

## THE SUSPENSION CLAUSE: ENGLISH TEXT, IMPERIAL CONTEXTS, AND AMERICAN IMPLICATIONS

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*SINCE at least 2001, the Supreme Court of the United States has signaled that the jurisprudence of the writ of habeas corpus, and its possible suspension, should be informed by an understanding of the writ and of the Habeas Suspension Clause in the U.S. Constitution “as it existed in 1789.” This Article recovers the historical basis of the Suspension Clause. It begins by exploring, in the English context, previously unexamined court archives and other manuscript sources. It then traces the path of the writ across the British Empire in the years before 1789. Finally, it analyzes early American uses of the writ, including its treatment in the Judiciary Act of 1789 and Chief Justice John Marshall’s decision in *Ex parte Bollman*. The Article concludes that the writ’s peculiar force was the product of judicial rather than statutory innovation; that judicial authority was premised on the idea that judges enacted powers peculiar to the king—his prerogative—when*

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*they used the writ; that this meant that judges focused more on the behavior of jailers rather than the rights of prisoners; that this focus gave the writ its surprisingly wide coverage as to persons and places; and that the implications of this history for current cases involving the claims of Guantanamo Bay detainees are significant.*

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## INTRODUCTION

“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.”<sup>1</sup> After long years of obscurity,<sup>2</sup> the Suspen-

<sup>1</sup> U. S. Const. art. I, § 9, cl. 2.

<sup>2</sup> Two features of the American jurisprudence of habeas corpus serve to explain the lack of cases. First, until very recently, congressional or presidential efforts to suspend the writ were quite rare. During the period from the framing of the Constitution through the close of the twentieth century, Congress authorized suspension on four occasions, and the President claimed the authority to do so once.

The four congressional occasions were: An Act Relating to Habeas Corpus and Regulating Judicial Proceedings in Certain Cases, ch. 81, 12 Stat. 755 (1863), authorizing President Abraham Lincoln to suspend the writ during the Civil War; An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes, ch. 22, 17 Stat. 13 (1871), authorizing President Ulysses S. Grant to suspend the writ in response to Ku Klux Klan-precipitated resistance to federal officials in southern states; An Act Temporarily to Provide for the Administration of the Affairs of Civil Government in the Philippine Islands, and for other Purposes, ch. 1369, 32 Stat. 691 (1902), which was used to authorize the governor of the Philippines to suspend the writ in that territory after an insurrection broke out in 1905; and the Hawaiian Organic Act, ch. 339, 31 Stat. 141 (1900), which was used to authorize the governor of Hawaii to suspend habeas corpus after the Japanese attack on Pearl Harbor in 1941. The 1902 Philippines Act was challenged unsuccessfully in *Fisher v. Baker*, 203 U.S. 174 (1906). A unanimous Court, in an opinion by Chief Justice Melville Fuller, dismissed the challenge on the ground that habeas corpus proceedings were civil, not criminal, and so the challenger should have brought the case on appeal, not on a writ of error. *Id.* at 181–83.

Lincoln himself claimed the authority to suspend the writ on several occasions, the most prominent of which was categorically rejected by Chief Justice Roger Taney, sitting in chambers, on May 28, 1861. Taney’s oral opinion denying that a president could suspend the writ without congressional authorization was subsequently published as a federal circuit court opinion. *Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9487). Taney himself treated his *Merryman* opinion as one issued by the Chief Justice of the United States as a Supreme Court Justice, not in his capacity as a federal circuit court judge. For a full discussion of the events that lead to *Merryman* and Taney’s intervention in the proceedings, see Carl B. Swisher, *5 History of the Supreme Court of the United States: The Taney Period, 1836–64*, at 842–54 (1974).

Second, as we will see in more detail, the Supreme Court has never squarely held that “the privilege of the writ of habeas corpus” amounts to an affirmative constitutional right to habeas review. It came perilously close to doing so in *INS v. St. Cyr*, 533 U.S. 289, 301, 304 (2001), but stopped short. The Court has, however, regularly entertained habeas corpus challenges to executive detentions. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (for a discussion of the *Bollman* case, see *infra* text

sion Clause of the Constitution has re-emerged as an important provision in contemporary constitutional jurisprudence. Five cases<sup>3</sup> and two Congressional statutes<sup>4</sup> arising out of the war on terror have brought the jurisdictional and normative dimensions of the Great Writ of habeas corpus into sharp relief. The most recent of the cases has been argued before the Supreme Court in its current Term.<sup>5</sup> In the wake of those developments, commentators have begun to explore the status of habeas corpus challenges to war on ter-

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accompanying notes 332-84). *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Ex parte Quirin*, 317 U.S. 1 (1942); *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944).

As we shall see, however, that history does not reduce the Suspension Clause to insignificance. The language of the Suspension Clause is couched in the negative (“the privilege of the writ shall not be suspended”), so it clearly would seem to leave open the possibility that some other official of the federal government, whose authority would issue from the president’s capacity as commander-in-chief of the armed forces or from some other constitutionally endowed presidential capacity, might invoke a suspension.

<sup>3</sup>The cases, in chronological order, are *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006); and *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), cert. granted, 127 S.Ct. 3078 (2007) (No. 06-1195).

<sup>4</sup>The statutes are the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739, and the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, Congress’s responses to lawsuits filed by aliens detained in the United States military base at Guantanamo Bay, Cuba.

<sup>5</sup>The Military Commissions Act provides that:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2636 (2006). At this writing it seems hazardous to state definitively that the Supreme Court will decide the constitutionality of the Military Commissions Act. But that issue received emphasis in the briefs submitted in *Boumediene*. See Brief for the Respondents at 13-61, *Boumediene v. Bush*, No. 06-1195 (U.S. Oct. 9, 2007); Reply Brief for the *Boumediene* Petitioners at 1-20, *Boumediene v. Bush*, No. 06-1195 (U.S. Nov. 13, 2007). Both the majority opinion for the D.C. Circuit panel and the dissenting opinion reached that issue, the majority concluding that the Act was constitutional and the dissent that it violated the Suspension Clause. *Boumediene*, 476 F.3d at 992, 994-95.

ror detentions<sup>6</sup> and to revisit the jurisprudential status of the Suspension Clause.<sup>7</sup> More contributions can be expected.<sup>8</sup>

*A. Habeas Corpus Jurisprudence and the Role of History*

The Suspension Clause does not itself confer jurisdiction on any court to enforce the “privilege of the writ.” But, as we shall see in more detail, the Suspension Clause needs to be read in connection with Article III of the Constitution and with the Judiciary Act of 1789, in which the newly created Congress sought to clarify the role of the federal courts in the newly created federal Union. In Section 14 of the Judiciary Act of 1789, Congress gave the federal courts jurisdiction to review challenges, based on the writ of habeas corpus, to the detention of American citizens awaiting a judicial trial within the boundaries of the United States. The relationship of the Suspension Clause to that legislation, and to Article III of the Constitution, has prompted considerable debate, much of it concerned with claims about the writ’s past.<sup>9</sup>

The Supreme Court, for its part, has consistently maintained that the contemporary constitutional jurisprudence of habeas corpus needs to be informed by the legal and constitutional history of the “Great Writ,”<sup>10</sup> both in England and in the framing period of the

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<sup>6</sup> See Richard H. Fallon, Jr. et al., 2007 Supplement to Hart and Wechsler’s *The Federal Courts and the Federal System* 154–89 (5th ed. 2003); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029 (2007).

<sup>7</sup> Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding Ex Parte Merryman*, 34 U. Balt. L. Rev. 11 (2004); David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 Notre Dame L. Rev. 59 (2006), cited with approval in Fallon & Meltzer, supra note 6, at 2045 n.53.

<sup>8</sup> In addition, there is a vast literature on two other habeas corpus issues that are largely outside the scope of this Article. The first is the scope of the privilege of the writ of habeas corpus for post-conviction challenges, as opposed to challenges brought before trial. The second is whether the habeas remedy is available for collateral attack on, and federal re-litigation of, state criminal convictions. For an exhaustive review of that literature, see Richard H. Fallon, Jr. et al., *Hart and Wechsler’s The Federal Courts and the Federal System* 1290–1324 (5th ed. 2003).

<sup>9</sup> For citations, see id. at 1286–87, 1289–90. For a fuller discussion of the Judiciary Act’s language, see *infra* Conclusion.

<sup>10</sup> The earliest usage of the term “great writ of English Liberty” we have found is in Giles Jacob, *A New Law-Dictionary* 348 (1729). In his discussion of the term, Jacob stated, “it is a mistaken notion that this Writ is of a modern date, and introduced with the reign of King Charles 2.” The first major *statutory* intervention in the writ’s use

Constitution. As the Court put it in a 2001 decision, habeas corpus decisions should be guided, “at the absolute minimum,” by an understanding of the legal status of the writ ““as it existed in 1789.””<sup>11</sup> That “understanding,” however, remains elusive. As we shall see, scholars have repeatedly written about the English history of habeas corpus from the same problematic body of evidence. Moreover, they have generally done so on the basis of flawed assumptions. Perhaps the most disabling of those assumptions can be characterized as follows. Because the writ has come to provide a means by which we might protect modern liberal aspirations concerning individual rights, historians have assumed that explaining the writ’s history requires that we see its origins in ideas about liberty that look like our own. One can understand the resonance of this assumption for Americans today, for it is consistent with a conception of the writ of habeas corpus as a synecdoche for modern liberal ideals. In that idealized version of habeas corpus, the history of the writ becomes a history of the ever-greater manifestation of ideals of fairness, due process, and humanitarianism associated with the “Anglo-American tradition” of justice under law.<sup>12</sup> Driven by ahistorical assumptions like this one, and working with a small body of sources, it is hardly surprising that commentators

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took place with the Habeas Corpus Act of 1679. 31 Car. 2, c. 2. As Jacob’s discussion suggests, and as we shall explore further below, the “Great Writ” of common law not only preceded, but was always greater—more expansive—than the writ enacted by statute.

<sup>11</sup> *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996)). Among briefs making use of this standard, see Brief for Former Federal Judges et al. as Amici Curiae Supporting Petitioners at 10, *Al Odah v. United States* (consolidated with *Boumediene*), cert. granted, 127 S. Ct. 3078 (2007) (No. 06-1196). Both Judges Randolph and Rogers of that court referred to this standard in explaining their contradictory positions as to whether or not the petitioners in the case the Court heard in December might be able to invoke habeas corpus challenges to their detentions. See *Boumediene v. Bush*, 476 F.3d 981, 988 (D.C. Cir. 2007) (Randolph, J., for the majority); *id.* at 1000 (Rogers, J., dissenting).

<sup>12</sup> The legal historiography of Anglo-American habeas corpus jurisprudence serves as a model example of “whig history,” in which contemporary commentators impose their current preconceptions on their pasts. In Herbert Butterfield’s classic formulation, “the whig historian can draw lines through certain events . . . to modern liberty.” In doing so, the historian “begins to forget that this line is merely a mental trick.” Herbert Butterfield, *The Whig Interpretation of History* 12 (1951) (originally published in 1931). This “is bound to lead to an over-simplification of the relations between events and a complete misapprehension of the relations between past and present.” *Id.* at 14.

have not yet produced a serious historical account of habeas corpus from its English origins through the American founding.<sup>13</sup>

### B. Overview of the Analysis

This Article recovers the historical basis of the Suspension Clause by working, in the English context, with court archives and with other manuscripts—readings in the Inns of Court, lawyers' notes and draft treatises, law reports, Admiralty papers, state papers, and private letters—as well as with the usual printed materials. It then turns to the American context. There our focus is not primarily on direct testimony from the framers of the Suspension Clause: such evidence is quite sparse.<sup>14</sup> Instead we concern ourselves with the text of the Clause and the underlying assumptions governing that text, using the contributions of seventeenth- and eighteenth-century English courts and commentators, and the practices of colonial American courts, to help recover those assumptions. In the course of our inquiry we trace the path of Anglo-American habeas jurisprudence from England across the British Empire to the American founding.

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<sup>13</sup> Nineteenth-century American accounts of the English history of habeas corpus provide an especially vivid example of “whig history.” In these, the genesis of habeas corpus rested in Magna Carta, or, more vaguely, in Anglo-American liberties. See, e.g., William S. Church, *A Treatise on the Writ of Habeas Corpus* 3 (2d ed., San Francisco, Bancroft-Whitney Co. 1893); Rollin C. Hurd, *A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus and the Practice Connected with It* 66–74 (2d ed., Albany, W.C. Little & Co. 1876). We will argue that this general claim, and many assumptions attendant on it, is anachronistic and in need of revision.

By the early twentieth century, historians were taking a more measured approach. See, e.g., William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 156, 421–22 (1905); Faith Thompson, *Magna Carta: Its Role in the Making of the English Constitution 1300–1629*, at 68–69 (1948). But the idea that the writ originated with Magna Carta remains deeply embedded. In the Senate's debates on the Military Commissions Act of 2006, Senator Arlen Specter of Pennsylvania stated that “[t]he right of habeas corpus was established in the Magna Carta in 1215 when, in England, there was action taken against King John to establish a procedure to prevent illegal detention.” 152 Cong. Rec. S10264 (daily ed. Sept. 27, 2006). In the same debate Senator Jeff Bingaman of New Mexico likewise dated habeas corpus to 1215. *Id.* at S10261.

<sup>14</sup> For a fuller discussion, see *infra* Part IV. Commentary on the Suspension Clause by the framers and their contemporaries is discussed in William F. Duker, *A Constitutional History of Habeas Corpus* 127–35 (1980) and Eric M. Freedman, *Habeas Corpus: Rethinking the Great Writ of Liberty* 12–19 (2001).

The Article begins with the language of the Clause and attempts to determine how that language had come to be understood by the time of the framing. As we proceed phrase-by-phrase through the Suspension Clause, we will explore the varying assumptions, arising out of centuries of English practice, that revealed themselves in these twenty-six words. Those assumptions can be summarized briefly here. A “Privilege of the Writ of Habeas Corpus” was taken by the framers and their contemporaries to be self-evident. At the same time its prospective “suspension” by statutory means in times of emergency was treated as inevitable, if not desirable, according to practices that were well-entrenched between 1689 and 1777. “Rebellion,” or “invasion,” and protection of the “public safety” were taken to be the conditions necessary to justify suspension of the privilege of the writ. Throughout the Article we seek to explain the origins and persistence of those assumptions, as revealed in legal arguments and court practices in many different English and American sources.

Part I of the Article argues that the Suspension Clause needs to be understood primarily as an English text rather than an American one. Unlike other parts of the Constitution, in which English practices—for instance, impeachment or writs of election<sup>15</sup>—were transformed to serve a new constitutional design, the Suspension Clause carried the writ of habeas corpus out of English practice and into American law with little additional jurisprudential baggage. Although there is comparatively little evidence of colonial American use of the writ of habeas corpus that might have informed those who wrote the Suspension Clause, there is plenty of other evidence of how the writ was understood.<sup>16</sup> The Clause refers to the writ of habeas corpus, its status as a privilege, and its capacity to be suspended in certain circumstances. All those propositions were derived from English usages in the two centuries preceding the Constitution. An English reading of this English text can thus take us quite far in answering the question of what Americans might have understood about habeas corpus and its suspension in 1787.

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<sup>15</sup> U.S. Const. art. I, § 3, cl. 6; U.S. Const. art. I, § 2, cl. 4.

<sup>16</sup> For a fuller discussion, see *infra* Part IV.

Parts II and III consider this English reading of the Suspension Clause in the rapidly changing imperial contexts of the 1770s and '80s. The Suspension Clause appeared after ten years of experimentation with habeas corpus and its suspension across Great Britain's empire. In the 1770s, the writ took on new meanings for British subjects in India, redefining subjecthood in the process. In those same years, as an imperial civil war broke out in North America, Parliament closed down access to the writ—the “palladium of liberty”<sup>17</sup>—for anyone detained outside of Britain for treason or piracy: in other words, Americans. In short, as the writ opened to new imperial subjects in the east, it was lost to old imperial subjects in the west. By the time they framed their Constitution, Americans had become well aware of the place of the writ of habeas corpus in defining English subjecthood and its perquisites, because they had felt so keenly their loss. In the course of considering the application of the habeas privilege to imperial contexts, we seek to answer some central questions concerning the Anglo-American jurisprudence of habeas corpus. On what conceptual

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<sup>17</sup> Across the eighteenth century, lawyers and other commentators referred routinely to habeas corpus as “the Palladium of Liberty,” a phrase rich with meaning in a society whose leaders were steeped in classical mythology. Widely printed books, like Francis Pomey, *The Pantheon, Representing the Fabulous Histories of the Heathen Gods And Most Illustrious Heroes* (Andrew Tooke ed., 6th ed., 1713), recounted classical lore in easily accessible form. Pomey told the story of the palladium, the image of the goddess Trojans called Pallas—better known as Minerva or Athena—that protected their city. As Pomey explained, the Greeks called her Athena “because she is never enslaved, but enjoys the most perfect liberty.” *Id.* at 114. Troy, and Trojan liberty, thus remained safe as long as the image of Pallas guarded the city. Ulysses, with the help of Diomedes, crept into Troy through the sewers and stole the Palladium. The city soon fell. For Pomey's account of the story, see *id.* at 113–15. For further discussion of Pallas, see *id.* at 120–22. The writ of habeas corpus and sometimes the Habeas Corpus Act of 1679 were routinely referred to as liberty's palladium. See, e.g., Britannicus, *A Reply to the Case of Alexander Murray, Esq.* 51 (1751); *The Annual Register, or a View of the History, Politics, and Literature, For the Year 1774*, at 72, 212 (3d ed., London, J. Dodsley 1782).

This language appeared frequently in parliamentary debates, especially when discussion turned to suspending the writ by statute. See, for instance, the 1777 debate to suspend the writ for American rebels, in which John Johnstone condemned a “measure of attacking the grand palladium of the British constitution”; Charles James Fox referred to habeas as “the great palladium of the liberties of the subject;” and James Luttrell damned the bill as a “daring attack upon the palladium of English liberty.” 19 *The Parliamentary History of England, from the Earliest Period to the Year 1803*, at 5–6, 11, 39–40 (William Cobbett comp., London, T. C. Hansard 1814) [hereinafter *Parliamentary History*].

foundations did the writ rest? By what means might the writ's use be suspended, and what exactly did a suspension entail? How did the writ come to travel beyond English shores, and how did the privilege of the writ come to extend to persons who were not English citizens?

Part IV addresses the translation of those English concepts and imperial experiences into the unique American constitutional design, with its emphasis on conceptions of separation of powers and federalism, arrangements that bear only surface—and deceptive—similarities to distinctive English institutional arrangements.<sup>18</sup> Here our time frame is necessarily limited. Many of the issues of constitutional design addressed in the Constitution were to play themselves out, and continue to do so, in a future that stretches from the framing era to the Supreme Court's recent habeas cases. Moreover, the American constitutional jurisprudence of habeas corpus has evolved since the framing period.<sup>19</sup>

Our focus is on two issues that were highly important to the founding generation: the self-evident quality of the Suspension Clause for Americans and the common law grounding of the writ. By exploring those issues, we can begin to see that the American version of the writ was not, as has been conventionally thought, part of a long evolving history of Anglo-American liberties, stretching back to Magna Carta.<sup>20</sup> Even though the Suspension Clause used the language of English legal and social practice, that language was not the language of liberty as it came to be understood in America. It was a language associated with royal prerogatives and the relationship of kings and queens to their subjects, a relationship managed in part by royal justices. By capturing the prerogative for their own use, English judges made a writ that gave them power to inspect all other courts or officers who detained

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<sup>18</sup> For a brief discussion of the fundamental unity in English constitutional arrangements and presuppositions owing to the centrality of the monarch, see *infra* notes 41-44 and the sources cited therein.

<sup>19</sup> That evolution is briefly discussed in the Article's Conclusion.

<sup>20</sup> The view that the writ of habeas corpus embodies a long Anglo-American tradition of vindicating the rights of subjects against the King, or of citizens against the unconstrained powers of the Executive branch, is so widely shared that modern commentators and judges take it for granted. See, e.g., sources cited in Fallon & Meltzer, *supra* note 6, at 2037-39 nn.24-28. Perhaps the best illustration is in Duker, *supra* note 14, at 3-9.

anyone. Though conceptually the writ arose from a theory of power rather than a theory of liberty, the legal possibilities this injected into the writ would permit the realization of those extra-legal ideals we invoke today when we speak the language of rights and liberties. Modern legal usages concerned with liberty turn out to have had some surprising sixteenth, seventeenth, and eighteenth century origins.

The Article concludes by suggesting some implications of our historical narrative for contemporary habeas cases emerging out of the War on Terror.<sup>21</sup> At this point a brief allusion to the methodological premises informing the Article's Conclusion seems in order. The historical emphasis of this Article suggests that it can fairly be seen as an exercise in extracting "original understandings" of the Suspension Clause. Although our coverage of the Anglo-American history of habeas jurisprudence extends well beyond the framing period, the Supreme Court has stated that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'"<sup>22</sup> In seeking to determine the content and scope of the writ at that time, we are necessarily attempting to recover something like the "original understanding" of the Suspension Clause.

Although our account of the Anglo-American history of habeas corpus ranges beyond that "originalist" inquiry, the account does have some implications for the habeas challenges presented by Guantanamo Bay detainees in *Boumediene*. Two sets of our findings, in particular, are relevant to those challenges.

One set of findings relates to the issue of whether, in Anglo-American jurisprudence, the writ of habeas corpus was thought capable of running outside the geographic boundaries of the sovereign nation whose officials were holding a prisoner in custody. The clear message of our historical account is that it was not the location of an incarceration that was taken as controlling the issuance of the writ, but the sovereign status of the officials holding a prisoner in custody. So long as officials of the king, or his equivalent, were exercising custody over the bodies of prisoners in a territory,

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<sup>21</sup> In *St. Cyr*, Justice Stevens, for the majority, and Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist in dissent, advanced alternative views of the history of the Suspension Clause. *INS v. St. Cyr*, 533 U.S. 289, 301–03, 336–41 (2001). We take up those views in more detail in the Conclusion.

<sup>22</sup> *Id.* at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996)).

the basis of that custody could be challenged by prisoners through habeas writs. In short, our account reinforces the conclusion by the majority in *Rasul v. Bush* that in 1789 the common law writ of habeas corpus would have extended to detainees at a facility outside the territory of the United States but under its control, such as the Guantanamo Bay naval base.<sup>23</sup>

The other set of findings relates to the issue of whether aliens in custody in such a facility, or in a facility within the sovereign's dominions, were seen as having the same "privilege of the writ" as "natural subjects" enjoyed. Here the implications of our findings for cases such as *Boumediene* are less straightforward. Early modern justices distinguished between aliens and "natural subjects," though, as we shall see, this distinction was irrelevant to their purview of prisoners using habeas corpus. Even aliens who were subjects of foreign princes at war with the English king—typically styled "alien enemies"—enjoyed ready access to the English king's courts. This was the result of the conceptual foundation from which habeas corpus arose: not from ideas about liberty, but from those concerned with sovereignty and the king's prerogative. Habeas corpus was fundamentally an instrument by which the sovereign, through his judges, might ensure that his authority was not abused whenever an officer acting in the king's name imprisoned someone. The status of the jailer—a servant of the king—not the status of the prisoner as a natural subject nor as an alien determined when and for whom the writ might issue.<sup>24</sup>

Thus when enemy aliens challenged imprisonment orders in the seventeenth and eighteenth centuries using habeas corpus, they asked the court to determine the factual question of whether they were indeed properly categorized as such by their jailers, and if so, whether they posed a danger of a kind for which a person might be imprisoned. The king's justices were quite ready to answer their requests. But here analogies among historical English conceptions and practices, the understandings of Americans in the founding era, and contemporary issues arising out of the war on terror are imperfect at best. Although the United States government refers to all persons detained in Guantanamo Bay as "enemy combatants,"

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<sup>23</sup> *Rasul v. Bush*, 542 U.S. 466, 481–82 (2004).

<sup>24</sup> For a fuller discussion see *infra* Sections III.B. and III.C.1.

none of them are citizens of a sovereign state formally at war with the United States, because that war is not being conducted against any such state. Many of the detainees may harbor ill will against the United States, but their designation as “enemy combatants” has been made unilaterally by the United States government. Although most of the detainees at Guantanamo Bay are aliens, they do not easily fit within those conceptions of subjecthood and of “alien enemies” that shaped habeas access in the centuries before 1789. But to the extent they do fit within those conceptions, the thrust of early modern usage shows us that the king’s justices were generally ready to investigate the factual and legal ground of imprisonment orders premised on allegations that a person was an enemy alien, a danger to the state, or both.

In considering the implications of our findings for the *Boumediene* case and other potential habeas challenges arising out of the war on terror, we need to guard against using history to answer questions it cannot definitively answer. Making reflexive analogies between past and present can be an intellectually lazy exercise. Our purpose is to gain a better understanding of the writ of habeas corpus “as it existed in 1789” by exploring the writ’s use from within the cultural norms and legal practices of Britain and its empire in the centuries before 1789. We then explore how those concepts were transposed in America at the time of the framing of the Constitution. If the Suspension Clause is to play an increasingly important role in challenges brought by persons in confinement as a result of their alleged involvement in the War on Terror, recovering a contextualized understanding of that Clause at the time it was enacted is important. The historical narrative of the Anglo-American jurisprudence of habeas corpus presented in this Article is offered as a contribution to that understanding.

## I. AN ENGLISH TEXT

### A. *Evidentiary Problems in Habeas History*

Before setting forth a preview of our general argument, it is necessary to undertake a brief review of the significant evidentiary problems that have confronted scholars of habeas corpus in English law.

First, scholars have relied overwhelmingly on printed primary sources since such sources are easily available.<sup>25</sup> But law in early modern<sup>26</sup> England was still deeply shaped by learning that remained in manuscript or which was transmitted only orally.<sup>27</sup> Second, historians have relied not only on printed sources, but on a limited set of such sources. For example, many American commentators on the English history of habeas corpus depend on assertions made by William Blackstone.<sup>28</sup> It is well known that the Oxford lectures, later published as Blackstone's *Commentaries*, were hugely influential, especially in late eighteenth-century America.<sup>29</sup> Blackstone was interested in far more than historical accuracy in writing his *Commentaries*, and it seems fair to say, at this point, that if one is seeking accuracy, one needs to supplement Blackstone with other sources.<sup>30</sup> More generally, relying upon print treatises such as

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<sup>25</sup> Such usage also reflects what John Baker has rightly called "the tyranny of the press over our intellectual horizons." J.H. Baker, *Why the History of English Law Has Not Been Finished*, 59 C.L.J. 62, 82 (2000).

<sup>26</sup> The period from the mid sixteenth century to the late eighteenth is conventionally labeled "early modern" by historians concerned with that period.

<sup>27</sup> Manuscripts were the favored form for storing and transmitting legal ideas in early modern England, even in the later eighteenth century, when printed treatises and legal reference works were widely available. Such manuscripts included treatises that were never published and notes or abridgments of statutes or cases carefully gathered under headings in a way that made them into customized reference sources for everyday consultation. Until the late seventeenth century, when readings—public lectures or learning exercises—all but ceased in the Inns of Court, unpublished notes of readings were another prominent feature of legal learning. For the importance of manuscripts and aural learning in the seventeenth century, see Wilfred R. Prest, *The Inns of Court Under Elizabeth I and the Early Stuarts, 1590–1640*, at 116–24 (1972). For the eighteenth century, see David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* 131–44 (2000).

<sup>28</sup> In *Rasul v. Bush*, the decision of the U.S. Supreme Court referred twice to the *Commentaries*; the dissent of Justice Scalia referred to it four times. 542 U.S. 466, 482 nn.12–13, 502–04 (2004). In *Hamdi v. Rumsfeld*, Justice Scalia made use of Blackstone six times. 542 U.S. 507, 555, 557–58, 561–62, 576 (2004). A few other treatise writers sometimes gain mention. Sir Matthew Hale, meanwhile, gets one notice from the Supreme Court in *Rasul*, 542 U.S. at 482 n.13, citing to the modern edition of a work first printed in 1713: Sir Matthew Hale, *The History of the Common Law of England* (Charles M. Gray ed., 1971). For the dating of the first print edition, see *id.* at xiii.

<sup>29</sup> The most readily available edition of Blackstone is the facsimile of the first edition of 1765–69. 1–4 William Blackstone, *Commentaries on the Laws of England* (Univ. of Chi. Press 1979).

<sup>30</sup> The very elegance of the analytic structure and prose in the *Commentaries*—by which Blackstone made order out of that which was essentially chaotic, English law—should give us pause in taking it as a merely descriptive treatise. For varying ap-

Blackstone's to recover an Anglo-American history of habeas corpus may adversely affect one's understanding of the actual workings of English habeas cases in practice.

Third, American historians and lawyers have relied unduly on *The English Reports*, an accidental gathering of cases that has been taken, erroneously, to be canonical in their range and reliability.<sup>31</sup> Historians of English law have long appreciated the serious flaws in such printed case reports from the early modern period.<sup>32</sup> Even though the quality of reporting improved in the second half of the eighteenth century, the majority of cases went unreported.

Furthermore, members of the early modern English legal community relied heavily on manuscript reports, most of which never made it into print.<sup>33</sup> In many instances, those that were printed are qualitatively inferior to those that remained in manuscript. Hundreds of important habeas reports survive only in manuscript, and in other instances in which they survive alongside a printed report, the manuscript version is much fuller.<sup>34</sup> In short, historians have

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proaches to Blackstone, see David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* 31–67 (1989); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *Buff. L. Rev.* 205 (1979); and Michael Lobban, *Blackstone and the Science of Law*, 30 *Hist. J.* 311 (1987). For a more recent treatment, see Bernadette Meyler, *Towards a Common Law Originalism*, 59 *Stan. L. Rev.* 551, 560–62 (2006).

<sup>31</sup> The English Reports (1900–1930). This compilation of the best-known nominate printed case reports was first gathered into a unified set in the early twentieth century. See J.H. Baker, *An Introduction to English Legal History* 181–84 (4th ed. 2002). For discussion of some of the problems in early modern English reports, see A.W. Brian Simpson, *Leading Cases in the Common Law* 10–12 (1995); Baker, *Why the History of English Law Has Not Been Finished*, *supra* note 25, at 73–78.

American law reports in the framing period were no better. See G. Edward White, 3–4 *History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815–35*, at 384–88 (1988) [hereinafter White, *The Marshall Court and Cultural Change*]. For a full discussion of early American law reports, see Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 *Mich. L. Rev.* 1291 (1985).

<sup>32</sup> John Baker has said of printed reports of the seventeenth and eighteenth centuries: “[s]ome of them were so bad that judges forbade their citation, or resorted to manuscripts to supply their deficiencies: a discipline which the student of legal history must necessarily emulate.” Baker, *Introduction*, *supra* note 31, at 183–84.

<sup>33</sup> See Baker, *Why the History of English Law Has Not Been Finished*, *supra* note 25, at 74.

<sup>34</sup> For an example, see the 1615 case of Henry Rosewell (“Ruswell” in the printed reports), one of a number from that year that concerned King’s Bench oversight on habeas corpus of Chancery imprisonment orders. The two printed reports of the case

written and re-written the same thin history of the English writ in its critical period—roughly 1580 to 1780—because they have consistently consulted the same limited set of materials.<sup>35</sup> Scholars and lawyers have persisted in writing the writ's history from a tiny sample of surviving evidence. To reconstruct the English history of habeas, one needs a different approach.

More than 11,000 prisoners used the writ of habeas corpus in the three centuries before the framing of the United States Constitution.<sup>36</sup> The archives for studying these habeas cases survive. From

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(Ruswells Case, 1 Rolle 192, 81 Eng. Rep. 425 (K.B.), and 1 Rolle 219, 81 Eng. Rep. 445 (K.B.)) offer only a précis of Chief Justice Sir Edward Coke's thinking in the matter, in which he ultimately decided to remand the prisoner based on the return to Rosewell's writ, which stated that he had been imprisoned for a contempt of Chancery. The manuscript version of the report gives a quite full account of the cases Coke discussed and of his exchange with Rosewell's counsel, George Croke. Bodleian Library, Oxford [hereafter Bod.], MS Rawlinson C.382, ff. 56v.–57v.

<sup>35</sup> In the most recent work considering the writ's English history, 159 reports of 143 habeas cases are cited from the writ's formative period, the three centuries before 1789. R.J. Sharpe, *The Law of Habeas Corpus* (2d ed. 1989). The principal American work on habeas corpus cites seventy-two reports of fifty-nine habeas cases from the same period. Duker, *supra* note 14. Earlier historians of the writ worked with far fewer cases. See, e.g., Church, *supra* note 13, at 4–16; Hurd, *supra* note 13, at 75–91.

<sup>36</sup> This number is derived from a quadrennial survey of King's Bench records (see *infra* note 37) conducted by Paul Halliday, yielding information on 2752 writs of habeas corpus *ad subjiciendum* issued every fourth year, from 1502 to 1798, inclusive. This gives us a projected total of just over 11,000 prisoners. Given the varying condition of these records over such a long period, the figure of 11,000 is almost certainly an undercount. Owing to problems with record survival, only partial information exists for the following years falling in the quadrennial series surveyed: 1510, 1518, 1534, 1674, 1678, and 1686.

From this information gleaned from King's Bench archives, a database has been constructed that allows many patterns of use to be traced. Among the many things we learn are the identity of the committing officer or court and the wrong alleged to support the commitment; the dates at each stage of proceedings, and thus the speed of process; results (whether prisoners were remanded, bailed, or discharged); and much more. After 1679, we can determine whether writs issued according to common law, or according to the Habeas Corpus Act of 1679, 31 Car. 2, c. 2.

In addition to the quadrennial survey years, the records described below were also searched in other years of probable importance: for instance, the first two decades of the seventeenth century, when certain aspects of writ process changed most rapidly; the 1640s and '50s, during the Civil Wars and the Interregnum; the 1690s, when England experienced foreign war and domestic risings; and the war years of the decades after 1756. This resulted in information on more than 2000 further users of the writ of habeas corpus in addition to the 2752 in the survey group. In total, we are working here with information surviving on over forty percent of the projected total number of users of a quite actively used writ. While the purpose of this Article is not to explore closely the many things we learn from this body of evidence, it is important to under-

them one can work not only with anecdotes—individual case reports, often containing little more than judicial dicta—but with the patterns of usage that only thousands of cases can reveal.<sup>37</sup> Court

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stand this information in brief, as at many points following, we can see more clearly the significance of various isolated moments by holding them up to general patterns of usage.

<sup>37</sup> Three classes of records from the Court of King's Bench, all held in the National Archives of the United Kingdom, London (Kew) [hereinafter TNA], have been studied. First, the recorda files of the Crown Side of King's Bench—concerned especially with crown pleas, such as felony and statutory wrongs—contain the actual writs and the returns made to them: the full, formal answer made to the writ in which the jailing officer explained the circumstances of imprisonment, often by transcribing into the return the warrant of commitment. Second, the Crown Side controlment rolls contain enrolled copies of many of the writs and/or their returns or at least a précis of the same. Third, the Crown Side rule and order books contain information on all aspects of proceedings on the Crown Side.

These documents are cited throughout this Article according to standard historical practice and to the forms of citation recommended by the National Archives of the United Kingdom. The recorda files may be found in TNA, KB145 (up to 1688) and in KB16 (after 1688); some stray recorda files are in TNA, KB32 (for various years in the reign of Charles I, 1625–49) and KB11 (1689–90). In most cases, each file covers a single regnal year: the dating of early modern judicial records, like the dating of statutes, was done not by reference to the calendar year, but by reference to the year of the monarch's reign, that year taken to begin on the date of accession. Because the controlment rolls and rule and order books were kept only during the court's four terms, and not during the lengthy vacations between terms, the recorda files provide us with the only surviving evidence of the extensive use of habeas corpus outside of term. Writs and their returns found in these files are cited herein by the recorda file reference, with the name of the prisoner(s) and, where date information survives, the writ's teste date, the date of issuance: e.g., TNA, KB145/17/14 (Henry Vane, teste May 30, 1662).

The controlment rolls are in TNA, KB29. These are composed of large parchment membranes gathered by term and then stitched together at the end of each regnal year to form the roll. References to these rolls are to the individual roll and membrane number: e.g., TNA, KB29/282, m. 159d., where "m." signifies the membrane number, and "d." signifies that the entry is on the dorse, or back, of the membrane. Clerical practice varied widely across three centuries, making these rolls of greater or lesser value from one period to the next. They tend to be quite full in the early sixteenth century, after which they vary in quality until the period after 1660, when the information they contain about habeas use drops rapidly. By the late 1670s, they only list the names of the writ's users, and from the 1690s, even this information disappears. Given this variation, the recorda files are to be preferred to the controlment rolls for any systematic study across centuries, though by combining information from the two, we can hope to get the fullest surviving information. Two important works have made effective use of the controlment rolls to study habeas history. The more recent is J.H. Baker, *The Common Law Tradition: Lawyers, Books and the Law* 341–46 (2000). In the 1880s, Frederick Solly-Flood wrote a long manuscript treatise on habeas corpus, now housed in the library of the Royal Historical Society, in London. He

archives—not reports, nor printed treatises, nor case abridgments and law dictionaries—constituted the official record of judicial process.<sup>38</sup> These sources will form the basis of our inquiry.

*B. “The privilege . . .”*

This phrase, at first glance, looks strange. Americans conceive of habeas as a “right,” a mechanism for defending what we call civil or human rights. But the English understood habeas corpus as a privilege. One of the king’s *brevia mandatoria* (writs of command), it arose from the royal prerogative and issued, on motion, at the discretion of the justices sitting in King’s Bench.<sup>39</sup> Paradoxical as it may seem—at least to the modern eye—the royal prerogative would give to habeas corpus its distinctive judicial power to defend what, centuries later, we call human rights. Liberty did not originate in the writ. But liberty would ultimately find a refuge in it, because habeas corpus stood on the most solid ground of sovereignty. To understand the writ’s history, we must first understand this conceptual foundation.

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did extensive work in the controlment rolls, sampling them for the first year of each monarch’s reign, though as he reached the seventeenth century, he worked more from the printed reports than from the rolls.

The Rule and Order books are in TNA, KB21. These are bound paper volumes, some of which are paginated, some foliated, and others without any numbering of the sheets. Volume and page or folio numbers are indicated thus: TNA, KB21/11, f. 167v., where the second number indicates the volume, “f.” indicates the folio number, and “v.” indicates the verso, or back of the folio. These order books have been very little studied, yet they contain information we can find nowhere else about many aspects of everyday court practice.

<sup>38</sup> As J.H. Baker has noted, such records have been too little studied, especially for the centuries after 1550, yet they “are ignored at our peril.” Baker, *Why the History of English Law Has Not Been Finished*, supra note 25, at 72.

<sup>39</sup> Habeas corpus was a judicial writ, requiring motion by counsel making a *prima facie* case for issuance. For examples of the denial of habeas on motion, see Lincoln’s Inn, MS Misc. 499, f. 249 (1666); and Lincoln’s Inn, MS Hill 83, f. 226 (1667). See also Thomas Franklyn’s case, (1783) 1 Leach 255, 168 Eng. Rep. 230, which provides a good example of the limitations of printed reports. Here the report does not make clear Franklyn’s failure to get the writ. For the court’s orders, see TNA, KB21/43, unpag., at Monday in fifteen days of St. Hilary (January 27, 1783) for the *nisi* order to issue; and at Wednesday next after the morrow of the Purification of the Blessed Virgin (February 5, 1783) for the discharge of the previous order: in other words, a denial of the writ.

*1. A Prerogative Writ*

In 1677, the lawyer William Williams addressed the justices of King's Bench:

It is the prerogative of the King to deliver all prisoners upon habeas corpus or to be satisfied that there [is] just cause for their imprisonment. It is the right of the subject to be so delivered and it is the right of the court to deliver them [sic] be the crime what it will and be the[y] committed by what court soever . . .<sup>40</sup>

Here, Williams knotted together the rights of subject, king, and court. The rights of subjects hung on the rights of the king. The king's rights were performed by his greatest common law court, the court of King's Bench, the only one of his courts in which he was theoretically always present.<sup>41</sup> However, as we shall see, there was one court even more powerful and highly regarded: the high court of Parliament.<sup>42</sup> This fact would have profound consequences for the operation and suspension of the writ. After all, there was no separation of powers in early modern England; there were no co-equal branches checking or balancing one another.<sup>43</sup> There was

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<sup>40</sup> National Library of Wales, MS Coedymaen 6, f. 1. Williams was arguing on behalf of the Earl of Shaftesbury. The sting was in the tail of his statement. Shaftesbury had been imprisoned by the House of Lords for contempt. Williams argued, unsuccessfully, that habeas was so important a privilege that even Parliament—"what court soever"—must answer it.

<sup>41</sup> King's Bench was said to convene *coram rege*: before the king. On the idea that King's Bench was the place where the king himself sat in judgment, even long after he had ceased to sit in that court, see Baker, Introduction, *supra* note 31, at 38–39.

<sup>42</sup> On Parliament as the king's highest court, see *id.* at 207–08.

<sup>43</sup> If we are to use English history to understand the contours of our law, then we must approach that history with some sensitivity for its distinctive features. The differences between American and early modern English ideas and practices must be the key to constructing a proper history of habeas corpus.

Americans commonly refer to imprisonments ordered by the king and his Privy Council as "executive" orders. Thus, the Five Knights' Case of 1627, in which the knights concerned had been imprisoned by an order of the king in Council, is commonly referred to as an "executive" imprisonment. On the Five Knights' Case, see *infra* text accompanying notes 125–30. For such usage, see, e.g., Tor Ekeland, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, of the United States Constitution and the War on Terror*, 74 Fordham L. Rev. 1475, 1481 (2005). But when we call the king or his council an executive, we immediately preclude an historical investigation by employing ahistorical premises.

The usage is anachronistic. Neither the king nor his Council was "an executive" in any meaningful sense of that word, nor was a Parliament simply a legislature. To ap-

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only one power from which all who exercised any authority might trace the origin of that authority: the king.

That the writ of habeas corpus should derive from those powers belonging uniquely to the king—his prerogative—and that it should be an instrument used by his greatest common law court to

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preciate this, we must understand that Privy Council, Parliament, and every other instrument of authority in England shared the same legal and conceptual source: the king. Judges, the Council, Parliaments, and all others who performed official functions derived their authority from the king, explicitly—through terms spelled out in charters or commissions passed by the great seal—or implicitly, by claims of custom. Powers within the English polity were not seen as separated; thus they did not check or balance one another, even if at times, as a result of institutional or personal jealousies, they came into conflict.

The Privy Council was simultaneously an administrative body, an advisory board, and a court. It arguably legislated as well, by proclamation. The Council oversaw the work of judges—issuing instructions to them before they rode their semi-annual assize circuits—and of local justices of the peace. On the Council's functions, see Penry Williams, *The Tudor Regime* 31–33 (1979). From the Council sprang two of the most popular courts of the sixteenth and early seventeenth centuries: Requests and Star Chamber. On the popularity of Requests, see Tim Stretton, *Women Waging Law in Elizabethan England* 70–100 (1998), and of Star Chamber, see Steve Hindle, *The State and Social Change in Early Modern England, c. 1550–1640*, at 66–93 (2000). Individual careers as well as institutional arrangements ensured significant sharing of personnel. Chief justices of the two principal common law courts—Common Pleas and King's Bench—typically first served as solicitor and/or attorney general, in which capacity they advised the Council and did its legal work. After promotion to the bench, chief justices were sometimes sworn as members of the Privy Council. In this capacity, they sat as judges in the Court of Star Chamber as well as in their own courts. See James S. Hart, Jr., *The Rule of Law, 1603–1660: Crowns, Courts and Judges* 59–62 (2003). The career of the legendary Edward Coke provides a notable illustration: Coke was attorney general, chief justice of Common Pleas and then of King's Bench, Privy Councilor, and sometime judge in Star Chamber. See Allen D. Boyer, Coke, Sir Edward, in *12 Oxford Dictionary of National Biography* 451 (H.C.G. Matthew & Brian Harrison eds., 2004), available at <http://www.oxforddnb.com/view/article/5826>.

Nor was Parliament typically a competitor with the king before the 1640s. Rather, it was both the king's highest court and his most important council. Thus Henry VIII was reputed as saying, “[W]e at no time stand so highly in our estate royal as in the time of Parliament, wherein we as head and you as members are conjoined and knit together into one body politic.” J.J. Scarisbrick, *Henry VIII* 507 (1968) (quoting 3 Holinshed's *Chronicles of England, Scotland, and Ireland* 826 (1808)). Henry's reference to “the time of Parliament” underscores the fact that his contemporaries thought of a Parliament, not *the* Parliament. Until 1640, and arguably until 1689, “Parliament was an event and not an institution.” Conrad Russell, *Parliaments and English Politics, 1621–1629*, at 3 (1979). Until 1689, Parliament convened at the king's or queen's command, and disbanded on the same authority. On the assembling of a Parliament, see Jennifer Loach, *Parliament Under the Tudors* 18–20 (1991). The classic statement of the proposition that Parliaments were not bodies apart from and competing with the crown is in G. R. Elton, *The Parliament of England, 1559–1581*, at 1–40 (1986).

inspect nearly all other courts and administrative officers whenever they detained someone, made perfect sense within an early modern conception of law in which all authority flowed from one fount.<sup>44</sup> Law, and this writ, relied on an idea of sovereignty so internally unified that it could only be conceived as arising within a single individual.

To illuminate this distinctive early modern English conception of the relationship between law and sovereignty, one can do no better than work through an analysis of the work of Sir Matthew Hale. Hale's work on the prerogative represents the closest any early modern legal thinker came to a unified field theory of English law.<sup>45</sup> Exploring Hale's arguments, we can see a conception of a prerogative writ as embodying the potency of a monarch whose judges employ the writ to protect the liberties of the monarch's subjects. The idea that liberty should arise from and be protected

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<sup>44</sup> This is emphatically not to say that law, and habeas corpus, were premised on so-called absolutism. For a discussion of concepts of monarchy in the seventeenth century, rebutting the common notion that early Stuart kings were "absolutist" in practice or in theory, and underscoring the consensual quality of political discourse in the early seventeenth century, see Glenn Burgess, *Absolute Monarchy and the Stuart Constitution* (1996), and Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603–1642* (1992). Historians now appreciate the intellectual force and legal clarity of what would become royalist legal argument up to and during the 1640s. This helps us understand why so many lawyers—including many of the King's critics—ended up supporting the king rather than Parliament in the 1640s. As Conrad Russell pointed out, Charles I won a following in the Civil Wars of the 1640s by an appeal to law, an appeal answered by many prominent lawyers. Conrad Russell, *The Causes of the English Civil War* 131–60 (1990).

<sup>45</sup> The modern edition of Hale's writings on the prerogative is a collation of two manuscripts, one probably written during the Civil Wars of the 1640s, the other probably written in the years immediately before and after the restoration of monarchy in 1660. A third manuscript, the *Incepta de Juribus Coronae*, contains Hale's working notes. On the manuscripts and their dates of composition, see D.E.C. Yale, *Introduction to Sir Matthew Hale, The Prerogatives of the King* ix–xi, xxiii–xxvi (D.E.C. Yale ed., Selden Society 1976) [hereinafter *Hale's Prerogatives*]. In writing about the prerogative, Hale took himself to be writing about the heart of English law. As he put it, "It is most certain that the English government is monarchical . . . [and] the supreme administration of this monarchy is lodged in the king, and that not only titularly but really." *Id.* at 10–11. From this, all else followed. For Hale's tabular arrangement of English public law, by which he tied political theory to English institutional arrangements as they arose from the central fact of monarchy, see *id.* at xi–xx. As the leading work on Hale notes, in his writings on the prerogative, Hale "organised the law, which had previously been scattered through an enormous range of difficult sources." Alan Cromartie, *Sir Matthew Hale, 1609–1676*, at 45 (1995).

only within the status of dependent subjects of a king sounds paradoxical to the modern ear. That it did not sound paradoxical to early modern English ears provides a clue to understanding habeas corpus jurisprudence in the centuries before 1789. By seeing the writ's derivation from the prerogative and by reading Hale to understand the nature of subjecthood, we shall see how the writ crossed the globe, following the king's officers, covering the king's subjects, "natural" and otherwise.<sup>46</sup> We shall also see how the attendant idea of franchises—that all authority came from the king<sup>47</sup>—explains the writ's peculiar force as a mechanism for defending the subject's liberty.<sup>48</sup> In short, the writ of habeas corpus focused less on what we might say were the rights of the prisoner than on the wrongs committed by the jailer.

Early modern English conceptions of the nature of the king's prerogative will thus be central to our account of the Anglo-American history of habeas jurisprudence and the Suspension Clause. But before developing that argument in more detail, it is necessary to review some more basic issues.

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<sup>46</sup> The term "natural" is placed in scare quotes because a bald distinction between the natural and alien subjects of a monarch may strike contemporary readers as loaded or offensive. The distinction was not so regarded in early modern English jurisprudence. For further discussion of the variety of subjects, see *infra* Subsection I.B.5.

<sup>47</sup> Hale's *Prerogatives* included a very full section discussing franchises, in which he stated that "all jurisdictions are derived from the crown and are exercised either by immediate commission from his Majesty or by grant over to his subjects, *viz.* by grant express or presumed . . . . This appears especially by that subordination that they all have to the king's jurisdiction . . . ." Hale's *Prerogatives*, *supra* note 45, at 201. For a fuller discussion, see *infra* Section II.B. Hale's contemporary, Francis North, later Lord Guilford, defined franchise succinctly as "a general denomination for all privileges, exemptions, capacities, and interests, which are claimed either by grant from the king, or by prescription . . . and are distinct from all specific estate or title in lands, tenements, or chattels." British Library [hereinafter BL], MS Add. 32,520, f. 66.

<sup>48</sup> As we will see in more detail, Hale endorsed the traditional doctrine "that the king can do no wrong." It did not follow, however, that the king's officers were above the law, even when implementing royal commands. "[F]or if it be wrong and contrary to the law," Hale argued, "it is not the act of the king but of the minister or instrument that put it in execution and consequently such minister is liable to the coercion of the law to make satisfaction." Hale's *Prerogatives*, *supra* note 45, at 15. Here we reach the heart of the matter: determining what was wrong in law in the actions of anyone commissioned by the king was the function of the writ of habeas corpus and the other prerogative writs.

## 2. Habeas Corpus in Early Modern England: A Primer

Habeas corpus is typically and properly classified as a common law writ. Justices of the King's Bench, primarily,<sup>49</sup> gave orders to issue the writ of habeas corpus *ad subjiciendum*<sup>50</sup> in response to motion by counsel.<sup>51</sup> The writ was, literally, a scrap of parchment, about one or two inches by eight or ten inches in size, directing the jailer to produce the body of the prisoner along with an explanation of the cause of the prisoner's detention.<sup>52</sup>

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<sup>49</sup> The writ also issued from Common Pleas and from the common law side of the Courts of the Exchequer and of the Chancery. Unlike in King's Bench, using the writ from one of these other courts required a claim of privilege: that the writ's user be an officer of, or litigant in, the issuing court. This explains why, as the court of Queen's Bench began to make significant changes in the use of the writ in the second half of the reign of Elizabeth I, use of habeas from these other courts appears to have fallen off dramatically. For this reason, as Chief Justice Sir John Vaughan of Common Pleas put it, it was "more natural" that habeas should issue from King's Bench since it was there that final determinations could be made on criminal wrongs. Carter 221, 124 Eng. Rep. 928 (1671).

<sup>50</sup> Throughout this article, the term habeas corpus will be used to refer to the writ of habeas corpus *ad subjiciendum et recipiendum* (to undergo and receive). The writ took many other forms, but it was this form that developed the force to review imprisonment orders by any official, the quality now regarded as central to the writ's utility. Habeas corpus *ad testificandum* also came to be regarded as very important, because it brought witnesses into court in criminal (as well as civil) proceedings.

The two most common forms of the writ in the early modern period were the writ *ad respondendum* and the *ad faciendum et recipiendum* writ, both of which removed a body from one court into another in a private action. To early modern lawyers, these two forms of the writ were central because they aided pleadings in disputes about debts and other private complaints, where professional incomes were earned. Thus early modern practice manuals focused almost entirely on these forms of the writ, not on the *ad subjiciendum et recipiendum* form. See, e.g., Richard Antrobus & Thomas Impey, *Brevia Selecta; Or, Choice Writs* 3 (1663); *Praxis Utriusque Banci: The Ancient and Modern Practice of the Two Superior Courts at Westminster* 1-4 (1674).

<sup>51</sup> From at least the early seventeenth century, affidavits from the prisoner or others might be used to support the motion by making out a *prima facie* case for the writ. Occasional references to affidavits may be found in the rulebooks. For example, the court ordered a writ to the jail in Lostwithiel, Cornwall, in 1624 for one Hayne, based on an affidavit presented in court. TNA, KB21/8, f. 28. Unfortunately, affidavits do not survive from before 1688 and only survive in large numbers beginning two decades later. Affidavits are in TNA, KB1 and KB2. The creation of indexes of affidavits (TNA, KB39), which survive from 1738, suggests how important they had become in the eighteenth century.

<sup>52</sup> The writ required return of the body along with "the cause of the detention" only. In the sixteenth century, returns were often brief enough that one could write them on the back of the writ itself. In 1628, the language of the writ changed, to require the return of "the day and the cause of the arrest and detention." This led to the making

The writ's recipient, typically a jail keeper or sheriff, would write this explanation, which was called the return. In it, the jailer would normally embody the warrant for the prisoner's detention made out to him by the officer or tribunal that ordered imprisonment. If returning officers balked, the justices typically responded by issuing new writs with "sub pena" clauses, threatening penalties for non-return, or by issuing attachments for contempt that could sometimes end in fines against the jailer.<sup>53</sup>

Over the course of the early seventeenth century, King's Bench slowly convinced all other courts and administrative officers that they must answer the court's demands expressed in the writ of habeas corpus.<sup>54</sup> Some jurisdictions resisted, claiming immunity from writs issuing from the king's great common law courts sitting in Westminster Hall.<sup>55</sup> But in the early years of the seventeenth cen-

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of longer returns, as more detailed information was now required. As returns lengthened, the practice increasingly was to attach another piece of parchment to the writ on which a more full return might be written. For more on this change in process, see *infra* note 158.

<sup>53</sup> Sub pena clauses were usually included in *alias* and *pluries* writs, repeat writs issued when the first was unreturned. As one reporter noted in 1632, "the custom of the court is to grant an alias with a pain on affidavit of the serving of the first writ." Cambridge University Library, MS Gg.2.19, f. 253. Such writs tended to impose a £40 penalty in the first instance and an £80 penalty in the second. But sometimes the threat could be more severe: see, for instance, the writ for John Somerland and Hatton Easton, which issued with a £200 threatened penalty. KB21/13, f. 99. They had been jailed in 1646, at the end of the first Civil War, for failing to pay their assessment for support of the parliamentary army. The threat appears to have worked: the return was made and they were bailed. TNA, KB29/296, m. 66d.; KB21/13, ff. 101 and 102v.

<sup>54</sup> A particularly impressive example of this concerned writs sent to the porter of the porter's lodge (the prison) of the Council of the Marches of Wales, based at Ludlow, in Shropshire, in 1605. This concerned a writ for Walter Witherley, sent to the porter, Francis Hunnyngs, reported in Harvard Law School [hereinafter HLS], MS 118, ff. 57–58 and HLS, MS 1180, ff. 68v.–70. After repeated attempts to force Hunnyngs to return the writ, King's Bench imprisoned the jailer for contempt. HLS, MS 118, f. 58.

<sup>55</sup> Examples were Berwick-upon-Tweed, on the Scottish border; the Cinque Ports, along the south coast; and the Council in the Marches of Wales, in the west. There were also other jurisdictions, known as the palatinates—Chester, Durham, and Lancaster—to which writs in civil process did not run from Westminster Hall, but to which the prerogative writs, including habeas corpus, did run. On these special jurisdictions, see Baker, Introduction, *supra* note 31, at 27–31, 121. On the Cinque Ports, see J.H. Baker, 6 *Oxford History of the Laws of England* 318 (2003). For the imposition of the writ of habeas corpus in Berwick, much against the will of the corporation there, see the 1601 case of Henry Brearley: TNA, KB21/2, ff. 84v., 87, and 95. This was in all likelihood the case adduced during arguments in *Bourne's Case*, from the

tury, using fines and powers of attachment, the justices of King's Bench convinced these and all other tribunals to make returns to their writs that provided full legal accounts to justify the detention of prisoners. The single most important feature of habeas corpus jurisprudence, as it emerged in the seventeenth century, did not concern *how* King's Bench justices decided the fate of prisoners. It concerned the fact *that* the justices decided their fate, regardless of who locked them up. Thus the great importance of habeas corpus lay in its extension to all institutions and courts by an insistent King's Bench, whose justices made use of all the powers available to them in doing so. Putting the prerogative into the writ made this possible.

In a case concerning the Cinque Ports in 1619, Chief Justice Sir Henry Montague explained that habeas corpus was a "writ of the prerogative." It was the means "by which the king demands account for his subject who is restrained of his liberty."<sup>56</sup> Why did the king care about the liberties of his subjects? "The reason why the common law has such great regard for the body of a man," Chief Justice Sir John Popham declared in 1605, "is so that he may be ready to preserve the king."<sup>57</sup> The king both relied upon and commanded the bodies of his subjects: from the need to command bodies came the power to free them. King's Bench judges used that power as their own. Thus a writ concerned with moving, holding, and releasing bodies from imprisonment arose directly from this fundamental aspect of the king's prerogative.

### *3. Miracles and the Royal Prerogative*

Sir John Dodderidge, one of the first justices to connect habeas corpus explicitly to the prerogative, described the prerogative this way around 1600: "The heavens in height, the earth in deepness, and the king's heart none can search. The royal prerogative[s] of princes are sacred mysteries not to be touched."<sup>58</sup> The prerogative

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Cinque Ports, in 1619: see *Richard Bourn's Case*, Cro. Jac. 543, 79 Eng. Rep. 465, 465–66. For an analysis of Hale's discussion of special jurisdictions, see *infra* Part II.

<sup>56</sup> *Habeas Corpus al Cinque-Ports pur un Borne Imprison La.*, (1619) Palmer 54, 81 Eng. Rep. 975, 975 (K.B.).

<sup>57</sup> HLS, MS 105, f. 85 (1605) (from a report on the writ for Ladd, et al.).

<sup>58</sup> BL, MS Harleian 5220, f. 3. Dodderidge's sketch of a planned treatise on the prerogative dates from late in Elizabeth's reign, around the years 1600–03. For discus-

was both within and beyond law, a place where the king's authority mimicked the divine. Like God, Dodderidge and his contemporaries reasoned, the king usually operated according to known rules. The king's rules were called law; God's were called nature. Might God or king act beyond the rules? Surely, yes, with respect to God: God performed miracles. What about the king? An important question was whether the royal prerogative was to be contained within law, or whether it should be understood as allowing the king to perform his own kind of miracles, through and upon law.<sup>59</sup>

Here we need to see the relationship of miracles to the royal prerogative as seventeenth-century English people would have seen it.<sup>60</sup> Contemporaries believed that a miracle was not contrary

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sion, see Christopher W. Brooks, *Lawyers, Litigation and English Society Since 1450*, at 207–08 (1998).

<sup>59</sup> Even in the eighteenth century, a King's Bench justice found the analogy to divine miracles a useful way to describe the prerogative. Sir John Fortescue Aland noted that Sir John Davies, a century earlier, had likened "the prerogative to the government of God himself, who suffers things generally to go in their usual course, but reserves to himself to go out of that by a miracle when he pleases." BL, MS Stowe 1011, f. 88 (Fortescue Aland commonplace book, n.d.). But there was nothing in Davies about acting by whim, "when he pleases." As we shall see, the people's well-being, not whim, justified use of the prerogative. See *infra* text accompanying notes 62–65. Davies wrote, "[The king] doth imitate the Divine Majesty, which in the government of the world doth suffer things for the most part to pass according to the order and course of nature, yet many times doth show his extraordinary power in working of miracles above nature." Sir John Davies, *The Question Concerning Impositions, Tonnage, Poundage, Prizage, Customs, &c.* 32 (1656). That work was posthumously published, Davies having died in 1626. Sean Kelsey, *Davies, Sir John*, in 15 *Oxford Dictionary of National Biography* 378, 378 (H. C. G. Matthew & Brian Harrison eds., 2004), available at <http://www.oxforddnb.com/view/article/7245>. Fortescue Aland was justice of King's Bench and later of Common Pleas; he died in 1746. David Lemmings, *Aland, John Fortescue*, first Baron Fortescue of Credan, in 1 *Oxford Dictionary of National Biography* 558, 558–59 (H.C.G. Matthew & Brian Harrison eds., 2004), available at <http://www.oxforddnb.com/view/article/271>.

<sup>60</sup> The strangeness of the miracles analogy in a secularized twenty-first century world raises a larger methodological issue. In exploring the centrality of the analogy to early modern English thought, we are arguing that to recover the history of legal concepts, we must recover epistemological assumptions by actors in the past that have now largely been discarded. Appreciating that point is crucial to understand the ideas that underlay Anglo-American habeas corpus jurisprudence during the period covered by this Article. See especially Quentin Skinner's discussion of these methods in his work on the history of political ideas. 1 Quentin Skinner, *Visions of Politics: Regarding Method*, especially chs. 1, 3, 4, 6, 8 (2002); Quentin Skinner, *Liberty Before Liberalism* 101–20 (1998). As Skinner notes, "one of the present values of the past is as a repository of values we no longer endorse, of questions we no longer ask." *Id.* at 112.

to nature—there was no necessary division between the natural and supernatural worlds—but an occasional divine intervention in it.<sup>61</sup> This they analogized to the prerogative. As God performs miracles within and upon the natural world, they reasoned, so too might kings wield the prerogative within and upon law. On both sides of the analogy, rule-transcending power complemented ordinary possibilities traced by the rules. Juxtaposing nature and miracle, law and royal prerogative—modern habits of thought—fails to capture the sensibility of Dodderidge, Davies, and their contemporaries. By seeing this, we can appreciate better the function of the prerogative within English law, and thus the operation of the writ of habeas corpus.

#### 4. *Justifying Royal Miracles: The Bond Between King and Subjects*

It was taken for granted that the king could perform his version of miracles using the prerogative. He justified that intervention, however, not simply by appeals to divine omniscience or mystery. Just as God only used miracles for the good of the people, the royal prerogative was used only to promote *salus populi*, the good of the king's subjects.<sup>62</sup> Linking king to God and the need for miracles to the common weal in 1606, Edward Forset noted the king's "prerogative rights of most ample extensions, and most free exemptions." He employed those prerogatives, Forset maintained, not whimsically, but moderately, "as God in the world, and the Soule in the body[;] not to the impeach, but to the support of justices; not to the hurt, but to the good of subjects."<sup>63</sup> As we shall see, this prerogative power, whether running through the writ of habeas corpus or through the king's suspension of law, was invariably connected to his obligation to protect and further the good of his subjects.

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<sup>61</sup> On early modern ideas about miracles, see Alexandra Walsham, *Providence in Early Modern England* 225–43 (1999). For the persistence of such thinking in the eighteenth century, see Jane Shaw, *Miracles in Enlightenment England* (2006).

<sup>62</sup> The king "is the most excellent and worthiest part or member of the body of the commonwealth, so is he also (through his good governance) the preserver, nourisher, and defender of all the people[, they] being the rest of the same body." Sir William Stanford, *An Exposition of the Kings Prerogatiue*, at Fol. 5 (1607).

<sup>63</sup> Edward Forset, *A Comparative Discovrse of the Bodies Natvral and Politique* 21 (1606). Forset develops at length the likeness of the king to God, and thus the idea of the king's power, like God's, to act beyond the bounds of nature. *Id.* at 20–26.

This obligation did not arise from a social contract, but from a reciprocity of duties that constituted the bond between the king and his subjects.<sup>64</sup> The subject's allegiance to the king, itself a product of natural law, required that the body of the subject be at the service of the body of the king. As Sir Thomas Fleming remarked in his discussion of subjecthood in *Calvin's Case* in 1608, "the bond of allegiance is not a bond of servitude but of freedom: *come liber homo*."<sup>65</sup> By giving allegiance to the person of the king, the person of the free subject was protected. Not only was his body protected, so too was what was thought of as his "inheritance." Inheritance did not mean only the ability to gain possessions from one's family. It meant something far greater: succession to the traditional privileges of a subject. Law was part of that inheritance because it helped protect subjects. In protecting law, partly through the use of the royal prerogative, the king protected the subject, just as the protected subject protected the king. To our eyes, this reasoning appears circular. To early modern eyes, it packed great force.

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<sup>64</sup> The judges discussed this in *Calvin's Case* (1608), which concerned whether a Scottish subject could hold property in England after Scotland's king, James VI, became England's king too, as James I, in 1603. In deciding that Scots born since 1603 could indeed hold property in England, the judges emphasized that the subject's allegiance was owed to the actual person of the king, not to his political person or some other abstraction such as "the Crown." See Coke's discussion of allegiance, 2 A Complete Collection of State Trials cols. 607, 613–21 (T. B. Howell comp., 1816) [hereinafter State Trials]. In considering whether subjects owed obligation to the king's body politic, or to his body natural, Coke was clear: "our ligeance is to our natural liege sovereign." Id. at col. 629. For analysis of Coke's report of *Calvin's Case*, see Keechang Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* 176–99 (2000) and Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 Law & Hist. Rev. 439 (2003).

<sup>65</sup> "Like a free man." John Hawarde, *Les Reportes del Cases in Camera Stellata*, 1593 to 1609, at 362 (William Paley Baildon ed., 1894). That liberty was a condition premised on obligation, even bondage. It was a secular rendition of the most pervasive language of liberty in seventeenth-century England: that associated with the status of a Christian. See, e.g., Alexander Chapman, *Christian Liberty Described in a Sermon Preached in the Collegiate Church at Westminster, by a Minister of Suffolke*, at signature D3 (unpaginated) (1606). Debates about the nature of liberty were thus heavily conditioned by religious controversy, the most important being that concerning antinomians. Those who emphasized the role of Hebraic law in controlling human actions were derisively called "legalists" by their antinomian foes, who thought that only in a full and unfettered liberation could they live out their salvation here on earth. On antinomians, see David R. Como, *Blown by the Spirit: Puritanism and the Emergence of an Antinomian Underground in Pre-Civil-War England* (2004). On "legalists," see id. at 2.

*5. Habeas Corpus and the King's Subjects, Natural and Alien*

Thus far we have associated the royal prerogative, from which the privilege of habeas corpus was derived, with subjecthood, which might be thought of as being limited to those born within England. But for the purposes of employing the writ of habeas corpus, subjecthood did not arise only from birth in the king's dominions.

Following the lead given by Coke in *Calvin's Case* (1608), Hale identified four kinds of subjects, ranging from those "natural born" to "local subjects."<sup>66</sup> It is in this latter category that the nature of subject status becomes much more complicated than modern language, with its emphasis on a distinction between citizens and aliens, might suggest. As Hale put it, "every person that comes within the king's dominions owes a local subjection and allegiance to the king, for he hath here the privilege of protection."<sup>67</sup> Protection—arising from allegiance—derived from the king's prerogative, which "flow[s] from the fountain of grace" to all the king's subjects, both "natural" and "local."<sup>68</sup> All were protected by those parts of English law that ensured that no one acting in the king's name performed any deed outside the law. The complex and inclusive notions of subjecthood on which this protection rested persisted at least until the first Aliens Act of 1793<sup>69</sup> and in practice, well beyond.<sup>70</sup> This expansiveness of the king's protection explains

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<sup>66</sup> "I find the denomination of subjects applicable to persons under these four considerations, first, natural born subjects, secondly, acquired, or subjects by purchase or acquest, thirdly, local subjects, fourthly, feudal subjects." Hale's *Prerogatives*, supra note 45, at 54. Coke's four varieties of "ligeance" differed slightly: "naturalis," "by acquisition or denization," "local obedience," and "legal obedience." 2 *State Trials*, supra note 64, at col. 615.

<sup>67</sup> Hale's *Prerogatives*, supra note 45, at 56.

<sup>68</sup> BL, MS Harleian 5220, f. 11v. "Protection," according to Thomas Blount, is "that benefit and safety, which every subject, denizen, or alien, specially secured, hath by the Kings Laws." Thomas Blount, *NOMO-ΛΕΞΙΚΟΝ: A Law-Dictionary*, at entry "Protection," signature Fff4 (Sherwin & Freutel 1970) (1670).

<sup>69</sup> 33 Geo. 3, c. 4.

<sup>70</sup> Sir Francis Ashley, in his 1616 reading on *Magna Carta*, chapter 29, argued that "none may be freemen except those who are subjects, or born, or resident within the fee of the king and within his protection." An alien, Ashley concluded, was a freeman for purposes of *Magna Carta*, but this status pertained only while one was within the king's dominions, "because his allegiance and protection is only local." Even an alien enemy, who came by safe conduct, was a "freeman because he has the protection of

why in the many cases of foreigners using habeas corpus the issue of their foreignness was almost never discussed, much less used to bar review of detention orders.<sup>71</sup> When foreign sailors were impressed into the king's navy in the second half of the eighteenth century, claims of alien status provided the foundation for using the writ and ultimately for releasing such impressed foreigners.<sup>72</sup>

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the king and thus by the law of nations (which is only the law of nature) must have the privilege of the laws of the realm." BL, MS Harleian 4841, f. 6.

On the impact of the Aliens Act of 1793 and further statutes amending it, see Caitlin Anderson, *Britons Abroad, Aliens at Home: Nationality Law and Policy in Britain, 1815–1870*, at 23–58 (2004) (unpublished Ph.D. dissertation, University of Cambridge). The extension of consular protection to a wide variety of different kinds of subjects—for instance, in the Mediterranean—persisted as late as the mid-nineteenth century. Broadly inclusive practices making protection available to persons who were not natural subjects only began to be curtailed, by statutory change, beginning in 1847. See *id.* at 168–75, 176–77. Our thanks to the author for sharing with us a copy of her unpublished dissertation.

<sup>71</sup> See, for example, the writ for the Marquis de Brabant and a knight of Malta who were bailed after conviction at Maidstone assizes for shooting three watermen. TNA, KB145/17/14 (teste February 12, 1662); KB21/14, ff. 70v. and 72v.

<sup>72</sup> Hundreds of foreign seamen, caught up by press gangs in English, Caribbean, or even foreign ports, successfully used habeas corpus to gain release from naval service in the second half of the eighteenth century. A 1740 statute had excepted from impressment "every foreigner." 13 Geo. 2, c. 17. Reference to this and other exempt categories were the chief grounds on which sailors used habeas corpus to challenge impressment. Foreign sailors in the merchant marine were supposed to be issued letters of protection explaining their foreign status, which could be presented whenever the press came on board. 13 Geo. 2, c. 17, § 3. This did not always prove effective when press officers anxious to meet their quotas were at work. In such cases, when foreign sailors used habeas corpus, the Admiralty's solicitor usually recommended that the sailor be released. In one such case, the Admiralty solicitor explained that two foreign sailors were "entitled to be discharged by virtue of the said writs of HC." He added, as he often did, that releasing them would be advised, "in order to save a great expense." TNA, ADM1/3678, f. 4 (letter of Samuel Seddon, Admiralty solicitor, to John Cleveland, secretary to the Admiralty board, January 22, 1760). While protections were desirable, they were not required, since aliens, by virtue of their status, were exempt from this form of detention. Thus even when a sailor lacked a protection, the Admiralty ordered release. See ADM1/1787 (letter of Capt. John Falkingham to John Cleveland, October 16, 1760, noting that a Swede and a Spaniard had no protection, with order to discharge on the verso). Admiralty solicitor letters in TNA, ADM1 and ADM7, provide a unique body of evidence for the perspective of counsel opposing writs of habeas corpus. The writs (TNA, KB16) and affidavits (TNA, KB1) in impressment cases, along with captains' letters (TNA, ADM1), and the attendant orders on those writs (TNA, KB21), provide an opportunity to examine habeas usage from several angles. For background on impressment, see N.A.M. Rodger, *The Wooden World: An Anatomy of the Georgian Navy* 164–88 (1986).

But the king's protection applied not only to foreign sailors and to other local subjects or "alien friend[s]," as Hale called such persons.<sup>73</sup> "[I]f an alien enemy reside or come into the kingdom, and not in open hostility, he owes an allegiance to the king *ratione loci* . . . ."<sup>74</sup> What counted as "open hostility?" Answering this question was a matter of both fact and law for the court of King's Bench to explore. Writs used during the French wars of the 1690s to investigate imprisonment orders for alleged "prisoners of war," "prisoners at war," or "spies" show this well. The court remanded some of these prisoners and released others.<sup>75</sup> In one of the few reported instances when alien enemy status was raised by counsel in hopes of impeding habeas corpus, the court not only issued the writ, but later released the prisoners.<sup>76</sup> Until a court explored an al-

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<sup>73</sup> Hale's Prerogatives, *supra* note 45, at 56.

<sup>74</sup> "By reason of place." *Id.* at 56.

<sup>75</sup> Abraham Fuller was arrested for "suspicion of dangerous and treasonable practices" and, according to the return to his writ, ordered held as "a prisoner at war." He was then discharged without bail upon consideration of this return in February 1690. TNA, KB11/14 (teste January 23, 1690) and KB21/23, p. 362. Though the return to his writ referred to him as a "prisoner at war" and explained his detention by order of the Privy Council, it made no mention of a suspicion of "treasonable practices" mentioned in the original conciliar order. See CSPD 1689-90, p. 329 and TNA, PC2/73, p. 351.

The return to the writ for John Dupuis reported that he had been captured at Exeter in September 1694 and ordered jailed by the mayor there, as "a Frenchman, on suspicion of being a spy." King's Bench ordered Dupuis remanded to the royal messenger who had custody of him when the return to his writ was examined in court. In September 1695, the Privy Council ordered that he be turned over to the Commissioners for Sick and Wounded Seamen, who also handled prisoners of war, and ordered that he be exchanged with the French "when there is any exchange of prisoners": TNA, KB16/1/5 (teste April 12, 1695) and PC2/76, f. 116v.

The return to a writ of early 1697 explained that Garrett Cumberford had been detained two years earlier, first in Newgate, and later in the Savoy, where other military prisoners were held. He was bailed by King's Bench. A Privy Council order of May 1695 (TNA, PC2/76, f. 65v.) suggests that he may have been given the chance to be released upon giving security and swearing the oath of allegiance. Whether he refused these terms, or other circumstances intervened, is unclear. No mention of any intervening release is made in the return to his writ in the winter of 1697. TNA, KB16/1/6 (teste January 23, 1697) and KB21/25, p. 120.

<sup>76</sup> See *The Case of Du Castro*, (1697) Fortescue 195, 92 Eng. Rep. 816 (K.B.) (he is called Du Castro in the report, but DuCastre in the record). For full information in the case, one must consult the original record, where Daniel DuCastre and Francis LaPierre were called in the return to their writ "alien enemies and spies." TNA, KB16/1/6 (teste January 23, 1697). The clerical note on the return to the writ shows they were bailed. DuCastre and LaPierre appeared twice in court on recognizances,

legation of violence intended by an enemy alien against the king and his subjects, it remained just that: an allegation.

Although subjects—alien or native born—performed the bond of allegiance with their bodies, the king did the same and more. We return to his capacity to perform legal miracles. The royal power to create sanctuary or to grant pardon was a kind of miracle: a dispensation from the law made possible by the prerogative.<sup>77</sup> Hale called pardon “dispensation with laws” or “[a]n exemption from government.”<sup>78</sup> As we shall see, “dispensation” from law, and its cousin, suspension, would become controversial. But as long as pardon was more closely connected to mercy for the subject than to the power of the king—“not to the hurt, but to the good of subjects”<sup>79</sup>—this use of the prerogative would persist. By providing protection where appropriate and by granting mercy beyond the law’s warrant, the king demonstrated his deep obligations to subjects of all kinds by performing extra-legal miracles.

Whether the king imposed justice or granted mercy, he imposed on bodies, and never more clearly than when he imprisoned those bodies. All prisons being the king’s franchises, the king could inspect all imprisonment orders made on his behalf.<sup>80</sup> Using writs issued by his judges, the king protected both the subject’s body and the royal dignity invoked by those who held his franchises. The writ of habeas corpus then was nothing if not a privilege, a privilege of the highest, most miraculous kind, for this writ could intervene where other law could not, to determine the rightness of constraints imposed on the bodies of the king’s subjects of all kinds.

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according to standard procedure in bail orders of this kind. Both were ultimately discharged from bail. KB21/25, pp. 149 and 210.

<sup>77</sup> On sanctuary, see Hale’s *Prerogatives*, supra note 45, at 259; Peter Iver Kaufman, *Henry VII and Sanctuary*, 53 *Church Hist.* 465 (1984). On pardons, see K.J. Kesselring, *Mercy and Authority in the Tudor State* 56–90 (2003).

<sup>78</sup> Hale’s *Prerogatives*, supra note 45, at 177, 259–60.

<sup>79</sup> Forset, supra note 63, at 21.

<sup>80</sup> “The gaols . . . are all in the king’s disposal . . . for the law hath originally trusted none with the custody of the bodies of the king’s subjects . . . but the king or such to whom he deputed it.” Hale’s *Prerogatives*, supra note 45, at 228–29.

## C. “. . .of the writ of habeas corpus. . .”

1. *An Equitable Common Law Writ*

The justices of King’s Bench used habeas corpus, like the other prerogative writs, to supervise the discretion of judicial and administrative officers of all kinds.<sup>81</sup> Subjects, many quite humble, employed the writ—what Sir Edward Coke saw as an example of the court’s ability to correct any “manner of misgovernment”<sup>82</sup>—to assert the royal prerogative against those whose authority threatened them most: not the Privy Council, but the justices of the peace and statutory commissioners who lived in their own communities. By using the prerogative writs, including habeas corpus, subjects invoked the king’s authority to prevent abuses of the king’s franchises.

Although habeas corpus was a common law writ, subjects’ pleas to use it were often based less on common law norms than on appeals to what we might call the equity of the writ.<sup>83</sup> The key to the prerogative writs lay in the court’s omnipotence when using them, and that omnipotence primarily stemmed from their equitable character: their embodiment of the King’s mercy. Habeas corpus and the other prerogative writs were not, technically, referred to as writs in equity. But equitable ideas provide the best explanation for how so many seventeenth- and eighteenth-century subjects could

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<sup>81</sup> Habeas is usually grouped with mandamus, prohibition, certiorari, and quo warranto as prerogative writs. Edward Jenks, *The Prerogative Writs in English Law*, 32 *Yale L.J.* 523, 527 (1923). It was no accident that the other prerogative writs underwent major developments in the early seventeenth century, in the same period that the justices of King’s Bench were arguing that they used the king’s prerogative when they issued habeas corpus, by which they gave that writ its strength. The first writs of restitution—prototypes of mandamus—were used in 1605. These concerned the Sussex parishes of Steyning, Hellingly, and Ashurst, where clergymen ejected from their livings for their refusal to obey the new church canons of 1604 tried to regain their places; another also issued for Newton Valence in Hampshire. For the writs and orders, see TNA, KB29/246, mm. 124 and 138d.; KB29/247, mm. 17 and 32d.; and KB21/3, ff. 58, 61v., and 62v. Underscoring how close were developments on habeas and mandamus is the unusual writ combining both for Edward Farndon, who had been dismissed from the freedom of London and imprisoned. TNA, KB29/249, m. 16. A translation of this unusual writ is in Edith G. Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century 167–71* (1963).

<sup>82</sup> 4 Edward Coke, *Institutes of the Laws of England* 71 (1644).

<sup>83</sup> As J.H. Baker notes of the prerogative writs, their “jurisdiction was, in other words, equitable.” Baker, *Introduction*, *supra* note 31, at 144.

employ habeas to win their freedom. Given the institutional competition and personal animosities that accompanied the sharpening distinction between common law and equity in the sixteenth and seventeenth centuries,<sup>84</sup> one should not be surprised that common lawyers would be reluctant to acknowledge the equitable dimensions of the prerogative writs. But some, like Edward Hake, could state the obvious:

[T]he Common law might seem to consist most upon *Equity*, yet this in my opinion were no derogation at all from the power, authority or credit of the Common law, for as from the first original of those grounds and maxims particular cases have ever and anon happened which could not receive rule by the generality of the same, but have been expounded by the hidden righteousness of those grounds and maxims . . . .<sup>85</sup>

Laying bare “the hidden righteousness” of the law was the point of habeas corpus.<sup>86</sup> Coke described the prerogative writ of mandamus in just these terms, suggesting that it was used “not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial . . . so that no wrong or injury, either public or private, can be done but that it shall be (here) reformed or punished by due course of law.”<sup>87</sup> Habeas corpus also concerned the correction of errors of officers, judicial and extra-judicial, whenever they wrongly detained one of the king’s subjects.

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<sup>84</sup> J.H. Baker, 6 *Oxford History of the Laws of England* 39–48 (2003).

<sup>85</sup> Edward Hake, *Epieikeia: A Dialogue on Equity in Three Parts* 56 (D.E.C. Yale ed., Yale Univ. Press 1953). Hake wrote his treatise between 1587 and 1591. Louis A. Knafka, Hake, Edward, in 24 *Oxford Dictionary of National Biography* 488, 489 (H. C. G. Matthew & Brian Harrison eds., 2004), available at <http://www.oxforddnb.com/view/article/11881>.

<sup>86</sup> What was accepted as the equitable use of statute—entailing, as Thomas Ashe put it, “the exposition of any statute by an Equitie, sometimes farther than the letter, and sometimes contrary to the letter”—applied also to what we may call the equitable use of writs, especially those based so explicitly on the king’s authority. Thomas Ashe, *Epieikeia: Et Table generall a les Annales del Ley*, at *The Epistle Dedicatorie* (1609).

<sup>87</sup> *James Bagg’s Case*, (1615) 11 Co. Rep. 93 b, 77 Eng. Rep. 1271, 1277–78 (K.B.). Though judges would not admit they acted equitably, it was a charge often made against figures like Chief Justice Mansfield, in the eighteenth century, who used habeas corpus as creatively as any justice ever has. “Junius” attacked Mansfield’s “arbitrary power of doing right” and his “natural turn to equity” in releasing some on bail. 2 *The Letters of Junius* 192, 196 (1775).

## 2. *The Equity of the Writ: Evidence from Records*

Evidence from judicial proceedings on habeas corpus suggests that seventeenth-century English judges frequently entertained uses of habeas corpus that were equitable in character. Two sets of examples will illustrate. First, the justices regularly rendered judgments that did more than answer the question about the propriety of the arrest warrant, ostensibly the only matter raised by the writ. Often this meant examining underlying issues, such as when they ordered an estranged husband imprisoned by an ecclesiastical court—even as they released him—to pay alimony to his wife, thereby invading the law of marriage, a church court matter.<sup>88</sup> Using the writ this energetically can be seen as the equivalent of invoking jurisdiction, on the basis of equitable concerns, over a matter normally considered outside the realm of a common law court.

Second, King's Bench often ignored its own ostensible rules controlling process. One of the most oft-repeated rules was that the return to habeas corpus had to be taken as true on its face, and the judges would decide, on its assumed veracity, the prisoner's fate.<sup>89</sup> If someone using a writ of habeas corpus wanted to challenge the allegations in the return, that person had to sue a separate action for a false return. This would, theoretically, put the disputed facts before a jury, ostensibly the only trier of facts. 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. Such practice was prominent, for instance, in eighteenth-century habeas cases concerned with child and spousal custody disputes, as factual

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<sup>88</sup> See, for instance, the writ for Ralph Brooke in 1615, committed by the High Commission for neglecting their order to cohabit with his wife and to provide for her maintenance. King's Bench ordered him to pay £20 annual maintenance when they bailed him. TNA, KB145/14/13 (teste May 5, 1615) and KB21/4, f. 116 and KB21/5a, ff. 10v.-16v., passim. A report is at Brokes Case, (1615) Moore (K.B.) 840, 72 Eng. Rep. 940 (K.B.).

<sup>89</sup> The clearest statement of this rule came from Justice Sir John Eardley Wilmot, in the House of Lords, during the debate on the failed habeas corpus bill of 1758. On this debate, see James Oldham & Michael J. Wishnie, *The Historical Scope of Habeas Corpus and INS v. St. Cyr*, 16 Geo. Immigr. L.J. 485, 488–89 (2002).

disputes were regularly decided by the justices in apparent violation of their own rules.<sup>90</sup>

### *3. A Judicial, Not a Parliamentary Writ*

One final theme related to the equitable dimensions of habeas corpus: the writ was fashioned by judges, not handed down by Parliament. A persistent misapprehension about the English history of habeas is that “the Great Writ” was a parliamentary rather than a judicial gift. This mistake arises from a fascination with the Habeas Corpus Act of 1679, which Blackstone over-enthusiastically called “that second *magna carta*.”<sup>91</sup> In fact, the celebrated Habeas Corpus Act merely codified practices generated by King’s Bench justices. In whig histories, the statutory writ of the 1679 Habeas Corpus Act provides a moment for parliamentary self-congratulation that all but erased the significance of the role judges had played in developing the equitable dimensions of habeas corpus jurisprudence.<sup>92</sup>

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<sup>90</sup> For example, in many cases, factual matters not in the return were raised in court though there was no jury to hear the facts. In a spousal custody case in 1701, Chief Justice Sir John Holt asserted, “it will be most proper to try the truth of what is sworn [in the affidavits required for issuance of the writ] when the young lady is present in court, upon the return of the habeas corpus.” Lincoln’s Inn, MS Misc. 713, p. 164. The young lady, Eleanor Archer, was then examined on oath. The printed report of this case says she was examined “by the Court secretly,” probably to avoid public scandal. *Mr. Archer’s Case*, (1701) Fortescue 196, 92 Eng. Rep. 816 (K.B.). Facts might also be raised by affidavit after return. These were used to certify the “lewdness” of Elizabeth Claxton in 1701, ensuring that she returned to jail. *Elizabeth Claxton’s Case*, (1701) Holt, K.B. 406, 90 Eng. Rep. 1124 (K.B.). In a capital matter, an accused highway robber was bailed after counsel stated that he had “several affidavits, containing very strong circumstances, to show that the prisoner did not commit the fact.” *The King and Crisp*, (1733) 2 Barn. K.B. 271, 94 Eng. Rep. 495 (K.B.); *The King against Crest*, Sess. Cas. 63, 93 Eng. Rep. 63 (K.B.). Judicial practices such as these amounted to a consideration by the court of facts that were based on sworn testimony rather than stipulated in the return.

<sup>91</sup> William Blackstone, 1 Commentaries \*133.

<sup>92</sup> 31 Car. 2, c. 2. For instance, it has long been said that one could not get a writ of habeas corpus during the court’s vacations before 1679. The source for this mistake may well come from Coke, who said that “neither the kings bench nor common pleas can grant that writ but in the term time.” 4 Edward Coke, *Institutes of the Laws of England* 81 (1797) (1644). But King’s Bench rulebooks and recorda files show hundreds of writs used during vacations throughout the sixteenth and seventeenth centuries. An examination of those writs reveals that thirty-nine percent of writs issuing under Coke’s predecessors as chief justice—Sir John Popham and Sir Thomas Fleming—issued during vacations, while only fourteen percent of the writs used during Coke’s tenure in King’s Bench issued in vacation. For a more general statement of the

Judges continued to take the lead in developing habeas corpus jurisprudence right up to 1787. This is apparent in the failure in 1758 of the bill “for giving more speedy remedy” on habeas corpus.<sup>93</sup> Jurists consulted at the time, such as Chief Justice Lord Mansfield of King’s Bench and Lord Chancellor Hardwicke, opposed the bill in part because of the constraints it would put on judicial freedom in using the writ.<sup>94</sup> They feared the damage a statute might do to the equitable flexibility of common law habeas.<sup>95</sup> Parliamentary debates in 1758 show a broad awareness of the surprising ways in which the 1679 Act had produced just this result.<sup>96</sup> After the failure of the 1758 bill—to remedy the supposed incapacity of the statutory writ to challenge impressment orders—Mansfield’s King’s Bench issued numerous writs at common law for just that purpose. As a general matter, in the century after the passage of the Habeas Corpus Act of 1679, all the important innovations in habeas corpus jurisprudence occurred through judicial use of the common law writ rather than the statutory one.<sup>97</sup>

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point that judicial accomplishments prefigured the Act of 1679, see Helen A. Nutting, *The Most Wholesome Law—The Habeas Corpus Act of 1679*, 65 Am. Hist. Rev. 527, 539 (1960).

<sup>93</sup> See Oldham & Wishnie, *supra* note 89, at 494.

<sup>94</sup> 3 Philip C. Yorke, *The Life and Correspondence of Philip Yorke, Earl of Hardwicke* 1–18, 42–53 (Octagon Books 1977) (1913). For more information on Mansfield’s reaction in particular, see Oldham & Wishnie, *supra* note 89, at 488–95.

<sup>95</sup> The vitality of the writ beyond the statutory terms of 1679 is illustrated by the Earl of Aylesbury’s case (1696). Accused of treason, Aylesbury was brought into King’s Bench by habeas corpus. The judges found that he was not bailable on the Habeas Corpus Act, “yet in regard that this court hath a sufficient power to bail by the common law, and that as well from the Tower as other prisons . . . the court thought it therefore very just and reasonable to bail him, not as an act of duty to which they were obliged by the statute, but as a discretionary act, which was in their power by the common law.” HLS, MS 1071, f. 52.

<sup>96</sup> Thus all the justices, when asked their opinions about habeas usage during discussion of the 1758 habeas corpus bill, agreed that the statutory writ of 1679 did not extend beyond criminal matters to such issues as impressment. BL, MS Add. 38,161, ff. 100v.–101. See also Oldham & Wishnie, *supra* note 89, at 488.

<sup>97</sup> The Act concerned the use of habeas corpus only in cases of alleged felony or treason. These wrongs dwindled as a share of habeas litigation in the eighteenth century as ever-larger numbers of writs tested detentions in which there was no allegation of wrong, such as those involving abused wives and impressed sailors. That the writ in its common law form developed new uses is evident not only from the non-felony matters to which it was put, but also from the note written on the back of each writ (in the recorda files, TNA, KB16, *passim*) saying whether it had issued according to the terms of the 1679 statute—a relatively rare occurrence—or by rule of the court.

In the latter years of the eighteenth century, judges, not Parliament, would expand the writ's application to new questions as they continued to exercise the king's prerogative to protect the subject's liberty. And as we shall see, it was by the common law writ rather than the statutory one that habeas began its journey into India in the 1770s and '80s, while in the same years, it was statute, passed by Parliament, that began to curtail the writ's reach in England, in Ireland, and in America too.

*D. "... shall not be suspended ..."*

*1. The Historical Context of the Suspension Acts*

Even after James II's army was destroyed in Ireland in July 1690, England's leaders remained skittish.<sup>98</sup> Rumored rebellions at home posed as much threat as invasion from abroad.<sup>99</sup> The Privy Council worked to defend the realm from foes within and enemies without. Scores were arrested and imprisoned for being Jesuits, or "papists," or for saying the wrong things. Scores soon became hundreds, charged with treason, sedition, or a catchall offense, "treasonable practices."<sup>100</sup>

The detention of so many prisoners raised the question: what, as a legal matter, should be done with them?<sup>101</sup> The longstanding an-

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<sup>98</sup> For contemporary circumstances in Ireland, see Tim Harris, *Revolution: The Great Crisis of the British Monarchy, 1685–1720*, at 445–50 (2006). For a general account of political and military events in 1689–90, see Craig Rose, *England in the 1690s: Revolution, Religion, and War 1–62* (1999).

<sup>99</sup> Reports of the "disaffected" came from all points. From Newcastle arrived ominous news that dozens of horsemen had mustered on a regular basis. Calendar of State Papers, Domestic Series, [hereinafter CSPD] 1689–90, at 71 (Kraus Reprint 1969) (1895). At Carlisle, tenants of Lord Preston—himself soon arrested on suspicions of treason—refused to obey commands of soldiers there and instead "bid them kisse their brichers." *Id.* at 40.

<sup>100</sup> The state papers are filled with Privy Council arrest orders and discussions of the cases of many alleged traitors. CSPD 1689–90, *supra* note 99, *passim*. As we shall see, 147 people used habeas corpus in 1689 and 1690 to test imprisonment ordered on one of these three grounds. See *infra* text accompanying notes 144–148.

<sup>101</sup> There was the practical problem of prison conditions. Jail keepers throughout the country, especially in places on the west and south coasts, held large numbers of prisoners, reflecting anxieties about invasion from France, Ireland, or both. Among the many letters to and from the Privy Council concerning prisoners, see CSPD 1689–90, *supra* note 99, at 151, 160, 217, 233 (discussing prisoners at Chester); *id.* at 250 (discussing prisoners at Gravesend); CSPD 1690–91, at 16 (discussing prisoners at Dover).

swer to that question involved using habeas corpus to sort the dangerous from the hapless. But in the winter of 1689, no one could do this legal sorting. James II's judiciary was in disarray, the chief justice of King's Bench and his Lord Chancellor now prisoners themselves.<sup>102</sup>

During this judicial hiatus, members of Parliament began exploring just this question. What concerned them was less the absence of judges than what would happen to all the prisoners when new judges sat again in Westminster Hall. Suspension of habeas corpus seemed the solution: a remarkable development because few words were more inflammatory in 1689 than "suspension." To see just how and why it was inflammatory, we must consider the various legal meanings of that word, and its connection to its less provocative cousin, "dispensation."

## 2. Meanings of "Suspension"

The royal prerogative of pardon is an example of a power to dispense with law: to vitiate the action of law in a specific instance.<sup>103</sup> Charles II and his brother James undertook a slightly different exercise in dispensing with law when they excepted individual Catholics and Protestant dissenters from the terms of the Corporation and Test Acts so that they might serve the king in offices from which they were otherwise barred by those statutes. In such instances, royal dispensations were justified by the long-recognized right of the king to enjoin the service of any of his subjects, a power that flowed from the assumption that it was his place, not Parliament's, to determine what might be "*pro bono publico*" in the

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<sup>102</sup> On the imprisonment of Chief Justice Sir Robert Wright, who died in Newgate in May 1689, see Stuart Handley, Wright, Sir Robert, in 60 *Oxford Dictionary of National Biography* 483 (H.C.G. Matthew & Brian Harrison eds., 2004), available at <http://www.oxforddnb.com/view/article/30056>. For Sir George Jeffreys, Lord Chancellor, who also died in prison that spring, see Paul D. Halliday, Jeffreys, George, first Baron Jeffreys, in 29 *Oxford Dictionary of National Biography* 882 (H.C.G. Matthew & Brian Harrison eds., 2004), available at <http://www.oxforddnb.com/view/article/14702>.

<sup>103</sup> Sir Robert Atkyns, justice of Common Pleas after 1689, likened pardon and dispensation, with one distinction: that pardon was retrospective while dispensation was prospective. Robert Atkyns, *An Enquiry into the Power of Dispensing with Penal Statutes* 12 (1689).

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choice of royal servants.<sup>104</sup> For example, when the king desired the service of Catholics, he simply added a “*non obstante*” clause to the royal patent of appointment. That clause stated that the appointee might assume office “notwithstanding” those statutes that otherwise required officeholders to receive the sacrament of holy communion according to the rites of the Church of England, something Catholics were loath to do.<sup>105</sup>

Dispensing excepted named persons from the action of law in specific cases. Suspending erased the action of law altogether. Recognizing this distinction, and recognizing political pressure, Charles II ended his own experiment with suspension when he withdrew his Declaration of Indulgence in 1673.<sup>106</sup> Those actions did not deter his brother, James II. Twice, in 1686 and 1687, by his own Declarations of Indulgence, James II suspended laws that should have prevented Catholics and Protestant dissenters from holding public office.<sup>107</sup> On the second occasion, seven bishops of the Church of England opposed him. Their acquittal on charges of seditious libel in the spring of 1688 helped to drive events culminating in James’s flight at year’s end.<sup>108</sup>

James II’s abdication did not, however, end arguments on behalf of the suspending power. Instead those arguments were transposed to support parliamentary rather than monarchical exercise of that

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<sup>104</sup> See Paul Birdsall, “Non Obstante”—A Study of the Dispensing Power of English Kings, in *Essays in History and Political Theory* 37–76 (Carl Wittke ed., 1936). On the need for dispensations and the right of the king to use them *pro bono publico*—for the public good—see *id.* at 60–63.

<sup>105</sup> Such appointments were controversial, though the legal arguments on which they rested were stronger than is often appreciated, connected as they were not only to the prerogative, but to mercy. But legality does not make popularity, as Charles understood, even if James did not. On James’s ambitious use of dispensations, see Harris, *Revolution*, *supra* note 98, at 191–95. The most spectacular use of *non obstantes* came in 1686–88, when James II removed more than two-thousand town leaders, only to replace them with Protestant dissenters and Catholics by patents permitting them to take office notwithstanding the usual requirements. See Paul D. Halliday, *Dismembering the Body Politic: Partisan Politics in England’s Towns, 1650–1730*, at 237–62 (1998).

<sup>106</sup> Tim Harris, *Restoration: Charles II and his Kingdoms, 1660–1685*, at 63–64, 69–70, 74–75 (2005).

<sup>107</sup> For a balanced discussion of the great 1686 test case on dispensations, *Godden v. Hales*, see Birdsall, *supra* note 104, at 68–75.

<sup>108</sup> On suspensions and the Seven Bishops, see Harris, *Revolution*, *supra* note 98, at 211–16, 258–69.

power. In February 1689, Parliament issued the Declaration of Rights, which damned James for trying “to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom.” Exhibit A in Parliament’s indictment of James was his “suspending of laws and the execution of laws without consent of Parliament.”<sup>109</sup> But it was just this power that Parliament now took exclusively to itself.<sup>110</sup>

### 3. *Parliamentary Suspension*

Debates in the House of Commons in March 1689 and throughout the rest of that year and into the next on whether to suspend habeas corpus revealed multiple concerns, including fears of invasion and rebellion as well as fears for English liberty.<sup>111</sup> More than one speaker could not resist employing sexual metaphors, suggesting that if Parliament used the suspension power it would make law a “strumpet,” defiled by her own protector.<sup>112</sup> But others thought the liberties of English subjects might only survive current dangers under the protection of a suspension. The prominent Whig Richard Hampden put the classic case for suspension: “We are in War, and if we make only use of that remedy as if we were in full Peace, you

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<sup>109</sup> The Declaration was enacted as a statute later that year, in which slightly modified form it is usually called the Bill of Rights. For the Declaration’s text, see *Sources and Debates in English History, 1485–1714*, at 282–85 (Newton Key & Robert Bucholz eds., 2004).

<sup>110</sup> Perhaps the most famous suspension act was the Toleration Act of 1689, though we tend not to think of it this way since it granted a grudging toleration of different religious views and practices. Its title suggests clearly its function as a statutory suspension of other statutes: “An act for exempting their Majesties protestant subjects . . . from the penalties of certain laws.” 1 W. & M., c. 18. The Act suspended penalties in statutes going back to the Act of Uniformity of 1559. What Parliament did in the Toleration Act was precisely what James II had done in his dispensations and the suspensions in his two Declarations of Indulgence, with one exception. James’s actions included Catholics; a virulently Protestant Parliament’s did not.

<sup>111</sup> On these debates, see Clarence C. Crawford, *The Suspension of the Habeas Corpus Act and the Revolution of 1689*, 30 Eng. Hist. Rev. 613 (1915).

<sup>112</sup> The reference to law being made a strumpet is from the speech of Sir Edward Seymour during debates on a suspension bill that did not pass in April 1690. 10 *Debates of the House of Commons, From the Year 1667 to the Year 1694*, at 93 (Anchitell Grey ed., London 1763). Sir Robert Napier, during debates on May 22, 1689 to renew the first suspension, said the Habeas Corpus Act of 1679 would “become quite a common Whore” if the Act was suspended again. 9 *Debates of the House of Commons, From the Year 1667 to the Year 1694*, at 263 (Anchitell Grey ed., London 1763).

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may be destroyed . . . .” Like many who shared his fear that James II might invade yet remained apprehensive about the future of liberty in England, Hampden desired a restricted measure: “This Bill [of suspension] is for [the] present occasion, and for a short time only . . . .”<sup>113</sup> That argument resonated: the first suspension, which received the King’s assent on March 16, 1689,<sup>114</sup> was set to expire in one month, although it would subsequently be extended twice more, ending only in October of that year. These first three statutes established a pattern of parliamentary suspension practices that would endure until 1777, which we can see by looking carefully at the terms of these acts.<sup>115</sup>

*4. Features of the Suspension Statutes*

As we shall see as we explore the texts of the suspension statutes,<sup>116</sup> their most prominent feature was their formulaic quality. The repeated use of similar—often the same—language in one

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<sup>113</sup> 9 Debates of the House of Commons, From the Year 1667 to the Year 1694, at 263 (Anchitell Grey ed., London 1763).

<sup>114</sup> 1 W. & M., c. 2. (“An act for empowering his Majesty to apprehend and detain such persons as he shall find just cause to suspect are conspiring against the government.”) This act is often misdated to 1688. See, e.g., Duker, *supra* note 14, at 171 n.117, and Sharpe, *supra* note 35, at 94. In fact no Parliament sat at any time in 1688, so no act could have passed that year. The error arises from the fact that until 1752, the new year was reckoned in England as beginning on March 25 (the feast of the Annunciation, or “Lady Day”) rather than January 1. Thus items dated January 1 to March 24, 1688, by this “Old Style” mode of dating, belong to 1689 by “New Style” dating. On Britain’s adoption of the Gregorian calendar in 1752, see C. R. Cheney, *A Handbook of Dates for Students of British History* 12–13, 17–19, 233 (Michael Jones ed., rev. ed. 2000).

<sup>115</sup> The first suspension was extended for one month in April, 1689, 1 W. & M., c. 7, and then for another five months in May 1689. 1 W. & M., c. 19. For additional acts, see *infra* note 116.

<sup>116</sup> In addition to the first three suspension statutes of 1689, further statutes were passed as follows, through 1783: 7 & 8 Will. 3, c. 11 (with effect Feb. 20 to Sept. 1, 1696); 6 Ann., c. 15 (Mar. 10, 1708 to Oct. 23, 1708); 1 Geo., sess. 2, c. 8 (July 23, 1715 to Jan. 24, 1716); 1 Geo., sess. 2, c. 30 (renewing previous to May 24, 1716); 9 Geo., c. 1 (Oct. 10, 1722 to Oct. 24, 1723); 17 Geo. 2, c. 6 (Feb. 29 to Apr. 29, 1744); 19 Geo. 2, c. 1 (Oct. 18, 1745 to Apr. 19, 1746); 19 Geo. 2, c. 17 (renewing previous to Nov. 20, 1746); 20 Geo. 2, c. 1 (renewing previous to Feb. 20, 1747); 17 Geo. 3, c. 9 (Feb. 20, 1777 to Jan. 1, 1778); 18 Geo. 3, c. 1 (renewing previous to Jan. 1, 1779); 19 Geo. 3, c. 1 (renewing previous to Jan. 1, 1780); 20 Geo. 3, c. 5 (renewing previous to Jan. 1, 1781); 21 Geo. 3, c. 2 (renewing previous to Jan. 1, 1782); 22 Geo. 3, c. 1 (renewing previous to Jan. 1, 1783). As we shall see, the statutes of 1777 to 1783 differed in some significant ways from those before 1777.

statute after another concerning who had special powers to imprison, how that power might be used, the duration of such powers, and the reversion to normal bail practices thereafter signals the making of a parliamentary tradition of practices related to habeas corpus and its suspension. Such consistent formulae operated as self-denying principles—parliamentary restraints on itself—checking Parliament whenever it enacted suspensions of habeas corpus from 1689 to 1777.

The second and most surprising feature is that no statute ever “suspended” “habeas corpus.” The words “habeas corpus” do not appear in any of them.<sup>117</sup> There is a reason why these were generally entitled acts “empowering His Majesty to apprehend and detain such Persons, as he shall find Cause to suspect are conspiring against His Royal Person and Government.” The suspension statutes expanded one power rather than curtail another. Even during periods of suspension, the common law writ of habeas corpus never lapsed, even if the Crown received new capacities to detain accused traitors without trial for carefully limited spells.

This result can be appreciated if one reviews the powers granted by the suspension statutes. Initially, they gave power to the Privy Council to imprison those alleged to have committed treason, or who were held on suspicion of treason, without allowing “bail or mainprise.”<sup>118</sup> Since access to bail was highly restricted both by common law and statutory definitions of treason, this may not have had a significant effect. But subsequent statutes extended the imprisonment power to those who had engaged in “treasonable prac-

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<sup>117</sup> The word “suspended” does appear in acts passed after the Treaty of Union of 1707, since those acts “suspended” the Scottish statute of 1701 “For preventing wrongous imprisonment.” The first to include this language was 6 Ann., c. 15 (1708). But never, in any of the so-called “suspension” statutes, is the word “suspended” used to describe anything done to habeas corpus since the writ itself is never named.

<sup>118</sup> E.g., 17 Geo. 2, c. 6 (1744). A prisoner on bail remained technically a prisoner since he was in the custody of those who served as bail on his behalf. A prisoner released on mainprise was likewise supported by persons who gave sureties on his behalf but in the view of law, the prisoner was not held in their custody. See 9 William Holdsworth, *A History of English Law* 105–06 (3d ed. 1944); see also 4 William Holdsworth, *A History of English Law* 525–28 (3d ed. 1922–1923). On magisterial discretion in the use of bail in felony cases, see Cynthia B. Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* 88–92 (1987). For the next century, see J. M. Beattie, *Crime and the Courts in England, 1660–1800*, at 281–83 (1986).

tices.”<sup>119</sup> This widened the category of offenses for which one could be jailed on “suspicion” only, that is to say, without evidence given under oath. Moreover, all the suspension statutes provided that Parliament, through the King, could imprison suspects, “any law, statute, or usage to the contrary in any wise notwithstanding.”<sup>120</sup> Here was the word that had always made royal dispensations and suspensions operable: “notwithstanding” (*non obstante*). The imitation of royal practice by Parliament could not have been more plain. Of course, it was not merely imitation of royal powers; it was capture. Finally, the suspension statutes provided that only specific officials—six members of the Privy Council and eventually either of the two secretaries of state—could exercise the suspension power to imprison without review by the judiciary.<sup>121</sup>

During periods of the suspension of bail for treason, King’s Bench continued to issue writs of habeas corpus for prisoners jailed by other authorities. Some of these writs concerned allegations of treason, though typically in cases where detention had been ordered by a justice of the peace.<sup>122</sup> Sometimes the writ issued because it was the means by which an accused traitor could be brought to trial, convicted, and executed.<sup>123</sup> In others, bail was allowed.<sup>124</sup>

<sup>119</sup> 1 W. & M., c. 7 (1689).

<sup>120</sup> E.g., 17 Geo. 2, c. 6. Critics attacked this “suspension of the *Habeas Corpus* act.” One suggested that it laid “at the feet of one individual [King William] the liberty of millions; which was never done in the much more dangerous times of queen *Elizabeth*, nor in *Monmouth’s* rebellion by the tyrant *James II.*” 1 James Burgh, *Political Disquisitions: An Enquiry into Public Errors, Defects, and Abuses* 408 (New York, Da Capo Press 1971) (1774).

<sup>121</sup> The extension of the power to one of the two secretaries of state came in the second statute of 1689. 1 W. & M., c. 7. The next suspension statute omitted this authority for the secretaries. 1 W. & M., c. 19 (1689). All subsequent statutes, beginning with that of 1696, included it again. E.g., 7 & 8 Will. 3, c. 11.

<sup>122</sup> For example, James Hunt was jailed in March 1696 by a justice of the peace “for holding correspondence with France,” but was bailed in Trinity term that year. The suspension made by 7/8 William III c. 11 was in effect both when Hunt was jailed and when he was released. TNA, KB16/1/6 (teste June 12, 1696).

<sup>123</sup> See, for instance, the case of Christopher Layer, in 1722. His writ does not survive, but orders on his writ do: TNA, KB21/31, pp. 608, 612. See also Charles Ratcliffe, in 1746: KB16/13/4 (teste November 19, 1746) and KB21/36, pp. 157–58.

<sup>124</sup> See John Purser, jailed on the warrant of Secretary of State the Earl of Harrington. TNA, KB16/13/4 (teste November 27, 1746) and KB21/36, p. 164. Purser’s writ was heard in Michaelmas 1746. The suspension declared in 20 Geo. 2, c. 1, was not set to expire until February 20, 1747.

### 5. Implications

The implications of the above developments deserve extended comment. By giving the Privy Council and the secretaries of state the authority to imprison people without bail, Parliament returned to the Council the very power that it had worked to deny the Council in the generations before 1689. The most famous of all habeas cases, the 1627 case of the Five Knights, was the touchstone in this struggle.<sup>125</sup> The Five Knights had been imprisoned by the king and the Privy Council for their refusal to pay the loan required of all subjects at that time.<sup>126</sup> The returns to the writs of habeas corpus the knights used in hopes of release stated simply that they had been imprisoned “by his majesty’s special commandment.”<sup>127</sup> But given the many precedents favoring such imprisonment orders, few could have been surprised to see the knights remanded to prison in 1627.<sup>128</sup>

The Petition of Right, crafted in Parliament the following spring partly in response to that result, declared that “no freeman . . . [may] be imprisoned or detained . . . contrary to the laws and franchise of the land.”<sup>129</sup> That vague declaration was more prescrip-

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<sup>125</sup> For a complete review of the major issues in the trial and their connection to parliamentary debates in 1628, see J.A. Guy, *The Origins of the Petition of Right Reconsidered*, 25 *Hist. J.* 289 (1982); Mark Kishlansky, *Tyranny Denied: Charles I, Attorney General Heath, and the Five Knights’ Case*, 42 *Hist. J.* 53 (1999).

<sup>126</sup> On the king’s loan, a traditional royal revenue device, see Richard Cust, *The Forced Loan and English Politics, 1626–1628* (1987).

<sup>127</sup> The writs and returns for four of the knights are in TNA, KB145/15/3 (individual writs for Sir John Heveningham, Sir John Corbett, Sir Edward Hampden, and Sir Walter Earle, all teste November 15, 1627). The writ and return for Sir Thomas Darnell—by whose name the case is often known—having never been filed, is not in the recorda file. TNA, KB21/9, ff. 16 and 18.

<sup>128</sup> The knights’ counsel conceded “our case will not stand upon precedents.” 3 *State Trials* col. 10 (1816). No less prominent an authority than Sir Edward Coke, while still chief justice in King’s Bench in 1615, said in more than one case that the Privy Council could imprison without returning a cause on a writ of habeas corpus. See *Les Bruers [Brewers’] Case*, 1 *Rolle* 134, 81 *Eng. Rep.* 382, 382–83 (K.B.); *Ruswells Case*, 1 *Rolle* 192, 81 *Eng. Rep.* 425 (K.B.); *Sir Sam. Salkingstowes Case*, 1 *Rolle* 219, 81 *Eng. Rep.* 444, 444–45 (K.B.). For Coke’s full discussion in *Rosewell [Ruswell’s Case]*, see *Bod.*, MS *Rawl. C.382*, ff. 56v.–57. Coke had famously changed his opinion by the time of the debates in the House of Commons that led to the Petition of Right in the spring of 1628, leading to some discomfiture. See 2 *Commons Debates, 1628*, at 190–93, 197 (Robert C. Johnson & Maija Jansson Cole eds., 1977).

<sup>129</sup> For the text of the Petition, see Hutton Webster, *Historical Source Book 21* (1920). Many must have known that the political compromise that made the Petition

tive than effective in curtailing imprisonment by the Council without cause shown in returns to habeas corpus. The more precise requirement in a 1641 statute that writs of habeas corpus used by Privy Council prisoners must be returned with “the true [c]ause of such his [d]etainer or [i]mprisonment” was more successful. The summary return was no longer possible in such cases.<sup>130</sup> Evidence suggests that nearly all writs of habeas corpus used to test imprisonment orders by the Privy Council in the 1650s and 1660s prompted full returns.<sup>131</sup>

Having accomplished the limitation on royal power it had sought for so long, Parliament reassigned this same power to the Privy Council in every suspension statute passed from 1689 to 1777. At

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possible had left “*lex terrae* yet an unfolded riddle.” Sir Roger North, in 3 Commons Debates, 1628, at 280 (Robert C. Johnson et al. eds., 1977). The “law of the land”—the phrase from Magna Carta’s chapter 29—was too vague to support a new legal imposition on the Privy Council. Few then must have been surprised when commitments by king and Council, tested on writs of habeas corpus, continued to come back during the 1630s with no cause expressed in the returns. For instances after 1628 of people imprisoned on the orders of the Privy Council, whose writs of habeas corpus were returned without cause given and which concluded with the prisoner’s remand, see Reginald Carew, TNA, KB29/282, m. 159d. (1634) and KB21/11, f. 141; Richard Leachford (1634), KB29/283, m. 46d. and KB21/11, f. 153v.; Edward Courtney (1634), KB29/283, m. 124d. and KB21/11, f. 167v.; Alexander Jennings (1637), KB29/286, m. 108d. and KB32/10, part 1 (teste June 27, 1637) (Jennings was bailed on another writ in 1638 after it was returned with a cause, that he had been jailed for “diverse scandalous speeches in derogation and disparagement of his majesty’s government”: KB29/287, m. 101d., KB145/15/14, and KB21/12, ff. 60–114, *passim*); and Francis Freeman (1640), KB21/12, ff. 146v.–149.

<sup>130</sup> 16 Car., c. 10, “An Act for the regulating of the Privy Council, and for taking away the Court commonly called the Star Chamber,” passed in July 1641.

For contemporary reaction to the statute, see Conrad Russell, *The Fall of the British Monarchies, 1637–1642*, at 354–55 (1991). Surprisingly, the Civil War of the 1640s proved to be one of the glory periods for habeas corpus. The court stood up to the imprisonment orders made by many of the new officers or agencies created by Parliament to fight a war against their king. But in the Interregnum of the 1650s, what was then called the Court of Upper Bench occasionally remanded habeas users imprisoned on the orders of Oliver Cromwell’s protectoral council. See the writs for John Biddle, jailed in the Isles of Scilly, with no cause given in the returns. No result of deliberations survives on the record for Biddle’s first writ, but he was discharged after a more full return was made to a second writ: TNA, KB145/16/1658 (writs teste April 29 and June 11, 1658).

<sup>131</sup> E.g., the case of Andrew Newport, bailed in Michaelmas 1659 after he had been jailed on a warrant of the Council of State (the re-named Privy Council) “upon suspicion of holding correspondence with the enemies of this commonwealth and treasonable practices.” TNA, KB145/16/1659 (teste October 25, 1659).

first glance this may seem to be a stunning abdication of a power that Parliament had fought hard to achieve. But as we shall see, the very period in which Parliament routinely passed these suspension statutes ostensibly increasing the power of the King and his officials was a period in which the relationship between Council and Parliament was changing. That changing relationship was to have a profound effect on habeas jurisprudence in the eighteenth century.

We can preview those developments by looking briefly at a final important feature of the suspension statutes: their duration. Members of Parliament, between 1689 and 1783, required that any suspension of the normal rules governing imprisonment should have a fixed period. Such periods ran from one month—in the first two Acts of 1689<sup>132</sup>—up to one year in the case of suspensions that were enacted after the Revolutionary War broke out.<sup>133</sup> The average duration of suspensions prior to 1777 was five months.

The language of fixed duration in all the statutes was accompanied by provisos addressing what should follow suspension: “Provided always, [t]hat from and after the said [date the statute expired], the said persons so committed shall have the benefit and advantage of all laws and statutes any way relating to, or providing for, the liberty of the subjects of this realm.”<sup>134</sup> These provisos were signals that the suspension statutes were being enacted in a jurisprudential universe in which the writ, and all the powers it gave to the judges to ensure that the king’s franchisees did not abuse the subject’s liberty, remained in place. The statutes did not simply curtail the writ. By these provisos, they reinforced what should be the natural state of affairs: an unconstrained writ.

English jurisprudence on habeas corpus after 1689 was complex, partaking of preexisting ideas and practices while transforming them. By suspending the action of law, Parliament after 1689 had in effect captured the royal prerogative, the generative force behind habeas corpus. In doing so, Parliament took over one of the roles once exclusively played by the king’s council. Parliament would henceforth determine what was *pro bono publico* and what was *salus populi*—when, for the common weal, law should run

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<sup>132</sup> 1 W. & M., cc. 2, 7.

<sup>133</sup> E.g., 18 Geo. 3, c. 1; 19 Geo. 3, c.1; 20 Geo. 3, c. 5; 21 Geo. 3, c. 2; 22 Geo. 3, c. 1.

<sup>134</sup> E.g., 17 Geo. 2, c. 6.

temporarily through extra-legal courses.<sup>135</sup> For that is what suspension was: the momentary diversion of law through practices that English legal tradition and moral norms would never permit unless necessity—as now determined by parliamentary votes rather than *conciliar diktat*—determined otherwise.

Suspension after 1689 was characterized by one feature more than any other: it could only be made by Parliament. The terms of the suspension statutes reveal that the older conceptions of the writ as flowing from the king's mercy, and containing equitable dimensions, remained in place and highly valued. It was these conceptions, and the judicial practices that had given rise to them, that always made the writ a palladium. In every statute it enacted, Parliament carefully specified the terms of suspension as to duration, the persons and wrongs covered, and the officers empowered to supervise them. Many may have believed that parliamentary action made safe what monarchical action had made dangerous. By the late eighteenth century, however, some were not convinced. Given the ability of successive first ministers of the king to control Parliament, some saw a statutory suspension as a more insidious form of oppression than one made by conciliar command.<sup>136</sup> Even so, the most marked feature of statutory suspension was not the fact of suspension but its limits. Those limits underscored the existence and equitable content of the common law writ at the center of habeas jurisprudence.<sup>137</sup> Chief among these limits was the rationale necessary to justify suspension: *salus populi*, the very concern that had always animated the prerogative.

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<sup>135</sup> *Pro bono publico*: “for the public good.” *Salus populi*: “the people’s well being”; perhaps more in keeping with seventeenth-century usage, we might also translate this as “for the common weal.”

<sup>136</sup> See, e.g., Robert, Earl Nugent, [attributed], *An Inquiry into the Origin and Consequences of the Influence of the Crown over Parliament* 29–31 (1780).

<sup>137</sup> One champion of suspension in 1715–16 noted that “the Difference between suspending the Force of a Law for a certain limited Time only, and the absolute repealing of such a Law . . . [is that] the Limitation [is] to expire at a certain Time, and the Law then to return to its full Force.” Daniel Defoe [attributed], *Some Considerations on a Law for Triennial Parliaments* 28–29 (1716).

*E. “. . . unless when in cases of rebellion or invasion the public safety may require it.”*

From the first debates about suspension in 1689, members of Parliament seemed to have been conscious of doing something so unusual, even repugnant, that it required justification. The preambles of the suspension statutes always gave reasons for suspension, referring to invasion from without, rebellion within, and sometimes both. Anxieties about pernicious religious differences often fuelled these fears. The 1708 Suspension Act was prompted by the threat of “papists and other wicked and rebellious persons.”<sup>138</sup> Scots, many of them Catholics, promoted “a wicked and unnatural rebellion” in 1745 “in order to set a popish pretender upon the throne, to the utter destruction of the protestant religion.”<sup>139</sup> Religious anxieties sharpened the tendency to invoke the ultimate rationale of the suspension statutes: necessity. “[S]ecuring the peace of th[e] kingdom,” in the language of many preambles,<sup>140</sup> justified exceptional action by Parliament just as it had once justified miraculous action by the king. The fear of a French invasion in 1744, for example, threatened not only “the Protestant Religion” but also “the Laws and Liberties of this Kingdom,” two mutually supporting props in the early modern English legal and political imagination.<sup>141</sup>

The necessity rationale thus emerged as the principal justification for suspending the writ of habeas corpus at the same time that Parliament began to emerge as the center of power in the English polity. The necessity rationale operated when, in Parliament’s estimation, the subjects’ liberties could only be protected by temporary, carefully contained limits on a writ that had come to be associated with those liberties. When it did so, Parliament consistently used the restrictive formulae described above. The result, between 1689 and 1777, was a self-restraining legislative tradition that simultaneously declared parliamentary supremacy and Parliament’s fundamental respect for the writ of habeas corpus. That tradition was to shatter in 1777, fractured by an expansion of parliamentary

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<sup>138</sup> 6 Ann., c. 15 preamble.

<sup>139</sup> 19 Geo. 2, c. 1 preamble.

<sup>140</sup> See, e.g., 7 & 8 Will. 3, c. 11 preamble (1696); 6 Ann., c. 15 preamble (1708); 17 Geo. 2, c. 6 preamble (1744).

<sup>141</sup> 17 Geo. 2, c. 6 preamble.

sovereignty that both followed and drove an equally dramatic expansion of the empire.

### *1. The Judicial Response to Parliamentary Suspension*

The option of suspending the writ of habeas corpus invariably raised the issue of balancing liberty with security. As we have seen, until 1641 the king and the Privy Council performed this function by deciding which writs to return with no cause of commitment other than “by special commandment.” Doing so amounted to a claim by the Privy Council that it held the authority to determine the balance between liberty and security for reasons of state.<sup>142</sup> Especially after 1660, the justices of King’s Bench took over much of the work finding the security/liberty balance, routinely releasing prisoners detained by the Privy Council, even when their writs of habeas corpus were returned without any wrong specified.<sup>143</sup> Finally, we have seen that by the suspension of 1689, Parliament took this authority from the court. But what shall we make of the court’s use of that authority when it was *not* suspended by Parliament? Let us examine one important period of King’s Bench work with the writ of habeas corpus to supervise imprisonment orders made for reasons of state.

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<sup>142</sup> In 1615, Coke justified the conciliar power to answer writs of habeas corpus “without expressing any cause because there are *arcana imperii*” (secrets of the realm) that must be protected. Bod., MS Rawlinson C.382, f. 57.

<sup>143</sup> We can see this trend by reviewing the results of the quadrennial survey for this period, using information from all writs used every fourth year, 1662 to 1686, inclusive. The survey shows that twenty-seven writs of habeas corpus were used on behalf of those imprisoned on conciliar orders. Results on twenty-six of these writs are known. The justices of King’s Bench bailed or discharged twenty (seventy-seven percent) of those prisoners, compared to an average rate of bail or discharge of sixty-six percent for all who used habeas corpus during the same period. Only one of the prisoners was remanded after the Council gave no cause for the incarceration in its return to the writ. This was Henry Vane the Younger, who was soon tried for treason and executed. The writ in his case was used simply to bring him from the Tower into King’s Bench for arraignment. TNA, KB145/17/14 (teste May 30, 1662) and KB21/14, ff. 86v., 87v., and 88. Vane had not participated in the regicide (the execution of Charles I in 1649), but he had been deeply involved in politics throughout the 1650s. His prominence ultimately made him a target of those who wanted to destroy prominent signs of the Interregnum regimes. See Ruth E. Mayers, Vane, Sir Henry, the Younger, in 56 Oxford Dictionary of National Biography 108–120 (2004), available at [www.oxforddnb.com/view/article/28086](http://www.oxforddnb.com/view/article/28086).

On October 23, 1689, the first three suspension statutes lapsed and the justices of King's Bench began again to determine the security/liberty balance in habeas cases. From the fall of 1689 through the end of 1690, King's Bench, led by Chief Justice Sir John Holt, handled more habeas cases (251) than in any other period of similar length before 1800. More than half of these cases (147) concerned accusations of treason, treasonable practices, or sedition prompted by Parliament's and the Privy Council's fears about threats to the realm from the French, the Irish, and their erstwhile king, James II.<sup>144</sup> King's Bench bailed or discharged eighty percent of those jailed for these wrongs against the state, compared to an average release rate on all wrongs across three centuries of fifty-three percent.<sup>145</sup>

Such high release rates become all the more interesting when we consider who ordered all these prisoners released. The newly appointed King's Bench justices of 1689 were among the chief beneficiaries of the new parliamentary order that these alleged traitors

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<sup>144</sup> On the threat James posed from Ireland, even after the destruction of most of his military support at the battle of the Boyne in July 1690, see Harris, *Revolution*, supra note 98, at 433–50. Meanwhile, war had also been declared in 1689 against France, long William's foe in his capacity as stadtholder of Orange and now as William III of England. France's Louis XIV was James II's most important supporter from 1689 to 1690, and England would remain at war with France until 1713, interrupted only by a fragile peace between 1697 and 1702. On the uniting of national fear with a national sense of religious destiny promoted by William's supporters, see Tony Claydon, *William III and the Godly Revolution* 122–47 (1996). For general background on the war with France, ended only with the Treaty of Utrecht in 1713, see Geoffrey Holmes, *The Making of a Great Power: Late Stuart and Early Georgian Britain, 1660–1722*, at 229–42 (1993).

<sup>145</sup> Of the 147 habeas cases concerning state wrongs found in this period, results for 14 are unknown. Outcomes are thus for the remaining 133 cases: 26 were remanded, 51 bailed, and 56 discharged. Of those bailed, there is every reason to believe that most were later discharged, which was consistent with the then-current practice, but no record of the discharges has survived. Writs for 1689 and 1690 are in TNA, KB11/14 and KB16/1/1, with court orders in KB21/23, passim. In nineteen additional cases of persons jailed for being Catholic priests or for being Catholics who refused to swear the oath of allegiance—a proxy for treason—the justices bailed all but one. Of those eighteen, fifteen were bailed and were later discharged; three others were bailed, but outcomes in their cases cannot be traced. Only one of the alleged priests, Ralph Gray, was remanded, and then only after the charge against him had been changed to sedition. Gray's offense was dispersing "The Coronation Song," a Jacobite pamphlet. His writ is at TNA, KB11/14 (teste date obscured by damage, but the order date was October 23, 1689), orders thereon at KB21/23, pp. 327, 331. The warrants for his arrest are also noted in CSPD 1689–90, at 110, 270.

were seen to threaten. By September 1689, Chief Justice Holt had even joined the Privy Council, the body that issued most of these imprisonment orders. Holt was always inclined to implement fully the laws of felony and treason and to defend the authority of Parliament and the post-1688 monarchical order. Nonetheless, in habeas cases especially, he handled legal evidence with precision and consistently conveyed his strong belief in the importance of judicial superintendence of other officials.<sup>146</sup>

By examining the twenty percent of habeas cases in which King's Bench justices remanded state prisoners to custody, we get a sense of the court's willingness and ability to distinguish those who posed a danger known to law from those who did not. In many cases, prisoners remanded were not ultimately tried for treason, but for other less serious charges.<sup>147</sup> But when treason was clearly established, the same judges who were inclined to scrutinize incarcerations carefully could impose the full severity of the law, as Godfrey Cross learned upon his conviction for giving intelligence to the enemy while aboard the French fleet in the summer of 1690. Holt's court ordered him hanged, drawn, and quartered.<sup>148</sup>

## 2. *The Institutional Implications of Parliamentary Suspensions*

When parliamentary suspensions first emerged in 1689, the kind of judicial activity just described was part of the background. Despite judicial care across many decades in distinguishing traitors

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<sup>146</sup> On Holt, see generally Paul D. Halliday, Holt, Sir John, 27 *Oxford Dictionary of National Biography* 830–834 (2004), available at [www.oxforddnb.com/view/article/13611](http://www.oxforddnb.com/view/article/13611).

<sup>147</sup> Thus Thomas Saxton, originally committed for treason by Secretary of State the Earl of Sunderland, was remanded to stand trial for perjury instead. He was convicted and sentenced to a fine, the pillory, and a whipping from Ludgate to Westminster Hall. TNA, KB11/14 (teste October 23, 1689) and KB21/23, p. 330. See also the case of Joseph Guilstop, initially taken on suspicion of treason, though later charged and convicted on grand misdemeanor, for which he was fined and pilloried. TNA, KB11/14 (teste October 23, 1689) and KB21/23, pp. 368, 377, 392. CSPD 1689–90, at 317. John Lowthorpe, initially remanded for treason upon hearing the return to his writ of habeas corpus, was ultimately convicted on the less serious charge of publishing *A Letter to the Bishop of Sarum*, for which he was imprisoned and fined 500 marks. KB16/1/1 (teste June 7, 1690), KB21/23, pp. 413, 416; CSPD 1690–91, at 348.

<sup>148</sup> TNA, KB16/1/1 (teste July 9, 1690), KB29/349, m. 112, and KB21/23, pp. 427, 443. CSPD 1690–91, at 56, 61, 92. Narcissus Luttrell noted that “[t]is said [Cross] died a Roman Catholic.” 2 Narcissus Luttrell, *A Brief Historical Relation of State Affairs from September 1678 to April 1714*, at 140 (1857).

from those who only looked like traitors, members of Parliament assumed that in times of crisis they were better suited to locate the balance between liberty and security than judges. Still, we should not overplay conflict between judges and Parliament in the late seventeenth and eighteenth centuries. After all, King's Bench justices attended the House of Lords, and throughout the eighteenth century the Chief Justice of King's Bench, and sometimes other members of that court, were members of the Privy Council, which Parliament had charged with oversight of the suspension process.

Members of Parliament often accepted that necessity might dictate the writ's suspension. And necessity did not concern physical safety alone. One might invoke it to protect the liberties of the subject as well. In a 1715 pamphlet, Joseph Addison, Member of Parliament (MP) and political commentator, heartily endorsed suspension as a response to the Jacobite uprising of that year.<sup>149</sup> The rebellion, he suggested, was a far greater threat to the liberties of the people than suspension of the writ of habeas corpus. At the same time, he and other advocates of suspension insisted that it be of limited duration: extending it beyond short, specifically defined periods raised the specter of tyranny.<sup>150</sup>

*F. The English Text and Its American Framing: A Preliminary Comment*

Let us briefly preview the possible effect of the history just recounted on the framers of the Suspension Clause of the Constitution.<sup>151</sup> As they considered its potential wording and whether to include such a provision in the document, how might their deliberations have been affected by the cumulative English experience of habeas corpus?

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<sup>149</sup> Joseph Addison [attributed], *The Freeholder, or Political Essays* 90–96 (1716) (no. 16, Monday, Feb. 13). On the so-called '15 Rebellion, see Tim Harris, *Politics under the Later Stuarts: Party Conflict in a Divided Society 1660–1715*, at 226–28 (1993).

<sup>150</sup> Addison, *supra* note 149, at 90–96. Much the same argument was made in Thomas Burnett, *The British Bulwark: Being a Collection of All the Clauses in the Several Statutes Now in Force Against the Pretender, the Non-Jurors and the Papists* 45–46 (London 1715).

<sup>151</sup> The issues raised in this section will be discussed in more detail *infra* Part IV.

First, we must linger on the question of how much the framers (and ratifiers) of the Suspension Clause “knew” about the English history of the writ of habeas corpus and its suspension by Parliament.<sup>152</sup> They “knew” something of that history, and felt strongly about what they took to be its implications. As we shall see in more detail, one reason for their awareness of the history of habeas corpus was the decision of Parliament, beginning in 1777, to suspend the privilege of habeas corpus in the “American plantations” during the civil war Britain confronted there. Although the precise relationship of that decision to the previous history of English habeas jurisprudence has been misunderstood,<sup>153</sup> the immediate effect of those parliamentary suspensions on Americans could hardly have been missed.<sup>154</sup> Another reason was related to the function of courts in the American colonies. There were no King’s Bench justices in colonial British America; instead, colonies had their own courts and the Privy Council heard appeals from those courts.<sup>155</sup> Conciliar appeals, though, were infrequent, and did not involve using habeas corpus. Nonetheless, there is evidence that colonial judges used habeas corpus. In sum, British residents of the American colonies were aware that colonial officials who had the power to imprison “free British” residents had to provide justifications for doing so.<sup>156</sup>

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<sup>152</sup> The term “knew” is placed in quotations marks to signal that scholars have advanced a variety of claims about the sources of the framers’ “knowledge” and the interpretive techniques employed to recover that knowledge. We are using “knew” to refer to the generally accepted understandings and assumptions about constitutional issues that ordinary American citizens, who were informed about law and politics, would have held at the time of the framing. One should recall that the debates at the Philadelphia Convention of 1787 were not published until 1840. See 1 *The Records of the Federal Convention of 1787*, at xv (Max Farrand ed., 1966).

<sup>153</sup> There has been surprisingly little discussion of these suspension statutes by historians of habeas corpus. Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 *Colum. L. Rev.* 961, 976 n.79 (1998), makes a brief allusion to the 1777 Suspension Act. Neither Sharpe, *supra* note 35, nor Duker, *supra* note 14, discusses the statutes.

<sup>154</sup> For further discussion of the six parliamentary acts suspending habeas corpus in the American colonies between 1777 and 1783, see *infra* Part III.

<sup>155</sup> See generally Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* (1950).

<sup>156</sup> For more detail, see *infra* Part IV. The term “free British” is used advisedly. African-American residents of the colonies were sometimes free persons, but were not treated as “British,” even though they were, by virtue of their residence in the king’s dominions, among his subjects. On the conceptual status of free blacks in 18th century

The framers of the Suspension Clause were well acquainted with England's experience with the writ of habeas corpus. Indeed, the Clause seemed to presuppose that a "privilege" associated with the writ was enjoyed by at least most residents of the new American nation.<sup>157</sup> And since the overwhelming majority of Europeans in America at the time of the framing were British, the framers of the Clause would naturally have looked to English history and English practice for the source of their understanding of the writ.

The history of habeas jurisprudence just described suggests that the framers would have understood the writ of habeas corpus as a royal prerogative writ whose equitable dimensions, originating in the concept of the king's mercy and in the need to supervise the work of franchise holders, had been largely implemented by common law judges. That process had not primarily occurred because King's Bench justices saw themselves as defenders of the natural rights of humans, or even of the liberties of the king's subjects. Instead, it had primarily occurred because the privilege of habeas corpus, as exemplified in a common law writ, allowed King's Bench justices to co-opt for their own uses the greatest authority in England: the king's. By implementing the king's responsibility to ensure that royal franchises were not abused—thereby protecting the liberties of his subjects, natural and otherwise—the justices of King's Bench fashioned an instrument of exceptional jurisdictional reach and power.

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colonial America, see Jonathan L. Alpert, *The Origin of Slavery in the United States—The Maryland Precedent*, 14 Am. J. Legal Hist. 189, 207–11 (1970); Edmund S. Morgan, *Slavery and Freedom: The American Paradox*, 59 J. Am. Hist. 5, 17–18, 23–26 (1972); William M. Wiecek, *The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America*, 34 Wm. & Mary Q. 258, 279 (1977). Members of Amerindian tribes were not treated as "British" for purposes of challenging those who incarcerated them. Finally, in the eighteenth century the British government, as part of a policy of encouraging European emigration to the American colonies, instituted a policy of treating natives of Germany, Sweden, and the Netherlands as "British" once they established residency in America. On the conception of Amerindian tribes as "non-British" and thus not "free men," see, for the seventeenth century, Katherine Hermes, "Justice Will Be Done Us": *Algonquian Demands for Reciprocity in the Courts of European Settlers*, in *The Many Legalities of Early America* 123–49 (Christopher L. Tomlins & Bruce H. Mann eds., 2001), and for the eighteenth century, see Richard White, *The Middle Ground* 186–523 (1991).

<sup>157</sup> For a discussion of habeas corpus petitions brought by African slaves in colonial British America, see *infra* Part IV, text accompanying notes 312–13.

The history also suggests that the relationship of this “common law” writ to the statutes intended to support it—the very statutes whose protection, we will see, was not extended to residents of colonial British America—was ambivalent at best. The Petition of Right in 1628<sup>158</sup> and the first Habeas Corpus Act of 1641<sup>159</sup> had only bolstered habeas use at the margins. The celebrated 1679 Act,<sup>160</sup> often taken to be the foundational charter of habeas protection, needs to be understood against a common law backdrop. The 1679 Act expanded the availability of habeas corpus in some respects. Rather surprisingly, it narrowed it in others. But the statutory writ was never understood, in the period before the American framing, as *superseding* the common law habeas jurisprudence.<sup>161</sup> And as we have seen, the habeas amending bill of 1758—thought necessary by many to make the writ available to test illegal naval impressment

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<sup>158</sup> Technically, the Petition of Right was just that: a petition graciously acceded to by the king, not a statute. But it was often interpreted as if it should have statutory effect. One of the most remarkable signs of its impact was a tiny, but critical, change in the standard formula used in the writ of habeas corpus *ad subjiciendum*. Previously, such writs had issued only requiring the return of the “cause of the detention” of the prisoner. During the Five Knights Case in November 1627, John Selden, the most famous of the Knights’ counsel, argued that though the form of the writ required only the return of the cause of detention, a proper return should also give the day and cause of the arrest, which logically, chronologically, and legally preceded detention. If so, he reasoned, then the Privy Council’s return to the writ was insufficient, for while a return stating that one was held “by the special command of his majesty” answered the cause of detention, it did not answer the cause of the arrest. 3 State Trials col. 3. The only problem with this argument was that it disregarded the actual language in writs of habeas corpus *ad subjiciendum*, which indeed required only return of the cause of detention. Having examined the texts of well over 1000 writs from the early fifteenth century to 1627, Paul Halliday has found that the usual formula was to require the “cause of the detention” only.

The Petition of Right said nothing about clerical formulae. But two surprising items indicate that the Petition had a direct impact on such formulae: the fact that, quite unusually, a full manuscript copy of the Petition was placed on the recorda file in 1628, soon after the Petition was written; and virtually all writs thereafter on that file and in all those following demand that the writ be returned with “the day and cause of the arrest and the detention,” a formula that required much fuller information from any recipient, including the Privy Council. The recorda file for 1628 is TNA, KB145/15/4. The Petition is on a large parchment near the middle of the bundle, with a note on the back that it was entered into the record of the court in Michaelmas term that year.

<sup>159</sup> 16 Car. 1, c. 10, *supra* note 130.

<sup>160</sup> 31 Car. 2, c. 2, *supra* note 92.

<sup>161</sup> For more detail, see *infra* Part IV.

orders—failed in Parliament.<sup>162</sup> As the hundreds of writs issued to test naval impressment orders that began coming from King's Bench right after the failure of that bill demonstrated, judicial innovation rather than statutory intervention would be the key to strengthening the writ for the king's subjects.<sup>163</sup>

In addition, the English history of habeas reveals that the deepest impact of statutes on the common law writ had not been made by legislative supports to the writ but by legislative suspensions of it. The suspension statutes have been characterized as Parliament's declarations of its power over the judiciary, and those declarations reflected the reality of English political and legal life in the eighteenth century: that Parliament was supreme.<sup>164</sup> But even as Parliament restricted the use of habeas corpus by curtailing the powers of the justices of King's Bench, its members did so keenly aware that they put important moral and legal ideals at risk. To avoid that danger, they limited the scope and duration of their suspensions. The provisos they inserted in suspension statutes, by stating that legal usages should revert to pre-suspension norms upon a statute's expiration, underscored the force of the common law writ and the judicial power on which it relied.

By the framing period, the legacy of English habeas jurisprudence was a rich one. And even though, in theory, the writ ran to all the king's dominions, Parliament suspended it repeatedly during the American conflict, starting in early 1777.<sup>165</sup> That decision signaled a larger trend, in which empire and parliamentary sover-

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<sup>162</sup> On the bill's legislative history and its ultimate failure, see Oldham & Wishnie, *supra* note 89, at 487–95.

<sup>163</sup> For an illustration of that judicial action, see the writs of 1757–58, soon after William Lord Mansfield assumed the presidency of King's Bench. These include one for Mary, wife of John Wilkes, by which their marriage settlement was tested. TNA, KB16/15/2 (teste February 13, 1758). On Wilkes, famed libertarian and libertine, see Arthur H. Cash, *John Wilkes: The Scandalous Father of Civil Liberty* (2006); for his unhappy marriage, see *id.* at 9–10, 17–19, 43–47. For an early naval impressment habeas case, see TNA, KB21/38, p. 110. For the application of the writ to a dispute over a daughter's custody by her father, see TNA, KB21/38, p. 133. An affidavit in this case, concerning Lydia Henrietta Clark, spells out the young woman's fears of her father: TNA, KB1/13/3, affidavit of Mervin James, May 23, 1758.

<sup>164</sup> Lieberman, *supra* note 30, at Introduction, especially 13–28, and Part II, especially chs. 3, 6. See also Lemmings, *supra* note 27 at 319–29.

<sup>165</sup> The Suspension Act of 1777, and subsequent acts that extended it until the beginning of 1783, are discussed in Part III, *infra*.

eignty grew in tandem. The expansion of the empire and the increasing array of imperial subjects accompanying that expansion generated new uses for the writ and novel suspension practices. In the process, the concept of subjecthood across the king's dominions—and beyond—was redefined. America was to become a major locus of that redefinition. Thus the next stage in the early Anglo-American history of habeas corpus is an imperial stage.

## II. IMPERIAL CONTEXTS I: HABEAS CORPUS IN THE REALM AND BEYOND

### *A. Locating the Law of the Land*

Consideration of the imperial stage of the Anglo-American history of habeas corpus begins with an analysis of just what the “law of the land”—that celebrated phrase in the 29th chapter of Magna Carta—meant over the course of that history. The phrase has two central terms, “law” and “land.” Here we primarily consider the latter, though as we shall see, it could only be explained by its relationship to the former. The law of the land, claimed an anonymous reader in the Inns of Court around 1500, included:

special jurisdictions and other courts of record, such as the Cinque Ports, where writs of the king do not run, [and] the counties palatine . . . All special courts are under the law of the land . . . Thus Ireland is the law of the land and the laws that are there are the law of the land.<sup>166</sup>

What did it mean when an English lawyer said that Ireland was the law of the land? What did it mean that the law of the land might be found in places “where writs of the king do not run”? In addressing these questions, we will confront the geographical breadth and legal complexity of the English kings' dominions going back to William's conquest from Normandy in 1066. We must disentangle the many varieties of sovereignty from the legal means—the king's writs—by which these many kinds of sovereignty were asserted. Doing so, we shall discover that there were indeed some places to which *some* of the king's writs did not run. But by includ-

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<sup>166</sup> HLS, MS 13, p. 441 (from an anonymous Reading on Magna Carta).

ing here a mention of the Cinque Ports and the palatinates, our reader erred.<sup>167</sup>

Some writs from King's Bench and the king's other courts in Westminster Hall were confined to the realm of England, but others could go anywhere within the dominions of the king. By appreciating the difference between writs restricted to the realm and those that went beyond, we shall trace the boundaries of empire as we trace the ambit of habeas corpus. Many kinds of places existed within the empire, all manifesting different varieties of sovereignty. As habeas corpus went everywhere the king's officers went—everywhere people exercised authority by his franchise—we will see how early modern use of habeas corpus shatters the neat categories of people and place used in modern law. Thus the writ might be available to a Frenchman or Hindu in far away Bengal, a place whose status as a dominion, or as a sovereign territory of the Crown, was dubious at best. Measuring this vast jurisdiction on the writ both with respect to places and to people, we will understand the meaning of its loss to those to whom it might be denied. Specifically, we will understand just what it meant to Americans in 1777 to have this critical marker of subjecthood taken from them.<sup>168</sup>

### *B. Defining the King's Dominions: Hale's Prerogatives of the King*

The best source for recovering how seventeenth- and eighteenth-century English lawyers thought about the meanings of “land” and “law” is the King's Bench justice Sir Matthew Hale's treatise, *Pre-*

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<sup>167</sup> On the Cinque Ports, palatinates, and other jurisdictions, see *supra* text accompanying notes 53–57.

<sup>168</sup> We recognize that our analysis in this section raises a puzzle for the American jurisprudence of habeas corpus. The puzzle centers on the role of “place” in the American constitutional system. After 1789, with the passage of the Constitution and the Judiciary Act of September 1789, informed Americans assumed that the jurisdiction of the federal courts was limited to *places in which these courts sat*. None of the federal courts of the United States sat abroad. Our analysis in this section reveals that between 1679 and 1789, the writ of habeas corpus was treated in Anglo-American jurisprudence as sounding in common law as well as in the 1679 Act. It thus *did run with the place*, and British courts in India and in America were understood as *having jurisdiction over habeas petitions filed by residents of the places in which those courts sat*. Thus our analysis in this Section necessarily raises the question about whether the Constitution and the Judiciary Act of 1789 changed the Anglo-American understanding of “place” for the purposes of habeas jurisprudence in the United States. We address that question in more detail *infra* Part IV.

*rogatives of the King*.<sup>169</sup> In his lengthy discussion “concerning the dominions of the king and crown of England,” Hale moved systematically across space, beginning with the many places within England and the British isles characterized by different legal and historical relationships to the king, then moving progressively out-

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<sup>169</sup> Throughout this section, we will focus on Hale’s thinking on the legal nature of territory and persons within and beyond the king’s direct control. Using Hale requires a brief explanation since interest in these issues has traditionally focused on Sir Edward Coke’s opinion in *Calvin’s Case* of 1608. 2 State Trials cols. 559–658. On *Calvin’s Case*, see supra note 64. For a different approach from our own, exploring Coke’s views in the case, see Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830*, at 20–28 (2005).

We concentrate on Hale’s thinking on these issues for three reasons. First, Hale drew on some of Coke’s insights, such as Coke’s categories of subjecthood and allegiance, from “natural born” to “local.” Supra text accompanying notes 66–76. Second, Hale extended this analysis, doing so within an integrated view of English law’s other aspects, making his discussion of subjecthood and the legal nature of the king’s dominions part of a unified conception of the operation of both subjecthood and dominion. Hale linked subjecthood and dominion in part through his discussion of franchises and the need, through the courts, to supervise the use of franchises: see supra notes 47–48. Third, in *Calvin’s Case*, Coke worked through his discussion of subjecthood largely as it pertained to property law. As Coke put it, the case arose from a question about landed property: whether a Scot born since 1603 was “disabled to bring any real or personal action for any lands within the realm of England.” 2 State Trials col. 609. But property law, as Coke’s discussion in *Calvin’s Case* shows, was bounded differently from the law of franchises in both conception and geography. English property law was tied to a place called England—just as the law of Jersey applied in Jersey—whereas the movement of that part of law concerned with the king’s franchises was not restricted in the same ways. See infra note 192.

Property law was arguably the area in which the king’s law varied most from one of his dominions to the next. Forms of tenure differed in the Channel Isles and Berwick from England. See infra text accompanying notes 191–92. But this variation in property law norms did not affect allegiance. In his own thorough discussion in *Calvin’s Case*, Lord Chancellor Ellesmere highlighted just this point: “diversity of laws and customs makes no breach of that unity of obedience, faith, and allegiance, which all liege subjects owe to their liege king and sovereign lord. And as none of them [in different dominions of the king] can be aliens to the king, so none of them can be aliens or strangers in any of his kingdoms or dominions.” Louis A. Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere 237* (1977). Brian Levack argues that by deciding in *Calvin’s Case* that the subject’s allegiance belonged to the person of the king and not to an abstraction of kingship—such as law—the decision “minimiz[ed] the ties of the subject with the territorial state and . . . emphasiz[ed] a ‘community of allegiance’ that transcended political boundaries and legal jurisdictions . . . .” *The Formation of the British State: England, Scotland, and the Union, 1603–1707*, at 183–84 (1987). On the political contexts of *Calvin’s Case*, see id. at chs. 1–3, 6.

ward.<sup>170</sup> Hale traced a spectrum of territories that had come to the crown at different moments and by different means. He assumed that different aspects of law—including aspects of that law called “common”—moved from one place to another by different means, at different times, and to different degrees.

Hale’s insight about the movement of English law across space and through time is particularly useful for an Anglo-American history of habeas corpus. A recurrent difficulty in understanding the movement of English common law across the British Empire stems from acceptance of the fiction that because the law was “common”—in the sense of unitary—it moved as a whole. Once we accept that in practice the common law was divisible, we can see how and why the imperial movement of habeas corpus differed from the movement of other elements of English law. So let us take a tour across the king’s dominions, beginning within the English realm then traveling well beyond it, with Hale as our guide.<sup>171</sup>

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<sup>170</sup> Hale’s *Prerogatives*, supra note 45, at 19. The section on the dominions is chapter 3 of the modern published version. We should bear in mind that this edition is a collation of two manuscripts that did not have precisely these internal divisions. Hale’s work on the prerogative was not published in his lifetime. Nonetheless, we believe that there are good reasons to treat it as an important statement of more widely held views. First, Hale’s views, in which the prerogative and the law of franchises are central, were arguably consensual, as indicated by their proximity to those of a judge of a different political stripe, Sir Francis North, later Lord Guilford. In his manuscript essays, North considered the king’s place at the center of law, reaching conclusions quite like Hale’s. See “A view of judicatures,” in BL, MS Add. 32,518, ff. 154–56; “Of franchises,” id. f. 182–83; “Of the Prerogative,” BL, MS Add. 32,520, f. 32v.; “An account of franchises,” id. ff. 66–67. On North, see Paul D. Halliday, North, Francis, first Baron Guilford, 41 *Oxford Dictionary of National Biography* 85–88 (2004), available at [www.oxforddnb.com/view/article/20301](http://www.oxforddnb.com/view/article/20301). For signs of lawyers consulting Hale’s manuscripts in the seventeenth and eighteenth centuries, see Hale’s *Prerogatives*, supra note 45, at x, n.3; for the bequest of his manuscripts to Lincoln’s Inn library, see id. at lix–lxxvi. Second, Hale’s treatise is arguably the single-most systematic treatment of English law before Blackstone. Unlike Coke or Blackstone, Hale stressed that English law could only be constructed as a coherent system through a careful historical explanation rather than a rationally constructed one. On the ways in which Hale did and did not share the historical sensibilities of Coke, see Hale, *History of the Common Law*, supra note 28, at 16–38; see also Cromartie, supra note 45, at 45–46, 101–03; J. G. A. Pocock, *The Ancient Constitution and the Feudal Law*, chs. 2, 7 (2d ed. 1987).

<sup>171</sup> For a recent reading of Hale on the territorial movement of law, see Ken Mac-Millan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576–1640*, at 35–38 (2006).

*1. The Palatinates*

Hale begins his discussion of territories with an analysis of the legal state of affairs in 1066, in an England unified “partly [because of] the laws of King Edward [the Confessor] and finally by the election and choice of William.”<sup>172</sup> Despite this apparent unity, various places within England stood in a slightly different relationship to the crown from the rest of the kingdom. Thus the palatinates of Durham, Chester, and Lancaster—within the realm of England, but distinct owing to their royally chartered privileges—were all places in which the law of England deviated slightly from that operating in other parts of the realm. Like the Cinque Ports, the palatinates possessed certain regal powers—franchises—not used elsewhere. Those franchises were given to the palatinates by “letters patent” from the king.<sup>173</sup> One characteristic of the palatinates was their exemption from original writs issuing from the king’s courts to commence suits between private parties.<sup>174</sup>

But the king had other writs, used to commence his own suits. No palatine privilege could block entry of these *brevia mandatoria*, for no franchise could “bar the king of his suit.”<sup>175</sup> The reason, to a seventeenth-century English lawyer, was obvious: the king could always demand an account of the actions of any of his franchise holders since all acted by the king’s grace.

*2. More Remote Regions*

Hale moved from the palatinates to places more remote. One was Berwick-upon-Tweed, on England’s northern border. Though taken from the Scots by conquest, the town was not incorporated into the kingdom of England. The law of Scotland and local custom remained in use there, a condition allowed by the king’s charters to Berwick.<sup>176</sup> At the southern end of the realm were the Channel Isles, which had very much the same relationship to the crown, though for different historical reasons. The Channel Isles—

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<sup>172</sup> Hale’s Prerogatives, supra note 45, at 20.

<sup>173</sup> Id. at 20; id. at ch. XIX, 208–13 (discussing franchises). “Letter patent” was a synonym for charter or other open letter of the king. See MacMillan, supra note 171 at 79–80.

<sup>174</sup> On original versus judicial writs, see Baker, Introduction, supra note 31, at 53–67.

<sup>175</sup> Hale’s Prerogatives, supra note 45, at 204–05.

<sup>176</sup> Id. at 42.

Guernsey, Jersey, Alderney, and Sark—had come to the king as part of his now defunct Norman patrimony. Both Berwick and the Channel Isles had been “annexed unto the crown of England”—Berwick by charter, the Isles “by long usage”—and though they were not within the realm, they were dominions of the king.<sup>177</sup>

Ancient laws, distinct from those of England, remained in use in both places. But because they were within the dominions of the king of England, even if outside the realm of England, they “were rendered in some kind of subordination to the English jurisdiction.”<sup>178</sup> And this subordination was implemented, Hale noted, through the power of King’s Bench to supervise franchisal authorities, using *brevia mandatoria* such as habeas corpus. In his history of the common law, Hale drove this point home:

[A] [w]rit of *Habeas Corpus* lies into [the Channel Islands] for one imprisoned there, for the King may demand, and must have an account of the cause of any of his subjects['] loss of liberty; and therefore a return must be made of this writ, to give the court an account of the cause of imprisonment; for no liberty, whether of a County Palatine, or other, holds place against those *Brevia Mandatoria* . . . .<sup>179</sup>

The next region Hale considered was Wales, conquered and annexed to the English crown by Edward I in the 1270s and 1280s.<sup>180</sup> Despite that annexation, Wales was not fully incorporated into England until a statute of 1536.<sup>181</sup> Until then, Wales remained a distinct jurisdiction to which ordinary common law writs did not run. But long before a statute formally joined Wales to England, the king’s commissions and *brevia mandatoria* went there, just as to Berwick or Guernsey.<sup>182</sup>

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<sup>177</sup> Id. at 41–42.

<sup>178</sup> Id. at 41.

<sup>179</sup> Hale, *History of the Common Law*, supra note 28, at 120. On the dating of Hale’s history to the early Restoration—perhaps contemporaneous with and related to the composition of his second manuscript on the prerogative—see Cromartie, supra note 45, at 104. The first printed edition appeared in 1713. Charles M. Gray, *Introduction to Sir Matthew Hale, History of the Common Law*, id. at xiii.

<sup>180</sup> The introduction of English law and a division of Wales into counties with sheriffs was accomplished by statute in 1284. Baker, *Introduction*, supra note 31, at 30–31.

<sup>181</sup> 27 Hen. 8, c. 26.

<sup>182</sup> Hale’s *Prerogatives*, supra note 45, at 26.

Turning to Ireland, Hale noted that Henry II and his son John “made a perfect conquest” of that country in the late twelfth century, “and in token thereof introduced the English laws.”<sup>183</sup> Hale explained what he meant: Ireland was “not only a conquest *in regem*,” like Wales, “but a conquest *in populum*.”<sup>184</sup> As a full conquest over an Irish king and the Irish people, the critical factor, Hale suggested, was the subsequent movement to Ireland not just of an English king, but of English people.

[T]hough the victor gets by right of conquest upon the conquered, yet these English planters and colonies [sic] were free Englishmen and carried with them their rights and liberties of Englishmen, though into a country acquired not only in point of superintendency but in point of propriety, by the conquering king.<sup>185</sup>

Like Berwick and the Channel Isles, Ireland was “a distinct kingdom still, though not a distinct dominion.”<sup>186</sup> Thus *brevia mandatoria* ran from King’s Bench in England into Ireland, even though that kingdom had its own court of King’s Bench.<sup>187</sup>

Hale’s survey of the Crown’s dominions concluded at the greatest distance from England’s shore, in America and the Caribbean. At first glance, Hale seems to place those possessions of the Crown in a different category:

If the king issue a commission under the great seal of England to take possession of a continent . . . he is seised thereof in the capacity of England, and I conceive hath the sole power of making

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<sup>183</sup> Id. at 33.

<sup>184</sup> “Against [or over] the king” and “against [or over] the people” of Ireland. Id. at 32.

<sup>185</sup> Id. at 34. Actually, much the same concerning popular desires on the part of Englishmen moving into conquered lands has been said for Wales by R.R. Davies, who notes that “the English communities in Wales were likewise anxious to avail themselves of the concepts and methods of English law . . .” R.R. Davies, *The First English Empire: Power and Identities in the British Isles, 1093–1343*, at 106 (2000).

<sup>186</sup> Hale’s Prerogatives, *supra* note 45, at 35.

<sup>187</sup> The so-called “Four Courts” in Dublin were reproductions of courts with the same names in Westminster. On Irish courts and their use of English common law—though superintended by process on writs of error from King’s Bench and Parliament in England—see Baker, Introduction, *supra* note 31, at 31–33.

laws &c. and [the continent] is not subject to the laws of England till the king proclaim them.<sup>188</sup>

Then, however, Hale turned to the examples of Ireland and the Channel Isles and argued, by analogy, that the status of these transatlantic possessions might change. “Course of time and usage of the English seal, process &c.,” he suggested, “may by custom annex [a continent], though in the original divided.”<sup>189</sup> Like those other places closer to home but distinct from the realm of England, possessions in the Western hemisphere were “parcel of the dominions [of the king] though not of the realm of England.”<sup>190</sup> As in Ireland, “English laws were gradually introduced [in America] by the king without the concurrence of an act of parliament.” And as in Ireland, where English law was settled, in part, as a result of the movement of English émigrés, “English planters carry along with them those English liberties that are incident to their persons,” even if “those laws that concern the lands, and propriety, and disposal of them, are settled according to the king’s pleasure, who is lord and proprietor of them, till he shall dispose of them by patent.”<sup>191</sup>

Here Hale makes a critical distinction. As “the law of the land” moves across the king’s imperial dominions, it does so in two components: the law concerned with land—property law—and the law concerned with franchises and with the relationship of the king to his subjects. For Hale, like others, the property law of the king’s dominions was spatially bounded. But, the law concerning the king and his subjects was bounded only by the relationship of allegiance. Thus the king’s *brevia mandatoria*—writs whose function was to do justice according to the king’s prerogative and his obligations to his subjects—could enter a territory prior to any other formal accession of that territory to the crown. As in Jersey or Berwick, so too

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<sup>188</sup> Hale’s Prerogatives, supra note 45, at 43 n.1.

<sup>189</sup> Id. The quoted passage is from “The Rights of the Crown,” Hale’s first unpublished manuscript, used by Prof. D.E.C. Yale in creating the collated text on the prerogatives. Hale makes much the same point in the main body of Prerogatives: “English laws are not settled there, or at least are only temporary till a settlement made.” Id. at 43.

<sup>190</sup> Id.

<sup>191</sup> Id. at 43–44. On the differences in the varieties of property law among the king’s dominions, see supra note 169.

in America: the king's subjects might hold lands by tenures unknown to English law and indefensible in English courts. But, they would still hold those liberties associated with their subjecthood in the same fashion as if they had remained in central London. Such liberties were "incident to their persons," even if their legal relationship to lands was not. Unlike property law, which might vary from place to place, the bonds of allegiance stretched as the king's subjects moved.<sup>192</sup> The law concerned with habeas corpus thus marked a potentially huge zone of allegiance and royal obligation.

### 3. *The Importance of Hale's Analysis*

Hale gives very little attention to two themes that scholars of early modern English history have regularly identified when discussing the theoretical basis of British imperial expansion. One such theme is the distinction between "Christian" and "infidel" inhabitants of territories occupied by English subjects. The other closely related theme, is a distinction between "uninhabited" lands (which included lands inhabited by "savages" such as the Amerindian tribes) and lands inhabited by Christian peoples. Those distinctions formed part of the rationale by which seventeenth-century English voyagers to the Caribbean and North America justified their claims to land in those territories on behalf of the monarch.<sup>193</sup> We are suggesting, however, that with respect to the imperial history of habeas corpus, Hale's account gets us closer to the theoretical heart of the matter.<sup>194</sup>

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<sup>192</sup> This echoes some of Coke's own thinking in *Calvin's Case*. Reasoning from the king's need to defend the realm by venturing abroad, Coke suggested that subjects, including those from the Channel Isles and other places outside England, remained subjects, and retained the perquisites of subjecthood, as they went abroad. Thus, "seeing the king's power[,] command and protection extendeth out of England, [] ligeance cannot be local, or confined within the bounds thereof. . . . [L]igeance is a quality of the mind, and not confined within any place . . ." 2 State Trials col. 623; see also id., col. 657.

<sup>193</sup> For an analysis of these and other theories of imperial expansion and possession, see MacMillan, *supra* note 171, especially chs. 1–3. On Coke's infidel/Christian distinction, see Mary Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* 36–38 (2004).

<sup>194</sup> Hale's account was derived from within English thought, more so than Coke's, which borrowed heavily from natural law arguments largely foreign to English law. MacMillan points out that much of the need to resort to foreign law traditions was to make sovereignty claims that would be recognized by foreign princes. But Hale's

Two analytic perspectives are at work in Hale's account. Both rely on the king's prerogative. First is the relationship between king and subject. The same concepts of allegiance and the need for the king to command his subjects' bodies that buttressed the writ's operation within England provided the basis for Hale's claim that the authority of English law, as it relates to writs like habeas corpus, moved as the bodies of the king's subjects moved. Acknowledging the grant of privileges in colonial charters—which generally issued under the king's great seal<sup>195</sup>—Hale maintained that subjects, both native born and those born within the new territory, would have “all the privileges of free denizens, and persons native of England, and within our allegiance in such like ample manner and form, as if they were born and personally resident within our said realm of England.”<sup>196</sup> A unified subjecthood, bounded only in the relationship of subject and king, was not bounded in space.<sup>197</sup>

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work in his chapter on dominions, concerned as it was to consider the problem of different kinds of lands' relationship to a specifically English king, depended less on ideas outside of English law. Hale consciously worked in the opposite direction here because of his emphasis on English history as the means whereby one can trace the operation in English law of the nature of allegiance and territorial control that are peculiar to a king of England. On non-English legal ideas justifying claims of imperial dominion, see MacMillan, *supra* note 171 at 17–31, 41–48, and especially 106–19.

On Hale's intellectual significance, see Cromartie, *supra* note 45, and Alan Cromartie, Hale, *Sir Mathew*, in 24 *Oxford Dictionary of National Biography* 533–39 (H.C.G. Matthew & Brian Harrison eds., 2004), available at <http://www.oxforddnb.com/view/article/11905>. On Hale as John Selden's protégé, and on Hale's participation in some of the major controversies of his own day—for instance, concerning the thought of Thomas Hobbes—see Richard Tuck, *Natural Rights Theories: Their Origin and Development* 115–18, 132–39 (1979). For his influence on Blackstone's thinking, see Lieberman, *supra* note 30, at 34–35 and works cited at 35 n.20.

<sup>195</sup> The earliest charters of colonies in British America were to “companies” (corporations), for example, the settlements in Jamestown, Plymouth, and Massachusetts Bay. One later colony, Georgia, had a charter in which the king retained “ownership” instead of granting it to a company. But in all instances the recital of the “liberties” of English subjects that was part of the charters presupposed that those liberties had been dispensed by the king. See MacMillan, *supra* note 171 at 79–105.

<sup>196</sup> This is from the patent to Sir Humphrey Gilbert and Sir Walter Raleigh, quoted in MacMillan, *supra* note 171 at 92. It was standard language in colonial charters.

<sup>197</sup> Such ideas of subjecthood and the protection they entailed, in conception and practice, persisted through the eighteenth century and into the nineteenth. For the invocation of consular protection on the Argentine frontier by British subjects in the nineteenth century, see Anderson, *supra* note 70 at 186–203. Proving British subjecthood in an environment of high population mobility could be difficult. Daniel Baret, born on an East India Company ship while docked at Rio de Janeiro, encountered

The second analytic perspective informing Hale's account of dominions and allegiance arose from his view of royal franchises. Hale explained that when the king chartered trading companies or colonies in various overseas places, he was carving off part of his authority and giving it to others.<sup>198</sup> All those charters in the seventeenth and eighteenth centuries contained language identical to that of the East India Company's of 1726: they recited that the king granted such authority "of Our special Grace, certain Knowledge and mere Motion."<sup>199</sup> Such language evokes the same ideas of miracle and divine grace that we have observed running through sixteenth- and seventeenth-century commentary on the king's prerogative. This is hardly surprising: all franchises arose from the prerogative, in answer to the king's perception of what would be for the public good. For this reason, the behavior of all franchisees was subject to constant monitoring to ensure that the king's franchises were used for the common weal. As Sir Francis North put it, all franchises "granted out of the crown are upon this trust, that there be justice done and that the people receive no prejudice thereby."<sup>200</sup> When a domestic urban corporation violated the king's trust, the information in the nature of *quo warranto* (by what

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just this problem, but on his being able to provide details of his London schooling, consular officers extended their assistance to him. *Id.* at 189.

<sup>198</sup> In this, the king did for persons leaving England precisely what he did for those to whom he granted franchises by charter within England. Thus the thinking and the language of overseas and domestic charters underlined the same franchisal ideas by the similarity of their operational language. On domestic urban corporations, see Halliday, *Dismembering*, supra note 105 at 29–55. For the likenesses between American charters and those for the East India Company, see Philip J. Stern, *British Asia and British Atlantic: Comparisons and Connections*, 63 *Wm. & Mary Q.* 693, 700–05 (2006).

<sup>199</sup> Charters Granted to the East-India Company, from 1601, at 370 (1773). Such language was standard in corporate charters. For its use in domestic urban charters, see Halliday, *Dismembering*, supra note 105 at 29.

<sup>200</sup> BL, MS Add. 32,518, f. 156. North's view of franchises, and the propriety of reviewing their use by *quo warranto*, was very much of a piece with Hale's. Hale's Prerogatives, supra note 45, at 244–46. North was probably writing this in the early 1680s, as part of his consideration of the legal propriety of challenging London's charter by *quo warranto*. Halliday, *Dismembering*, supra note 105 at 220–22. For North, see supra note 170.

warrant)<sup>201</sup> was available to take away the franchise.<sup>202</sup> Where an alleged violation of trust concerned imprisonment orders, the preferred process to correct a franchise holder's wrong was by writ of habeas corpus.

Thus Hale helps us understand that as royal franchises operated as the means by which the king gave parts of his authority to English companies as they ventured across the globe, the writ of habeas corpus went with them. This underscores a point we have seen before: the writ's strength arose less from its concern with the rights of prisoners than with the wrongs of jailers, the wrongs committed by someone commissioned to act in the king's name. Understanding this will enable us to see how a "gentoo"<sup>203</sup>—or even a Frenchman—might use habeas corpus in far away Calcutta. But first we turn to developments in America itself.

### III. IMPERIAL CONTEXTS II: AMERICA AND INDIA

#### A. *An Imperial Writ, Its Suspension in 1777, and the American Revolution*

Between 1777 and 1783, Parliament passed six acts suspending habeas corpus during the American rebellion, constituting a dramatically new approach to suspension.<sup>204</sup> These statutes contained some familiar language: those accused of treason might be held without bail, unless released by an order signed by six or more of the Privy Council, "any law, statute, or usage, to the contrary in any-wise notwithstanding."<sup>205</sup> But the 1777 suspension, which has sometimes been viewed as stating categorically that the writ of ha-

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<sup>201</sup> Technically, from the sixteenth century forward, *quo warranto* issued by process of information rather than as a writ. Confusion has arisen about this, in part because it has long been classed as a prerogative "writ." On process by *quo warranto*, and on the distinction between *quo warranto* process by writ or by information, see Halliday, *Dismembering*, supra note 105, at 163–64.

<sup>202</sup> On the use of *quo warranto* against domestic urban corporations in the early seventeenth century, see Catherine Patterson, *Quo Warranto and Borough Corporations in Early Stuart England: Royal Prerogative and Local Privileges in the Central Courts*, 120 Eng. Hist. Rev. 879 (2005).

<sup>203</sup> Gentoo was the word used by Britons in the eighteenth century for Hindus. See 6 The Oxford English Dictionary 454–55 (2d ed. 1989).

<sup>204</sup> These were: 17 Geo. 3, c. 9; 18 Geo. 3, c. 1; 19 Geo. 3, c. 1; 20 Geo. 3, c. 5; 21 Geo. 3, c. 2; and 22 Geo. 3, c. 1 (end date: January 1, 1783).

<sup>205</sup> See 17 Geo. 3, c. 9.

beas corpus did not run to America,<sup>206</sup> demonstrates precisely the opposite. The suspension of 1777 applied only to those taken for treason in any colony, on the high seas, or for piracy, and declared “[t]hat nothing herein contained is intended, or shall be construed to extend to the case of any other prisoner or prisoners than such as shall have been out of the realm at the time or times of the offence or offences wherewith he or they shall be charged.”<sup>207</sup> The Act was vigorously debated in Parliament. Many members applauded themselves for a measure that they said would affect so few. Others thought that a limited suspension was the worst kind, a greater threat to liberty than any other, as by this new statute, Parliament began making distinctions among the king’s many imperial subjects.<sup>208</sup>

### *1. The 1777 Suspension Act: Text*

Let us begin our analysis of the Act by observing the absence from it of the usual justifications accompanying a suspension. Although the Act declared there was a “rebellion and war,” these were not in England, but “in certain of his Majesty’s colonies and plantations in America.” The danger was not to the English realm but only to some of the English king’s dominions. Nor was there any further claim of necessity. The only rationale the statute provided was that “it may be inconvenient in many such cases [of accused American traitors] to proceed forthwith to the trial of such criminals, and at the same time of evil example to suffer them to go at large.”<sup>209</sup> “Inconvenience” and concerns about “evil example” marked a significant retreat from “necessity.”

And as we recall the discussion above of Hale’s account of English law’s movement, we can hear in the Act’s language just how far English law was seen as having traveled in the course of the em-

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<sup>206</sup> That mistaken view is perpetuated in encyclopedias: see Paul J. Mishkin, *Habeas Corpus*, in 3 *Encyclopedia of the American Constitution* 1245, 1246 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000) (“[T]he Habeas Corpus Acts did not extend to the American colonies . . .”).

<sup>207</sup> 17 Geo. 3, c. 9. The subsequent suspensions during the American war simply continued this one, following the practice in earlier periods when an initial statute was extended by later ones.

<sup>208</sup> 19 Parliamentary History, *supra* note 17, at cols. 4–53.

<sup>209</sup> 17 Geo. 3, c. 9.

pire's expansion. The 1777 suspension statute extended the places subject to the kind of rebellion that justified suspension beyond English shores. Suspension of habeas corpus only affected those in "his Majesty's colonies" in America and "such as shall have been out of the realm"<sup>210</sup> when their offenses occurred, including in international waters. The statute thus operated on a remarkable presupposition: that bail and mainprise, guaranteed by habeas corpus, were otherwise available to those who committed offences outside the realm and even outside the king's dominions. The Act thus followed Hale's logic, then exceeded it. The traditional practice of suspension in England had been drawn outward by imperial expansion and then transformed. The 1777 suspension gave a backhanded recognition to the vast preexisting ambit of habeas corpus in the very process of pulling back the writ's traditional reach.

## 2. *The 1777 Suspension Act: Parliamentary Debates*

In distinguishing subjects in America from those in England, supporters of the Act believed that they were doing liberty a great service. Frederick Lord North, the king's prime minister, when introducing the bill in February 1777, admitted there was no rebellion at home, "and as to an invasion, we ha[ve] not the least prospect of it." For those reasons, he did not "ask [for] the full power, usual upon former occasions of rebellion."<sup>211</sup> Others were unconvinced. John Johnstone argued that surely the militia in England, the navy upon the seas, and the army over the seas offered protection, "without the dangerous measure of attacking the grand palladium of the British constitution, the freedom of men's persons."<sup>212</sup>

John Dunning—prominent for his work representing prisoners on habeas corpus<sup>213</sup>—went further. He declared the measure ille-

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<sup>210</sup> *Id.*

<sup>211</sup> 19 Parliamentary History, *supra* note 17, at col. 4. The timing of the bill's introduction may have been related to the commitment to Newgate of Georgia merchant Ebenezer Smith Platt on January 23, 1777 on a charge of treason. His was a cause célèbre in the public debate over habeas corpus that followed. See John Wilkes's discussion, *id.* at cols. 29–30; see also *An Argument in the Case of Ebenezer Smith Platt, Now Under Confinement for High Treason* (1777), which offers a sardonic endorsement of Mansfield's opinion against Platt.

<sup>212</sup> 19 Parliamentary History, *supra* note 17, at cols. 5–6.

<sup>213</sup> On Dunning's prominence, see Lemmings, *supra* note 27, at 198–201, 347–48; John Cannon, Dunning, John, first Baron Ashburton, *in* 17 Oxford Dictionary of Na-

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gal.<sup>214</sup> The bill, he said, did not contain the traditional justification: rebellion or invasion at home. Dunning admitted that suspension had been “necessary” during the ‘45 Rebellion in Scotland. Now there was no necessity. And, as we have seen, necessity had been the watchword in all suspensions since 1689. “Are we . . . afraid,” Dunning asked,

that the people of America will pass the Atlantic on a bridge, and come over and conquer us? [A]nd that their partisans lie in ambush about Brentford or Colnbrook? That, it may be presumed, will be hardly contended, even in the present rage for assertion without proof, and conclusion without argument.<sup>215</sup>

Dunning’s comments highlighted the fact that North, by confessing there was no rebellion or invasion in England, had tacitly admitted that the bill deviated from the traditional “necessity” justification. The bill also violated the accompanying tradition of parliamentary self-restraint in instances in which suspension of the writ of habeas corpus was contemplated.

For Charles James Fox, the bill smelled of more foul designs. It amounted, he felt, to “nothing less than the robbing America of her franchises . . . and, in fine, of spreading arbitrary dominion over all the territories belonging to the British crown.”<sup>216</sup> James Luttrell picked up Fox’s point, but added an important gloss. The bill made distinctions among the king’s subjects, Luttrell noted, and from those distinctions would arise divisions. Oppressing the edge of empire, he reasoned, must oppress its core:

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tional Biography 333–35 (H.C.G. Matthew & Brian Harrison eds., 2004), available at <http://www.oxforddnb.com/view/article/8284>.

<sup>214</sup> 19 Parliamentary History, supra note 17, at col. 6.

<sup>215</sup> Id. at col. 7. Dunning continued:

[The act] may overtake any man, any where. It authorizes a discretionary punishment, without a color of legal proof, or even a probable ground of suspicion. It makes no distinction between the dreams of a sick man, the ravings of a demoniac, and the malice of a secret or declared enemy. No man is exempt from punishment, because innocence is no longer a protection. It will generate spies, informers, and false accusers beyond number . . . . In fine, it will realize what has hitherto been looked upon to be the creature of poetic fiction: it will scatter over the land more ills and curses, than were ever supposed to flow from Pandora’s box. Justice will be bound, as well as blind.

Id. at col. 9.

<sup>216</sup> Id. at col. 11.

To be separated for ever from America, endangers our liberties and the happiness of every individual in this kingdom . . . . [T]he attempts of government to claim a right of oppressing the subject, situated however distant from the capital, or varnished over with any pretence whatsoever, ought to be opposed for the good of the whole empire. For there can be no natural divisions, no slavish distinctions constituted amongst us, without its ending in destroying the freedom of the whole.<sup>217</sup>

Hale had shown, and those who had written the king's colonial and merchant company charters had understood, that space did not divide subjects nor distinguish among them. Nor had English law—until the Suspension Act of 1777.<sup>218</sup> A once unitary English subjecthood had been shattered by imperial expansion and parliamentary supremacy.

### 3. *The 1777 Suspension Act: Reactions*

The *Annual Register* reported the debate and the ensuing public clamor, which included a petition against the bill from the City of London.<sup>219</sup> The *Register's* report of opposition arguments in Parliament explained that such a suspension would “render the present unhappy animosities between the English of these islands and that continent implacable, and not only cut off the hope, but the possibility of any future reconciliation.”<sup>220</sup> Because so much of the domestic public was indifferent, the Act's impact on liberty would seep outward, “draw[ing] every subject of this country, residing either in the East or the West Indies, in the unoffending provinces of America, on the coasts of Africa, and all that immense body of the

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<sup>217</sup> *Id.* at col. 42.

<sup>218</sup> The making of distinctions among subjects was underscored by the Lord Chancellor in his speech supporting the bill in the House of Lords on February 21, 1777: “I am happy to say, no Englishman need to dread the suspension of the Habeas Corpus bill[, even] though the bill takes away the benefit of the Habeas Corpus Act in America . . . .” This was reported in American newspapers. See, e.g., *The Norwich Packet*, May 26–June 2, 1777, at 2.

<sup>219</sup> *The Annual Register, or a View of the History, Politics, and Literature, for the Year 1777*, at 53–56 (3d ed., London 1785) [hereinafter *Annual Register, 1777*]. For London's petition, see *id.* at 231–32. A later petition from the City of London, calling the conflict a “civil war,” referred to Americans as “our brethren (Englishmen like ourselves).” *The Pennsylvania Evening Post*, June 20, 1778, at 207.

<sup>220</sup> *Annual Register, 1777*, *supra* note 219, at 55.

people who in any manner use the seas, within its perilous vortex.”<sup>221</sup>

This and other expressions of outrage were premised on the idea that habeas corpus was so fundamental to Englishness that it was perhaps the most important thing that the king’s subjects, anywhere on the globe, carried with them. None other than General Washington, in his manifesto of September 1777, noted among other wrongs against North Americans that “arbitrary imprisonment has received the sanction of British laws by the suspension of the Habeas Corpus Act.”<sup>222</sup> By redefining legal space, the 1777 Act had in effect terminated the subjecthood of subjects in colonial British America, whether they remained in that territory or journeyed on the high seas.<sup>223</sup>

#### 4. *Edmund Burke’s Intervention*

Member of Parliament Edmund Burke, Irishman and imperial subject, pulled together the above arguments against the Suspension Act in a 1777 pamphlet that would be widely reported in America. “We are heartily agreed,” Burke began, “in our detestation of a civil war. . . . we feel exactly the same emotions of grief and shame on all its miserable consequences . . . of legislative regulations which subvert the liberties of our brethren, or which undermine our own.”<sup>224</sup> He then attacked the argument from neces-

<sup>221</sup> Id. at 56.

<sup>222</sup> The Continental Journal, and Weekly Advertiser, Mar. 5, 1778, at 3.

<sup>223</sup> Some opponents of the Act went further. One anonymous pamphleteer wrote that

such a suspension . . . of common justice and common right is so fundamentally subversive of the British constitution of state, that no authority of parliament can make it legal; because it is high-treason against the king and people . . . [and] no human authority upon earth can suspend or annul any part of the eternal law, without grievous sin!

An Address to the People of England: Being the Protest of a Private Person Against Every Suspension of Law that is Liable to Injure or Endanger Personal Security, 14–15, 23 (London 1778) (emphases omitted). The author also made a connection between the suspension of habeas corpus and the impressment of seamen, which he also considered contrary to the laws of God and nature. Impressment, he argued, was in reality a suspension, and like other suspensions, it was justified by “this mere bugbear, necessity!” Acts impressing seamen amounted to “a real suspension (with respect to one part of the community).” Id. at 59, 67 (emphases omitted).

<sup>224</sup> A Letter from Edmund Burke, Esq. . . . to . . . [the] Sheriffs of [Bristol], on the Affairs of America 4 (2d ed. London 1777). Portions of the *Letter* or comments on it

sity. No circumstances—certainly not convenience—could justify deviating from English legal traditions:

All the ancient, honest juridical principles, and institutions of England, are so many clogs to check and retard the headlong course of violence and oppression. They were invented for this one good purpose;—that what was not just should not be convenient. . . . The old, coolheaded, general law, is as good as any deviation dictated by present heat.<sup>225</sup>

Burke's main concern was that this suspension affected only some of the king's subjects:

Liberty, if I understand it at all, is a *general* principle, and the clear right of all the subjects within the realm, or of none. Partial freedom seems to me a most invidious mode of slavery. But, unfortunately, it is the kind of slavery the most easily committed in times of civil discord. . . . People without much difficulty admit the entrance of that injustice of which they are not to be the immediate victims.<sup>226</sup>

What for North and his supporters had been the Act's chief merit was for Burke its principal evil. "Other laws," he reasoned, "may injure the community; this tends to dissolve it. It destroys *equality*, which is the essence of community."<sup>227</sup>

Burke astonished some by proposing that if there was to be a suspension, it should apply to all, not just some, of the king's subjects.<sup>228</sup> "[That measure] would operate," he argued, "as a sort of *call of the nation*. It would become every man's immediate and instant concern, to be made very sensible of *the absolute necessity* of this total eclipse of liberty."<sup>229</sup> Burke thus turned the traditional

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were printed in many American newspapers. See, e.g., *New-England Chronicle* (Boston), Oct. 2, 1777, at 1 (published as *The Independent Chronicle and the Universal Advertiser*); *The Pennsylvania Packet*, Dec. 3, 1777, at 2; *The New Jersey Gazette*, Jan. 21, 1778, at 2.

<sup>225</sup> Burke, *supra* note 224, at 8–9.

<sup>226</sup> *Id.* at 15. (emphasis in original).

<sup>227</sup> *Id.* at 17. (emphasis in original).

<sup>228</sup> Burke's erstwhile ally, the Earl of Abingdon, defended the bill from Burke's attack on just this ground. *Thoughts on the Letter of Edmund Burke, Esq. to the Sheriffs of Bristol, on the Affairs of America* 5–6 (Dublin 1777).

<sup>229</sup> Burke, *supra* note 224, at 15. (emphasis in original).

language of necessity on its head. Like security, liberty too might be the object of necessity. Necessity required that all subjects, on both sides of the Atlantic, live under one legal regime.

With the text of the suspension statute readily available, parliamentary debates routinely reported, and Burke's pamphlet widely available in the colonies, Americans could not have failed to grasp the meaning of the 1777 Suspension Act. At the same moment that the Act tacitly confirmed that English subjects in America had always fallen within the ambit of English law and the writ of habeas corpus, it revealed that Parliament had the power to put them outside of it. Colonial British Americans were stripped of the fundamental characteristic that had bound them to people living in England: their common subjecthood, indicated in part by the common availability of habeas corpus. John Dickinson, a wealthy Pennsylvania landowner who would eventually serve as Delaware's delegate to the Constitutional Convention of 1787, complained of British treatment that made him the equal of an East Indian, or worse: "[W]e are not Sea Poys ["Sepoys"], nor Marrattas ["Marathas"],"<sup>230</sup> he exclaimed, "but *British Subjects*, who are born to Liberty, who know its Worth, and who prize it high."<sup>231</sup> Americans had come to recognize that in the Suspension Act of 1777, Parliament had radically restricted the range of English subjecthood. Ironically, in just these same years, Parliament expanded the liberties of subjects in India. In law, Dickinson was now less than a Sepoy or Maratha.

### *B. The Imperial Writ in India, 1774-1781*

Our story of the writ of habeas corpus in India begins in the 1770s. A new Supreme Court of Judicature was established in Cal-

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<sup>230</sup> "Sepoy" was the term used for an Indian native employed in the British army. 14 *The Oxford English Dictionary* 1003 (2d ed. 1989). Marathas were Hindus who had long challenged the Mughal emperors for control of central and northern India. In the late eighteenth century, they were rulers of Orissa, which put them within the area whose revenues were ceded to the East India Company by the Treaty of Allahabad of 1765. See *infra* note 245; P.J. Marshall, *Bengal, The British Bridgehead: Eastern India 1740-1828*, at 70-74 (1987) [hereinafter Marshall, *Bengal*]; Barbara N. Ramusack, *The Indian Princes and their States* 34-37 (2004).

<sup>231</sup> Arthur Meier Schlesinger, *The Colonial Merchants and the American Revolution, 1763-1776*, at 275-76 (1918). For more on Dickinson's role in events leading to the American Revolution, see David L. Jacobson, *John Dickinson and the Revolution in Pennsylvania, 1764-1776* (1965).

cutta by royal charter in 1774.<sup>232</sup> The charter was itself the result of a parliamentary statute of 1773 that, among other things, directed the creation of that court.<sup>233</sup> The first chief justice of the Supreme Court of Judicature, Sir Elijah Impey, explained his view of law to the council and governor-general of the East India Company in Calcutta:

Though the natives without question are under your general protection, they are more immediately so under that of the laws. . . . I have no doubt but the laws will be found to be in practice what they are universally esteemed in theory, a better security to the people than the discretionary power of any council of state. . . . [T]here doth not reside in the governor general and council any legal authority what so ever to review and control any judicial acts of the judges done either in or out of court, be those acts ever so erroneous.<sup>234</sup>

Impey had thrown down his gauntlet before the Company. Moreover, a month before he wrote this, his court had issued the first writ of habeas corpus in India, for Kemaluddin Khan, jailed by the Company's council at Calcutta for his debts as a revenue farmer. Kemaluddin was released, touching off a long-running battle between court and Company over the judges' powers to use habeas

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<sup>232</sup> Charter For Erecting a Supreme Court of Judicature at Fort William, in Bengal, dated 26th March, 1774, in *A Collection of Statutes . . . of the East India Company*, app. at xlv–liv (2d pagination, at rear) (London 1794) [hereinafter *A Collection of Statutes*]. The 1726 charter to the East India Company had appointed local governing bodies for the three Presidency Towns of Bombay, Madras, and Calcutta. Each was thereby given its own justices of the peace and courts of civil jurisdiction. Following the practice also used in the transatlantic colonies, appeal was permitted from these local courts in India to the Privy Council. No other tribunal thus operated in India to supervise these and other local courts until the 1774 charter. For the 1726 charter, see *Charters Granted to the East-India Company from 1601*, supra note 199, at 368–99. For discussion of the charter and the courts it created, see M. P. Jain, *Outlines of Indian Legal History* 35–44 (5th ed. 1990).

<sup>233</sup> 13 Geo. 3, c. 63. (“An act for establishing certain regulations for the better management of the affairs of the East India Company,” usually known as the Regulating Act.) See id. §§ 13–18 for an outline of the court's authority as it was to be defined in the resulting charter. For a superb account of the Calcutta court's beginnings, and the political interplay of the justices and officers of the British East India Company during these years of English law's awkward movement into India, see Robert Travers, *Ideology and Empire in Eighteenth-Century India: The British in Bengal* 181–206 (2007). We thank the author for sharing his work with us prior to publication.

<sup>234</sup> BL, MS Add. 16,265 (Impey letter book, 1774–76), ff. 29v.–30 (May 25, 1775).

corpus to supervise the use of franchises granted to the East India Company by the king's charters.<sup>235</sup>

### *1. The Governance of India in the Eighteenth Century*

The court of which Impey was chief justice had all the strength that might be provided by a parliamentary statute—which directed its creation—and a royal letter patent, by which, in law, that court was *actually* created.<sup>236</sup> The 1773 Regulating Act noted the need for such a court in order “to prevent various abuses which have prevailed in the government and administration” of the Company.<sup>237</sup> To accomplish this, the king's charter granted “the like jurisdiction and authority as may be executed by the chief justice and other justices of the court of King's Bench in *England*.”<sup>238</sup> Furthermore, courts established in British India by earlier charters<sup>239</sup> would be made “subject to the order and control of the supreme court, in the like manner as inferior courts and magistrates in *England* are subject to the order and control of the court of King's Bench.”<sup>240</sup> Its jurisdiction would “extend to all *British* subjects who shall reside in the . . . provinces of *Bengal, Bahar, and Orissa* . . . under the protection of the said united company.” The statute also directed that

<sup>235</sup> Kemaluddin Khan was also known as Comaul O'Dein in the eighteenth century. His release, the Company complained, was “to the destruction of our authority by serving as an example to the other [revenue] farmers.” BL, MS IOR/H/121, p. 108. Kemaluddin's case is recounted in Jain, *supra* note 232, at 87–88; B.B. Misra, *The Judicial Administration of the East India Company in Bengal, 1765–1782*, at 217–21 (1961); B.N. Pandey, *The Introduction of English Law into India: The Career of Elijah Impey in Bengal, 1774–1783*, at 111–17 (1967).

<sup>236</sup> The distinction here is critical: the statute declared that such a court should be made and outlined its form. But following the longstanding law of franchises, only the king, by his charter, could perform the creative act. The most important discussion was in the 1615 case of *Sutton's Hospital*, in which the justices made clear the nature of corporate franchises: only the king made them, even if a statute might declare the desirability of their creation and suggest some of their terms. *Sutton's Hospital*, 77 Eng. Rep. 937, 962–63, 975 (K.B. 1615). For discussion of that case, see Halliday, *Dismembering*, *supra* note 105, at 32–33.

<sup>237</sup> 13 Geo. 3, c. 63, preamble.

<sup>238</sup> A Collection of Statutes, *supra* note 232, at xlv (emphasis in original).

<sup>239</sup> In 1753, the 1726 Company charter was surrendered and a new one granted. This re-established justices of the peace for Madras, Bombay, and Calcutta, who were empowered to hold courts of quarter sessions and of jail delivery. *Id.* at xxxiii–xxxix. The 1753 charter appointed these local courts to proceed “as in England,” by indictment and trial by jury. *Id.* at xxxviii.

<sup>240</sup> For these terms, in the 1774 charter, see *id.* at xlv, l (emphasis in original).

the court should have “full power and authority to hear . . . all complaints against any of his Majesty’s subjects for any crimes, misdemeanors, or oppressions.”<sup>241</sup>

The making of the Supreme Court of Judicature at Calcutta reflected both halves of Hale’s theory of law’s expansion across the king’s imperial dominions. The statute that enabled the creation of that court by charter declared the justices’ purview of “all British subjects.” This echoes Hale’s understanding of law’s movement with English people. But we hear more prominently the franchisal view of law’s spread, by which the court’s jurisdiction would be concerned not only with the wrongs alleged by British subjects, but also with those they committed. By granting his charter, the king created a “supreme” court that would supervise all lesser magistrates and sheriffs “in the like manner as inferior courts and magistrates in England are subject to the order and control of the King’s Bench,”<sup>242</sup> and would have within its purview “all complaints *against* any of his Majesty’s subjects.”<sup>243</sup> The new court would focus on the behavior of the king’s officers: officers of the East India Company operating according to the charters granted to that company. Thus, the court’s creation embodied Hale’s proposition that the law concerned with habeas corpus moves with subjects by virtue of their subjecthood, and his accompanying proposition that English law follows the king’s franchise holders to ensure they do not violate the terms of their franchises.

As the Supreme Court of Judicature at Calcutta began its work, two accompanying sets of questions immediately surfaced. The first involved determining which persons were “subjects . . . under the protection of the said united company.” The second asked how, and for whom, the court was expected to answer “complaints against any . . . oppressions” allegedly imposed by Company em-

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<sup>241</sup> 13 Geo. 3, c. 63, § 14 (emphasis in original). The court thus had jurisdiction over the northern and northeastern portions of the subcontinent. Further supreme courts would be established at Madras in 1801 and at Bombay in 1824. See Jain, *supra* note 232, at 112.

<sup>242</sup> A Collection of Statutes, *supra* note 232, at 1.

<sup>243</sup> 13 Geo. 3, c. 63, § 14 (emphasis added). By adding emphasis to the word “against,” we mean to suggest that the key to defining the court’s purview would arise less from the status of those who made such claims, than from the status of those against whom such claims were directed: that they would be more concerned with the jailer’s wrongs than the prisoner’s rights.

ployees.<sup>244</sup> Answers to both questions were complicated by the overlapping sovereignties in India created by the 1765 Treaty of Allahabad, by which Shah Alam, the Mughal Emperor, had granted the East India Company the *diwani*—the civil administration and collection of revenues—in Bengal and surrounding regions.<sup>245</sup> The emperor had done so on the understanding that the Company should govern “agreeably to the rules of Mahomed and the law of the [Mughal] Empire.”<sup>246</sup> Within those parts of northeast India run by the East India Company from Fort William in Calcutta, there remained long-established Muslim and Hindu courts.<sup>247</sup> These multiple poles of authority would create multiple perceptions and experiences of sovereignty and subjecthood.<sup>248</sup>

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<sup>244</sup> *Id.*

<sup>245</sup> The language in Article I of the Treaty of Allahabad marks out a contract of equals: a “reciprocal friendship, without permitting, on either side, any kind of hostilities . . . which might hereafter prejudice the union now happily established.” 43 *The Consolidated Treaty Series* 189 (Clive Parry ed., 1969). Granting the *diwani* did not import a western idea of unitary sovereignty. It was not understood as the equivalent of a royal letter patent to the Company because the Emperor was clearly thought of as retaining sovereignty in the Bengal region. As Bernard Cohn points out, “[b]y 1785, a dual principle of sovereignty had been established.” Bernard S. Cohn, *Colonialism and its Forms of Knowledge: The British in India* 58 (1996).

<sup>246</sup> Rajat Kanta Ray, *Indian Society and the Establishment of British Supremacy, 1765–1818*, in 2 *The Oxford History of the British Empire: The Eighteenth Century* 508, 510 (P.J. Marshall ed., 1998). For more on this relationship, see *id.* at 508–13. On events in the 1750s and ‘60s, see P.J. Marshall, *The British in Asia: Trade to Dominion, 1700–1765*, in 2 *The Oxford History of the British Empire: The Eighteenth Century*, *supra*, at 487, 491–507. On the *diwani* and lingering Mughal allegiance after 1765, see Marshall, *Bengal*, *supra* note 230, at 49–52, 77–79, 89–90.

<sup>247</sup> To make matters more complex, in 1772 the East India Company approved new criminal regulations based on traditional elements of Islamic law that had fallen into disuse. See Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* 1–6, 26–32 (1998). On jurisdictional complexities in this period, during which British law awkwardly and incompletely overlaid Hindu and Islamic legal practices and institutions, see Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900*, at 129–40 (2002).

<sup>248</sup> On overlapping sovereignties and the indeterminacy of where a claim to ultimate sovereignty might lie, see Lauren Benton, *The Geography of Quasi-Sovereignty: Westlake, Maine, and the Legal Politics of Colonial Enclaves* (Inst. for Int’l Law and Justice, Working Paper No. 2006/5). Our thanks to the author for permission to cite this article. See also Sudipta Sen, *Distant Sovereignty: National Imperialism and the Origins of British India* xi–xxxi, 1–26 (2002); Lauren Benton, *Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State*, 41 *Comp. Stud. Soc’y & Hist.* 563 (1999).

*2. Using Habeas Corpus in India*

These issues of sovereignty and subjecthood were raised in a 1777 case involving Seroop Chund, jailed by the East India Company's Council for failure to pay debts he owed. When Chund's case came before the Supreme Court of Judicature on a writ of habeas corpus, Impey's fellow justice, Stephen Caesar Lemaistre, was uncertain if this "Gentoo" was a subject of his king. Nonetheless, he bailed Seroop Chund. "It is to the favor of the law," Lemaistre reasoned, that Chund owed "the benefit of this remedial writ, which it is discretional in us to grant or refuse."<sup>249</sup> He noted that the preamble of the statute on which his court and its authority rested had declared its purpose to be "manifestly remedial" of the Company's "abuses."<sup>250</sup>

Were Impey and Lemaistre on solid ground in issuing habeas writs on behalf of Indians? The charter of their court had explicitly likened its authority to that of King's Bench, but the charter only mentioned their power to "award writs of mandamus, certiorari, procedendo, and error, directed to the said inferior courts" supervised by the Calcutta Supreme Court of Judicature.<sup>251</sup> There was no mention of habeas corpus. How, then, did Impey, Lemaistre, and their fellow justices use the writ for native Indians? Two ideas justified doing so: an appeal to natural justice and a sense of the need for judicial oversight of the use of franchises.

Lemaistre took the lead in promoting the resort to arguments of natural justice. One of his reasons for releasing Seroop Chund was Lemaistre's concern that the conditions of his imprisonment prevented him from making the observances his religion demanded. In his lengthy opinion in the case, Lemaistre declared that he should "proceed into the inquiry of the imprisonment and detention of this man, for which there appeared no cause whatsoever."<sup>252</sup> In recounting the discussion of another habeas case concerning a Frenchman, Justice Chambers reported that Lemaistre claimed it

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<sup>249</sup> Report from the Committee to whom the Petition of John Touchet and John Irving, Agents for the British Subjects Residing in the Provinces of Bengal, Bahar, and Orissa . . . were Severally Referred, at app. 9 (1781) (unpaginated) [hereinafter Touchet Report]; see also Misra, *supra* note 235, at 225–29 (recounting Chund's case).

<sup>250</sup> Touchet Report, *supra* note 249, at app. 9.

<sup>251</sup> A Collection of Statutes, *supra* note 232, at 1.

<sup>252</sup> Touchet Report, *supra* note 249, at app. 9.

would be “contrary to natural justice to remand him.”<sup>253</sup> Though such ambitious claims were most clear in Lemaistre’s thinking, Chief Justice Impey took a similar view, arguing that judicial authority must check arbitrary behavior by British officers, especially in light of the fact that Indians “feel themselves entitled to the rights of humanity in common with the Europeans.”<sup>254</sup>

As grand as these claims were, the second line of reasoning for the court’s jurisdiction carried more punch in light of longstanding uses of habeas corpus in England and the theory of law’s movement evident in Hale’s thinking. It took no great leaps of legal imagination to go from the king’s protection and royal franchises to the use of habeas corpus, even on behalf of native Indians. “The power of granting” such writs, Impey explained to Lord Bathurst, “has been founded on Mr. J. Blackstone’s opinion that the judges of the King’s Bench have a right by common law to allow them.” This was all the more important given Company officers’s behavior toward native revenue farmers like Kemaluddin Khan and Seroop Chund.<sup>255</sup>

Impey and Lemaistre believed they needed no specific grant of jurisdiction to use habeas corpus. By their reading of the statute of 1773 and the royal charter of 1774, they had brought this part of English law with them to India. “The people,” Impey declared, us-

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<sup>253</sup> BL, MS Add. 38,401 (Liverpool Papers, CCXII: East India Papers 1778–79), f. 29 (Chambers to Charles Jenkinson, Feb. 1, 1778). A Monsieur Sanson, “a low Frenchman,” had been committed by the foudari adawlat—criminal court—at Midnapur, for an unspecified “outrage.” The Supreme Court granted the writ, to which they received a return written in Persian by the judge of the native court. Upon reviewing the return, they ordered Sanson remanded, according to Chambers, because the officers of that court could not be said to be officers of the Company, “without supposing that Company to be the sovereign of these provinces,” a supposition Chambers would not make. *Id.* at ff. 27v.–28. On the foudari adawlat, see N. Majumdar, *Justice and Police in Bengal, 1765–1793: A Study of the Nizamat in Decline* 40–43 (1960). For more on this case, see Thomas M. Curley, *Sir Robert Chambers: Law, Literature, and Empire in the Age of Johnson* 242–43 (1998).

<sup>254</sup> P.J. Marshall, *The Making and Unmaking of Empires: Britain, India, and America, c.1750–1783*, at 268 (2005), quoting BL, MS Add. 16,259, f. 195 (letter to G. Johnstone, n.d.).

<sup>255</sup> Impey continued: “We found it highly expedient [to use habeas corpus] in a country when [sic] every man assumed a right to imprison his debtor, if by law we might, and we thought his opinion a full justification for the practice.” BL, MS Add. 16,265 (Impey letter book, 1774–76), f. 128 (Impey to Lord Chancellor Bathurst, Sept. 20, 1776).

ing a richly vague term, were under the protection of the Company, and thus of English law.<sup>256</sup> This argument extended the king of England's protection, embodied in his prerogative writ, to any person who owed him allegiance, whether permanently, by "natural" subjecthood, or temporarily, by "local" allegiance.<sup>257</sup> The Company's authority in India, Impey implied, was like that of a palatine lord: the Company held a franchise granted by the king in order to extend the benefits of his law. English law, in Impey's formulation, moved with the king's officers along lines traced by Hale's account of law's territorial movement. Law flowed from the king through the Company's royally chartered authority and from there to the Supreme Court of Judicature, as evidenced by its own royal charter. By this thinking, the king's protection extended to a potentially vast array of imperial subjects, as the Supreme Court of Judicature acted to ensure that the king's franchise holder did not abuse its powers.<sup>258</sup>

The justices thus objected to the Company's claimed authority to suspend, in all but name, the writ of habeas corpus. When Seroop Chund was before him, Lemaistre expressed his disgust that Company employees had "exercise[d] a ministerial power of imprisoning, without bail or mainprise," for unpaid revenues. The practice, Lemaistre noted, "strikes me as the most arbitrary abuse of a power."<sup>259</sup> There was no country in the world, he proclaimed, "so

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<sup>256</sup> BL, MS Add. 16,265 (Impey letter book, 1774–76), f. 29v.

<sup>257</sup> This echoes the usage of Coke, Hale, and Blackstone, all of whom recognized that there were other kinds of subjects besides simply "natural" ones. For Coke and Hale's discussion, see *supra* text accompanying notes 66–75. Blackstone followed Hale's and Coke's distinction between "natural" and "local" allegiance or subjecthood. 1 Commentaries, *supra* note 29, at 357–59.

<sup>258</sup> Justice John Hyde of the Supreme Court of Judicature advanced an explicit version of that argument. "If the writ be considered," Hyde wrote, "as it formerly was, a prerogative writ, this can afford no objection, because the King's prerogative extends as fully over his subjects here as in any part of his dominions." Hyde was referring to the writ of mandamus, but his argument was directed at the prerogative character of that writ rather than to any distinction between mandamus and habeas corpus. *Rex v. Warren Hastings* (1775), *in* T. C. Morton, *Decisions of the Supreme Court of Judicature at Fort William in Bengal* 206, 207 (Calcutta, 1841). By this view, the justices could correct all abuses: language that takes us back to Coke's claims about his authority on the prerogative writs, an authority derived from the need to ensure that the king's franchises were not abused by their holders. See *supra* text accompanying notes 81–87.

<sup>259</sup> Touchet Report, *supra* note 249, at app. 9.

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arbitrary and despotic, that a conscientious Judge is bound to admit as lawful, a ministerial power to imprison, without bail or mainprize.”<sup>260</sup>

It is important not to misunderstand this rhetoric. It was the “arbitrary abuse” of “a ministerial power” to imprison that caught Lemaistre’s eye more than a concern for the rights of prisoners. The key, as in Hale, was the need to supervise the operation of a most unusual franchise, the East India Company, which acted by the British king’s authority and exercised a sub-sovereign authority by concession of the Mughal emperor. As Justice Robert Chambers put it, habeas corpus was a means of inspecting the work of Company agents:

I conceive every man in these provinces, whether subject to our jurisdiction or no, to be entitled to a habeas corpus, upon an affidavit which gives the judge, to whom application is made, reason to believe that he is imprisoned without any just cause, *by a person employed by the East India Company.*<sup>261</sup>

Impey took the same line, explaining to the Company’s council in Calcutta that “one of the great ends of the institution of our court is [the natives’] protection, particularly against British subjects vested with real or pretended authority.”<sup>262</sup> He suggested much the same in a letter to the Company’s directors in London: the court’s role, he wrote, was to prevent “their ministers, under the color of legal proceeding, from being guilty of the most aggravated injustice.”<sup>263</sup> By relying on a franchise theory similar to Hale’s, the Supreme Court of Judicature focused on the behavior of those who claimed to act by the king’s authority. As a chartered corporation, the Company, and all its representatives, represented the king. Neither his dignity, nor the liberties of his subjects—natural or alien—would be properly served by allowing individuals to act outside the terms of their franchises.

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<sup>260</sup> Id.

<sup>261</sup> BL, MS Add. 38,400 (Liverpool Papers, CCXI: East India Papers 1776–77), f. 84 (opinion in *Kamal v. Goring* (1777)) (emphasis in original). At one point, the Company’s governor-general in Calcutta, Warren Hastings, admitted as much: “the Court cannot avoid issuing such writs, if the complainants swear that the defendants are employed in the service of British subjects.” Curley, *supra* note 253, at 593 n.57.

<sup>262</sup> BL, MS Add. 16,265 (Impey letter book, 1774–76), f. 29v. (May 25, 1775).

<sup>263</sup> BL, MS IOR/H/121, p. 160 (Sept. 19, 1775).

### 3. *The East India Company's Response*

The use of habeas corpus to scrutinize Company officials' conduct toward Indians provoked the Company, which, before the Supreme Court of Judicature was created, had done largely as it pleased in collecting the revenues on which its profits depended.<sup>264</sup> The Company claimed that the justices had overstepped the jurisdictional bounds declared by the 1773 statute and by the subsequent royal charter that created their court. The practical effects, they argued, were of two kinds: to damage the Company's ability to collect revenues and to undermine traditional Indian forms of law.<sup>265</sup>

By November 1777, the Company began work in Parliament to amend the 1773 Regulating Act in order to clarify the relationship between the Supreme Court of Judicature and the Governor General's Council in Calcutta, as well as to fix the relationship between English law and the native forms of law that remained in use. English law, the Company contended, was simply incompatible with Indian law. Even where English law had been used only in reference to British subjects, it had been too aggressively applied, thus damaging the Company's revenues.<sup>266</sup> Justices of the Supreme Court of Judicature answered this criticism by pointing out that they did not interfere with the management of the revenue; they only intervened where there was an abuse of the authority to man-

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<sup>264</sup> Court and Company reached a momentary compromise—supported by Impey and Chambers, but not by Lemaistre and Hyde—in their struggle over the use of habeas for Company prisoners. This broke down by late 1777. Curley, *supra* note 253, at 242–43.

<sup>265</sup> This is apparent both in Company papers and letters, and in their public argument. As the Company directors put it when writing to Secretary of State Lord Weymouth, the Supreme Court's work "has been found in experience as oppressive to the natives as it certainly is adverse to the interests of the Company." BL, IOR/H/148, p. 223 (Jan. 25, 1781). The Company mounted a vigorous public campaign to make its case for further legislation to reform the court. See, e.g., *Observations Upon the Administration of Justice in Bengal; Occasioned by Some Late Proceedings at Dacca 4 (1778)* [hereinafter *Observations*]; *Administration of Justice in Bengal: The Several Petitions of the British Inhabitants of Bengal (recited in the Petition of their Agents) of the Governor-General and Council, and of the Court of Directors of the East-India Company to Parliament 2–8 (1778)* [hereinafter *Bengal Petitions*].

<sup>266</sup> "[T]he Supreme Court must be restrained from a direct interference with the management of the revenues, either by its ordinary process, or by writs of *habeas corpus*, or the provinces cannot be retained in a manner beneficial to *Great Britain* . . ." *Bengal Petitions*, *supra* note 265, at 7 (emphasis in original).

age that revenue. In making that argument they were reasserting the classic view of royal franchises and of law's role in monitoring their operation.<sup>267</sup>

Attacks on the Supreme Court of Judicature began appearing in print by 1778. One critic of the justices conceded that by the 1773 Regulating Act, "the English laws are introduced in their full extent." Herein, he felt, lay the problem: this had been done "without any regard to religious institutions or local habits."<sup>268</sup> Damage to the Company's revenues, the oppression of native Indians, and the introduction of "an arbitrary" regime were all "evils," he said, that "flow[ed] from one source, the introduction of English laws and customs."<sup>269</sup> Another critic admitted that "the great wisdom of the municipal law of England . . . [was] founded in the true and universal principles of abstract justice." But that did not necessarily mean that English law traveled easily: "[I]n many respects no system of

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<sup>267</sup> The same franchisal view applied in the Supreme Court of Judicature's view of its power to monitor native Indian courts that managed the Company's revenue interests. In one case, Impey distinguished between the court's interference with the revenue—a charge he rejected—and the court's proper supervision of the uses of a franchise, even if by a native tribunal.

This distinction, if attended to, is of itself sufficient to clear away every thing that can give the least alarm on the account of the interests of the Company: for the court, allowing the custom and usage of the collections to be the law of the country, have only compelled the officers of the government to act conformable to those usages, and not to make use of the color and forms of law to the oppression of the people.

Touchet Report, *supra* note 249, at 79 (Impey to the Company Court of Directors in London, Sept. 19, 1775, discussing the case of Kemaluddin). At least one Company officer admitted that the Supreme Court's scrutiny made them more precise in the conduct of their business:

"Decrees founded on a knowledge of the customs and usages of Hindostan . . . may be tried by statutes of English laws; and if the proof of the customs be not clear and positive, *which frequently happens*, the Superintendent who passes them, or his officer who carries them into execution, may become the sufferers. Even in the daily case of business in the Committee, which relates to the management of the Revenues, we feel too sensibly the truth of these observations. In place of a summary mode of proceedings we are cautious to observe distinctions, rules and forms, lest our proceedings, if hereafter laid before the Supreme Court, should be deemed informal or irregular."

Misra, *supra* note 235, at 259–60 (quoting the minutes of John Shore, president of the revenue committee at Calcutta, 1779, in BL, IOR, Homes Series Miscellaneous, vol. 421, pp. 145–46) (emphasis in original).

<sup>268</sup> Observations, *supra* note 265, at 4.

<sup>269</sup> *Id.* at 6.

municipal law [such as England's] can be more local or more peculiarly adapted to the country where it prevails. To transplant it, therefore, is a work of great delicacy. . . ." English law, "though highly beneficial to ourselves, would be intolerable to any other people."<sup>270</sup> Thus the Company's defenders claimed they were motivated by nothing but an appropriate paternalism, a desire to respect the integrity of the culture of those whom their commerce touched.

This last argument was developed by critics of English law's movement into India. They asserted that English law introduced leveling tendencies into a society "accustomed to the most rigid subordination of rank and character."<sup>271</sup> Worse, they felt, was English law's impact on relations between Indian men and women. By sending habeas corpus to release Indian wives from their husbands' custody—as English courts did for English wives—the honor of Indian husbands and the integrity of the harem were violated.<sup>272</sup>

[I]n despite of nature, shall we dissolve the ties of domestic life . . . and force the servant, the child, and the wife to renounce their dependence . . . ? The officer of justice must break through the restraints of the *haram* in execution of his writ; and if resistance is made by the distracted husband, the judge is bound to pronounce him criminal, though he must see and feel that he acted . . . from motives as justifiable as self-defence.<sup>273</sup>

Not only the husband and his honor would be damaged. The wife would also be violated by this "law of liberty":

A woman taken from the *haram* would be as incapable of forming connections, or even of providing for herself, as a bird that is

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<sup>270</sup> Considerations on the Administration of Justice in Bengal, Extracted From a Pamphlet Intituled Thoughts on Improving the Government of the British Territorial Possessions in the East-Indies 2 (1780).

<sup>271</sup> Observations, supra note 265, at 8.

<sup>272</sup> "Shall our writs of liberty unlock these sacred recesses?" Id. at 28–29.

<sup>273</sup> Id. at 29 (emphasis in original). In a letter from Directors of the East India Company to Lord Weymouth, printed with their petition against the Supreme Court, the Company complained against the invasion of harems "as such acts of violence, and such violation of the Hindoo laws, [which] must not only disgrace us as a national body with the natives, but likewise breed a disgust in their minds, that may tend to the most serious consequences." Bengal Petitions, supra note 265, at 13 (emphasis in original).

taken from the nest to a cage, and bred up in it, and let out after long confinement, would be unable to procure subsistence. Are all birds to be therefore confined? it may be asked: Surely not; but do not dismiss those that are so, till you have taught them how to enjoy their liberty.<sup>274</sup>

#### *4. Parliament's Response: The Judicature Act of 1781*

By 1781, the East India Company had procured the introduction in Parliament of a bill to curb the authority of the supreme court and its writs. Predictably, John Dunning blasted the proposed measure as “subversive of all liberty.”<sup>275</sup> Then, Edmund Burke rose to speak for the opposite point of view. Burke’s thinking adhered to the same racial essentialism running through all the critiques of the Calcutta court’s powers that had come from London presses in recent years. His case was now the reverse of that he had made on behalf of English and American liberties during the 1777 Suspension Act debates. “The free system of Great Britain,” he began,

was considered by Britons, and justly, as the best and most beautiful fabric of government in Europe; but would the Indians think and speak of it in the same terms? No; their habits were contrary, their dispositions were inimical to equal freedom. They were familiarized to a system of rule more despotic, and familiarity had rendered it congenial.<sup>276</sup>

Like other critics of the supreme court, Burke was concerned for the honor of Indian women and the authority of Indian men. Using writs of habeas corpus was a “violation of their dearest rights, particularly in forcing the ladies before their courts.”<sup>277</sup>

Burke then advanced an argument of particular relevance to the framework of this Article. He suggested that the behavior of the Calcutta Supreme Court showed the same kind of insensitivity to inhabitants of a British territory that had doomed Britain to lose its American colonies. “[W]e must now be guided, as we ought to have been with respect to America,” he said, “by studying the gen-

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<sup>274</sup> Observations, supra note 265, at 29 (emphasis in original).

<sup>275</sup> 22 Parliamentary History, supra note 17, at col. 549.

<sup>276</sup> Id. at col. 554.

<sup>277</sup> Id. at col. 555.

ius, the temper, and the manners of the people, and adapting to them the laws that we establish.”<sup>278</sup> Indians needed a different law, and that law should be for Britons to declare. Burke’s paternalism had a cutting edge.

When Burke’s 1781 reactions to the use of habeas corpus in India are compared with his intervention in the Suspension Act debates of 1777, they help us see more clearly what suspension had come to mean. Suspending the writ of habeas corpus was a way of defining the scope of subjecthood. For Burke, subjecthood should include British Americans as surely as it should exclude Indians. The same principle applied in both cases: “the genius, the temper, the manners of the people.” Americans were subject to the same law because they were the same people: English subjects by birth-right.<sup>279</sup> Other *imperial* subjects were not.

At least one member of Parliament who participated in the 1781 debates felt that Burke’s argument amounted to “eloquence pleading the cause of despotism.”<sup>280</sup> John Courtenay believed that native Indians had already become the king’s subjects by virtue of the 1773 Act and the 1774 charter that established the Supreme Court of Judicature. “[S]o many millions of British subjects in India, who, by a former act, were thought worthy of some attention and protection,” Courtenay declared, would now lose that protection if the 1781 bill were enacted by Parliament.<sup>281</sup> Courtenay argued that Indians should not be regarded as merely the objects of British law-making, as Burke’s argument proposed. They should be regarded as the British king’s subjects, with all the legal protections arising from that status.

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<sup>278</sup> *Id.*

<sup>279</sup> Dror Wahrman has argued that it was precisely in the 1770s and 1780s that ideas emphasizing fluid cultural differences transformed into ideas emphasizing fixed racial differences. Dror Wahrman, *The Making of the Modern Self: Identity and Culture in Eighteenth-Century England* 113–22 (2004). Kathleen Wilson suggests that in the wake of losing America, while at the same time expanding its territorial possessions in the Eastern hemisphere, “English observers from all social levels began to articulate less geographically expansive notions of the nation and narrower definitions of national belonging. . . . [T]he empire of the seas, once idealized as the domain of free white British peoples, had become the imperium of palpably alien colonial subjects. . . .” Kathleen Wilson, *The Island Race: Englishness, Empire and Gender in the Eighteenth Century* 10–11 (2003).

<sup>280</sup> 22 *Parliamentary History*, *supra* note 17, at col. 556.

<sup>281</sup> *Id.* at cols. 559–60.

In the end, neither Burke's nor Courtenay's view would prevail. Parliament's Judicature Act of 1781 granted the East India Company much of what it sought, but in terms too limited to prevent the Supreme Court of Judicature from continuing to push the boundaries of imperial subjecthood by using writs of habeas corpus at common law.<sup>282</sup> The Act's second section permitted anyone sued in the Supreme Court for a deed performed on order of the Company's council to produce a written copy of that order as a sufficient legal justification of the act. This had the effect of suspending habeas corpus for Indians jailed by the Company for debt. Furthermore, Section Three of the Act stated that when such orders concerned "any British subject or subjects, the said court shall have and retain as full and competent jurisdiction as if this act had never been made." Taken together, the two sections, when applied to Company imprisonment orders, appeared to retain habeas corpus for Britons but not for native Indians. The sections gave the East India Company essentially the same authority the Privy Council of Charles I had enjoyed: it could defend any inquiry into its imprisonment orders against Indians with nothing more than an explanation that it had ordered the imprisonment.<sup>283</sup> Viewed broadly, the sections seemed to amount to a suspension of habeas corpus, and, as in the case of Americans after 1777, to define Indians as outside the boundaries of English subjecthood.

But the next section of the Judicature Act cut in the other direction. It made it lawful for the Supreme Court to make such judgments "as may accommodate the same to the religion and manners of such natives, so far as the same may consist with the due execu-

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<sup>282</sup> 21 Geo. 3, c. 70.

<sup>283</sup> The rationales of preserving the authority of Indian men and the laws and customs of Indian culture were also advanced in connection with the two sections:

And, in order that regard should be had to the civil and religious usages of the said natives, be it enacted, that the rights and authorities of fathers of families, and masters of families, according as the same might have been exercised by the *Gentu* or *Mahomedan* Law, shall be preserved to them respectively within their said families; nor shall any acts done in consequence of the rule and law of cast, respecting the members of the said families only, be held and adjudged a crime, although the same may not be held justifiable by the laws of *England*.

21 Geo. 3, c. 70, § 18 (emphasis in original). The use of habeas thus narrowed in the decades after 1781, and especially in the first half of the nineteenth century. See Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* 69–131 (2003); Jain, *supra* note 232, at 106–08.

tion of the laws and attainment of justice.”<sup>284</sup> This language amounted to an invitation for the Court to continue to use habeas corpus, as King’s Bench had in England, to settle spousal and child custody disputes. And in the years after the passage of the 1781 Act, the Court continued to do just that. The Act, in short, had created a new, distinct form of subjecthood for Indians. They were not fully English subjects, nor were they fully denied those parts of English law that the Supreme Court of Judicature and its justices had brought with them to India. They were imperial subjects.

### *5. The Fracturing of a Unitary Subjecthood*

The debates over the 1781 Act, and that Act’s contents, revealed that as the British Empire expanded, English subjecthood had become too fractured to permit the use of neat categories—either ethnic, religious, or legal—to describe the legal capacities of those brought within imperial authority.<sup>285</sup> This was hardly surprising, given the multiple sovereignties overlapping in India. As Great Britain lost a part of its empire in the western hemisphere—and lost a sizable, largely British population there—the empire expanded to the east, increasing Britons’ encounters with other cultures. In India, those encounters defied the simple racial, cultural, and legal distinctions members of Parliament tried to impose by statute on the Crown’s imperial subjects.<sup>286</sup> The varieties of subjecthood in India would multiply as the Supreme Court of Judicature applied the English law of habeas corpus to the increasing variety of people who came before it. These included English, Scots, and Irish; Europeans of all sorts; Indians of many ethnic or religious groups; and increasingly, those born of the unions of all the

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<sup>284</sup> 21 Geo. 3, c. 70, § 19.

<sup>285</sup> Sudipta Sen has shown that the operation of English law in Bengal in the late eighteenth century was much messier than either Burke or Courtenay would have preferred. Sudipta Sen, *Imperial Subjects on Trial: On the Legal Identity of Britons in Late Eighteenth-Century India*, 45 *J. Brit. Stud.* 532 (2006). In Sen’s terms, “an exigent sense of legal entitlement created more expansive . . . subject positions.” *Id.* at 539.

<sup>286</sup> For a vivid account of Britons and Europeans in their relationships with the people of the subcontinent, see Maya Jasanoff, *Edge of Empire: Lives, Culture, and Conquest in the East, 1750–1850* (2005).

above.<sup>287</sup> All were “his majesty’s subjects,” if not “British subjects.”<sup>288</sup>

### *C. Imperial Contexts and the American Framing*

#### *1. Fracturing Subjecthood in the 1770s and 1780s*

Between 1774 and 1781, Parliament had simultaneously suspended habeas corpus for a continent full of English subjects on the western side of the Atlantic, and through its partial, awkward embrace of habeas corpus in India, had created a new group of imperial subjects.<sup>289</sup> In the process, traditional conceptions of a unified subjecthood had broken. As a result, traditional English practices for using and suspending habeas corpus were transformed.

As the American Revolution gained momentum after 1777, eventually resulting in England’s surrender of “his majesty’s American plantations” in 1783, statutory experiments with habeas corpus continued throughout the king’s dominions. In the year after the Parliament in Westminster passed the Indian Judicature Act of 1781, the Irish Parliament in Dublin enacted a statute importing into Irish law nearly the whole of the 1679 English Habeas

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<sup>287</sup> Habeas corpus was used in the early years of the Supreme Court of Judicature not only by native Indians, but by other Europeans, including Frenchmen. In *Baughan Ghose v. Peter Veblé*, the defendant, a Frenchman whose king, in 1781, was at war with Britain, used the writ while a prisoner of war. No record of the outcome in the case could be found. See Morton, *supra* note 258, at 123–24. For the cases of one Sanson and Joseph Pavesi, both Frenchmen who used the writ in 1776, see Curley, *supra* note 253, at 242, 288–89. See also Case of Joseph Pavesi (Calcutta S.C. 1776), in *The Judicial Notebooks of John Hyde and Sir Robert Chambers 1774–1798*, Victoria Memorial Hall, Calcutta, *cited in* Brief of Legal Historians as Amici Curiae in Support of Petitioners at 23 n.20, *Boumediene v. Bush*, No. 06–1195 (U.S. Aug., 2007).

<sup>288</sup> Jain, *supra* note 232, at 74. For the court’s grappling with this distinction, see *id.* at 74–76.

<sup>289</sup> As P. J. Marshall notes by holding India and America side by side, “an imperial structure consonant with British preoccupations emerged over seemingly alien new subjects in Bengal,” while in North America, British rule was frustrated “over people for the most part self-consciously English.” Marshall, *supra* note 254, at 12. American newspapers, as was common, republished excerpts from English papers of debates in Parliament on the 1781 Judicature Act. See, for instance, the debates of February 12, 1781, concerned with the danger of enforcing English law as it concerned Indian women, in *Extracts of a Letter From Helvostflays, Feb. 12, Conn. Gazette*, May 25, 1781, at 1.

Corpus Act.<sup>290</sup> Although the measure received some favorable discussion in America,<sup>291</sup> it concluded with a striking proviso permitting the Irish Privy Council to suspend the writ of habeas corpus at will, “during such time only as there shall be an actual invasion or rebellion in this kingdom [of Ireland] or Great Britain.”<sup>292</sup> The statute thus gave to the Irish Privy Council a power greater than that possessed by the Privy Council in London, which could only imprison people without bail in those limited periods first declared in a parliamentary suspension statute. The power granted in Ireland amounted to a loud echo, in parliamentary language, of the long-abandoned practice of English Privy Councils returning habeas corpus with the simple declaration that the prisoner in question had been imprisoned “by his majesty’s special commandment.”<sup>293</sup> One critic of the Irish Act stated that “[r]easons of state lie in the breasts of ministers; they may always *pretend* exigencies of state whether they exist or no.” The “suspending power,” he felt, “will be a *sword of Damocles* in their hands.”<sup>294</sup>

The Parliament in Westminster turned its attention to India again in 1784. One section of “Pitt’s India Act,” passed that year, permitted the governor-general and council in Calcutta or Bombay to confine a person almost indefinitely while awaiting trial.<sup>295</sup> Other sections required all officers of the East India Company, upon their return to Britain, to present full inventories of their wealth before

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<sup>290</sup> On the Irish Parliament’s passage of the 1781 Habeas Corpus Act, see Kevin Costello, *The Law of Habeas Corpus in Ireland: History, Scope of Review, and Practice Under Article 40.4.2 of the Irish Constitution* 5–17 (2006).

<sup>291</sup> See, for instance, the accounts of debates in the Parliament at Dublin in 1780 on an early version of this measure, and in the Parliament at Westminster, after its passage in 1782, in *The Indep. Chron. and the Universal Advertiser* (Boston), July 11, 1782, at 1; *The Pa. Packet*, Apr. 22, 1780, at 2. The full transcript of the English Parliament’s subsequent discussion is in 22 *Parliamentary History*, supra note 17, at cols. 1241–64.

<sup>292</sup> 21–22 Geo. 3, c. 11, § 16, in 12 *The Statutes at Large, Passed in the Parliaments Held in Ireland: From the Third Year of Edward the Second, A.D. 1310, to the Twenty Sixth Year of George Third, A. D. 1786, Inclusive* 143 (Dublin, 1786).

<sup>293</sup> Five Knights Case, TNA, KB145/15/3 (in the return to the writs for the Five Knights, teste November 15, 1627), supra note 127.

<sup>294</sup> Account of Some Proceedings on the Writ of Habeas Corpus 17 (1781) (emphasis in original).

<sup>295</sup> 24 Geo. 3, c. 25 (“An act for the better regulation and management of the affairs of the *East India* company, and of the *British* possessions in *India*.”); see 24 Geo. 3, c. 25 §§ 53–54 (setting forth these imprisonment powers).

the Court of Exchequer in Westminster. Those who did not, or who submitted false accounts, would “suffer imprisonment for such time as the said court of exchequer shall in their discretion think fit, without bail or mainprize.”<sup>296</sup> Such persons remained subject to prosecution for failure to report their Indian earnings for up to three years after their return to England.

The latter sections of the 1784 India Act were a response to the tendency of those officers of the Company who returned from India—known as “nabobs”—to bring with them wealth that they had acquired through dubious practices.<sup>297</sup> But the inclusion of the evocative words, “without bail or mainprize,” provoked strong reactions. Parliament had again suspended the writ of habeas corpus for just one part of the English population: the part that had gone to India to make its fortune. Critics—using language that reverberated with American arguments of recent years—quickly condemned the Act as an attack on “our characters, as men; of our constitutional and unalienable rights, as Britons.”<sup>298</sup> One of the British residents of Calcutta, George Dallas, in the course of denouncing the Act in 1785, stated that it fashioned an “odious and humiliating . . . distinction between ourselves and the rest of our fellow subjects on that island from whence this oppressive act dates its existence.”<sup>299</sup> In the course of petitioning Parliament for redress, Dallas argued that “the Constitution of Great Britain is a blessing not common to all, but peculiarly intailed upon the posterity of Englishmen.”<sup>300</sup> “This novel act,” he wrote, “deprives us of our participation in the inestimable act of Habeas Corpus.”<sup>301</sup> Americans had learned the same lesson eight years earlier: Parliament could

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<sup>296</sup> 24 Geo. 3, c. 25 § 57.

<sup>297</sup> “Nabob” was a British corruption of the word *nawab*, which indicated the ruler of Bengal or the other states within the Mughal empire. “Nabob” was generally used to refer to anyone returning from India with large, and perhaps dubiously gained, new wealth. Sen, *Distant Sovereignty*, *supra* note 248, at 124–25. For a thoughtful account of nabobs, see Jasanoff, *supra* note 286, at 32–39.

<sup>298</sup> George Dallas, Speech of George Dallas, Esq., Member of the Committee Appointed by the British Inhabitants Residing in Bengal, for the Purpose of Preparing Petitions to His Majesty and Both Houses of Parliament, Praying Redress Against an Act of Parliament, &c. As delivered by him at a Meeting held at the Theatre in Calcutta 8 (July 25, 1785).

<sup>299</sup> *Id.* at 10.

<sup>300</sup> *Id.* at 17.

<sup>301</sup> *Id.* at 25.

change seemingly durable traditions of habeas corpus and of English subjecthood at any time in response to the exigencies of empire.<sup>302</sup>

Debates about parliamentary suspension, the “necessity” justification, and the meaning of subjecthood would continue in Parliament—and in America—right up to the framing of the United States Constitution in 1787.<sup>303</sup> Despite the regular criticism of suspension statutes within and outside Parliament, the traditional conception of a singular English subjecthood, embodied in the writ of habeas corpus, appeared to have vanished.

## *2. The American Constitutional Convention*

As the framers of the American Constitution began to assemble in Philadelphia in the summer of 1787, they did so against the backdrop of an English history of habeas corpus, which included two centuries of judicial innovation in habeas corpus jurisprudence. Innovation was made possible by the judiciary’s capture of the royal prerogative. For nearly ninety years after 1689, that writ had continued in use, available to all natural subjects, and for all those within the king’s dominions, except during carefully limited periods of suspension. By consistently using the same parliamentary practices and language every time they suspended habeas corpus, the English had established a legal tradition that defined a unified English subjecthood. All shared in the liberties protected by the vigorous judicial oversight of any officer who imprisoned the king’s subjects, and all shared in the loss of those liberties on those occasions when Parliament suspended the writ. Then, English subjects began to move across the seas in great numbers. By 1777, subjecthood was no longer unified: English subjects had become imperial subjects of many different kinds.

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<sup>302</sup> Americans noted this impact of Pitt’s India Bill on access to habeas corpus for returning nabobs. Mr. Pitt’s East India Bill, *State Gazette S.C.*, April 24, 1786, at 2.

<sup>303</sup> See Robert Dallas, Esq., Speech at the Bar of the House of Commons in Support of the Bengal Petition (Feb. 27, 1787), at 1–7, 25–29. For the debates of 1787, see 26 *Parliamentary History*, supra note 17, at cols. 133, 637–38, 739–52. The 1786 Judicature Amending Act did little to address some of the most serious concerns raised about suspension or about the loss of trial by jury, which also figured prominently in these debates. 26 *Geo. 3*, c. 57.

As we will see in the remainder of this Article, the framers of the Suspension Clause implicitly restored the traditional order of writs and suspensions that had existed before the Parliamentary suspension acts that began in 1777. The Suspension Clause's language echoes ideas we have seen at work in the writ's use in the seventeenth and eighteenth centuries and those found in Parliament's suspensions after 1689. The Clause anticipates the possibility that the writ may be suspended in particular circumstances. But its primary thrust is to protect what had come to be a powerful and important judicial writ from obliteration by governmental officials. Further, the Clause should be read as a declaration that British Americans, in forging a new nation, were casting off their newly-acquired status as imperial subjects. The Suspension Clause was an English text made in defiance of imperial contexts, by which Americans rejected a lesser status in a faltering British imperium and claimed for themselves a fully recovered subjecthood within their own new imperium.

The history so far recounted permits that conclusion, but questions remain. The foremost of those questions, for our purposes, is why the legal framework established by the Suspension Clause and the Judiciary Act of 1789, which gave the federal courts jurisdiction to entertain writs of habeas corpus, took the form it did. How did the English and imperial background of the Suspension Clause translate into the quite different structure of government established by the Constitution? What was the precise legal status of the "privilege" of habeas corpus at the time of the framing? Which American courts did the founding generation anticipate implementing habeas remedies in the fashion of King's Bench? We now turn to those issues, and eventually to some contemporary implications of the history we have recounted.

#### IV. TRANSLATING ENGLISH HABEAS CORPUS JURISPRUDENCE TO AMERICA

##### *A. The English Legacy*

Four features of the English history of habeas corpus are particularly relevant to the status of the "privilege of the writ" at the time of the American founding. The first is that the writ originated not principally from parliamentary statutes but from the practice of

the court of King's Bench in England and of courts created in the king's dominions such as the Supreme Court of Judicature in Calcutta. The history we have described illustrates that the writ by common law was always more important in habeas corpus jurisprudence than the writ by the 1679 Habeas Corpus Act. One American observer noted in 1777 that "the habeas corpus act in England gives not, but it is only declaratory of a right to [the writ]." <sup>304</sup>

The common law version of habeas corpus had been available in the American colonies. The most detailed study of habeas corpus in colonial British America has found evidence of judges issuing the writ on behalf of persons detained in custody in every one of the thirteen original colonies. <sup>305</sup> Yet the use of the writ seems to have been sparse, and in some instances persons were remanded to custody even when returns to the writ were summary. <sup>306</sup> One cannot conclude from the evidence that judicial use of the writ was robust in colonial America, but neither can one conclude that the writ was tacitly disfavored. Perhaps the best explanations for the sparseness of common law habeas cases in colonial America are mundane ones: not many records of the dispositions of colonial courts have survived, and the colonies had comparatively few jails in which to confine "the bodies" of residents.

The second relevant feature of the English history is institutional, pertaining to the governmental entities to which the writ was directed and the entities that suspended it. As to the latter institutions, it is clear that when the writ was first formally suspended, the suspension was done by Parliament, not by the Crown or any royal officials. As to the former, the history is more complicated. As we have seen, the writ was initially a prerogative writ, but at the same time was directed to the king's officials and franchisees. The original conception of the writ, however, was that it

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<sup>304</sup> *Indep. Chron. & Universal Advertiser* (Boston), April 17, 1777, at 1.

<sup>305</sup> Duker, *supra* note 14, at 98–115.

<sup>306</sup> For examples, see *id.* at 104, 108–14. Although Duker successfully compiles evidence showing the recognition of common law habeas in all of the American colonies, including colonial legislative acts empowering judges to issue common law writs, discussions of the importance of the writ of habeas corpus in colonial assemblies, and a smattering of judicial decisions, his sample of judicial decisions is quite small, and in some of those decisions the person on whose behalf the writ issued was judicially remanded to custody.

flowed from the king's power and his mercy; its thrust was not to check the king's abuses of power but the abuses of those who acted in his name. Bear this in mind as we seek to understand the Suspension Clause and American habeas corpus jurisprudence at the time of the Constitution's framing.

The third relevant feature of English habeas corpus follows closely from the second. The English system of government in the seventeenth and eighteenth centuries was, in most respects, significantly different from the system of American government created in the Founding era. The United States of America, from its conception, was a republic, with no king and hence no royal prerogatives or obligations. The structure of English government, during the Founding Era and subsequently, differs significantly from the structure of government created by the Constitution of the United States. At the time of the framing the relationship between colonial assemblies and Parliament (through the Privy Council) was not one approximated in England. And although English government, by the late eighteenth century, was surely a "mixed" government, with royal ministers, the Privy Council, Parliament, and King's Bench each performing governmental functions and to an extent competing with one another, the system of separated tripartite powers, a two-tiered federal Union, and a republican form of government established by the American Constitution was a major departure from the English model. Crucially, the various parts of English government were characterized more by the ways in which they interpenetrated one another—even when competing—than by any balancing or checking function.

The final relevant feature of the English history of habeas corpus is its imperial dimension. As we have seen, Parliament's decision not to apply the 1679 Habeas Corpus Act to his "majesty's plantations in America," and its subsequent decisions to suspend the writ of habeas corpus in America between 1777 and 1783, took place during precisely the same period in which a new, less integrated conception of English subjecthood in the British Empire was developing.

All those features of the English history of habeas corpus would affect the early development of habeas corpus jurisprudence in America. Although that development resulted in American habeas jurisprudence evolving in somewhat different directions from the

English model, the English heritage continued to loom large in its evolution.

*B. The Suspension Clause and the Judiciary Act of 1789*

*1. Habeas Corpus in North America in the 1770s and 1780s*

What was the status of the writ of habeas corpus in America during the period between 1776 and 1789? As noted, remarkably little has been written on this question, and the principal histories of habeas corpus in America seem to assume that the writ was used only sparingly, and that there was little commentary on its suspension.<sup>307</sup>

But consider this passage from a letter to the publisher of the *Freeman's Journal*, by "Valerius," a Pennsylvania political writer:

Now, without pretending to more knowledge of the law than any man of common reading and observation possesses, I appeal to the judgment of every reader, whether a more complete code of tyranny and oppression, ever insulted the understandings and feelings of a free people. In England, and I believe in many states in America, in cases of invasion or imminent public danger, when the safety of the people became the supreme law, what is called the habeas corpus act is suspended during short periods for the sake of public safety.<sup>308</sup>

Valerius went on to decry the indiscriminate use of suspension acts. The language of his letter is particularly evocative. After suggesting that parliamentary suspensions amounted to a "code of tyranny and oppression," Valerius referred to "what is called the habeas corpus act." He identified the *salus populi* rationale for suspension statutes and noted that habeas corpus had not only been suspended "in England" but "in many states in America."<sup>309</sup> In short, the letter

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<sup>307</sup> Neuman, *supra* note 153, at 976–77 & nn.80–81, makes a brief reference to the suspension statutes in South Carolina (1778), Virginia (1781), New Jersey (1780), and Massachusetts (1786). Freedman, *supra* note 14, at 12, begins his coverage with the Philadelphia Convention of 1787.

<sup>308</sup> Valerius, Letter to Mr. Printer, *Freeman's J.* (Philadelphia), Feb. 26, 1783, at 2. The use of classical pseudonyms was habitual for pamphlet writers in the period from just before Independence through the early nineteenth century. For examples of the use of classical pseudonyms in debates about Marshall Court cases, see White, *Marshall Court and Cultural Change*, *supra* note 31, at 521–22, 552–62.

<sup>309</sup> *Id.*; see, e.g., An Act for Suspending the Privilege of the Writ of Habeas Corpus, 2 Worcester Mag., Dec. 7, 1786, at 435; An Act More Effectually to Prevent the Inhabi-

provides evidence that in the early 1780s at least some Americans linked the suspension of habeas corpus by state legislatures with the parliamentary suspension acts of the 1770s, were well aware of the *salus populi* justification, and were offended by the use of suspension.

About a year after Valerius's letter, John Dickinson, another Pennsylvania resident who was to be a prominent figure in the 1787 constitutional convention,<sup>310</sup> signaled a comparable interest in preserving the writ. "The cases in which the inestimable writ of Habeas Corpus is to issue," Dickinson wrote to the *Philadelphia Freeman's Journal*, "and the mode of obtaining and proceeding upon it, should be ascertained with all possible precision, so that no doubts, delays and difficulties may obstruct that relief which it ought to yield."<sup>311</sup> The two comments illustrate that during the 1780s Americans had been concerned about the nature of the writ in their new nation, and the scope of legislative authority over it. That concern would be one of the background elements to the convention of 1789.

Newspaper accounts of habeas use by African-American slaves in the 1780s to challenge their detentions provide additional evidence of the kind of discussions Americans had been having about the writ, and the way in which those discussions were shaped by developments in English habeas corpus jurisprudence. A sample of newspapers from the 1780s provides four instances of the use of the writ by slaves in Connecticut, New Jersey, Pennsylvania, and Maryland.<sup>312</sup> These suggest that the use of the writ was not confined to native-born British-American citizens of European ancestry, and that American usage was paralleling that in England and its colonies. Indeed, it is difficult to imagine that Americans were not

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tants of this State from Trading with the Enemy, or Going within Their Lines, and for other Purposes Therein Mentioned, *N.J. Gazette* (Trenton), Dec. 27, 1780, at 2, § 9.

<sup>310</sup> See David L. Jacobson, *John Dickinson and the Revolution in Pennsylvania 1764–1776*, at 123 (1965); Charles J. Stillé, *The Life and Times of John Dickinson 1732–1808*, at 257 (1891).

<sup>311</sup> John Dickinson, Letter, *Freeman's J.* (Philadelphia), Feb. 4, 1784, at 2.

<sup>312</sup> In chronological order, the slave petitions are reported in the *Conn. J.* (New-Haven), Feb. 28, 1782, at 3 (describing a petition filed in Philadelphia); David Cowell, Notice, *N.J. Gazette* (Trenton), June 25, 1783, at 3; *New-Haven Gazette*, Dec. 16, 1784, at 2; and *Pa. Packet* (Philadelphia), Mar. 8, 1786, at 2. In all those instances the slaves brought writs because they had been detained after running away from their masters.

aware of reports of the decision in *Somerset's Case* of 1772, in which Chief Justice Mansfield ruled that a slave in England could not be held in custody.<sup>313</sup> As in India, the writ in America applied to all residents who were the king's subjects, regardless of other social or legal status.

## 2. *The Constitution and the Judiciary Act of 1789*

With this background, we turn to the framing period. For American constitutionalists, the two foundational documents of the framing years are the Constitution and the Judiciary Act of 1789. The former has necessarily received the most attention from courts and commentators, but the latter has been very important as well. The assumptions that lie behind the text of the Judiciary Act of 1789 tell us a good deal about the goals of the framers in creating the experiment of a federated republican form of government with separated powers. In particular, they reveal how mindful the framers were that the federal Union they were creating was being carved out of the powers of the states, and needed to be independent of, and in some respects superior to, state governments. Over and over again, provisions of the Constitution, when matched up with provisions of the 1789 Judiciary Act, reveal those concerns.<sup>314</sup>

Commentators overwhelmingly agree that the Judiciary Act of 1789 was an effort to enlist the federal courts in carving out federal power from the states and in consolidating that power in the national government. The Act was to be the mechanism for establish-

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<sup>313</sup> Investigation of slave habeas petitions in the late eighteenth century seems long overdue. For an analysis of Mansfield's decision in its imperial contexts, see George Van Cleve, *Somerset's Case and Its Antecedents in Imperial Perspective*, 24 *L. & Hist. Rev.* 601 (2006). For examples of the many reports in America of the judgment in *Somerset's Case*, see 4 *Essex Gazette* (Salem, Mass.), June 30 to July 7, 1772, at 200; *Mass. Gazette & Boston Weekly News-Letter*, Sept. 10, 1772, supp. to the *Mass. Gazette*, 1.

<sup>314</sup> Given the significance of the Judiciary Act of 1789, it is puzzling that no recent historical treatment of it has appeared. Perhaps this is because of the exhaustiveness of Prof. Goebel's chapter in Julius Goebel, Jr., *Antecedents and Beginnings to 1801*, at 457-508 (1971), and the revisionist work of Wilfred Ritz, published posthumously. Wilfred J. Ritz, *Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging Premises, and Using New Evidence* (Wythe Holt & L.H. LaRue eds., 1990). See also Wythe Holt, "To Establish Justice": *Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 *Duke L. J.* 1421, especially for the political context of the Act.

ing the federal judiciary as an agent of the newly created Union.<sup>315</sup> There is also agreement, however, that the framers were very concerned about the potential scope of the powers of the new federal government, and more particularly, about the scope of the federal judicial power.<sup>316</sup>

### *3. Reading the Texts*

With that view of the relationship of the Constitution and the first Judiciary Act as background, let us attempt to assemble the relationship between the Suspension Clause and that Act. As we have seen, the historical evidence makes plain that at the time of the framing of the Constitution, Americans treated the privilege of the writ of habeas corpus as a longstanding tradition of English law. They knew this tradition through their own use of the writ, and thus some Americans had been highly exercised by the writ's repeated suspension by Parliament and some American states between 1777 and 1783. Does this evidence support the conclusion that when the Suspension Clause was enacted, the founders presupposed that since there was a "privilege of the writ of habeas corpus" which might be suspended, that "privilege" was constitutionally conferred on American citizens? Or was the privilege thought of as extending even more widely, to all residents of America?

Those questions, of course, have not been authoritatively answered, either by the Supreme Court or commentators, although the Court took a tentative run at them in the *St. Cyr* case, as noted previously.<sup>317</sup> The reason why the questions have remained unresolved for so long has to do with the interaction of the Suspension

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<sup>315</sup> The best general discussion of the relationship of the Constitution to the Judiciary Act of 1789 is Fallon et al., *supra* note 8, at 28–33. See also the debate among several scholars on the constitutionality of prospective congressional efforts to withdraw all the jurisdiction of the federal courts. Among the contributors are Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499 (1990); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. Chi. L. Rev. 203 (1997); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569 (1990); Robert J. Pushaw, Jr., *Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. Rev. 847.

<sup>316</sup> See Stanley Elkins & Eric McKittrick, *The Age of Federalism* 62–64 (1993).

<sup>317</sup> *INS v. St. Cyr*, 533 U.S. 289, 300–02 (2001); See *supra* note 2.

Clause with the Judiciary Act of 1789. To see why that is so, the text of Section 14 of the Judiciary Act, designed to clarify the power of federal judges to issue writs, needs to be set forth. The Section provides:

That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.<sup>318</sup>

Read against the backdrop of the framing period,<sup>319</sup> Section 14 was doing a great deal of work. Let us consider its individual sentences with that backdrop in mind.<sup>320</sup>

The first sentence, in light of the findings of this Article, requires extended discussion. It represents a grant of power by Congress to the federal courts to issue writs of *scire facias*<sup>321</sup> and *habeas corpus*. It also grants the federal courts power to issue “all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.”<sup>322</sup> The result of that language was apparently to create two categories of writs that the federal courts could issue. One was writs of *scire facias* and *habeas corpus*. The other

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<sup>318</sup> Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (emphasis in original).

<sup>319</sup> See Elkins & McKittrick, *supra* note 316, at 58–64.

<sup>320</sup> The discussion in the next few paragraphs draws on White, *The Marshall Court and Cultural Change*, *supra* note 31. See also Freedman, *supra* note 14, at 12–19; Francis Paschal, *The Constitution and Habeas Corpus*, 1970 *Duke L.J.* 605, 608–17 (1970).

<sup>321</sup> A writ of *scire facias* required the party against whom it was directed to appear before the issuing court and show cause why a particular order or proceeding of that court should not be enforced.

<sup>322</sup> Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82.

was an unspecified group of writs (“all other writs not specially provided for by statute”) that could be issued only when they pertained to litigation appropriately before the court (“necessary for the exercise of their respective jurisdictions”) and when they were couched in proper form (“agreeable to the principles and usages of law”). What might Oliver Ellsworth, the principal draftsman of Section 14,<sup>323</sup> have wanted to accomplish with that language?

#### 4. *The Jurisprudential Context of the Texts*

Here it is necessary to understand three dimensions of the jurisprudence of the framing period that have been largely lost to moderns. English and American jurists of that period did not treat statutes as *necessarily superior* to common law decisions, but merely as another source of law.<sup>324</sup> This was because they did not equate “law” only with the positive enactments of legislatures, or even with those enactments and the decisions of courts, but thought of it as a timeless, foundational body of principles, including principles of natural justice, which remained above and beyond particular legislative or judicial applications of those principles. Thus, they believed that there was a distinction between the jurisdiction of a court, which could be prescribed by the sovereign in a statute or a comparably authoritative enactment, such as a Constitution, and that court’s power to declare substantive rules of law, which existed outside, and beyond, its jurisdictional reach.<sup>325</sup> Finally, they believed that a writ—an individual’s means of access to a court—was also the equivalent of a substantive legal doctrine. This was why a writ needed to be in proper form: “agreeable to the principles and usages of law.”<sup>326</sup>

Once those jurisprudential assumptions of the Judiciary Act of 1789 framers are understood, it becomes easier to see that they

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<sup>323</sup> Robert J. Reinstein & Mark C. Rahdert, *Reconstructing Marbury*, 57 Ark. L. Rev. 729, 746 (2005).

<sup>324</sup> See White, *The Marshall Court and Cultural Change*, supra note 31, at 112–13.

<sup>325</sup> See id. at 117–46 (discussing the views of several late eighteenth- and early nineteenth-century treatise writers and commentators).

<sup>326</sup> Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82. For more detail, see G. Edward White, *Tort Law in America: An Intellectual History* 9–12 (expanded ed. 2003) (discussing the “writ system” of jurisprudence in place when tort law became a discrete field of common law with distinctive substantive rules).

were treating the writ of habeas corpus as having substantive common law dimensions. They were of course aware of the 1679 Act and its effects on English habeas corpus. But they were also aware of instances in which American petitioners—seamen, slaves, and other persons placed in custody—had brought habeas petitions before state courts, thus continuing a tradition of common law habeas usage derived from English practice. Moreover, the Constitution had codified a “privilege of the writ of habeas corpus,” and indicated that it could only be suspended in prescribed circumstances. Determining the content and scope of that privilege would be the task of the courts in common law cases.

Thus the best reading of the first sentence of Section 14 would seem to be that Congress explicitly conferred habeas jurisdiction on the federal courts, but that those courts were already assumed to have habeas powers at common law, as had courts in colonial British America. The framers had made it explicit that Congress might choose to limit the jurisdiction of the lower federal courts. But once it had granted jurisdiction to those courts to entertain certain cases, the federal courts could exercise the law declaration powers they already had.<sup>327</sup>

The remaining sentence of Section 14, along with its proviso, reinforces this reading:

And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.

Then comes the proviso:

*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for

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<sup>327</sup> None of this language can be seen as affecting another issue that has received a great deal of attention: whether habeas relief is available to prisoners in state as opposed to federal custodial facilities. For an exhaustive review of the literature on that topic, see Fallon et al., *supra* note 8, at 1297–1405. That issue is a product of an 1867 congressional statute, the Act of February 5, 1867, ch. 27, 14 Stat. 385, which expanded the scope of the habeas writ to persons in state custody. It is outside the scope of our inquiry.

trial before some court of the same, or are necessary to be brought into court to testify.<sup>328</sup>

The portion of the sentence before the proviso makes it abundantly clear, if there were any doubt, that the “power to grant writs of *habeas corpus*” had been reframed in America. It was no longer associated with the prerogative: it was now thought of as a power exercised by individual judges as well as courts. In that sense Section 14 of the Judiciary Act was based on a recognition that there was a common law element of habeas jurisprudence in America, just as there had been in England.<sup>329</sup>

The judicial common law power to issue habeas writs was confined, however, by the proviso. The language of the proviso was somewhat convoluted, making it necessary to determine how its clauses fit together with one another as well as its relationship to the section as a whole.

The first clause of the proviso states that habeas corpus writs shall not “extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States.” This was followed by the other two clauses. Taken together, they outline three instances in which jailed prisoners may be brought into the federal courts through habeas. One is where they are being detained by persons who are officials of the United States government or acting under color of that government’s authority; the second is where they are committed for trial in a federal court; and the third is where their testimony is required in “court.”

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<sup>328</sup> Judiciary Act of 1789, c. 20, § 14, 1 Stat. 73, 82 (emphasis in original).

<sup>329</sup> For the same argument, see Freedman, *supra* note 14, at 30–35. A further issue, somewhat peripheral to our analysis, is raised by the fact that the sentence gives habeas power to both Supreme Court Justices and lower federal court judges. Does that mean that the Court, or individual Justices, may issue the writ directly, as an exercise of original jurisdiction, or only on appellate or discretionary review? The modern answer seems to be that (1) the Court or individual justices may issue the writ; and (2) when they do so, it is typically an exercise of appellate jurisdiction. See 28 U.S.C. § 2241(b) (2000); Sup. Ct. R. 20.4(a); *Ex parte Abernathy*, 320 U.S. 219 (1943). For more detail, see Fallon et al., *supra* note 8, at 1295–96.

Putting these conclusions in terms of the 1789 Act, the best reading is that there are two sources of habeas jurisdiction, original and appellate; that most cases do not involve “ambassadors” within the meaning of Article III, § 2, and thus the Supreme Court’s or its Justices’ jurisdiction to issue habeas writs is primarily appellate (that is, when persons have challenged detentions in another court), and that § 14 authorizes collateral review only of the actions of federal, not state, officials.

The drafters of the proviso can thus be seen as having two primary concerns. One is with the status of the jailer: whether the prisoner is being held by an *official or one operating "by color" of such an official's authority*. Here the connection to English experience is particularly powerful, because, as we have seen, habeas writs were directed at officials of the Crown. The other concern is that the habeas powers of federal courts and judges not be utilized in a fashion to invade the prerogatives of the states. Thus the issuance of habeas writs is limited to instances where the *federal* government is the jailer, or where a person is being held in custody before being tried before a *federal* court. The contrast between those requirements and the proviso's third anticipated use of habeas, in which a person is needed as a witness in a *court* proceeding, is instructive. The term "court" in the last category is not accompanied by words such as "of the same" or "federal." This suggests that members of the First Congress expected that on occasion state courts would issue their own habeas writs to federal officials, or at least did not want to be understood as preventing them from doing so.<sup>330</sup>

In short, the understanding of the drafters of Section 14 about the scope of habeas writs can be seen as drawing upon the English experience. The writ was to be available primarily to force federal officials to release prisoners in their custody, either because they sought to challenge the basis of that custody, they were being

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<sup>330</sup> For a suggestion that the proviso to § 14 was drafted so as to alleviate fears that the federal courts might use their habeas powers to release persons in custody in the states, see Freedman, *supra* note 14, at 27, 29. For an argument that the proviso was also designed to prevent restrictions on the power of state courts to issue habeas writs for federal prisoners, see, Duker, *supra* note 14, at 131–35.

On the scope of the habeas powers of the state courts, the Supreme Court later held in *Tarble's Case*, 80 U.S. 397 (1871), that those courts lacked the power to issue habeas corpus writs to federal officials. To the extent that decision claimed to be recovering original understandings about the habeas powers of state courts, it was historically inaccurate. Freedman's comment on *Tarble's Case* is apt: "However odd the notion may appear to modern lawyers, contemporaries [of the framers of the Constitution and the Judiciary Act of 1789] all assumed that the state courts would be able to issue writs of habeas corpus to release those in federal custody." Freedman, *supra* note 14, at 18. Freedman cites instances of Massachusetts courts issuing writs during the Revolutionary War to challenge the validity of military enlistments, citing William E. Nelson, *The American Revolution and the Emergence of Modern Doctrines of Federalism and Conflict of Laws*, in *Law in Colonial Massachusetts 1630–1800*, at 419, 457 (Daniel R. Colquhille ed., 1984).

granted a trial in the federal courts, or they were witnesses in a court proceeding. Section 14's understanding of habeas can be seen as the equivalent of the understanding of English courts when they demanded that officials acting under the authority of the king or Parliament produce the bodies of their prisoners.

### C. Ex Parte Bollman

Our historical narrative concludes with a discussion of the pivotal Suspension Clause case of the framing era, *Ex parte Bollman*.<sup>331</sup> Technically speaking, of course, the *Bollman* case did not address the Suspension Clause. It was about whether the Supreme Court had the power to issue writs of habeas corpus to examine the cause of commitment of prisoners in federal custody. But *Bollman* is significant, for our purposes, because of some categorical language by Marshall that has been understood by some commentators to mean that the source of the habeas privilege in America is exclusively statutory.<sup>332</sup> Given our reading of the English and imperial experience of the writ, of the writ's use in America before 1789, and of the assumptions at work in Section 14 of the Judiciary Act, we suggest that this understanding of *Bollman* should be reconsidered.

#### 1. *The Facts and Background of Bollman*

*Bollman* arose out of a mysterious expedition in 1805 and 1806 to the delta South by former Vice President Aaron Burr. One of Burr's associates in the expedition, General James Wilkinson,<sup>333</sup> was an agent of the Spanish government, and he eventually claimed that Burr's purpose was to encourage southern states to separate from the Union and support Spain, who had land claims to the delta region which conflicted with those of the United States after the Louisiana Purchase. Burr probably had no treasonous intent. Although the details remain murky, the purposes of his expe-

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<sup>331</sup> *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807).

<sup>332</sup> See debates in Fallon et al., *supra* note 8, at 1289–93 (reviewing the relevant literature).

<sup>333</sup> For the details of Wilkinson's career, see George Lee Haskins & Herbert A. Johnson, *Foundations of Power: John Marshall, 1801–15*, in 2 *History of the Supreme Court of the United States* 255 (Paul A. Freund ed., 1981); James Ripley Jacobs, *Tarnished Warrior: Major-General James Wilkinson 233–36* (1938).

dition seem to have been to get out of New York and New Jersey, states in which he was under indictment for the 1805 killing of Alexander Hamilton, to pursue some land speculation (Burr was deeply in debt), and to consider the prospect of provoking a war with Spain in order to gain American access to Mexico.<sup>334</sup>

Dr. Justus Erich Bollman, a supporter of Burr's plans, was carrying a letter by sea from Burr to Wilkinson, dated May 13, 1806, when Wilkinson, as commander of the American army in the territory of Louisiana and also Governor of the territory, came under pressure to institute military action against the Spanish in the area around New Orleans. Given his status as an agent for the Spanish government, Wilkinson obviously did not want to declare war on Spain. As a diversion, Wilkinson claimed, in a confidential letter to President Thomas Jefferson, that Burr had encouraged him to join the Spanish forces. Wilkinson also betrayed Bollman to the American military authorities, and Bollman was arrested when his ship reached New Orleans. By December 1806, he was in Wilkinson's custody. Arrested at the same time was another man to whom Burr had entrusted a copy of the letter to Wilkinson, Samuel Swartwout.<sup>335</sup>

Bollman was denied access to counsel and the courts and placed on a U.S. warship for transportation to Baltimore, the seaport closest to Washington. After his arrival, he and Swartwout were taken under guard to Washington and imprisoned. The U.S. government then sought a bench warrant from Chief Judge William Cranch of the Circuit Court of the District of Columbia in order to try Bollman and Swartwout for treason. Cranch referred the warrant to the full Circuit Court, which consisted of himself and two other judges who had been appointed by Jefferson. On January 27, 1807, the Circuit Court, with Cranch dissenting, ruled that Bollman and Swartwout should be imprisoned without bail and held for a treason trial, the "treason" in question consisting of levying war against

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<sup>334</sup> A detailed account of the Burr expedition can be found in Haskins & Johnson, *supra* note 333, at 248–55. See also Francis S. Philbrick, *The Rise of the West, 1754–1830*, at 234–52 (1965) (discussing Burr and the conflicting land claims of Spain and the United States to the delta land just west of the Mississippi River in the early 1800s).

<sup>335</sup> Haskins and Johnson, *supra* note 333, at 252–55.

the United States.<sup>336</sup> William Brent, the Clerk of the Circuit Court, issued an order stating that there was probable cause to try Bollman and Swartwout for treason and that the marshal of the District of Columbia should take their “bodies . . . and them safely keep, so that you have [them] before [Cranch’s circuit court] to answer the [treason] charge aforesaid.” Cranch witnessed the order.<sup>337</sup>

Prior to these developments, Jefferson, in a January 22 special message to Congress, had asserted that Aaron Burr was the “prime mover” in a conspiracy to encourage southern states to secede from the Union and invade Mexico, and that Burr’s “guilt is placed beyond question.”<sup>338</sup> The next day, Senator William B. Giles of Virginia, a Jefferson ally, had successfully introduced a bill in the Senate to suspend the privilege of habeas corpus, and the Senate, with only one dissent, had passed the bill.<sup>339</sup> Three days later, the House voted down the bill, 113-19.<sup>340</sup>

After the Circuit Court’s ruling on January 27, Charles Lee, on behalf of Swartwout, and Robert Goodloe Harper, on behalf of Bollman, applied to Chief Justice John Marshall for a writ of habeas corpus against the marshal of the District of Columbia, compelling him to produce the bodies of their clients before the Supreme Court of the United States.<sup>341</sup> On February 5, Marshall issued an order compelling the marshal to produce Bollman and Swartwout and to keep them in safe custody in the prison of the District of Columbia while they awaited trial for treason. He also remarked that the issue of whether the Supreme Court could take

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<sup>336</sup> United States v. Bollman, 24 F. Cas. 1189, 1190 (C.C.D.C. 1807) (No. 14,622).

<sup>337</sup> The order is in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 76 (1807).

<sup>338</sup> 16 Annals of Cong. 39, 39–40 (1807).

<sup>339</sup> 16 Annals of Cong. 44 (1807). The lone dissenter was Senator James A. Bayard of Delaware. See Letter from John Quincy Adams to John Adams (January 27, 1807), quoted in Albert J. Beveridge, *The Life of John Marshall: Conflict and Construction 1800–1815*, at 347 (1919).

<sup>340</sup> For the House vote, see 16 Annals of Cong. 424–25 (1807). One passage in the House debate, a speech by Congressman James M. Broom of Delaware, who introduced a motion to “make further provision, by law, for securing the privilege of the writ of habeas corpus,” is noteworthy for our purposes. Broom said that “the commander of the army [Wilkinson], in the plenitude of his power, avows his disobedience to laws and Constitution, and takes on himself all the responsibility of the violation of our Constitutional rights of personal liberty.” *Id.* at 502, 506. Broom’s motion was ultimately postponed indefinitely by the House by a vote of 60-58. See *id.* at 589–90.

<sup>341</sup> 8 U.S. (4 Cranch) at 75.

jurisdiction over Bollman and Swartwout would “be taken up *de novo*, without reference to precedents,” and asked counsel to be prepared for full arguments the next day.<sup>342</sup>

To say that the case of Bollman’s and Swartwout’s incarceration and prospective trial for treason was a controversial matter of early nineteenth-century national politics would be to understate matters significantly. Burr had been Jefferson’s chief rival in the emerging Republican party. He had been Jefferson’s Vice President only because he received the second highest number of votes in the House of Representatives after the disputed 1800 election was referred to that body. Burr and Jefferson loathed each other personally. At the same time, Jefferson and John Marshall were old political rivals and personal antagonists. The memory of Marshall’s lecture to Jefferson about the latter’s assertion of a version of executive privilege in *Marbury v. Madison* was only four years old. The long struggle between the Federalist and Republican parties that began in the 1790s and reached one high point in the 1800 election was still at the center of American political life.<sup>343</sup>

## 2. *The Jurisprudential Ramifications of Bollman*

Those were the most apparent political issues forming the background to *Bollman*. There was one other, at the interface between politics and jurisprudence, of which all the major players in the *Bollman* case were keenly aware. That issue was the federal courts’ power to declare common law rules of criminal law. In *Bollman*, the issue presented itself in two forms: as a general jurisprudential proposition with distinct political overtones, and in the federal crime of treason itself, the only federal crime that had been defined in the Constitution.

Space does not permit an extended discussion of the extremely controversial issue of a federal common law of crimes, ostensibly to be developed by the judges of the federal courts in opinions that

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<sup>342</sup> Id. at 75 n.\* (“It is the wish of the court to have the [habeas] motion made in a more solemn manner to-morrow, when you may come prepared to take up the whole ground.”). Marshall also indicated that Lee had made a motion on behalf of James Alexander, a New Orleans attorney who had also been arrested under Wilkinson’s orders. In response to that motion, Alexander was subsequently discharged by a judge of Cranch’s circuit court. Id.

<sup>343</sup> Elkins & McKittrick, *supra* note 316, at 741–54.

were, in the late eighteenth and early nineteenth centuries, not often published.<sup>344</sup> Nor does it permit an extended discussion of the history of the Constitution's Treason Clause.<sup>345</sup> For present purposes, it is enough to say that many Americans of the framing generation were deeply apprehensive of the possibility that the judges of the newly created federal courts might, as they believed English officials had, define "treason" and other common law crimes in a vindictive and partisan fashion.<sup>346</sup> If federal courts had inherent common law powers to issue writs of habeas corpus, those powers might be understood as allowing them to declare the substance of a common law of crimes.

A dominant feature of John Marshall's approach to judging was his interest in promoting the role of the Supreme Court as an institution that would intervene in deeply contested political issues and resolve them through extended analysis of provisions of the Constitution. Another feature of his approach—perhaps logically entailed by the first—was a tendency to proceed very cautiously in resolving issues which had acquired a strongly partisan cast.<sup>347</sup> The best-known example of this stance is *Marbury v. Madison* itself, but

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<sup>344</sup> For more on the subject, see White, *The Marshall Court and Cultural Change*, supra note 31, at 122–44, 450–51. In *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32 (1812), the Court finally confronted the issue of whether there was a federal common law of crimes and concluded that there was not. But judicial decisions in the 1790s, including one by Oliver Ellsworth, had upheld prosecutions based on a federal common law of crimes. See *Williams' Case*, 29 F. Cas. 1330 (C.C.D. Conn. 1799) (No. 17,708); *United States v. Ravara*, 27 F. Cas. 713 (C.C.D. Pa. 1793) (No. 16,122). For an argument that the framers of the Judiciary Act anticipated that the federal courts might well be defining the contours of a common law of crimes, see Holt, supra note 314, at 1505–06.

<sup>345</sup> U.S. Const. art. III, § 3. The language of the Treason Clause at issue in the *Bollman* case defined "[t]reason against the United States" as consisting "only in levying war against them, or in adhering to their enemies, giving them aid and comfort." 8 U.S. (4 Cranch) at 126. The best study of the Treason Clause remains James Willard Hurst, *The Law of Treason in the United States* (1971).

<sup>346</sup> See id. at 153–54.

<sup>347</sup> See White, *The Marshall Court and Cultural Change*, supra note 31, at 963–64. For an illustration, see the discussion of *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), in White, *The Marshall Court and Cultural Change*, supra note 31, at 612–28. Over the course of his 34-year tenure as the Court's Chief Justice, Marshall himself supplied most of that extended constitutional analysis. In the years of Marshall's tenure he wrote forty-five opinions in constitutional cases, the overwhelming number of which were opinions of the Court, whereas the other justices who served with him during that time period—twelve in number—wrote only thirty-one opinions in constitutional cases *combined*. See id. at 367–68.

there were several others, ranging from admiralty jurisdiction cases to Commerce Clause cases and beyond.<sup>348</sup>

As Marshall entertained the *Bollman* case in his capacity as circuit justice, he could not have failed to grasp its jurisprudential and political significance. On the question of whether anyone associated with the Burr expedition had committed treason, Marshall would eventually conclude, in an “opinion of the Court” handed down when three other justices were present, that neither Bollman nor Swartwout could be convicted in a civil court of treason, consistent with the requirements of the Treason Clause, because they had not levied war against the United States. Marshall defined “levying war” as “an actual assemblage of men for the purpose of executing a treasonable design.” He left open the possibility that Bollman and Swartwout could be tried in a military tribunal.<sup>349</sup>

But before reaching the treason issue, Marshall had needed to address the question of whether the Supreme Court of the United States had power to issue habeas writs. Although the Court’s resolution of that question and its resolution of the treason charge were combined in one opinion in the Court’s reports, the issues were argued separately. Cranch’s report of the case, designated as *Ex parte Bollman and Swartwout*, actually described two cases that were adjudicated sequentially, the latter of those (*Bollman II*) being dependent on the Court’s finding in the former (*Bollman I*) that it could entertain habeas petitions.<sup>350</sup> Arguments began in *Bollman*

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<sup>348</sup> For more detail on Marshall’s approach to admiralty jurisdiction cases, an extremely controversial area in the early nineteenth century, see *id.* at 432–84. For more detail on his approach in Commerce Clause cases, see *id.* at 568–84.

<sup>349</sup> *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125, 127, 136–37 (1807). Marshall’s opinion was described by Cranch, the Reporter, as “the opinion of the court.” *Id.* at 125. Cranch also reported that three other justices, Samuel Chase, Bushrod Washington, and William Johnson, were “present” when Marshall *delivered* his opinion. It would be a mistake to conclude from those details that Marshall’s opinion was unanimous. First, a custom of “silent acquiescence” existed on the Marshall Court, in which justices who found themselves outvoted on an issue typically did not record themselves as dissenting. Second, the fact that justices were “present” when an opinion was delivered does not necessarily suggest that they participated in the deliberations on the case. See White, *The Marshall Court and Cultural Change*, *supra* note 31, at 186–92; G. Edward White, *History and the Constitution: Collected Essays* 405–11 (2007). Finally, Marshall explicitly said there was only a “majority” of the Court for dismissing the treason charge against Swartwout. *Bollman*, 8 U.S. (4 Cranch) at 135.

<sup>350</sup> Unless otherwise indicated, references to *Bollman* refer to *Bollman I*.

on February 7, and Marshall's opinion for a divided Court<sup>351</sup> was handed down on February 13.<sup>352</sup>

### 3. Robert Goodloe Harper's Argument in *Bollman I*

At the very outset of his argument Harper, representing Bollman, went to the heart of the case. He began by stating a general proposition: "The general power of issuing this great remedial writ . . . is a power given to [the Supreme Court] by the common law. . . . [Such a power is] not given by the constitution, nor by statute, but flow[s] from the common law."<sup>353</sup> Having made that claim, Harper immediately took pains to point out that the question of where the Court's power to issue writs of habeas corpus originated was "not connected with another, much agitated in this country, but little understood, viz. whether the courts of the United States have a common law jurisdiction to punish common law offences against the government of the United States."<sup>354</sup>

On the latter question, concerning the "federal common law of crimes," Harper demurred. "The power to punish offences against the government," he suggested, "is not necessarily incident to a court." In contrast, "the power of issuing writs of *habeas corpus*, for the purpose of relieving from illegal imprisonment, is one of those inherent powers, bestowed by the law upon every superior court of record, as incidental to its nature, for the protection of the citizen."<sup>355</sup> In other words, the power of courts to issue writs of habeas corpus was not just derived from common law, but from the "nature" of every "superior" court of record, whose fundamental purpose was the "protection of the citizen."

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<sup>351</sup> Cranch's Reports record Bushrod Washington, William Johnson, and Brockholst Livingston as "present when [Marshall's opinion in *Bollman I* was] given." 8 U.S. (4 Cranch) at 93. Justices Samuel Chase and William Cushing were recorded as being absent. Johnson published a dissent from Marshall's opinion and indicated that another justice, "who is prevented by indisposition from attending," supported his dissent. *Id.* at 101, 107. Since Chase had already signaled that he "doubted the jurisdiction of [the Supreme Court] to issue a *habeas corpus* in any case," *id.* at 75, he was likely the justice Johnson had in mind.

<sup>352</sup> *Id.* at 93.

<sup>353</sup> *Id.* at 79–80.

<sup>354</sup> *Id.* at 80.

<sup>355</sup> *Id.*

Next, Harper moved to trace the common law sources of judicial habeas in more detail. He noted that the term “*habeas corpus*,” like the term “*trial by jury*,” was used in the Constitution. He added that “we ascertain what is meant by these [constitutional] terms . . . [b]y a reference to the common law.” The common law, he claimed, “forms an essential part of all our ideas.”<sup>356</sup> He then began to particularize.

“[W]e find,” Harper noted, “that the court of common pleas in England, though possessing no criminal jurisdiction of any kind . . . has power to issue this writ of *habeas corpus*.” The court of common pleas had derived that power “from the great protective principle of the common law, which in favour of liberty gives this power to every superior court of record, as incidental to its existence.” Likewise, the courts of chancery and exchequer in England had “the same power,” though they were both “wholly destitute of criminal jurisdiction.”<sup>357</sup> Where had the English courts derived that power? The answer, for Harper, was plain.

The reason assigned for it in the English law books is, that the king has always a right to know, and by means of these courts to inquire, what has become of his subjects. That is, that he is bound to protect the personal liberty of his people, and that these courts are the instruments which the law has furnished him for discharging his high duty with effect.<sup>358</sup>

Harper then sought to ascertain whether the English parallel was exact. He said:

It may then be asked whether the same reasons do not apply to our situation, and to [the Supreme Court of the United States.] Have the United States, in their collective capacity, as sovereign, less right to know what has become of their citizens, than the king or government of England to inquire into the situation of his subjects? Are they under an obligation, less strong, to protect individual liberty? Have not the people as good a right as those

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<sup>356</sup> Id.

<sup>357</sup> Id. at 80–82.

<sup>358</sup> Id. at 82.

of England to the aid of a high and responsible court for the protection of their persons?<sup>359</sup>

By transposing the sovereignty of the king into the sovereignty of the United States,<sup>360</sup> Harper translated a prerogative writ whose principal justifications were the divine mercy of the king and his concern for *salus populi* into one whose principal justifications were its foundational status as a device for protecting the liberties of individuals. He appreciated that the key, whether in England or America, was the foundation of the writ in sovereign authority.

That was the gist of Harper's argument that habeas sounded in Anglo-American common law. "On this ground alone," he maintained, "the question [of the Supreme Court's competence to issue writs of habeas corpus] might be safely rested." But there was another ground, one "not stronger indeed, but perhaps less liable to question." It was "the 14th section of the act of 24th September, 1789."<sup>361</sup> Before detailing Harper's statutory argument on behalf of the Court's habeas power, we should call attention to his suggestion that the argument, if no "stronger" than the common law argument, was "perhaps less liable to question." In light of the history that we have recounted, and Harper distilled, why might the statutory basis of habeas have been considered less problematic by Harper's audience?

Harper did not expand on his suggestion, at least directly. But he did so indirectly, in the following passage:

Do we not know that [under Article III] congress may institute as many inferior tribunals, and may assign to the judges of these tribunals such salaries as they may think fit? . . . Will not such courts, therefore, be necessarily filled by . . . the most servile tools of those in power for the moment? . . . Let it be once established by the authority of this court, that a commitment on record by such a tribunal, is to stop the course of the writ of *habeas corpus*, is to shut the mouth of the supreme court, and see how ready, how terrible, and how irresistible an engine of oppression

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<sup>359</sup> *Id.*

<sup>360</sup> Notice Harper's careful use of language. He refers to "the United States, in their collective capacity," thus signaling to his audience that he is mindful that the federal union has been forged from the states.

<sup>361</sup> *Id.* at 83. (emphasis in original).

is placed in the hands of a dominant party, flushed with victory, and irritated by a recent conflict; or struggling to keep down an opposing party which it hates and fears.<sup>362</sup>

In this passage Harper, a Federalist, was saying that in the event the Supreme Court concluded that it lacked the power to issue a writ of habeas corpus to review the detention orders of lower federal courts, partisan oppression might result. He was reminding John Marshall and his colleagues that in 1807, Jefferson's Republican supporters controlled the Presidency and the Senate; that after the Federalists had sought to retreat into the federal judiciary in the wake of the 1800 election, Republican majorities in Congress were hostile to the federal courts; that under Article III Congress could "ordain and establish" federal courts at its pleasure, either limiting their jurisdiction or stacking them with partisans; and that Bollman's case itself was evidence of partisan behavior on the part of the Jefferson administration. "We unfortunately know, from the experience of every age," Harper observed, "that there are few excesses into which men may not be hurried by the lust of power or the thirst of vengeance." "Let it be now declared," he urged the Court, "that there resides in this high tribunal . . . a power to protect the liberty of the citizen, by the writ of *habeas corpus*, against the enterprizes of inferior courts, which may be constituted for the purposes of oppression or revenge."<sup>363</sup>

Harper's remaining arguments were less emotionally charged. Among them was a precise analysis of the text of Section 14 of the Judiciary Act of 1789. We will not rehearse that analysis, for it was almost identical to the one we have previously advanced,<sup>364</sup> with one exception. Harper emphasized, as we have, the separation of "writs of *scire facias* and *habeas corpus*" from "such other writs as the court might find necessary for the exercise of their jurisdiction."<sup>365</sup> He then argued that this meant that the "necessary" qualification on the power to issue writs only pertained to the latter class of writs. The former class of writs "should be issued, not merely to aid the court in the exercise of its ordinary jurisdiction,

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<sup>362</sup> Id. at 89–90.

<sup>363</sup> Id. at 90.

<sup>364</sup> See *supra* Section IV.B; 8 U.S. (4 Cranch) at 83–84 (analyzing § 14).

<sup>365</sup> 8 U.S. (4 Cranch) at 83 (emphasis in original).

but for the general purposes of justice and protection.” Scire facias and habeas were examples of those “great writs.” This suggests that Harper may have wanted to imply that the power of a court to issue habeas was not a function of the jurisdictional reach of that court, but of the status of the court as a declarer of the common law. Marshall was to make use of Harper’s distinction between the habeas writ and other writs in his opinion in *Bollman*, but for quite different purposes.<sup>366</sup>

#### 4. *Marshall’s Response to Harper*

John Marshall was doubtless attentive to all the overtones in Harper’s argument. Indeed, if Cranch’s report of Charles Lee’s argument on behalf of Swartwout was accurate, Harper’s argument was almost all Marshall had before him in *Bollman*, because the argument Cranch reported Lee as making was perfunctory and not always coherent.<sup>367</sup> Lee had recognized, however, that a pivotal issue in *Bollman* would be whether the proviso in Section 14 qualified all, or just some, of the Section’s text. As we shall see, Marshall was to seize upon that issue.

Marshall was well aware that *Ex parte Bollman* and *Swartwout* potentially presented another occasion for momentous conflict between the Jefferson administration, which was certainly eager to label Burr and his supporters treasonous, and the Chief Justice of the Supreme Court of the United States, who might end up being—and eventually was—the instrument of the Burr group’s release.<sup>368</sup> Marshall had been an active participant in the partisan bat-

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<sup>366</sup> Harper’s final argument was that the jurisdiction of the Supreme Court to issue writs of habeas corpus in the vast majority of cases was appellate, not original. That argument is peripheral to our concerns. Marshall’s opinion would agree with the argument, see 8 U.S. (4 Cranch) at 100–01, and the conclusion was foreordained after Marshall had concluded, in *Marbury*, that the Court could only exercise original jurisdiction when it was specially conferred by the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174–80 (1803).

<sup>367</sup> For Lee’s argument, see 8 U.S. (4 Cranch) at 77–79.

<sup>368</sup> *Bollman*, *Swartwout*, and Burr were never successfully prosecuted for their allegedly treasonous activities, and Marshall, who sat as a circuit judge in Burr’s trial, contributed to those outcomes. On the Burr trial, see 1–2 David Robertson, *Reports of the Trials of Colonel Aaron Burr (Late Vice President of the United States), for Treason, and for a misdemeanor, in preparing the means of a military expedition against Mexico, a territory of the King of Spain, with whom the United States were at peace. In the Circuit Court of the United States, held at the city of Richmond, in the district of*

tles of the 1790s and remained a dedicated, if moderate, supporter of the Federalists. He was also well aware of some of Jefferson's supporters' strong inclination to distrust the federal judiciary and attribute partisan motives to it.<sup>369</sup> His habitual response to potential conflicts between the Jeffersonians and the Court was to proceed cautiously and strategically. Consequently, Marshall's opinion on the jurisprudential status of habeas corpus in *Bollman*, despite his great authority and its very longstanding status as a precedent, needs to be seen against the partisan backdrop of the case.

Marshall began his opinion in *Bollman* with a revealing passage: "As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States."<sup>370</sup> That was an arresting and potentially misleading statement. Marshall seemed to be saying that the Supreme Court of the United States was not a common law court. But that, of course, was not what he meant. He meant that the Court's *jurisdiction*—not its power to declare substantive rules of law—came only from Article III of the Constitution, the Judiciary Act of 1789, and any other statutes Congress might pass. Furthermore, *Marbury v. Madison* was on the books, and *Marbury* had announced the Court's power to review acts of Congress. The term "disclaims" was rhetorically suggestive. Given Marshall's awareness of the politically sensitive quality of the *Bollman* case, he was beginning on an ostensibly deferential note.

The next sentence was far less deferential: "Courts which originate in the common law," Marshall declared, "possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." Marshall claimed that it was "unnecessary to state the reasoning" supporting that

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*Virginia, in the Summer Term of the year 1807* (1808); See also Haskins & Johnson, *supra* note 333, at 246–92.

<sup>369</sup> Both Marshall's sensitivity toward Jefferson and his supporters and Jefferson's antipathy toward Marshall and the Court persisted until Jefferson's death in 1826. See White, *The Marshall Court and Cultural Change*, *supra* note 31, at 369–72, 522–23.

<sup>370</sup> 8 U.S. (4 Cranch) at 93.

claim “because it ha[d] been repeatedly given by this court.”<sup>371</sup> This statement has been the primary source of the belief that the habeas powers of the federal courts in America are statutory in origin.

But historians have not been able to find any instances of the “reasoning” supporting Marshall’s claim in Supreme Court decisions prior to *Bollman* or even any evidence of the claim having ever been made.<sup>372</sup> Moreover, the claim appears to fly in the face of views Marshall himself had previously expressed. In 1800 he wrote a letter to St. George Tucker, commenting favorably on one of the cases in the 1790s in which federal judges had assumed they had the power to declare a federal common law of crimes. In that letter Marshall wrote, “[m]y own opinion is that . . . on adopting the existing constitution of the United States the common and statute law of each state remained as before & that the principles of the common law of the state would apply themselves to magistrates of the general as well as to magistrates of the particular government.” Consider also *Marbury v. Madison*. In that case the Court’s exercise of a power, announced by Marshall, to subject an act of Congress to review under the Constitution, was, strictly speaking, an exercise of judicial transcendence of written law, because neither the Constitution nor the Judiciary Act of 1789 had granted that power to the Court. In addition, claiming that power for the Court might well have been an example of judicial transcendence of a common understanding that there was no hierarchy of institutional interpreters of the Constitution.<sup>373</sup>

After emphasizing the limited jurisdiction of the Article III courts, Marshall tersely responded to Harper’s argument that habeas was an inherent common law power. “[F]or the meaning of the term *habeas corpus*,” he maintained, “resort may unquestionably be had to the common law.” But the power to award the writ itself by any federal court “must be given by written law.”<sup>374</sup> That statement raised the possibility that “the privilege of the writ of

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<sup>371</sup> *Id.*

<sup>372</sup> See Milton Cantor, The Writ of Habeas Corpus: Early American Origins and Development, in *Freedom and Reform* 55, 76–77 (Harold L. Hyman & Leonard W. Levy eds., 1967); Paschal, *supra* note 320, at 628.

<sup>373</sup> For more detail, see G. Edward White, The Constitutional Journey of *Marbury v. Madison*, 89 *Va. L. Rev.* 1463, 1468–91 (2003).

<sup>374</sup> 8 U.S. (4 Cranch) at 93–94.

habeas corpus” might not exist, at least within areas under the control of the federal government, unless Congress made an affirmative grant of habeas powers to the federal courts. And after noting that the First Congress had passed the Judiciary Act “sitting under a constitution” containing the Suspension Clause, Marshall proceeded to embrace that possibility explicitly: “[I]f the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.”<sup>375</sup>

Marshall then took up Section 14 as if it were the *only* source of the Supreme Court’s power to issue writs of habeas corpus. That the section granted such power was plain enough, and the only question of any delicacy was the effect of the section’s proviso, the scope of which was somewhat ambiguous. Harper had already suggested a way to read the section to give the Supreme Court full habeas powers, and Marshall followed his lead, while adding some additional arguments. The comparative ease of Marshall’s interpretive task suggested that his unsupported, and dubious, observations about the statutory basis of habeas powers in the federal courts were designed to reassure readers that the Court was not going to take the occasion of *Bollman*, a highly sensitive case, to suggest that the habeas powers of the federal courts went beyond those specifically granted to them by Congress.

Turning to the heart of his argument, Marshall concluded that the proviso to Section 14 authorized federal courts to issue writs of habeas corpus even where doing so was not necessary for the exercise of their jurisdiction. When Marshall was confronted with a delicate exercise in textual analysis, he typically liked to refer to the generally understood meanings of words, and to the context in which words were being used.<sup>376</sup> In *Bollman*, his formulation was that “the true sense of the words is to be determined by the nature of the provision, and by the context.”<sup>377</sup>

Context came first. Marshall alluded to the Suspension Clause and noted that the Judiciary Act of 1789 had been passed by a Congress “sitting under” the Constitution. “[T]hey must have felt,

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<sup>375</sup> Id. at 95.

<sup>376</sup> G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* 32 (2007) (citing Marshall’s opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187–88 (1824)).

<sup>377</sup> 8 U.S. (4 Cranch) at 95.

with peculiar force,” he reasoned, “the obligation of providing efficient means by which this great constitutional privilege should receive life and activity.” Under “the impression of this obligation,” Congress gave “to all the courts, the power of awarding writs of *habeas corpus*.”<sup>378</sup> This rhetoric surely cut in favor of the Court’s ability to issue the writ, but it did not suggest that the writ was only conferred by statute.

Marshall then took up an argument that Justice William Johnson, the gifted acolyte of Jefferson’s who was highly sensitive to political currents,<sup>379</sup> would advance in his dissent in *Bollman*. Johnson had argued that the grant of habeas power to the Supreme Court and lower federal courts in Section 14 was something like an auxiliary power: it was limited to issuing habeas writs in cases over which those courts already had jurisdiction.<sup>380</sup>

Marshall demolished that argument. He maintained that since Congress, in Section 14, had granted the habeas power first to “all the . . . courts of the United States,” and then to “[all] the justices of the supreme court, as well as judges of the district courts,” the two sentences should be taken as reinforcing one another. The “first sentence,” he concluded, “vests this power in all the courts of the United States; but as those courts are not always in session, the second sentence vests it in every justice or judge of the United States.”<sup>381</sup> It was a classic “nature of words” argument, which Marshall then buttressed with some context by pointing out that habeas writs had historically been used to transport a detained person from confinement to a court before the court actually determined whether it had jurisdiction over that person.

Marshall then built on the distinction Harper had made between the writs of scire facias and habeas and other writs necessary for the exercise of a court’s jurisdiction, and concluded that the restrictive words at the end of the first sentence of Section 14 (“writs . . . which may be necessary for the exercise of their respective jurisdictions”) were not intended to apply to the writ of habeas corpus. Since habeas writs testing the legitimacy of commitments were not

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<sup>378</sup> *Id.*

<sup>379</sup> For a portrait of Johnson, see White, *The Marshall Court and Cultural Change*, *supra* note 31, at 332–44.

<sup>380</sup> 8 U.S. (4 Cranch) at 101, 103–07 (Johnson, J., dissenting).

<sup>381</sup> *Id.* at 94, 96 (majority opinion).

“necessary for the exercise” of a court’s jurisdiction, they might have been seen as outside the statutory grant. Marshall noted, however, that Section 14 gave individual Supreme Court justices and lower federal court judges power “to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.” Since that use of the writ was not “necessary to the exercise” of jurisdiction, this would mean that “the right to grant this important writ is given . . . to every judge of the circuit, or district court, but can neither be exercised by the circuit nor district court.”<sup>382</sup> Moreover, Marshall noted, the proviso in Section 14, which he took as “extend[ing] to the whole section,” specified instances in which habeas writs would apply in addition to the necessity of bringing a prisoner into a court to testify.<sup>383</sup> If the only habeas writ allowed by the section was one related to testimony, the language of the proviso made no sense.

Marshall’s reading of Section 14 was correct, and it anticipated the possibility of robust use of the writ in the federal courts. But it was also informed by some of the charged issues that formed a backdrop to *Bollman* and *Swartwout*. The common law of crimes controversy and the Federalist/Republican clashes of the 1790s had made Marshall disinclined to emphasize the common law origins of the writ. At the same time, the sharp recent memory of the suspension acts, and of the Suspension Clause itself, made it clear that recourse to habeas was part of the fabric of American jurisprudence. In *Bollman*, Marshall let a Republican Congress, and a Republican President, know that the federal judiciary would be available when their political opponents were jailed. They would be available through the habeas power. It was Congress, he took pains to suggest, which had conferred that power on the federal courts. But that was not the whole story, and Marshall knew it.

#### *D. The Founding History of Habeas Revisited*

Before concluding, let us circle back to where this Article began. The history just recounted is a history with implications for our understanding of the Suspension Clause. But that Clause itself has not figured prominently in our account. Instead, we have focused

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<sup>382</sup> *Id.* at 96.

<sup>383</sup> *Id.* at 99.

on the Anglo-American jurisprudence of habeas corpus, manifested as much in practice as in prescriptive statements about the content of that jurisprudence. It should go without saying—but we say it nonetheless—that just as the framers of the Judiciary Act of 1789 sat in the shadow of a Constitution that contained the Suspension Clause, Marshall’s opinion in *Bollman* was itself mindful of the fact that the Clause was not merely about suspending the privilege of the writ of habeas corpus, but about the meaning of the “privilege of the writ” itself. When one considers the potential scope of the Suspension Clause, it should be against the backdrop of an informed understanding of what the privilege of the writ of habeas corpus has meant in English, British, and American history. In particular, one needs to recognize that the broad and foundational nature of the privilege has been associated with its origins in the royal prerogative and with its status as a common law instrument by which courts inspected the behavior of anyone who claimed to detain another according to law.

## CONCLUSION

### *A. The Import of History*

In *INS v. St. Cyr*, Justice Stevens, for the majority, stated that “at the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’”<sup>384</sup> This Article suggests that although that proposition may be unexceptionable, learning just what existed in 1789 requires a serious effort of a kind not undertaken before. The Article has examined sources that have long lain untouched in order to understand better the state of habeas jurisprudence in 1789. In seeking to show what the privilege of the writ was understood to be in 1789, we have had to range far beyond the Philadelphia Convention and the Act of September 24, 1789. Habeas corpus was not only an English writ; it was a writ that had undergone dramatic transformations during years in which Americans not only established their independence from British imperial control but also erected a novel set of institutional arrangements, themselves affected by English practice and thinking.

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<sup>384</sup> *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996)).

This Article is primarily a work of historical scholarship. Although we believe that history does and should inform present concerns, we also believe that history does not control the future. As Grant Gilmore once put it, “looking backward and forward at the same time”<sup>385</sup> is a complicated process. When one shifts to the role of habeas in the current war on terror cases, a spate of constitutional and other issues remain unresolved.<sup>386</sup> Nonetheless, we are prepared to draw some conclusions from our historical account that may have contemporary relevance.

First, the history of Anglo-American habeas jurisprudence suggests that the principal focus of the writ of habeas has been more on the jailer and less on the prisoner. This focus, in our view, enhances the power of the writ and also the power of the judge issuing it. In English law, this focus derived from the court of King’s Bench’s concern that those who acted in the king’s name should not abuse royal authority.

Second, the history helps explain why the writ could show up in some surprising places, from the Cinque Ports to India. It suggests that the critical concern of habeas jurisprudence as it evolved in early modern England and expanded into eighteenth-century imperial contexts was to emphasize the franchisal authority of the sovereign’s officials, not the territory in which a prisoner was being held or the nationality status of the prisoner. It helps to explain how the writ could be used by those whose allegiance to the king

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<sup>385</sup> Grant Gilmore, *The Ages of American Law* 99 (1977).

<sup>386</sup> Of those issues, the one central to the *Boumediene* case might be distilled as follows: Does the Suspension Clause, taken together with the background assumptions of its framers, the language of § 14 of the Judiciary Act of 1789, and the relevant Supreme Court precedent, require that alien detainees housed in a naval base leased by the United States government from Cuba be afforded the “privilege of the writ of habeas corpus” to challenge their detention? Or does the Suspension Clause permit Congress, acting on recommendations from the Executive Branch, to withdraw jurisdiction to entertain habeas petitions by those detainees from any courts and judges of the United States, including justices of the United States Supreme Court? Compare the plurality opinion in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2772–86 (2006) (discussing military tribunals and their constitutional limits) with *Johnson v. Eisentrager*, 339 U.S. 763, 777, 781 (1950) (concluding that “no right to the writ of *habeas corpus* appears” for “enemy aliens, resident, captured and imprisoned abroad”). See also the discussions in Fallon et al., *Supp.*, *supra* note 6, at 45–54, and Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 *Loy. L. Rev.* 1 (2004).

was “local” or “temporary” as well as by those whose allegiance was “natural.”

Third, the writ of habeas corpus, as opposed to the privilege of the writ, was initially fashioned by judges. Judges first accomplished this in the early seventeenth century when they explicitly took the king’s prerogative into their own hands to empower them in the use of this writ. Statutes in both England and America, we have seen, also shaped the writ, though in ways more complex than those emphasized by previous historical accounts that have taken the writ’s statutory character for granted. In England, the common law writ remained more vigorous than the statutory one, right up to the time of the founding of the United States. In the United States, although *Bollman* insisted that a congressional statute was required to create habeas jurisdiction in the federal courts, it recognized that the Suspension Clause of the Constitution presupposed a judicially fashioned common law writ of habeas corpus.

### *B. American Constitutional Implications*

What are the implications of our historical account for the contemporary war on terror cases? As noted in the Introduction to this Article, the D.C. Circuit’s decision in *Boumediene* has been argued in the Supreme Court this Term. It is plain from the majority and dissenting opinions in the D.C. Circuit panel’s decision in *Boumediene* that the meaning and scope of the Suspension Clause are up for grabs.<sup>387</sup> It is also plain that two lines of Supreme Court cases

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<sup>387</sup> Both the majority and dissenting opinions in the D.C. Circuit’s *Boumediene* decision agreed that Congress had intended to withdraw jurisdiction from the federal courts to consider the habeas petitions of aliens captured abroad and detained in the Guantanamo Naval Base. Both thus reached the constitutional question of whether the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10 and 28 U.S.C.), could be reconciled with the Suspension Clause. *Boumediene v. Bush*, 476 F.3d 981, 988 (D.C. Cir. 2007); *id.* at 999–1000 (Rogers, C.J., dissenting).

The majority and dissenting opinions from the *Boumediene* panel were notably pointed in their criticism of each other’s approach to the Suspension Clause. The majority stated that a distinction posited in the dissent, which treated the Suspension Clause as “a limitation on congressional power rather than a constitutional right,” was “no distinction at all”; that one of the dissent’s citations in support of that proposition was “particularly baffling”; and that the dissent’s characterization of the Suspension Clause, and “the reasoning behind it,” was a “strange idea,” the source of which was “a mystery.” *Id.* at 993–94. The dissenting opinion, for its part, began by suggesting

addressing the constitutional status of the writ of habeas corpus and the potential availability of the writ to detainees in Guantanamo Bay are in apparent conflict. One line is embodied by the Court's 1950 decision in *Johnson v. Eisentrager*; the other by *St. Cyr* and language in *Rasul v. Bush*. Whether or not the Court attempts to resolve the constitutional questions in *Boumediene*, it would seem that a sorting out of those potentially irreconcilable lines will be in order.

The historical claims on which those opposing understandings of the Suspension Clause and the Anglo-American history of habeas corpus jurisprudence rest are obviously important to the *Boumediene* decision. Let us briefly review those claims in light of the history of Anglo-American habeas jurisprudence we have set forth.

In *Eisentrager*, two issues informed by our historical account took center stage: the territorial location of prisoners, and their status as alleged "enemy aliens." The case considered habeas petitions by German nationals in the service of the German government in China, who, prior to the unconditional surrender of the Nazi government on May 8, 1945, had been detained by American forces and charged with passing intelligence about American military operations in China to the Japanese government. They were convicted by a military tribunal of violating the laws of war and were repatriated to Germany, where they were incarcerated in Landsberg Prison, an American Army facility. They sought access to civilian courts through a writ of habeas corpus. In an opinion for a six-judge majority of the Court, Justice Robert Jackson made some quite broad pronouncements about the unavailability of habeas relief to "alien enemies" of the United States. In one passage, Jackson maintained that:

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that the majority "fundamentally misconstrues the nature of suspension" by "misreading the historical record and ignoring the Supreme Court's well-considered and binding dictum" in *Rasul*, which had suggested that "the writ at common law would have extended to the [Guantanamo Bay] detainees." *Id.* at 994-95. Along the way the dissent added that the majority had declared a jurisprudential proposition without making any "affirmative argument" in support of it; that it had quoted language from a supposed Supreme Court precedent "without context"; and that it had, "oddly," ignored the "question of whether the Suspension Clause protects the writ of habeas corpus as it had developed since 1789." *Id.* at 997 & n.4, 1000 n.5.

We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.<sup>388</sup>

The question raised by that passage is whether Jackson was suggesting that the “alien enemy” status of the detainee, his location outside the territorial jurisdiction of the United States, or the combination of those factors precluded habeas relief. The *Eisentrager* opinion did not fully clarify that question.

If “alien enemy” status was critical, Jackson’s own historical citations in *Eisentrager* demonstrated that after an initial period in which commentators believed that resident enemy aliens had no access to American courts, both courts and commentators have allowed such aliens access, except where, in times of war, granting such access would hamper the United States’s war efforts.<sup>389</sup> For instance, in *Ex parte Quirin* and *In re Yamashita*, two cases decided shortly before *Eisentrager*, the Court had allowed German saboteurs and a Japanese general, both imprisoned in United States territory and charged with violating the laws of war, to challenge the authority of military commissions to try them through habeas petitions.<sup>390</sup> Jackson himself noted in *Eisentrager* that the “privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection,” and that “[a]nother reason for a limited opening of our courts to resident aliens is that among them are many of friendly personal disposition to whom the status of enemy is only one imputed by law.”<sup>391</sup> He went on to say, however, that the “prisoners [before the Court] were actual enemies, active in the hostile service of an enemy power,” and that “we deny any use of our courts [to resident alien enemies] that would hamper our war effort or aid the enemy.”<sup>392</sup>

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<sup>388</sup> *Eisentrager*, 339 U.S. at 768.

<sup>389</sup> *Id.* at 776.

<sup>390</sup> *In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>391</sup> 339 U.S. at 777–78.

<sup>392</sup> *Id.* at 778.

Such comments suggested that if a resident alien's "enemy" status were "actual" rather than simply ascribed to any citizen of a country at war with the United States, there would be no relief. "We hold," Jackson wrote, "that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States."<sup>393</sup> But that proposition seemed inconsistent with the *Quirin* and *Yamashita* cases.

Another passage in *Eisentrager* implied that it was not "enemy" status but extraterritorial confinement that was critical. After conceding that both friendly and hostile resident aliens had access to U.S. courts, Jackson stated that

[n]o such basis can be invoked here, [because] these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.<sup>394</sup>

That language raised the question whether the *Eisentrager* decision would apply equally to an American citizen held in U.S. military facilities abroad, which the government's brief in *Eisentrager* had conceded.<sup>395</sup> Jackson maintained that the prospective opportunities of such citizens to bring habeas relief would be "untouched by [the] decision."<sup>396</sup> He then cited a number of illustrations of the special protections accorded citizens residing abroad; however, none dealt directly with the availability of habeas corpus for citizens held in custody in military tribunals outside the territory of the United States.<sup>397</sup>

The ambiguity in Jackson's formulation led Justice Black, in dissent, to conclude that "the Court . . . must be relying not on the status of these petitioners as alien enemy belligerents but rather on the fact that they were captured, tried and imprisoned outside our territory."<sup>398</sup> "Does a prisoner's right to test legality of a sentence,"

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<sup>393</sup> Id. at 785.

<sup>394</sup> Id. at 778.

<sup>395</sup> See id. at 795 (Black, J., dissenting).

<sup>396</sup> Id. at 769.

<sup>397</sup> See id. at 769–70.

<sup>398</sup> Id. at 795 (Black, J., dissenting).

Black then asked, “depend on where the Government chooses to imprison him?”<sup>399</sup> Black thought that the *Eisentrager* majority was “fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive’s illegal incarcerations.”<sup>400</sup> If Jackson’s opinion meant, Black added, “that these petitioners are deprived of the privilege of habeas corpus solely because they were convicted and imprisoned overseas, the Court is adopting a broad and dangerous principle.”<sup>401</sup>

From the perspective of our historical account, there would have been a considerable difference, in British habeas jurisprudence, whether a candidate for habeas relief fell into one or the other of the categories Jackson emphasized in his *Eisentrager* opinion. If the candidate was in custody abroad, we have seen that habeas cases in “his majesty’s American plantations” and India attached no significance to that fact. Following the logic raised by our analysis of Hale and of usage generally, the issue for the judges was not *where* the prisoner was held, but *by whom*: whether he was held by the king’s franchise holder, someone empowered to act in the name of the king.

The question was more complicated if the prisoner was an alleged enemy alien. Subjects of a sovereign at war with Britain’s monarch were considered “alien enemies.” But when they were residents of, or came into, the king’s dominions, they were nonetheless treated as having an allegiance to the king by virtue of their location. This explains how they might be tried for treason if they conspired against the monarch, as in the case of Queen Elizabeth’s Portuguese doctor, Roger Lopez, executed for plotting to poison her in 1594.<sup>402</sup> Alien prisoners accused of intending violence required an additional inquiry. Drawing from Hale’s formulation of subjecthood as a condition arising from protection, that inquiry

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<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> TNA, KB29/231, m. 83v., is the enrolled writ by which Lopez, and two other aliens, were turned over to their executioner in 1594. Hale discussed this case immediately after introducing the phrase “open hostility.” Lopez served as an example of an alien who had violated the protection of the queen, which amounted to treason. Hale’s *Prerogatives*, *supra* note 45, at 56.

concerned whether an alien enemy was in the kingdom in “open hostility.”<sup>403</sup> Those found to be in hostility were treated as having violated their allegiance to the king. The king’s protection could not be expected to flow toward them in the form of release after a hearing on habeas corpus. Blackstone summarized this treatment as follows: “alien enemies have no rights, no privileges, *unless by the king’s special favour*, during the time of war.”<sup>404</sup> Crucially, establishing whether one alleged to be an enemy alien in hostility was in fact such a person remained the job of King’s Bench, as the “prisoner at war” cases of the 1690s demonstrate.<sup>405</sup>

*Eisentrager* figured prominently in the *Rasul* majority, concurring, and dissenting opinions, which alternatively distinguished<sup>406</sup> and relied<sup>407</sup> upon it, and in the D.C. Circuit opinions in *Boumediene*.<sup>408</sup> Justice Stevens’s opinion for the Court in *Rasul* concluded that *Eisentrager* did not foreclose habeas relief for Guantanamo Bay detainees. The historical underpinnings of Stevens’s analysis were slight, as Justice Scalia pointed out in his dissent. Although the *Rasul* case, and its treatment of *Eisentrager*, will surely be relevant in the Court’s forthcoming disposition of *Boumediene*, only Justice Scalia’s opinion attempted a sustained exploration of the Anglo-American history of habeas corpus.<sup>409</sup>

The D.C. Circuit opinions in *Boumediene*, by contrast, touched directly on topics we have addressed in detail in this Article. Both

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<sup>403</sup> Hale’s Prerogatives, *supra* note 45, at 56.

<sup>404</sup> William Blackstone, 1 Commentaries \*361 (emphasis added).

<sup>405</sup> See *supra* notes 73–76 and accompanying text.

<sup>406</sup> *Rasul*, 542 U.S. at 475–79 (majority opinion); *id.* at 485–88 (Kennedy, J., concurring).

<sup>407</sup> *Id.* at 488–98 (Scalia, J., dissenting).

<sup>408</sup> *Boumediene*, 476 F.3d at 990–92; *id.* at 1004, 1010–11 (Rogers, J., dissenting).

<sup>409</sup> Justice Stevens cited several English and a few eighteenth-century common law habeas cases, and briefly responded to Justice Scalia’s more extensive analysis. Among Stevens’s English cases were some reported Cinque Ports cases. He also cited a 1960 Queen’s Bench opinion for the proposition that the reach of the writ depended on “the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.” *Rasul*, 542 U.S. at 481–82 (citing *Ex parte Mwenya*, (1960) 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.)). Scalia’s historical exegesis was far more extensive and arguably informed, pivoting on what he took to be an established distinction between the access of subjects of the British Crown and aliens to the courts through the habeas writ. *Id.* at 502–05. Suffice to say, at this juncture, our analysis presupposes that the distinction posited by Scalia is less of a bright-line one than his *Rasul* opinion might suggest.

opinions assumed that the *St. Cyr* formulation was controlling: that the Suspension Clause protects the habeas writ “as it existed in 1789.”<sup>410</sup> Both then sought to establish what the state of the writ was at the time of the framing.

The majority’s historical argument, although mainly interested in criticizing that of the dissent,<sup>411</sup> eventually rested on the proposition that the writ of habeas corpus did not run where the person in custody was “an alien outside the territory of the sovereign.”<sup>412</sup> That statement highlights two legal categories: alienage and place. “The detainees cite no case and no historical treatise,” the majority announced, “showing that the English common law of habeas corpus extended to aliens beyond the Crown’s dominions.” “The short of the matter,” the majority concluded, “is that given the history of the writ in England prior to the founding, habeas corpus would not have been available in 1789 to aliens without presence or property within the United States.”<sup>413</sup>

We need not rehearse in any detail the history we have set forth to conclude that the majority’s conclusion is inaccurate. Habeas corpus *would* have been available to “aliens without presence or property within the United States,” and it *was* available to some of those persons. Moreover, the Anglo-American common law jurisprudence of habeas corpus presupposed that so long as the writ was not suspended, it ran to *residents* of territory controlled by the king, or to residents of *former* territory controlled by the king, such as the “plantations” that became, after 1782, states of the United States of America.

But what about “enemy” alien residents? And what about enemy alien residents not within the territorial jurisdiction of the king’s courts, or of the courts of the United States? Did the writ run to them? The history that we have set forth cannot be fairly read as demonstrating that the writ ran to every person in the world who happened to be *outside* the jurisdiction of British or

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<sup>410</sup> The majority opinion in *Boumediene* left “[a]t the absolute minimum” out of its formulation. See *Boumediene*, 476 F.3d at 988. The dissent included it. See *id.* at 1000.

<sup>411</sup> *Id.* at 993–94.

<sup>412</sup> *Id.* at 989. The dissent did not focus on that issue. It argued that the Suspension Clause prevented Congress from withdrawing the habeas jurisdiction of the federal courts which was within the scope of the “privilege of the writ” in 1789. See *id.* at 1007 (Rogers, J., dissenting).

<sup>413</sup> *Id.* at 989–90 (majority opinion).

American courts. But we do not believe that any sensible person would make that claim. Rather, the writ of habeas corpus presupposes a connection between the jailer and the sovereign with which that jailer is associated.

Thus our history demonstrates only that when the framers enacted the Suspension Clause in 1789, Anglo-American habeas jurisprudence took for granted that “except in cases of Invasion or Rebellion,” or when the public safety demanded it, a resident prisoner detained by an official of the British or American sovereign was entitled to the privilege of the writ of habeas corpus unless that prisoner had already been determined by judicial process to be an “alien enemy” who had entered the territory of the sovereign in “open hostility” to the sovereign. We have attempted to do what the court in *Boumediene* was “unwilling” to undertake: “piec[e] together the considerable . . . evidence . . . [t]o draw [a] conclusion as to whether the writ at common law would have extended to aliens under the control (if not within the sovereign territory) of the Crown.”<sup>414</sup> In both India and America the writ ran where the “sovereign territory” of the Crown was either disputed or did not formally exist. So if *Rasul*’s conclusion—that “[a]pplication of the habeas statute to persons detained [at the Guantanamo Naval Base in Cuba] is consistent with the historical reach of the writ of habeas corpus”<sup>415</sup>—is still controlling, the Guantanamo base is “under the control” of the United States, and the privilege of the writ of habeas corpus extends to any detainee in custody in Guantanamo who has not been determined to have entered United States territory in “open hostility.”<sup>416</sup> After all, jailers there act as franchisees, at the behest of their sovereign.

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<sup>414</sup> Id. at 1001 (Rogers, J., dissenting).

<sup>415</sup> 542 U.S. at 481.

<sup>416</sup> The U.S. government has consistently taken the position, since September 11, 2001, that “enemy combatants” apprehended in connection with the “war on terror” and detained in Guantanamo Bay would fall into this category. Fitting individuals into the historical category of “enemy aliens” entering the sovereign’s territory in “open hostility” requires some modifications of the category. At the time of the Suspension Clause’s framing, the status of “alien enemy” was determined by a state of war between the sovereign and a foreign state of which the alien was a citizen. Moreover, as we have seen, coming into the territory of a sovereign in “open hostility” presumed that the entry was voluntary. The “war on terror” is not one in which the United States has formally declared war on any foreign state, and consequently is not a war with any apparent time frame, making the term “open hostility” difficult to confine.

On the issue of the appropriateness of habeas relief for resident “alien enemies,” we want to add one final piece of historical evidence. In 2005, Gerald Neuman, then on the faculty of Columbia Law School, and Charles Hobson, the editor of the Papers of John Marshall, published an unreported 1813 decision of John Marshall, sitting on circuit.<sup>417</sup> The decision had been alluded to by Justice Hugh H. Brackenridge of the Pennsylvania Supreme Court in *Lockington’s Case*, in which Charles Lockington, a British resident of Philadelphia, had been imprisoned during the War of 1812 for failing to comply with a federal marshal’s order to relocate to Reading, Pennsylvania.<sup>418</sup> He sought relief from the Pennsylvania Supreme Court through a habeas writ.<sup>419</sup> Three justices of the Supreme Court heard the case, with two—one of whom was Chief Justice William Tilghman—concluding that Lockington and other enemy aliens residing in the United States were entitled to question the sufficiency of their detentions through habeas petitions.<sup>420</sup> After a hearing, those two justices concluded that Lockington had been lawfully detained.

Brackenridge took the position that the writ of habeas corpus could not issue to test the legality of the Secretary of State’s orders affecting enemy aliens during wartime. In his opinion he made an allusion to a report of a decision in a “gazette” in which Marshall had taken a contrary position. Although a 1985 book had men-

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Moreover, “enemy combatants” detained in Guantanamo Bay have not entered U.S. territory voluntarily, and their designation as “enemies” and “combatants” has been made by the officials detaining them.

<sup>417</sup> Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 *Green Bag 2d*. 39 (2005).

<sup>418</sup> *Lockington’s Case* (Pa. 1814), reprinted in 5 *Am. L.J.* 301, 325 (1814) (Brackenridge, J.). In 1851, Frederick C. Brightly, then the Reporter for the Pennsylvania courts, reproduced the unpublished report. Frederick C. Brightly, *Reports of Cases Decided by the Judges of the Supreme Court of Pennsylvania in the Court of Nisi Prius at Philadelphia, and Also in the Supreme Court* 269 (Philadelphia, James Kay, Jr. & Brother 1851). For more on the history of *Lockington’s Case*, see Neuman & Hobson, *supra* note 417, at 40–41 & n.10.

<sup>419</sup> *Lockington’s Case*, 5 *Am. L.J.* at 301. Shortly after Congress declared war on Great Britain in 1812, James Monroe, then Secretary of State, invoked section 1 of the Alien Enemies Act of 1798, ch. 66, 1 Stat. 577 (codified at 50 U.S.C. § 21 (2000)), to issue a notice requiring all British subjects within the United States to report to federal marshals. For more detail, see Neuman & Hobson, *supra* note 417, at 39–40.

<sup>420</sup> *Lockington’s Case*, 5 *Am. L.J.* at 313–15 (referring to *Lockington’s Case*, 5 *Am. L.J.* 92, 94, 97 (Pa. 1813)).

tioned Marshall's decision, neither Neuman, who became aware of it after reading Brackenridge's opinion in *Lockington's Case*, nor Hobson, who learned of the decision from Neuman in 2001 but was unaware of the reference in the 1985 book, had been able to locate the report of that decision. Once Hobson became aware of the 1985 reference, he was able to track the report down in archival sources.

Marshall's decision had been made in *United States v. Thomas Williams*, decided by the United States Circuit Court for the District of Virginia, Marshall's circuit, on December 4, 1813. Neuman and Hobson eventually found several newspaper reports of the decision.<sup>421</sup> One Thomas Williams was—according to an unpublished account by William Rose, the keeper of the Richmond jail—placed in custody on November 20, 1813, pursuant to the same order Monroe had issued under the Alien Enemies Act, which triggered *Lockington's Case*. On November 25, Marshall, sitting by himself, awarded Williams a habeas writ, commanding Rose to bring Williams into court the next day. Marshall, still sitting alone, postponed a decision on the habeas petition. Eventually, on December 4, the full circuit, which consisted of Marshall and district judge St. George Tucker, ordered Williams to be released.

Very little is known about who Williams was. Neuman and Hobson speculated that he might have been “a resident of Richmond, 30 years of age,” who had been in the United States for four years working as a stone-cutter. They based their speculation on data from a book on British aliens who were residents of America during the War of 1812.<sup>422</sup>

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<sup>421</sup> The original report of the decision appeared in the *Virginia Patriot* (Richmond) on December 14, 1813. That report was reprinted in the *American Daily Advertiser* (Phila.) on December 20, 1813, and the *Charleston Courier* on December 21, 1813. Neuman & Hobson, *supra* note 417, at 41. See A Short Report of a Late Decision on the Question Concerning Alien Enemies, *Virginia Patriot* (Richmond), Dec. 14, 1813; A Short Report of a Late Decision on the Question Concerning Alien Enemies, *American Daily Advertiser* (Phila.), Dec. 20, 1813; A Short Report of a Late Decision on the Question Concerning Alien Enemies, *Charleston Courier*, Dec. 21, 1813. Neuman and Hobson speculate that the “gazette” where Justice Brackenridge had read the report of Marshall's decision was the *American Daily Advertiser*. Neuman & Hobson, *supra* note 417, at 41.

<sup>422</sup> See Neuman & Hobson, *supra* note 417, at 42 n.17. The book was Kenneth Scott, *British Aliens in the United States During the War of 1812*, at 332 (1979).

Neuman and Hobson found a microfilm copy of the circuit court's order, which had originally been entered in the U.S. Circuit Court Order Book for the Virginia circuit. The microfilm was too faint to read, so Hobson read the original Order Book at the Library of Virginia in Richmond.<sup>423</sup> The order said, in pertinent part:

[T]he Court is of opinion; that the regulations made by the President of the United States [through Secretary of State Monroe] respecting alien enemies, do not authorize the confinement of the petitioner in this case; Therefore, It is ordered that he be discharged from the custody of the Jailor so far as he is detained therein by virtue of the warrant of commitment from the Marshal of this District.<sup>424</sup>

The *Daily Advertiser's* report of Chief Justice Marshall's and Judge Tucker's decision added three pieces of information about the *Williams* case. One was that Williams's lawyer was "Mr. Hiort,"<sup>425</sup> very likely Henry Hiort, a native of England who had argued on behalf of the Jefferson administration in *Bollman*.<sup>426</sup> The second was that Hiort urged the court "constitutionally to interpret the Laws of the Land, and not to give too much power, into the hands of any ministerial officer where there was a judicial power."<sup>427</sup> The final piece of information was that "[o]n [December 4, 1813] the Chief Justice stated that 'no place having been assigned by the Marshal, that Thomas Williams should be removed to, he ought to be discharged,' and the Marshal by his warrant discharged him accordingly."<sup>428</sup>

If Williams was a stone cutter, who had been a resident of Richmond for four years when he was swept into the fairly large cate-

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<sup>423</sup> The order appears as U.S. Circuit Court, Va., Order Book No. 9 (1811–1816), at 240, *United States v. Thomas Williams*. See Neuman & Hobson, *supra* note 417, at 42 n.17.

<sup>424</sup> U.S. Circuit Court Order Book, *supra* note 423, at 264, *quoted in* Neuman & Hobson, *supra* note 417, at 42.

<sup>425</sup> *American Daily Advertiser*, *supra* note 421, at 2, *quoted in* Neuman & Hobson, *supra* note 417, at 41–42.

<sup>426</sup> Neuman & Hobson, *supra* note 417, at 42 n.17. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 114 (1807).

<sup>427</sup> Neuman & Hobson, *supra* note 417, at 41 (quoting *American Daily Advertiser*, *supra* note 421, at 2).

<sup>428</sup> Neuman & Hobson, *supra* note 417, at 41–42 (quoting *American Daily Advertiser*, *supra* note 421, at 2).

gory of British citizens living in America who found themselves “alien enemies” once the United States declared war against Great Britain in 1812, one can see how Marshall might have swiftly concluded that he had not entered American territory in a posture of hostility toward the interests of the United States government. The fact that the Marshal of the Richmond district had not assigned any location for Williams to be removed to might have also suggested that he was not a person perceived as likely to undermine the war effort. Thus the Williams case provides evidence that “alien enemies,” by virtue of that formal designation, were not automatically precluded from eligibility for habeas writs after *Bollman*.

One can, in fact, draw four broader conclusions from the *Lockington/Williams* sequence, conclusions not unlike those we might draw from the “prisoner-at-war” writs of the 1690s.<sup>429</sup> First, resident enemy aliens in America, incarcerated because they were citizens of a nation at war with the United States, sought habeas writs to challenge their confinement during the War of 1812. Second, three of the four judges who entertained habeas petitions in *Lockington* and *Williams*, including Chief Justice Marshall, concluded that such persons were entitled to test the sufficiency of their detentions through habeas writs. Third, counsel for one of those aliens argued that they were entitled to habeas relief because the Constitution and the “Laws of the Land” mandated that common law judicial power should be available to test the sufficiency of executive detentions. Fourth, Chief Justice Marshall, after having heard that argument, released one of the habeas petitioners, suggesting that he may have retained the distinction between “hostile” and other enemy aliens that was part of the legacy of Anglo-American habeas jurisprudence at the founding of the Constitution. In short, the *Lockington/Williams* sequence is supportive of the history we have set forth in this Article.

### *C. Concluding Thoughts*

It remains to summarize the contributions we hope to have made in this survey of the Anglo-American jurisprudence of habeas corpus. One set of contributions is historiographical in its orientation,

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<sup>429</sup> See *supra* notes 73–76 and accompanying text.

and the other set is directed toward the increased significance of the Suspension Clause in current constitutional law.

Previous histories of the course of habeas jurisprudence in England, the British Empire, and America after independence have been insufficient in their coverage. They have not looked at what judges actually *did* in habeas corpus cases in England and in English imperial possessions. They have relied on printed law reports and other sources readily at hand, as opposed to working with archival materials that, it turns out, significantly complicate and deepen our understanding of how English jurists thought about and used the “Great Writ” in the generations before the framing of the Constitution. Analysis of suspension statutes in colonial British America, and in the American states after independence, has been rudimentary, as has the study of judicial decisions in which a variety of residents of eighteenth-century America made use of the writ to challenge their detentions. Scholars have only recently begun to pay attention to the continued use of habeas as a common law remedy in American courts after 1789, and after the *Bollman* decision. A thin history of habeas jurisprudence invites the drawing of inaccurate inferences from that history, and in our view a number of such inferences have been drawn. It is time they were corrected.

Our historical account has implications for the current constitutional jurisprudence of the Suspension Clause, and for the *Boumediene* case argued this Term, but it stops short of pointing toward a definitive resolution of *Boumediene*, or toward the reach of the Clause. We believe that if the proper inquiry in Suspension Clause cases, notwithstanding *Eisentrager*, remains that formulated in *St. Cyr* and *Rasul*, the history of Anglo-American habeas jurisprudence suggests that “at a minimum” the writ of habeas, in 1789, was taken as extending to natural subjects or citizens and resident aliens in British or American territory. This is not only because some American courts granted habeas writs to resident aliens in the early nineteenth century, but because, more fundamentally, the central concern of Anglo-American habeas cases had been with the status of the incarcerating official, not that of the prisoner. As a writ originating in the prerogative, habeas corpus was concerned with jailers more than with prisoners. Therein lay its utility for the widest array of prisoners.

It would seem that the jurisprudence of habeas corpus in England, its empire, and in America is antithetical to the proposition that access to the courts to test the validity of confinement can be summarily determined by the authorities confining a prisoner. At a minimum, the history we have set forth suggests that there should be some opportunity for a judicial inquiry into the circumstances by which a Guantanamo Bay detainee was designated to be eligible for indefinite confinement. As noted, even taking that step raises conceptual and practical issues about the scope of habeas review, and there are reasons why the Court might not be inclined to take that step in *Boumediene*. It might be reluctant to broaden the jurisdiction of the federal courts, traditionally understood as courts of limited jurisdiction, to entertain habeas writs from persons incarcerated in military facilities outside the borders of the United States. It might conclude that to permit even a limited inquiry into the conditions of detention would raise issues of confidentiality and become administratively burdensome to the courts. It might want to stop short of using the Suspension Clause to invalidate a Congressional statute on constitutional grounds. It might, confronted with awkward historical evidence about the meaning of the Suspension Clause in 1789, revise its originalist standard of constitutional interpretation in habeas cases.

But whatever the Court's disposition in *Boumediene*, the historical inquiry we have undertaken remains relevant, at least as long as the Court continues to believe that the Suspension Clause protects the writ of habeas corpus "as it existed in 1789." Our primary purpose has been to sketch an understanding of what existed in 1789 by exploring habeas jurisprudence in the centuries leading up to that time. We believe that efforts summarily to withdraw the federal courts' capacity to entertain habeas petitions from *any* detainee at Guantanamo Bay cannot be seen as consistent with that understanding. But this Article has not been designed as an exercise in advocacy. It has been an effort to set forth the history of Anglo-American habeas jurisprudence through the founding generation, and to see where that history might take us in the future.