habeas Corpus Act “describ[ed] the cases in which relief is . . . afforded by this writ to a person detained in custody,”²⁵² the 1679 Act did not *limit* habeas relief to prisoners eligible for the statutory writ the 1679 Act created.²⁵³ The 1679 Act was specifically targeted at abusive pre-trial detention,²⁵⁴ and the common-law writ remained intact.²⁵⁵ Paul Halliday’s work shows that eighteenth-century writs were inscribed to show whether they issued under common law or statute.²⁵⁶ The 1679 statutory proviso for post-conviction relief appeared in a section creating a habeas remedy for *potential bailees*.²⁵⁷ In other

²⁵⁰ *Watkins*, 28 U.S. (3 Pet.) at 202–03.

²⁵¹ See *Bushell’s Case*, (1670) 124 Eng. Rep. 1006, 1006–07, 1018 (C.P.); (1669) Vaughan 135, 135–37, 158 (discharging through habeas a juror, sitting for the trial of William Penn and William Mead, criminally sentenced for contempt and by a court of general jurisdiction); see also Freund, *Hayman Brief*, supra note 117, at 30 (“[I]t is maintained that habeas corpus did not lie on behalf of a prisoner convicted by a court of general criminal jurisdiction . . . [T]he governing criterion is not the Act of 1679, which in fact left cases of convicted persons to the common-law writ; the writ was in fact available to prisoners convicted by a court of general criminal jurisdiction and factual inquiries could be made; and the developing use of the writ in the Federal courts has not rested on statutory grant but on a normal exercise of the judicial process.”).

²⁵² *Watkins*, 28 U.S. (3 Pet.) at 202 (excerpted in text accompanying note 250, supra).

²⁵³ See Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 967 (1965) (“The act provided in great detail for an habeas corpus procedure which *plugged the loopholes* and made even the king’s bench judges subject to penalties for noncompliance.” (emphasis added)).

²⁵⁴ See Meador, supra note 28, at 26; R.J. Sharpe, *The Law of Habeas Corpus* 19 (2d ed. 1989); Donald E. Wilkes, Jr., *Federal Postconviction Remedies and Relief* 60–61 (1996).

²⁵⁵ See Halliday, supra note 18, at 242 (“[J]udges performed their most innovative work using the common-law writ, in part because the statute applied only to imprisonment for felony or treason.”).

²⁵⁶ See *id.* at 426 n.105 (explaining that statutory writs were inscribed “*per statutum tricesimo primo Caroli Secundi Regis*,” as opposed to “*per regulam curiam*”).

²⁵⁷ See Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.) (“Whereas great [delays] have been used by [sheriffs, jailers] and other officers, to whose Custody any of the Kings Subjects have [been] committed for [criminal] or supposed [criminal matters] in [making returns of writs] of habeas corpus . . . contrary to their Duty and the [known laws] of the Land, whereby many of the Kings Subjects have been and hereafter may be long detained in Prison, in such Cases where by Law they are [bailable] to their great charge and vexation.” (pre-ambular recital)).

words, the 1679 Act made the statutory writ unavailable to criminally-convicted prisoners because that particular provision set forth rules for bail, not because judges otherwise lacked habeas power to scrutinize a criminal judgment.

I. Watkins's Analytic Entanglements

During the nineteenth century, federal courts parroted a notional rule against post-conviction review because it became entangled with two other features of American habeas law: (1) whether the Supreme Court should use its “original” habeas authority to conduct ordinary appellate review (*Watkins* was a question about the propriety of a Supreme Court habeas writ); and (2) whether one sovereign can conduct habeas review of another sovereign’s custody (*Watkins* also involved federal review of federal custody). I touch on each feature with detail sufficient only to relate it to the Habeas Power Theory I tender here.

First, observers (and judges) consistently confused limits on the Supreme Court’s Article III appellate jurisdiction with limits on Article III judicial power common to all federal courts.²⁵⁸ *Watkins* was at least as much about the former as it was the latter. This distinction is evident on the opinion’s face:

This application is made to [the Supreme Court] which has no jurisdiction in criminal cases; which could not revise this judgment; could not reverse or affirm it, were the record brought up directly by writ of error. The power, however, to award writs of habeas corpus . . . has been repeatedly exercised. No doubt exists respecting the power; the question is, whether this be a case in which it ought to be exercised.²⁵⁹

For most of the nineteenth century, the Supreme Court lacked conventional appellate jurisdiction over federal criminal convictions.²⁶⁰ Instead, the Court combined its *original* habeas power (bringing up the

²⁵⁸ See *infra* note 263 (collecting sources and explaining the implications of this confusion).

²⁵⁹ *Watkins*, 28 U.S. (3 Pet.) at 201 (emphasis in original) (citation omitted).

²⁶⁰ See Dallin H. Oaks, *The “Original” Writ of Habeas Corpus in the Supreme Court*, 1962 *Sup. Ct. Rev.* 153, 177–79. Under the 1789 Judiciary Act, the Supreme Court could issue writs of error only in civil cases. See Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84; *United States v. More*, 7 U.S. (3 Cranch) 159, 170–71 (1805). Congress added a right of appeal in admiralty and equity in 1803. See Act of March 3, 1803, ch. 40, § 2, 2 Stat. 244.

prisoner) with the *common-law* certiorari power (bringing up the record) to achieve the functional equivalent of direct review.²⁶¹ *Watkins* was the first in a series of cases, with similar boilerplate, urging restraint in the exercise of this particular form of appellate power.²⁶² The fact that these decisions were almost invariably announced in the combined habeas-certiorari posture makes it impossible to isolate conclusively the Supreme Court's early treatment of habeas jurisdiction common to all Article III tribunals,²⁶³ especially because many contemporaneous decisions *did* conduct some habeas review of due process questions.²⁶⁴ By the time

²⁶¹ See, e.g., *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 163–64 (1873) (relying on combination of original habeas writ and common-law certiorari petition); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 75 (1807) (same); *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 448 (1806) (same).

²⁶² See, e.g., *Ex parte Wilson*, 114 U.S. 417, 420–21 (1885) (“[H]aving no jurisdiction of criminal cases by writ of error or appeal, [the Court] cannot discharge on habeas corpus a person imprisoned under the sentence of a Circuit or District Court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence.”); *Ex parte Yarbrough*, 110 U.S. 651, 653–54 (1884) (“[T]his court has no general authority to review on error or appeal the judgments of the Circuit Courts . . . in cases within their criminal jurisdiction [I]f that court [which passed the sentence] had jurisdiction . . . this court can inquire no further.”); *Ex parte Watkins*, 28 U.S. (3 Pet.) at 203 (“We have no power to examine the proceedings on a writ of error, and it would be strange, if, under colour of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our control.”); *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38, 42 (1822) (“[T]his Court has no appellate jurisdiction confided to it in criminal cases If, then, this Court cannot *directly* revise a judgment of the Circuit Court in a criminal case, what reason is there to suppose, that it was intended to vest it with the authority to do it indirectly?”).

²⁶³ Cf. Gary Peller, In Defense of Federal Habeas Corpus Relitigation, 16 *Harv. C.R.-C.L. L. Rev.* 579, 612 (1982) (“Given the special limitation on the Supreme Court’s appellate jurisdiction in criminal cases until 1886, each case from that period on which Bator relies to demonstrate the narrow scope of habeas review can be read alternatively to reflect the Supreme Court’s view that its lack of appellate jurisdiction prevented exercise of habeas jurisdiction.”). I do not agree with Professor Peller’s statement that each case decision can be characterized purely as an appellate rule. The relevant Supreme Court opinions contain passages for which isolation of the limits on appellate jurisdiction and limits on habeas jurisdiction is difficult. See, e.g., *Ex parte Siebold*, 100 U.S. 371, 374–77 (1879) (hedging as to whether putative rule barring habeas review of criminal convictions is a feature of limited appellate or limited habeas power). I have already argued extensively that, in original writ cases, the Supreme Court has historically evaded the distinction between its own lack of *appellate* power and an absence of original power common to all Article III courts. See Lee Kovarsky, *Original Habeas Redux*, 97 *Va. L. Rev.* 61, 68–73 (2011). Nonetheless, there is considerable evidence that lower federal courts were unrestricted by Article III, § 2 constraints on the appellate jurisdiction of the Supreme Court. See, e.g., *In re McDonald*, 16 F. Cas. 17, 27 (E.D. Mo. 1861) (No. 8751) (“No question was made as to the power and efficiency of the writ, or as to the jurisdiction of any court not restricted by the constitution to the exercise of appellate power.”).

²⁶⁴ See *infra* note 270.

the Supreme Court reviewed federal criminal judgments using more familiar types of appellate jurisdiction, the ambiguous language had crept into some habeas decisions that had nothing to do with appellate power.²⁶⁵

Second, Chief Justice Marshall's *Watkins* opinion is bound up in a debate over *federal* habeas review of *state* convictions, with the major positions on the relevant nineteenth-century cases staked out by Professor Paul Bator and Professor Gary Peller.²⁶⁶ For Professor Bator, *Watkins* and its progeny expressed the principle that habeas was not used to scrutinize the lawfulness of a criminal judgment issued by a jurisdictionally "competent" court.²⁶⁷ For Professor Peller, those cases did not reflect a limited habeas remedy so much as a narrow due process right.²⁶⁸ Law professors have felled forests in this dispute, but I do not want to tread unnecessarily on the question. Each camp has made serious mistakes in its characterization of English common law and nineteenth-

²⁶⁵ To its credit, the Supreme Court was sometimes careful to delineate this distinction. In 1879, the Supreme Court decided *Siebold*, 100 U.S. 371, which addressed statutory limits on the Supreme Court's appellate jurisdiction, *id.* at 374-75, but expressly distinguished those limits from those that "aris[e] from the nature and objects of the writ itself." *Id.* at 375. The Court stated that the general rule was that a criminal judgment was sufficient to prove lawfulness, but then made an extraordinarily important caveat: "The only ground on which . . . any court, without some special statute authorizing it, will give relief on habeas corpus to a prisoner under conviction . . . is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void." *Id.* Two ideas from that caveat merit emphasis. First, the Supreme Court stated explicitly that it did not need statutory authorization to conduct habeas review of a criminal conviction. Second, the Court identified an absence of jurisdiction as one example of a void proceeding. *Siebold*, in fact, carefully emphasized the common-law origins of the rule and of the source of judicially-created exceptions to it. See *id.* at 376-77.

²⁶⁶ See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 466 (1963) (describing *Watkins* as "the great case" showing that inmates could not relitigate "substantive error" in a habeas proceeding); Peller, *supra* note 263, at 604-05 (critiquing Professor Bator's reliance on *Watkins*). The debate between Professor Bator and Professor Peller is treated by the leading habeas treatise as the defining debate in the field of post-conviction review. See 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 2.4(c), at 40 (6th ed. 2011) (describing the theses of Professors Bator and Peller as "dominat[ing] recent judicial opinions and scholarship").

²⁶⁷ See Bator, *supra* note 266, at 466 ("The principle [from *Watkins*] is clear: substantive error on the part of a court of competent jurisdiction does not render a detention 'illegal' for purposes of habeas corpus . . .").

²⁶⁸ See Peller, *supra* note 263, at 663 ("[B]y not distinguishing between the scope of habeas review and the requirements of the due process clause, [Professor Bator's] analysis consistently mistakes the narrow view of due process for a narrow view of habeas jurisdiction.").

century habeas cases. For example, Professor Bator repeats a mistake that Chief Justice Marshall committed in *Watkins*—both erroneously emphasized the English *statutory* habeas writ.²⁶⁹ Professor Bator also ignores habeas decisions memorializing more than strict inquiries into “jurisdiction.”²⁷⁰ Professor Peller’s argument—that habeas remedies were unavailable only because there was a thin due process right—glosses over inconsistent nineteenth-century cases treating a criminal judgment from a jurisdictionally-competent court as dispositive evidence of lawfulness.²⁷¹ Moreover, Professor Peller’s thesis is inconsistent with the nineteenth-century availability of direct appellate relief on claims for which the Court foreclosed habeas relief.²⁷² To generalize somewhat, Professor Peller incorrectly theorized that the presence of a criminal judgment did not restrict the habeas remedy, and Professor Bator incorrectly characterized those limits as jurisdictional bars to habeas relief.

2. Reconciling the Habeas Post-Conviction Cases

These two entanglements notwithstanding, there is language in *Watkins* pertinent to any collateral review of a criminal conviction: “An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous.”²⁷³ The best

²⁶⁹ See Bator, *supra* note 266, at 466 & n.51 (emphasizing *Watkins* and the Habeas Corpus Act of 1679).

²⁷⁰ See, e.g., *Felts v. Murphy*, 201 U.S. 123, 129 (1906) (speaking largely in jurisdictional language, but holding that the prisoner “was not deprived of his liberty without due process of law by the manner in which he was tried, so as to violate the provisions of the Fourteenth Amendment to the Federal Constitution”); *Davis v. Burke*, 179 U.S. 399, 402–04 (1900) (suggesting that habeas relief should not issue if a conviction “involves no question of due process of law under the Fourteenth Amendment”); *Crowley v. Christensen*, 137 U.S. 86, 86, 91–95 (1890) (reaching a Fourteenth Amendment question pursuant to federal habeas jurisdiction); *Ex parte Nielsen*, 131 U.S. 176, 184 (1889) (presenting habeas as a remedy for an unlawful conviction that is an “invasion of a constitutional right”).

²⁷¹ See, e.g., *Siebold*, 100 U.S. at 375 (“The only ground on which this court, or any court, without some special statute authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.”)

²⁷² See 1 Hertz & Liebman, *supra* note 266, at 44–45.

²⁷³ *Watkins*, 28 U.S. (3 Pet.) at 203; see also *id.* at 201 (emphasizing that “[n]o doubt exists respecting the power [to grant writs of habeas corpus]” and that “the question is, whether . . . it ought to be exercised”). Justice Marshall, however, seemed to cloud this statement with subsequent language suggesting that the “law” did not invest the Court with the power to revise criminal judgments through habeas. See *id.* at 207 (“The judgment . . . is of itself

way reconcile the reality of restricted relief with robust judicial power is to conceptualize limited post-conviction review as a *nonjurisdictional* rule imposed by judges. The Supreme Court retains ultimate authority to determine what features of a criminal judgment show that the resulting custody is lawful. Federal courts may deny habeas relief on the ground that a conviction proves the lawfulness of custody, but judges—not Congress—make that decision. Treating the post-conviction rule as a prudential phenomenon is consistent with English common-law habeas power. The fact that a prisoner was confined by a jurisdictionally-competent court did not defeat the power of another English court to consider the lawfulness of the custody, although a criminal judgment was generally dispositive as an evidentiary matter.²⁷⁴

C. Implications for Modern Detention

Boumediene reasons that a custodial outcome must be subject to habeas scrutiny inversely proportional to the legal process that produced it.²⁷⁵ The Supreme Court seems to affirm the following logic: that Article III creates the power to do the sorts of things that courts do in order to issue habeas relief;²⁷⁶ that one of those things involves the inherent authority of an Article III judge to decide whether the process involved in the custody disposition was lawful;²⁷⁷ and that Congress is forbidden from substituting an inadequate form of relief for habeas process.²⁷⁸ The

evidence of its own legality, and requires for its support no inspection of the indictments on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decisions [using habeas corpus]. . . . The judgment informs us that the commitment is legal, and with that information it is our duty to be satisfied.”). This language does not specify whether the Court lacks power to “revise” the judgment because it lacks appellate power to do so, or because “the law” must authorize any collateral review of criminal judgments.

²⁷⁴ See supra text accompanying notes 46–52.

²⁷⁵ See *Boumediene*, 553 U.S. at 781–83.

²⁷⁶ See id. at 779 (describing what the Constitution requires as a *power* of judges).

²⁷⁷ See id. (holding that habeas power includes judicial authority to hear arguments on the lawfulness of detention and order discharge); see also id. at 783 (“The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive’s power to detain.”); id. at 787 (“[W]hen the judicial power to issue habeas corpus properly is invoked[,] the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner’s release.”).

²⁷⁸ See id. at 786 (phrasing the constitutional requirement as whether “the writ of habeas corpus, or its substitute, [can] function as an effective and proper remedy”); id. at 732–33 (holding Military Commissions Act of 2006 § 7 unconstitutional because it took habeas au-

proposition that the Federal Constitution guarantees habeas access for criminally-convicted federal inmates no longer occupies a grey area; modern case law now aligns with the English writ's historical office.

1. The Federal Post-Conviction Power

Boumediene formally involved legislative restrictions on relief for GTMO detainees, but its logic goes beyond military custody. To be sure, *Boumediene* embraces (at the very least) the idea that the effective standard for habeas review should vary with respect to the custodial form at issue. Whatever the variation, however, it should be expressed in non-jurisdictional terms.

First, as a matter of historical practice, “habeas” did not mean one thing for executive detention, another thing for an immigration proceeding, another thing for pretrial detention, and another thing for post-conviction challenges.²⁷⁹ Habeas proceedings may have produced different results that varied by custodial category, but that variation can represent variation in the substantive authority to detain prisoners,²⁸⁰ variation in the substantive rights the different categories of prisoners enjoyed,²⁸¹ and variation in the evidentiary presumption of lawfulness afforded to categories of detention that were products of more judicial process.²⁸² In other words, we need not alter the outcomes of our major habeas cases to acknowledge the remedial principle that judges retain power to decide lawfulness.

thority that was constitutionally required away); see also *id.* at 785 (“Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant.”).

²⁷⁹ See *id.* at 779–81 (articulating a habeas rule across various custody sources that judges had the power to inquire into the legality of detention).

²⁸⁰ Compare, e.g., *Ekiu v. United States*, 142 U.S. 651, 662 (1892) (“A writ of habeas corpus . . . is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment.”), with *id.* at 660 (“As to [noncitizens seeking entry to the United States] the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.”).

²⁸¹ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 524 (2004) (O’Connor, J., plurality opinion) (“Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a *citizen* who disputes his enemy-combatant status.” (emphasis added)).

²⁸² Cf. *Boumediene*, 553 U.S. at 781–82 (contrasting review where convictions are available and where they are not).

Second, the idea that there are separate remedial rules for different types of custody appears flatly inconsistent with *Boumediene* itself. The Court dedicates a considerable amount of space to the discussion that the amount of “deference” courts should show to a custody order is inversely proportional to the amount of process that produced it.²⁸³ In establishing this proposition for GTMO detainees, *Boumediene* cites to no fewer than ten post-conviction cases.²⁸⁴ Moreover, in announcing the rule that a remedy’s adequacy and effectiveness are *necessary* to show constitutionality, the Court incorporated its ruling from two prior federal post-conviction cases in which it held that adequacy and effectiveness are *sufficient* to show constitutionality.²⁸⁵

Third, I want to acknowledge the practical objection that Congress, not the courts, should determine the scope of detention authority. A habeas power need not trench on the prerogatives of the coordinate branches. The other two branches can still authorize detention pursuant to whatever power the constitution allocates to them; habeas power means only that a federal jailor must release the prisoner if the underlying custody is unlawful.²⁸⁶ In other words, the political branches can still decide what custody is authorized and what custody is not, but they cannot effectuate unlawful custody by removing the habeas remedy.

²⁸³ See *id.*

²⁸⁴ See *id.* at 780–87 (citing *Swain v. Pressley*, 430 U.S. 372 (1977); *Townsend v. Sain*, 372 U.S. 293, 313 (1963); *Brown v. Allen*, 344 U.S. 443, 506 (1953) (opinion of Frankfurter, J.); *United States v. Hayman*, 342 U.S. 205 (1952); *Frank v. Mangum*, 237 U.S. 309, 346 (1915); *Ex parte Royall*, 117 U.S. 241, 251–52 (1886); *Watkins*, 28 U.S. (3 Pet.) at 209; *Ex parte Robinson*, 20 F. Cas. 969, 971 (S.D. Ohio 1855) (No. 11,935); *Ex parte Pattison*, 56 Miss. 161, 164 (1878); *Ex parte Foster*, 5 Tex. Ct. App. 625, 644 (1879)). In passing, the Court contrasts GTMO detention with state post-conviction review, and states that “[h]ere, [the] opportunity [to introduce exculpatory evidence] is constitutionally required.” *Boumediene*, 553 U.S. at 786.

²⁸⁵ See *Boumediene*, 553 U.S. at 785 (“[The Suspension Clause remains applicable and relevant], as *Hayman* and *Swain* make clear, even where the prisoner is detained after a criminal trial conducted in full accordance with the protections of the Bill of Rights. Were this not the case, there would have been no reason for the Court to inquire into the adequacy of substitute habeas procedures in *Hayman* and *Swain*. That the prisoners were detained pursuant to the most rigorous proceedings imaginable, a full criminal trial, would have been enough to render any habeas substitute acceptable *per se*.”).

²⁸⁶ To be clear, Congress can continue to authorize detention to the maximum amount allowable under federal statutes and the Constitution. The only difference is that, because of the habeas power, Congress could not take away a habeas remedy for unlawful custody.

2. Examples of Unconstitutional Restrictions on Federal Post-Conviction Review

What are the practical consequences of explicitly recognizing a durably-vested Article III habeas power to decide the lawfulness of federal custody? In this Subsection, I want to discuss several congressional restrictions that would be more difficult to justify under such a theory than under prevailing paradigms for writ process. First, the one-year statute of limitations applicable to post-conviction claims of federal inmates is probably unconstitutional.²⁸⁷ Statutes of limitations are sometimes considered part of the entitlement to which they apply.²⁸⁸ That linkage, however, is almost beside the point—if a legislative rule is generally used to restrict relief and is not meant to streamline process, then the paradigm advanced here would lead to the conclusion that legislative rule is unconstitutional. The idea of a judicially imposed timeliness rule is nothing unusual, as pre-Antiterrorism and Effective Death Penalty Act (“AEDPA”) decisional law used an equitable laches rule for post-conviction petitions.²⁸⁹ Even post-AEDPA decisional law functionally vests judges with timeliness decisions, as the Supreme Court has read an equitable tolling rule into the limitations statute.²⁹⁰

Second, legislative rules against “successive” and “abusive” claims, along the lines of those appearing in 28 U.S.C. Section 2255(h), would also be constitutionally problematic. “Successive” claims are challenges

²⁸⁷ See 28 U.S.C. § 2255(f) (2006).

²⁸⁸ I make this observation primarily based on the “*Erie*” cases in which a federal court exercising diversity jurisdiction must apply the limitations period that the state court in which the district court sits would apply. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 110 (1945). But see *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988) (“The historical record shows conclusively, we think, that the society which adopted the Constitution did not regard statutes of limitations as substantive provisions, akin to the rules governing the validity and effect of contracts, but rather as procedural restrictions fashioned by each jurisdiction for its own courts.”).

²⁸⁹ See *Day v. McDonough*, 547 U.S. 198, 202 n.1 (2006); see also 28 U.S.C. § 2254 advisory committee note (1976) (Rules Governing Section 2254 Cases in the United States District Courts) (“[Rule 9(a)] is not a statute of limitations. Rather, the limitation is based on the equitable doctrine of laches.”).

²⁹⁰ See *Holland v. Florida*, 130 S. Ct. 2549, 2554 (2010). *Holland* involved the limitations period for state prisoners in 28 U.S.C. § 2244(d) (2006), but the limitations period for federal prisoners is virtually identical. See 28 U.S.C. § 2255(f). In cases where the federal government does not assert a statute of limitations defense, however, no equitable tolling question arises. See *Day*, 547 U.S. at 204 n.3.

presented in some previous petitions,²⁹¹ and “abusive” claims are new challenges not presented in a prior federal proceeding.²⁹² Section 2255 categorically bars successive claims and, with limited exceptions, also prohibits abusive ones.²⁹³ These abusive-claim rules dramatically curtail relief, often leaving prisoners unable to litigate challenges that potentially accrue upon the announcement of a new decision or discovery of new facts. These rules are not semantic requirements about the form of a filing. And, as with the statute of limitations, the pre-AEDPA decisional law had dealt with abusive and successive claims quite well, having fashioned fairly clear rules about the criteria for judges to grant relief on the pertinent claims.²⁹⁴ So, when the Supreme Court reasons that statutory abuse-of-the-writ restrictions are constitutional because the provision resembles the judge made rule,²⁹⁵ it misses the entire point. The judicially created restriction is constitutional not because its content is acceptable, but because judges created it.

Third, under a habeas power paradigm, any interpretation of the post-conviction statute that affords dispositive weight to a jurisdictionally sound federal criminal conviction would be unconstitutional. (There is no such rule now, although many federal restrictions proceed from a greater-includes-the-lesser notion that such a restriction might be constitutionally permissible.)²⁹⁶ In other words, the Article III habeas power includes the authority to look “inside” a conviction to assess custody in light of the procedure that secured it. Certainly, as *Boumediene* acknowledges, where there is evidence of criminal process, the custodial

²⁹¹ There is no federal provision even discussing a successive claim, although the structure of 28 U.S.C. § 2255, which does include certain exceptions for abusive claims, strongly suggests that relief in such cases is categorically unavailable. The analogous rule for state prisoners expressly forecloses relief for successive claims. See 28 U.S.C. § 2244(b)(1).

²⁹² The term “abusive claim” is therefore pejorative; a claim that is asserted for the first time in a subsequent habeas petition need not be “abusive” in the everyday sense.

²⁹³ See 28 U.S.C. § 2255(h)(1)–(h)(2) (specifying “new rule” and “new evidence” exceptions to abusive-claim rule). Unlike 28 U.S.C. § 2244(b)—the analogous provision for state prisoners—§ 2255 contains no express bar on claims presented in a previous petition, but there is no judicial authority indicating such an omission should be interpreted as a grant of jurisdiction to entertain such claims.

²⁹⁴ See *Schlup v. Delo*, 513 U.S. 298, 318–19 (1995); *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992); cf. 2 Hertz & Liebman, *supra* note 266, at § 28.3, at 1572–1632 (tracing the evolution of the law governing claims subject to the abuse-of-the-writ defense); *id.* at 1632–53 (tracing the evolution of the law governing successive claims).

²⁹⁵ See, e.g., *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (assessing the statutory rule against the history of the judge-made rule).

²⁹⁶ See *supra* Section III.B.

order is far more persuasive evidence of lawfulness than is an order where such process is lacking.²⁹⁷ If there is an Article III habeas power, then judges must determine the degree of presumptive weight to afford such an order. That conclusion is consistent with the power that judges could exercise at common law.²⁹⁸ *Boumediene* supports the idea that the power would include an ability to look inside a federal conviction; the case upon which *Boumediene*'s Suspension Clause holding rests (*United States v. Hayman*) involved a claim that federal criminal trial counsel was constitutionally ineffective.²⁹⁹ The counterargument, that Congress can freely restrict post-conviction review because the Federal Constitution guarantees no post-conviction access at all, is an idea that crept into Supreme Court decisions *after* the founding.³⁰⁰ Those decisions, however, can be reconciled with the modern state of habeas law under the theory of Article III power I propound here.

D. The State Prisoner Question

My Habeas Power Theory is inconclusive as to federal relief for state prisoners. As Subsection III.B.1 mentions, the degree to which Article III courts may conduct habeas review of state custody is the subject of intense dispute both on the bench and in the academy.³⁰¹ Part of that discussion certainly involves how habeas interacts with criminal custody, but it also implicates broader questions about what sovereign comity requires.

In short, I do not believe that Article III in and of itself vests a judicial power to assess the lawfulness of state custody. If the Federal Constitution requires federal habeas access for state prisoners, then it does so pursuant to some combination of Article III, the Suspension Clause, and another constitutional provision—such as the Supremacy Clause or the

²⁹⁷ See supra Section III.A, and supra notes 283–85 and accompanying text.

²⁹⁸ See supra Part I.

²⁹⁹ See *United States v. Hayman*, 342 U.S. 205, 208 (1952) (cited in *Boumediene*, 553 U.S. at 774–75). Treating *Hayman* as the source of a constitutional rule of adequacy and effectiveness would seem strange if the ability to present the underlying claim in *Hayman*—a claim that went to the procedural integrity of the decision—was not within the Suspension Clause guarantee. See also Neuman, supra note 6, at 554 (observing more generally that the issue in *Hayman* was “worth recalling” in light of *Boumediene*'s reliance on it).

³⁰⁰ See supra Section III.B.

³⁰¹ See supra notes 258–72 and accompanying text.

Civil War Amendments.³⁰² Those combinations are certainly plausible accounts of habeas law, but they are beyond this paper's scope.

CONCLUSION

Habeas law remains addled by legislation, decisional law, and academic theory that have ruptured any contemporary link to the English common-law writ. The modern literature suggests that the availability of habeas process is contingent upon, among other things: the distribution of Article III judicial power between the Supreme Court and lower federal tribunals; the type of custody that is subject to habeas scrutiny; the procedural protections afforded in the original custodial commitment; and varied policy priorities associated with either public safety or national emergencies.

Habeas power theory represents my attempt to unify the various threads of habeas law, in a way that is consistent with established maxims of federal jurisdiction. The key to cohering the pertinent law is to analyze habeas less as an individual right and more as a judicial power. A theory deriving from Article III and the Suspension Clause is surprisingly simple: in the absence of formal suspension, a federal judge has judicial power to decide the lawfulness of federal custody. Congress retains the ability to set the substantive parameters of federal detention, but cannot strip judges of power to award a federal habeas remedy in the event that custody is unlawful.

³⁰² For an argument that Article III combines with the Supremacy Clause to ensure some sort of state-prisoner habeas review, see James S. Liebman & William F. Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 *Colum. L. Rev.* 696, 850-84 (1998). For an argument that the Due Process Clause incorporates the Suspension Clause against the states, see Steiker, *supra* note 116, at 866-68.