Introduction

Nearly two decades ago, the war on terror generated renewed scholarly and judicial focus on the writ of habeas corpus. The United States’ conduct during the war on terror, as well as contemporaneous federal restrictive immigration laws, raised questions such as whether the Constitution requires habeas proceedings absent congressional suspension, where and to whom the constitutional guarantee of habeas applies, and what constitutionally mandated habeas proceedings might entail. In *Boumediene v. Bush*, the Supreme Court held for the first time that the Suspension Clause of the U.S. Constitution guarantees some quantum of habeas corpus absent suspension of the writ. Just last term, in *Department of Homeland Security v. Thraissigiam*, the Court concluded that the constitutional guarantee of habeas corpus does not apply to noncitizen arrivals to the United States who recently entered the country without legal authorization.

To get traction on these and other questions, scholars have turned to historical analyses of habeas corpus, examining the pre-ratification history of the writ, as well as Marshall-era decisions involving federal post-conviction review, the Civil War era restrictions on the writ, the confinement of American citizens during World War II, and, more recently 19th and 20th century review of immigration orders.1 These studies focus on how habeas functioned in individual cases during in these time periods.

This mode of analysis has generated a picture of the writ as a mechanism for enforcing individual liberty. Cases have hailed the writ as “the best and only sufficient defence of personal freedom,”2 and insisted that “its history is inextricably intertwined with the growth of fundamental rights of personal liberty.”3 Justices across the ideological spectrum have made similar claims. Justice Powell wrote that “[t]here has been a halo about the ‘Great Writ’ that no one would wish to dim.”4 In his celebrated concurrence in *Hamdi*, Justice Scalia invoked Alexander Hamilton’s writings to assert that the writ was “a means to protect against ‘the practice of arbitrary imprisonments in all ages, the favourite and most formidable instruments of tyranny.’”5 Legislators view the writ in a similar way. As Chairman of the Judiciary Committee, Senator Patrick Leahy declared that the “Great Writ is the legal process that guarantees an opportunity to go to court and challenge the

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1 See infra TAN TK.
2 Ex Parte Yerger, 75 U.S. 85, 95 (1868).
abuse of power by the Government.” Responding to congressional efforts to restrict Guantanamo detainees’ access to the writ, then Senator Russ Feingold implored his colleagues that in order “[t]o be true to our Nation’s proud traditions and principles, we must restore the writ of habeas corpus.”

Senator Feingold’s plea to return to the lost, great history of habeas appears in scholarship as well. Brandon Garrett invoked the “much-celebrated and storied history” of the writ to argue that the U.S. Court of Appeals for the D.C. Circuit adopted a mistakenly narrow view of the constitutional limits on habeas proceedings in Guantanamo cases, where the court has never ordered the release of a detainee held at Guantanamo Bay. Garrett maintained that the full history of the writ made clear that the writ was more protective of individual liberty and freedom than appellate judges had suggested. Scholarship on modern post-conviction review also borrows from the idea that habeas historically functioned as a meaningful guarantor of individual liberty to critique the scope of post-conviction review today. One representative article argued that “the authority of the federal courts to entertain constitutional challenges to state criminal convictions is the embodiment of all that was right about the Warren Court. . . . The lower federal courts, receiving habeas corpus petitions from prison inmates, provide[d] the indispensable machinery for maintaining and invigorating individual rights on a daily basis.” Relying on this history, scholars have argued that modern-day restrictions on federal post-conviction review have prevented habeas from performing its core function of protecting individual liberty. In these and other sources, habeas is depicted as a guarantor of individual liberty. For that reason, we often hear about the remarkable tangle of procedural rules that have defanged habeas as a mechanism for protecting individual freedom.

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8 Brandon L. Garret, Habeas Corpus and Due Process, 98 Cornell L. Rev. 47, 57 (2012).

9 Id. at 60-75.


11 See, e.g., Eve Brenskke Primus, A Structural Vision of Habeas Corpus, 98 Calif. L. Rev. 1, 6 (2010) (“Part II attempts to recover a lost purpose of federal habeas review by explaining that the original Reconstruction-era extension of federal jurisdiction to review state convictions was aimed at a problem of systemic state resistance to constitutional rights.”); Lee Kovarsky, AEDPA’s Wrecks: Comity, Finality, and Federalism, 82 Tul. L. Rev. 443, 444-46 (2007).

While “telling and retelling the history of the writ”\textsuperscript{13} may be a common tack, this Article undertakes a different approach to studying habeas--a systemic lens that analyzes how habeas is embedded within other legal structures and societal norms. Rather than the individualist, case-oriented approach that other studies have taken, it examines how habeas proceedings intersected with legislative policies, engaged contemporaneous sociopolitical issues, executive branch decisionmaking, and managed the distribution of authority between states and the federal government and among the different branches of the federal government. It also conducts a holistic assessment of the cases in addition to focusing on their individual outcomes.

This systemic perspective offers a different picture of habeas than do analyses of individual habeas cases. In particular, it suggests that habeas can be a tool to implement governing coalitions’ policies, just as it can be a way to check them. Habeas can cement and protect contested assertions of government power just as it can invalidate them. And habeas can generate and refine detention schemes as much as it can constrain them. A holistic, systemic analysis of habeas suggests the writ is less liberty enhancing than analyses of individual cases do.

In addition to adopting a different analytical approach, this Article also broadens scholarly assessments of habeas by examining how habeas functioned in different areas that the study of habeas has largely neglected. It analyzes three areas of law in which habeas figured prominently during the 19\textsuperscript{th} century—the law of slavery and freedom, Native American affairs, and immigration. While immigration proceedings have recently figured into analyses of habeas, the other two areas have been mostly absent. These areas of law are sometimes overlooked within public law on the ground that they are aberrational or unique. Perhaps for this reason, scholars have not studied these three areas together in order to better understand the nature and function of remedies such as habeas corpus. But the three areas shed important light on what habeas actually does, and they constituted a significant portion of the reported federal habeas cases and a good number of state habeas cases as well.

It is partially because of the absence of these cases and this framework of analysis that habeas corpus can be thought of today as the Great Writ of Liberty when the reality is more complicated. Habeas is not a legal structure whose normative valence uniformly pushes in one direction. Extending the analysis of habeas to cover historically neglected areas of law, and analyzing these areas in a more systemic fashion brings into focus the duality of the writ. Habeas can be empowering just as it can be constraining; instead of limiting detention schemes, habeas occasionally played a significant role in expanding them. And instead of curbing government power, habeas constituted an important element of government power and provided the government with one means to carry out its policies. Habeas was a legal channel that people used to seize power, and it served as an engine for constructing racialized ideas about who gets to be free and the terms of individuals' freedom.

\textsuperscript{13} Garrett, supra note TK, at 81.
Excavating these forgotten usages of habeas corpus and analyzing them together serves several purposes. First, it provides a more complete picture of habeas and identifies gaps in the existing theories of habeas. In the 19th and 20th centuries, habeas was a mechanism to vindicate constitutional structure and government power as well as individual rights. Understanding this aspect of habeas confirms that habeas can exist even where individual rights guarantees might not apply. Habeas was routinely used in areas where the individuals filing habeas petitions were understood to lack rights and the protections of citizenship. It also identifies flaws in existing analyses of habeas. The current legal frameworks assume that the existence of habeas is a benefit to individuals and a burden on the government when in reality, habeas can be an important element of and augmentation to government power.

Second, the case studies help surface an additional function that remedies can perform. Remedies can function as tools of the state that legitimize and extend government power just as they can constrain it. This is in part because of the plasticity and malleability of remedies such as habeas, which allowed the remedy to become part of the legal apparatus that furthered the American colonial project—legalizing violence against fugitive slaves and free Black persons, dispossessing Native lands and Natives’ governing authority, and facilitating sweeping control over immigrant communities. Sometimes habeas contributed to state building because habeas courts reject a challenge to government action and green lights certain kinds of state action. Sometimes habeas works as state building and liberty denying because a habeas claim wins and Congress overrides it. Other times habeas expanded government power by implementing federal schemes. In all of these ways, habeas proceedings laid the ground work for expansive theories of government power over those groups and functioned as a way to authorize detentions, rather than just determining whether detentions were authorized.

Habeas proceedings also facilitated the legal construction of race in the guise of theories about who gets to be free and on what terms. Habeas insulated exercises of government power, freeing government agents or private individuals to exercise power over certain groups, and signaling to the government who was not free by telling Congress and the executive branch who they could detain. Habeas proceedings provided the occasion for generating pro-government law to authorize detentions, occasionally offering broader, more far-reaching justifications for detentions than the executive branch itself argued for. And habeas supplied the mechanism to determine how detentions should be carried out—by whom and where.

Third, the case studies raise questions about recent suggestions that constitutional structure should be the primary, if not the exclusive, tool for addressing racial subordination. It is in part because the study of habeas has focused on these questions of institutional competence that the myth of habeas as a guarantor of individual liberty has persisted. By ignoring substantive questions such as whose interests an institution is actually serving, or what purpose power is being exercised for, the principles and frameworks that dominate habeas and remedies have minimized or obscured these questions. Understanding how dearly held principles like checks and balances or the separation of powers, as well celebrated bulwarks of individual liberty such as habeas, can further racial subordination is an important step toward appreciating the limits of existing frameworks for studying of habeas and remedies.
This article proceeds in three parts. Part I explains how scholarship about habeas has adopted an individual perspective that is limited to certain areas. Part II offers a thick analysis of habeas played in three areas of law in the 19th and early 20th century, focusing on the institutional dynamics of habeas proceedings. Part III uses the case studies to shed light on the nature and function of habeas, and to reveal how seeming institutional bulwarks of institutional liberty such as the separation of powers or checks and balances as well as federalism supplied important components of the legal architecture for American colonialism and racial subordination. Part IV concludes by speculating about how and why the myth of habeas as a bulwark of individual liberty has persisted notwithstanding this history and offers some modern-day codas to the case studies.

Despite surfacing these functions of habeas, and identifying how habeas became bound up with projects of racial subordination and colonialism, my goal is not to argue that habeas should be abolished or to use these case studies to suggest that the constitution supplies no guarantee of habeas. It is instead, to reorient and recalibrate the debates around habeas so they can more fully take into account some of the limitations of habeas and some of the pro-government functions that habeas can have.

I.

This Part provides an overview of existing scholarship about the scope and function of the writ of habeas corpus. Largely driven by the war on terror litigation, scholars and courts have focused on three sets of questions about habeas corpus. The first is whether, absent suspension, the Constitution requires the availability of habeas proceedings in some set of cases. The second set of questions address who and where the writ reaches, such as whether the writ extends to noncitizens, including persons who are engaged in active hostilities against the United States, and whether it reaches to areas outside of the

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14 Rex Collings argued in an influential article that the Constitution merely prohibits Congress from restricting access to the writ of habeas corpus so long as Congress has made the writ generally available by statute. See Rex A. Collings, Jr., Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?, 40 Calif. L. Rev. 335, 341-42 (1952), cited in INS v. St. Cyr. 533 U.S. at 337 (Scalia, J., dissenting). Another variation on the anti-suspension rule is that the Constitution prohibits Congress from limiting access to the writ in state courts, but does not require access to the writ in federal court. William F. Duker, A Constitutional History of Habeas Corpus 260-80 (1980); David L. Shapiro, Habeas Corpus, Suspension, and Detention: Another View, 82 Notre Dame L. Rev. 59, 64 n.17 (2006). Boumediene held that the Constitution requires some quantum of habeas. 553 U.S. 723, 798 (2008); see also Gerald L. Neuman, The Habeas Corpus Suspension Clause After Boumediene v. Bush, 110 Colum. L. Rev. 537. 538 (2010) (“Boumediene v. Bush …, [held] that Congress had violated the Suspension Clause by denying someone an adequate judicial remedy for unlawful detention.”); Lee Kovarsky, A Constitutional Theory of Habeas Power, 99 Va. L. Rev. 753, 756 (2013) (“[T]he Constitution entitles all federal prisoners to some quantum of habeas (or substitute) process before an Article III judge.”); Brandon L. Garrett, Habeas Corpus And Due Process, 98 Cornell L. Rev. 47, 57 (2012) (“A judge asking whether the Suspension Clause was violated asks a different question: whether the process preserves an adequate and effective role for federal judges to independently review authorization of each individual detainee.”).
United States’ territorial borders. The third set of questions involve what constitutionally required habeas proceedings actually entail.

Answering questions about the nature and scope of habeas requires some understanding about the purpose of the writ. That does not mean that analyses are purely functionalist and address only whether a certain application of habeas would further the goals of the writ. But both scholars and courts rely on assessments about the purpose of habeas to generate rules about when habeas is required and what habeas entails. Justice Scalia, who was hardly a separation of powers functionalist, announced in his Hamdi dissent that “habeas corpus [w]as the instrument by which due process could be insisted upon by a citizen illegally imprisoned.” Based on that assessment, Justice Scalia arrived at rules about the scope of the writ and the protections it entailed: Because habeas is a means to vindicate due process rights, habeas proceedings are not required where individuals lack due process rights. Boumediene also exemplified how habeas corpus tends to be informed by functional considerations. After determining that the purpose of habeas is to guard against erroneous detentions, the Court reasoned that the protections accordingly vary “depend[ing] upon the rigor of any earlier proceedings.”

In these and other examples, conclusions about the purpose of the writ drive answers to questions about the scope of the writ. Brandon Garrett has argued that habeas protections are strongest where due process protections are weakest because both habeas corpus and due process minimize the risk of erroneous detentions. Lee Kovarsky, by

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15 Paul Halliday and Lee Kovarsky have concluded that the writ runs anywhere a prisoner is held under color of a sovereign’s law. Kovarsky, Citizenship, supra note TK, at 869-70; Halliday, supra note TK, at 259-60 & 433 n.2; Halliday & White, supra note TK, at 713. There are, however, some rules that are particular to prisoners of war – persons who are actually prisoners of war may not be entitled to release under the writ, but anyone detained as a prisoner of war is entitled to some judicial inquiry into whether they have been correctly labeled a prisoner of war. See Halliday, supra note TK, at 169 (“[A] person properly categorized as a ‘prisoner [of] war’ could only be dismissed by exchange” but the writ was used “to investigate whether a person was correctly labeled a POW”). Amanda Tyler, by contrast, doubts that noncitizens who are detained under color of American law beyond its sovereign control have access to the writ. Amanda Tyler, Habeas Corpus During Wartime 66-71 108-11, 271; Tyler, Core Meaning, supra note TK, at 906.

16 542 U.S. at 555 (Scalia, J. dissenting); id. at 557. (“due process rights have historically been vindicated by the writ of habeas corpus.”) The due process rights were “to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property.” Id. at 556.

17 Id. at 573. See also id. at 575 (“The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ can be withheld, would be a sham if it could be evaded by congressional prescription of requirements other than the common-law requirement of committal for criminal prosecution that render the writ, though available, unavailing.”).

18 553 U.S. at 729.

19 553 U.S. at 781; id. at 785 (“This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is ‘closed and accusatorial.’”).

20 Garrett, supra note TK, at 47 (“habeas corpus begins where due process ends”; see also id. at 56-57, 124.
contrast, has argued that because the writ protects the judicial power to determine whether detentions are lawful, the constitutionally required amount of habeas corpus does not vary according to whether the due process clause applies or not. Here too, scholars' assessments about the function of the writ dictate rules about its scope.

In order to ascertain the purposes of the writ, scholars have focused on several discrete periods in English and American history. Paul Halliday examined every writ of habeas corpus issued by King's Bench in every fourth year between 1502 and 1789, and Amanda Tyler explored the history behind the English habeas statute, the English Habeas Corpus Act of 1679. Scholars who have analyzed subsequent historical practice tend to focus on two periods in American history—the Civil War, and specifically the United States' efforts to use military commissions to conduct trials, and World War II when President Roosevelt ordered the detention of Japanese-American citizens. These scholars have also parsed the reasoning in Chief Justice Marshall's decisions in Ex Parte Watkins and Ex Parte Bollman about the scope of federal post-conviction review for federal criminal convictions in the early 1800s. These focus points are unsurprising because they shed light on what kind of habeas proceedings the Constitution might require when the political branches attempt to limit it. But they cannot tell the full story. The periods in which habeas corpus is limited cannot tell us what habeas corpus does when it is in operation. Yet the constitutional and theoretical understanding of habeas is inextricably linked to a functional analysis of what habeas can do.

Three scholars have explored other usages of the writ in immigration, but with an eye toward answering constitutional questions about the nature and function of the writ in immigration proceedings in particular. David Cole analyzed mid 20th century “judicial review of immigration detentions” in order to assess the constitutionality of several provisions in the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act. Gerry Neuman analyzed earlier

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22 Id. See also Kovarsky, Habeas Power, supra note TK, at
23 Halliday, supra note TK, at 4-5, 16-17, 319-33.
24 Amanda L. Tyler, Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay.
26 Tyler, Habeas Corpus in Wartime, supra note TK, at 211-45; Kovarsky, Citizenship, supra note TK, at 898-901.
27 Neuman, supra note TK, at 982-85; Cole, supra note TK, at 2499; Kovarsky, supra note TK, at 768-70, 800-04.
28 Cole, supra note TK, at 2483. Specifically, Cole “examine[d] … four Supreme Court cases” to conclude that the constitutional requirement of habeas in immigration proceedings extended to violations of statutes and regulations, including eligibility for discretionary relief. Id. at 2500; id. at 2500-06 (citing four mid to late 20th century cases Heikkila v. Barber, 345 U.S. 229 (1953); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954), United States ex rel. Hintopoulous v. Shanghnessy,
immigration cases from the 18\textsuperscript{th} and 19\textsuperscript{th} centuries with a similar focus on “the detention and removal of aliens” and the constitutionality of the 1996 immigration Act.\footnote{Brandon Garrett, by contrast, incorporated some immigration law decisions from the 20\textsuperscript{th} century (and specifically immigration cases under the Illegal Immigrant Reform and Responsibility Act & REAL ID Act) to offer a more general theory of habeas.\footnote{29}}

In studying these usages of habeas, scholars have adopted a similar approach that focuses on the outcomes and reasoning of particular cases. Neuman surveyed individual cases involving desertions from foreign ships\footnote{Gerald L. Neuman, \textit{Habeas Corpus, Executive Detention, and the Removal of Aliens}, 98 Colum. L. Rev. 961, 962 (1998). \textit{See also} Cleveland, supra note TK, at 13 (“Gerald Neuman’s recent work on the scope of the Constitution in the immigration and territorial expansion contexts does not focus on inherent powers theories or consider the contribution of Indian law.”).} and extraditions\footnote{990-92} before analyzing habeas cases decided in the district and circuit courts between 1882 and 1917, as well as the Supreme Court’s cases in \textit{Nishimura Ekiu, Lem Moon Sing,} and \textit{Fong Yue Ting}.\footnote{33} David Cole expanded on Neuman’s analysis to focus on several additional immigration cases from the 20\textsuperscript{th} century.\footnote{34} Brandon Garrett’s general theory of habeas similarly drew insights from the reasoning and outcomes of the same individual cases.\footnote{35} Kovarsky’s theory of habeas power also drew from individual cases at English common law, as well as the canonical Marshall-era habeas cases.\footnote{36} Fallon and Meltzer’s pre-\textit{Boumediene} theory of habeas was

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\item 353 U.S. 72 (1957), and \textit{United States ex rel. Vajtauer v. Commissioner}, 273 U.S. 103 (1927). These decisions illustrated the constitutional requirements of the writ since Congress had foreclosed access to the writ during this period for immigration decisions except required by the Constitution. \textit{See} Cole, supra note TK, at 2500 (explaining Heikkila). \textit{But see} Department of Homeland Security v. Thuraissigiam (rejecting this view of the finality era cases).
\item 29 Gerald L. Neuman, \textit{Habeas Corpus, Executive Detention, and the Removal of Aliens}, 98 Colum. L. Rev. 961, 962 (1998). \textit{See also} Cleveland, supra note TK, at 13 (“Gerald Neuman’s recent work on the scope of the Constitution in the immigration and territorial expansion contexts does not focus on inherent powers theories or consider the contribution of Indian law.”).
\item 30 Garrett, supra note TK, at 72 n. 171 (citing 20\textsuperscript{th} century cases and \textit{United States v. Jung Ah Lung}, 124 U.S. 621, 626-32 (1888) for the proposition that the Chinese Exclusion Act of 1882 did not affect jurisdiction of federal courts to hear habeas petitions), 96 & nn. 348-60, 112-16.
\item 31 990-92
\item 32 994-1004.
\item 33 Neuman, supra note TK, at 1004-05 (focusing on “the habeas cases [that] were decided”); \textit{id.} at 1007 (analyzing three cases); \textit{id.} at 1008-16 (analyzing \textit{Nishimura Ekiu, Lem Moon Sing,} and \textit{Fong Yue Ting}). Neuman also relied on cases decided under the 1917 Immigration Act. \textit{id.} at 1016.
\item 34 Cole, supra note TK, at 2500-07 (analyzing Heikkila v. Barber and Ng Fung Ho v. White). Cole also included 20\textsuperscript{th} century cases such as \textit{United States ex rel. Accardi v. Shaughnessy}, \textit{United States ex rel Nitopoulos v. Shaughnessy}, and \textit{United States ex rel Vajtauer v. Commissioner} to illustrate the distinction between legal and factual challenges. \textit{id.} at 2500-02.
\item 35 Garrett, supra note TK, at 66 (“For example, in \textit{Ladecke v. Watkins}, the Court upheld discretionary deportation authority ... but noted that judicial review remained available to examine ‘the construction and validity of the statute’ and ‘whether the person restrained is in fact an alien enemy.’”); \textit{id.} at 96-99 (invoking immigration habeas cases decided in the courts of appeals in the 20\textsuperscript{th} century); \textit{id.} at 72 & n.171. 96 & n.348 (invoking those cases and \textit{United States ex rel Knauff v. Shaughnessy, Ladecke v. Watkins,} and \textit{United States v. Jung Ah Lung}).
\item 36 Kovarsky, supra note TK, at 766-71.
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based on the four war on terror habeas cases that the Supreme Court had decided to that date, as well as three others.\footnote{Fallon & Meltzer, supra note TK, at 2050-54 (relying on INS v. St. Cyr, Burns v. Wilson and United States ex rel. Toth v. Quarles).}

Some scholars have adopted more holistic assessments of habeas, but their analyses focus on the overarching body of rules that are produced from aggregating individual cases. Fallon and Meltzer extrapolated from the various cases that one core function of habeas was to keep the government within the bounds of the law.\footnote{Fallon & Meltzer, supra note TK, at 2032; id. at 2094-96, 2105-06, 2112 (describing habeas and due process as working in tandem). See also Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1778-79 (1991) (“Another principle, whose focus is more structural, demands a system of constitutional remedies adequate to keep government generally within the bounds of law.”).}

Kovarsky similarly explained that the overall operation of the habeas cases was to protect individual rights, observing that one important function of habeas proceedings was to “transmit, to the national defense bureaucracy, non-detention rules about military operations.”\footnote{Kovarsky, Citizenship, supra note TK, at 928-29.}

Because the cases all focus on whether individuals can be detained, habeas proceedings appear to be designed to keep the government within the bounds of the law and to ensure that individuals are not wrongfully detained. Isolating that purpose of the habeas proceedings, and pairing it with the outcomes of cases resulting in individuals’ freedom, has generated the idea that habeas is an important bulwark of individual liberty.\footnote{Neuman, supra note TK, at 1022 (“The fundamental purpose of a habeas corpus guarantee is to ensure that executive officials will not be left to determine the scope of their own authority to arrest and detain individuals.”); Cole, supra note TK, at 2503 (Habeas “require[s] that taking an individual into custody be subject to the rule of law” and “judicial review of the legality of all executive detentions.”); Garrett, supra note TK, at 124 (“Habeas process provides the authority for judges to examine the factual and legal authorization for detention.”).}

Scholars have tied these conclusions about the function of habeas to more general theories about constitutional structure, particularly judicial power, the separation of powers, and checks and balances. Garrett argued that habeas courts’ power to examine whether a detention is authorized by law was one way that the separation of powers and checks and balances vindicate individual rights, such as the guarantee of due process.\footnote{Garrett, supra note TK, at 59 (“[T]he government has the burden of showing that a detention is authorized. This burden reflects a principle central to the concept of due process: deprivation of an individual’s liberty must be in accordance with the law.”); id. at 59 (“What judges conducting habeas review do … is to inquire whether the detention is lawful or factually supported.”); id. at 59-60 (“A detainee filing a writ need not allege a violation of a right, just that custody is unauthorized, thereby placing the burden on the Executive to show cause for the detention and requiring the judge to review the legality of and authorization for the detention.”).}

Fallon and Meltzer likewise described the judicial power to inquire into whether a detention was authorized as a way “to enforce the most basic requirements of the rule of law.”\footnote{Fallon & Meltzer, supra note TK, at 2094-96, 2105-06, 2112 (describing habeas and due process as working in tandem). See also Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1778-79 (1991) (“Another principle, whose focus is more structural, demands a system of constitutional remedies adequate to keep government generally within the bounds of law.”).}
Kovarsky framed his theory of habeas, which focused on habeas as a guarantee of judicial power, in similar terms. In all of these examples, the “structural role” of habeas, be it preserving judicial power, the separation of powers, or checks and balances is a way of protecting individual liberty and rights. David Cole’s conceptualization of habeas is illustrative. Cole argued that the availability of judicial review protected individual liberty by minimizing the risk of error in executive detentions. Cole argued that the separation of powers protects individual rights because the availability of judicial review prevented unlawful deprivations of liberty by the executive. The connection is straightforward enough: If the executive branch detains someone whose detention is not authorized, then judicial review is the mechanism to free them, which promotes liberty. Boumediene reflected similar thinking about the relationship between the separation of powers and individual rights and liberty. Boumediene explained that “[t]he separation-of-powers doctrine … inform[s] the reach and purpose of the Suspension Clause,” which, for the majority, meant that the writ served as a check against arbitrary executive detention.

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42 Fallon & Meltzer, supra note TK, at 2032; id. at 2094-96, 2105-06, 2112 (describing habeas and due process as working in tandem).

43 Kovarsky, Habeas Power, supra note TK, at 810 (describing habeas a judicial power as a limit on congress’s ability to “strip judges of power to award a federal habeas remedy in the vent that custody is unlawful”); Kovarsky, Custodial and Collateral Process, supra note TK, at 19 (“Prisoners are guaranteed discharge for the violation of any right that affects any federal custody, something that the founders almost certainly intended the Suspension Clause and Article III to guarantee.”);


45 E.g., Kovarsky, Custodial and Collateral Process, supra note TK, at 2 (“[T]he better paradigm for thinking about habeas process is as a feature of judicial power.”); Kovarsky, Custodial and Collateral Process, supra note TK, at 2 (“[T]he habeas privilege, guaranteed against suspension in Article I, Section 9, secures a judicial remedy, not an individual right.”).

46 Tyler, Is Suspension A Political Question?, supra note 21, at 342, 386-86 (describing “the relationship between the Great Writ and core due process values”); Cole, supra note TK, at 2484 (arguing that the structural separation of powers features of the Suspension Clause should be “read together” with the due process clause).

47 Cole, supra note TK, at 2489, 2499-2500 (invoking Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953)).

48 Cole, supra note TK, at 2495-96

49 David Cole, Jurisdiction and Liberty: Habeas Corpus and Due Process, 86 Geo. L. J. 2481, 2484 (1998) (arguing that the Due Process Clause “establish[es] at a minimum that the executive cannot detain any individual without providing for judicial review of the legality of the detention”); id. at 2494 (“To hold someone in detention without affording her a judicial forum to test whether the detention is lawful (in any respect) is the very essence of a deprivation of liberty without due process.”).

50 553 U.S. at 746.

51 553 U.S. at 744-45, 785, 794, 797.
Thus, to date, studies of habeas have focused on similar time periods (pre-ratification history, Marshall-era decisions, and Civil War and World War II usages of the writ) and have adopted similar methods that rely on the outcomes and reasoning of particular cases. Scholars have grounded the resulting theories of the writ in terms of how separation of powers, checks and balances, and the exercise of judicial power protect individual liberty.

II.

This Part unpacks three areas in which habeas corpus was commonly used in the mid to late 19th century: habeas petitions related to slavery, Native American affairs, and immigration. Understanding how the writ operated in these contexts clarifies what habeas is and what habeas does. The cases are also representative of habeas simply by virtue of their numbers. Based solely on the number of habeas cases reported in the U.S. Supreme Court and the lower federal courts during the relevant time period, these cases represent significant functions of habeas corpus, even though these areas are often “ignored by mainstream constitutional law scholars as late-nineteenth-century anomalies of American constitutional jurisprudence.”52 These three areas of law and their relationship to habeas corpus share other similarities that make investigating them together useful.53 The claims that formed the basis of the habeas petitions also frequently sounded in the register of jurisdiction and power rather than individual rights. Analyzing the cases provides a window into whether constitutional structure, including federalism and the separation of powers, serve as a force for liberty and equality.

Together, the cases illustrate several dualities of the nature and function of habeas corpus. Although habeas can be a mechanism for protecting individual liberty, it can also lay the foundation for expansive government powers and contribute to the development of more far-reaching detention schemes. Although habeas can constrain the government, it can also constitute an important component of government power and be used to solidify government authority at the expense of individual liberties. Moreover, in all three areas, habeas was used in service of peculiarly unattractive racist views of American society and governmental power.

A. Slavery

1. Fugitive Slave Proceedings

Favorable depictions of the writ often imagine that an individual who is wrongfully imprisoned reaches out to a court for help, and that the court orders their release. But historically, hostile third parties invoked habeas as a way to claim authority over others and to place persons under their control. Habeas was also used to free hostile third parties who had attempted to assert authority over other persons.

52 Cleveland, supra note TK, at 12.

53 See Cleveland, supra note TK, at 14 (arguing that immigration and Native American affairs “share important theoretical links”).
Consider how habeas operated in relation to the infamous Fugitive Slave Acts of 1793 and 1850. The Fugitive Slave Act of 1793 allowed a slave owner or slave owner’s agent to seize an alleged fugitive and bring them before a federal or state judge to obtain permission to send the individual into slavery. In response to the Fugitive Slave Acts, several states passed personal liberty laws, which the Court largely invalidated in Prigg v. Pennsylvania. The law at issue in Prigg prohibited taking someone out of state as an alleged fugitive without first going before a state court. The Court held that Pennsylvania’s law was preempted because it conflicted with the 1793 federal statute authorizing the forced kidnapping of individuals with the permission of a federal official. In the aftermath of Prigg, several Northern states prohibited state officials from participating in the process of returning fugitive slaves or from using state jails to aid the fugitive slave proceedings. Against this backdrop, Congress passed the Fugitive Slave Act of 1850 as part of the Compromise of 1850, which increased the number of federal officials who could issue certificates of removal, among other things.

Prigg and the 1850 Fugitive Slave Act preserved two other usages of habeas corpus. First, people seeking to kidnap individuals and force them into slavery to elect to use writs of habeas corpus as the means to do so instead of the processes spelled out in the Fugitive Slave Act.

54 Upon “proof [of ownership] to the satisfaction” of the officer, a certificate of removal would issue that allowed the removal of the alleged slave. The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793, J.S. Hist. 397, 419-20 (1990).

55 The full text was “And be it also enacted, That when a person held to labor in any of the United States, or in either of the Territories on the Northwest or South of the river Ohio, under the laws thereof, shall escape into any other part of the said States or Territory, the person to whom such labor or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor, and to take him or her before any Judge of the Circuit or District Courts of the United States, residing or being within the State, or before any magistrate of a county, city, or town corporate, wherein such seizure or arrest shall be made, and upon proof to the satisfaction of such Judge or magistrate, either by oral testimony or affidavit taken before and certified by a magistrate of any such State or Territory, that the person so seized or arrested, doth, under the laws of the State or Territory from which he or she fled, owe service or labor to the person claiming him or her, it shall be the duty of such Judge or magistrate to give a certificate thereof to such claimant, his agent, or attorney, which shall be sufficient warrant for removing the said fugitive from labor to the State or Territory from which he or she fled.” For a history of the enactment, see Paul Finkelman, The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793, The Journal of Southern History, Vol. 56, No. 3 (Aug. 1990).

56 41 U.S. 539 (1842).

57 Id. at 551-57.


60 See also TAN TK (discussing Ray v. Donnell)
Slave Act. Prigg described how an anti-slavery state like Pennsylvania had provided for would-be kidnappers to rely habeas on carry out kidnappings and renditions. “[T]he person to whom … labor or service is due … is hereby authorized to apply to any judge … … who, on such application, supported by the oath or affirmation … shall issue his warrant … authorizing and empowering said sheriff or constable … to arrest and seize the said fugitive.”\(^{61}\) The law further provided that “the said fugitive shall be brought before [the court] by habeas corpus … for final hearing and adjudication.”\(^{62}\) Even in an antislavery state like Pennsylvania, habeas was a way to oversee and legitimate legalized violence against black persons.\(^{63}\)

In some iterations, habeas proceedings provided an affirmative authorization for legal violence against black persons. After Prigg, in Ray v. Donnell, a district court granted a habeas petition filed by persons who alleged that a group of people were hiding black “persons … who did not belong to the neighborhood” and were allegedly fugitive slaves.\(^{64}\) In that case and others, would-be kidnappers sought writs of habeas corpus to gave them permission to kidnap persons and force them into slavery.\(^{65}\)

Another related use of habeas proceedings might be called anti-freedom petitions: Some states allowed owners to file habeas petitions seeking the release of a slave into an owner’s custody.\(^{66}\) Mississippi’s habeas corpus act specifically designated habeas a vehicle to deliver up a slave and resolve contested legal ownership and disputed title.\(^{67}\) The provisions were broad enough to allow habeas to restore ownership of slaves who were removed from “the master, owner or overseers … by … stratagem.”\(^{68}\) Even in states that were ostensibly in favor of abolition, habeas resolved disputed claim of title to slaves.\(^{69}\) Slaveowners and masters filed habeas petitions seeking the return of their slaves. In one case, a Pennsylvania court denied the master’s claim on the ground that the state had the authority to detain the slave for violating criminal law.\(^{70}\)

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\(^{61}\) Prigg, 41 U.S. at 551-52.

\(^{62}\) Id. at 554.

\(^{63}\) Cf. Greene, supra note TK, at 428 (summarizing Prigg’s holding as “violence against blacks was ‘legal’ violence; ‘illegal’ violence was violence against whites”).

\(^{64}\) Ray v. Donnell, 20 F. Cas. 325, 326–27 (C.C.D. Ind. 1849).

\(^{65}\) Cross v. Black, 9 G. & J. 198, 199–201 (Mo. 1837).

\(^{66}\) Matter of Areby, 9 Cal. 147, 147 (1858)(releasing slave to custody of the owner); Ex parte Toney, 11 Mo. 661 (1848) (denying writ because prisoner was confined pursuant to criminal conviction).

\(^{67}\) E.g., Scudder v. Seals, 1 Miss. (Walker) 154 (1824) (determining that slaves were stolen from former owner and therefore belonged to former owner’s daughter); Steele v. Shirley, 17 Miss. (9 S. & M.) 382 (1848).

\(^{68}\) Miss Comp. Stat., sec. 11, 1802-39; see Oaks, Habeas Corpus in the States –1776-1865, 278.

\(^{69}\) E.g., State v. Anderson, 1 N.J. L. 41 (1790) (determining whether a child born to a woman promised freedom fifteen years after owners’ death was free); State v. Frees, 1 N.J.L. 299, 300 (1793) (holding that verbal intention to free a slave upon owner’s death is not enough for manumission).

Second, habeas freed persons who carried out the kidnappings and renditions under the Act. That is, instead of freeing individuals from slavery, habeas freed the persons who sold them into slavery. In several cases federal courts granted writs of habeas corpus to free fugitive slave hunters from state criminal process.\footnote{E.g., \textit{Ex parte Jenkins}, 13 F. Cas. 445, 448 (E.D. Pa. 1853) (releasing captors acting under Fugitive Slave Act by writ of habeas corpus).} The courts reasoned that because federal law authorized the detentions, the fugitive slave hunters were imbued with federal authority that insulated them from state criminal process in state court.\footnote{\textit{Ex parte Robinson}, 20 F. Cas. 965 (S.D. Ohio 1856) (releasing captors acting under Fugitive Slave Act by writ of habeas corpus); \textit{Case of Rosetta}, 20 F. Cas. 969 (S.D. Ohio 1855)(same).} These habeas proceedings relied on the Force Act of 1833,\footnote{The habeas provision provided that “[E]ither of the justices of the Supreme Court, or a judge of any district court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or liberty in violation of the Constitution, or of any treaty or law of the united States.” Senator Lyman Trumbull of Illinois, who drafted the Act, explained its purpose in these terms:}

A similar dynamic played out in \textit{Ex Parte McCordie}. Here too, habeas was invoked by hostile third parties as a way to dismantle liberty-enhancing government action. After the Civil War, the Reconstruction Congress provided for federal habeas review of state convictions and authorized appeals from habeas cases in the appellate courts to the U.S. Supreme Court.\footnote{Wert, supra note TK, at 47.} Federal law previously permitted federal courts to issue writs only on behalf of prisoners held “in custody … of the authority of the United States,”\footnote{Act of February 5, 1867, 14 Stat. 385, 28 U.S.C. 451.} but the Habeas Corpus Act of 1867 authorized federal courts to grant writs of habeas corpus “in all cases where any person may be restrained of his or liberty in violation of the Constitution, or of any treaty or law of the united States.” Senator Lyman Trumbull of Illinois, who drafted the Act, explained its purpose in these terms:

It was the object of the act of 1867 to confer jurisdiction on the United States courts in cases not before provided for, and it was to meet a class of cases which was arising in the rebel States, under pretense of certain State laws, men made free by the Constitution of the United States were virtually being enslaved, and it was also applicable to cases in the State of

\begin{verbatim}
71 E.g., Ex parte Jenkins, 13 F. Cas. 445, 448 (E.D. Pa. 1853) (releasing captors acting under Fugitive Slave Act by writ of habeas corpus).
72 Ex parte Robinson, 20 F. Cas. 965 (S.D. Ohio 1856) (releasing captors acting under Fugitive Slave Act by writ of habeas corpus); Case of Rosetta, 20 F. Cas. 969 (S.D. Ohio 1855)(same).
73 The habeas provision provided that “[E]ither of the justices of the Supreme Court, or a judge of any district court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of a prisoner or prisoners, in jail or confinement, where he or they shall be committed or confined on, or by any authority of law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof.”
74 Wert, supra note TK, at 47.
76 Judiciary Act of 1789, ch. 20, §14, 1 Stat. 81.
\end{verbatim}
Maryland where, under an apprentice law, freedmen were being subjected to a species of bondage. The object was to authorize a *habeas corpus* in those cases to issue from the United States courts, and to be taken by appeal to the Supreme Court.\(^78\)

The additional provision extending the Supreme Court’s appellate jurisdiction over habeas cases addressed a gap in the Court’s appellate jurisdiction. The Judiciary Act of 1789 had provided for Supreme Court review from judgments of inferior federal courts in all civil actions and suits in equity only when the matter in dispute exceeded $2,000.\(^79\) The Court had previously said that a denial of habeas corpus relief could not be brought to the Supreme Court under that provision unless the jurisdictional amount was satisfied.\(^80\)

Yet it was not only newly freed slaves or black citizens of Northern states who relied on the Reconstruction Congress’s habeas expansion. Groups opposing Reconstruction did as well. The highest profile such case—indeed, the highest profile case involving the Habeas Corpus Act of 1867—was initiated by a Reconstruction critic, William McCordle, who sought to invalidate the entire Military Reconstruction Act, a key component of Reconstruction intended to protect newly freed slaves, Black persons, and white loyalists against harassment by southern states. McCordle was a newspaper editor critical of Reconstruction and in 1867, federal authorities detained him in Mississippi.\(^81\) McCordle filed a habeas petition challenging his detention, which the lower federal courts denied. He then sought review under the Habeas Corpus Act of 1867.\(^82\) The Habeas Corpus Act, “intended by its sponsors … to review state laws impeding reconstruction and subordinating federal rights,” was therefore “about to be used with the immediate prospect that a federal statute deemed vital to reconstruction might be held unconstitutional.”\(^83\) Congress ultimately chose to repeal the provision of the Habeas Corpus Act of 1867 that gave the Supreme Court appellate jurisdiction over habeas cases in the lower federal courts.\(^84\) The Court upheld the provision repealing the 1867 Act and

\(^78\) Cong. Globe, 40th Cong., 2d Sess. 1906 (1868).

\(^79\) Judiciary Act of 1789, ch. 20, 22, 1 Stat. 84.


\(^81\) See William W. Van Alstyne, *A Critical Guide to Ex parte McCordle*, 15 Ariz. L. Rev. 229, 236 (1973) (observing that McCordle was “charged with disturbing the peace...and impeding reconstruction, solely on the basis of several” statements he authored and published in the Vicksburg Times). He was detained under the Military Reconstruction Act and charged with disturbing the peace, inciting to insurrection and disorder, libel, and impeding reconstruction. See *id.*

\(^82\) Ch. 28, 14 Stat. 385 §1, 14 Stat. at 385-86; Van Alstyne, *supra* note TK, at 237.

\(^83\) Van Alstyne, *supra* note TK, at 238.

\(^84\) Repeal Act of 1868, ch. 34, §2, 15 Stat. 44, 44 (providing “[t]hat so much of the act approved February [5, 1867,]...as authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is, hereby repealed”). President Johnson initially vetoed the bill, but the House had sufficient votes to override the veto.
dismissed the case for lack of jurisdiction, though it affirmed that habeas review remained available in the Supreme Court via original petitions for habeas corpus.

2. Freedom Petitions

Within the regime of slavery, habeas did perform its associated liberating function when detained individuals asked a court to free them. Persons asserting their freedom from slavery filed freedom petitions, many of which were brought as habeas petitions.

While the focus of these proceedings was whether an individual could be free, and habeas proceedings did free a significant number of persons, the overall structure of the habeas system also reinforced the regime of slavery. Some of the proceedings developed the legal architecture of race, since black persons, but not white persons, could be slaves. Whether a person was considered black depended on a set of considerations that courts stitched together into a body of racially productive law. Habeas courts pointed to the physical attributes of a person such as facial features (like whether they had a big nose) or physical stature, in addition to hair texture, as defining features of race. Habeas courts also focused on ancestry and descent. A person’s reputation within the community also factored into the proceedings, which allowed courts to draw on racial stereotypes,

Cong. Globe, 40th Cong., 2d Sess. 2170 (1868) (showing that, on March 27, 1868, the House voted 114-34 to override the veto); id. at 2128 (showing that, on March 26, 1868, the Senate voted 33-9 to override President Johnson’s veto). In 1885, Congress restored the Court’s appellate jurisdiction over habeas petitions from the lower federal courts. See William M. Wiecek, The Great Writ and Reconstruction: The Habeas Corpus Act of 1867, 36 J. S. Hist. 530, 543-44 (1970).

74 U.S. (7 Wall.) 506 (1869).

Id. at 512-15. See Ex parte Yerger, 75 U.S. (8 Wall.) 85, 103 (1869). This extended to persons technically held in state custody, as the Court implied that persons were held under the authority of the United States by virtue of a federal court order upholding their detention. See Van Alstyne, supra note TK, at 252-53 (citing Yerger, 75 U.S. at 103).

Vandervelde, supra note TK, at 8-9 (describing freedom petitions); id. at 25 (very first freedom petition stylized as habeas petition). Others stylized as habeas petitions described in id. at 29, 47; Welch at 82.

Twitty, supra note TK, at 67 (describing captions which described persons in terms of color)

Kimberly M. Welch, Black Litigants in the Antebellum American South 67, 107 (describing focus of freedom petitions on reputation and physical appearance, such as “blunt & heavy features” and “large boned”).

Vandervelde, supra note TK, at 47.

See Vandervelde, supra note TK, at 78 (describing habeas petitions of children “of the original French slaves” exempted from operation of the Northwest Ordinance). This included deciding whether persons descended from Natchez Indians on their mother’s side could be slaves. The court held that they were not slaves even though they physically appeared to the court as black. Marguerite v. Chouteau, 3 Mo. 540 (1834); Vandervelde, supra note TK, at 39-56.

including anti-Black tropes about the relative work ethic of white and black persons, to determine whether an individual was free.  

The most common question in freedom petitions concerned issues of federalism—the force and effect of different states’ or territories’ laws. During the period of westward expansion, owners transported slaves to new states and federal territories in order to claim lands. Because different states had different laws regarding slavery, questions arose about whether someone’s presence in a state or territory meant that they were governed by that state or territory’s law. Habeas courts developed doctrines that preserved slavemasters’ ability to take slaves to other states and territories without freeing them. Some of the doctrines addressed what kinds of passages through a state allowed a passer-through to gain the benefit of the state’s laws; others identified the kinds of work arrangements allowed a slave to avail themselves of a free state or territory’s laws. The second body of law effectively allowed private agreements to insulate slave owners from anti-slavery laws.  

Contrary to some assessments, the habeas cases did not uniformly centralize power at the expense of state authority. Rather, habeas courts resolved issues of overlapping and competing jurisdiction in different ways. But habeas was a way for governments to challenge and assert authority over one another. The Court limited states’ ability to use habeas petitions to challenge slavery in 

Ableman v. Booth, when it held that state habeas courts could not free persons in federal custody in a case involving persons were convicted of assisting in the escape of a fugitive slave. Sherman Booth had been charged in federal court with assisting in the escape of a fugitive slave, after which a state habeas court issued a writ freeing him until further proceedings took place. Booth was subsequently convicted and sentenced in a federal court, after which the state court once again issued a writ of habeas corpus. The Supreme Court held that the state court lacked authority to issue the writ of habeas corpus: “[T]he sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or

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93 Id.; Welch, supra note TK, at 67-69.
94 Vandervelde, supra note TK, at 57.
95 The overwhelming majority of freedom petitions in Missouri addressed the effect of one state’s or a territory’s laws on another state’s residents. Vandervelde, supra note TK, at 7-8.
96 Vandervelde, supra note TK, at 67 (noting that slaves would not be freed if they were indentured within 30 days of entry into the territory or removed within sixty days).
97 Vandervelde, supra note TK, at 79 (“[T]he distinction between a legally fully indentured servant and a slave was merely a matter of a piece of paper and taking the slave before a clerk.”); id. at 67 a (“The rules “do[] not appear to have been designed as much to secure freedom as it was thought to accommodate bondage.”).
98 See Wirt, supra note TK, at 21-22.
99 62 U.S. 506 (1858).
a State court.” The decision prohibited abolitionist states from using state habeas petitions to free persons seeking to protect individuals from slavery and marked an important step solidifying federal supremacy.

While Ableman restricted states’ authority, the habeas cases addressing state or territory’s authority both empowered and constrained states. Decisions allowing individuals to effectively take with them the law of their domicile expanded some states’ authority but also restricted others. Decisions allowing slaveowners to structure their work arrangements to effectively opt out of anti-slavery laws meant that slavery was governed by private agreements between white men rather than by public, state law. Or take Dred Scott, which involved a freedom petition as well as the claim that ultimately made its way to the Supreme Court—an assault and battery claim. Before filing in federal court for assault and false imprisonment, Scott had brought a habeas petition in state court raising the same claim that his travel through free territory and a free state meant that he was free. While Ableman centralized authority, Dred Scott decentralized authority, giving states the ability to determine whether slaves had become free. Justice Nelson concurred to explain that the Court’s conclusion that Scott was not a citizen under the federal constitution meant that the case belonged “exclusively within the jurisdiction of the courts of the State of Missouri” and that those courts would determine whether Scott was free. Toward the end of the opinion, the majority likewise invoked judicial federalism concerns to justify its conclusion, cautioning against using the federal courts to institute suits that involve “the same case and the same evidence” as suits in state court.

B. Native American Affairs


101 Wheaton § 58.

102 See Twitty, supra note TK, at 33-37.

103 Id. at 529 (Mclean, J., dissenting). The state court had also concluded that Scott remained a slave. Id. at 453 (majority op.). See Scott v. Emerson, 15 Mo. 576 (1852).

104 Id. at 457 (Nelson, J., concurring).

105 Id. at 454. At the time, state cases could be reviewed by the Supreme Court only under the specific limitations provided for by the judiciary act of 1789. Id. at 453-54 (“...[T]he plaintiff ... then brings here the same case from the Circuit Court, which the law would not have permitted him to bring directly from the State court.). The Court warned: “[If this court takes jurisdiction in this form, the result, so far as the rights of the respective parties are concerned, is in every respect substantially the same as if it had in open violation of law entertained jurisdiction over the judgment of the State court ... It would ill become this court to sanction such an attempt to evade the law, or to exercise an appellate power in this circuitous way, which it is forbidden to exercise in the direct and regular and invariable forms of judicial proceedings.”
Habeas corpus also played a significant role at the turn of the century in shaping the law regarding Native American affairs. Because habeas concerns whether a detainer has jurisdiction, habeas courts helped sort out the proper distribution of government authority over Native nations. Habeas courts policed which governments had what kinds of authority over Native persons, Native lands, and people who interacted with Native persons, and, in the process, cemented the boundaries between Native Americans and white citizens. Habeas cases also laid the groundwork for one of the most significant principles governing Native American affairs, the federal government’s plenary power, that facilitated the subordination of Native tribes. And they refined the detention apparatuses used by the federal government.

1. Policing Jurisdiction

One of the most significant functions that habeas performed was to distribute authority over Native nations. The rule that habeas courts will hear claims involving jurisdiction is supposed to differentiate habeas proceedings from criminal appeals. It also meant that habeas could always inquire into whether a sentencing court or federal official had jurisdiction over an individual—even if that claim had been raised in earlier court proceedings. Because habeas focused on jurisdiction, habeas courts continually policed state, federal, and tribal courts’ authority over tribal lands and tribal members.

Habeas was not the sole engine or originator of jurisdiction, but habeas’s focus on jurisdiction made it a particularly useful tool for resolving issues related to Native American affairs, which presented complicated and competing assertions of jurisdiction by states, tribes, and the federal government. Habeas courts’ focus on jurisdiction put them in a position to determine if a state could apply its laws on reservation lands, if a state could subject Native Americans to state criminal law, if the federal government had authority over crimes between Native Americans, or crimes involving one Native

107 E.g., In re Mills, 135 U.S. 263, 265 (1890) (habeas focused on jurisdiction); Ex parte Mayfield, 141 U.S. 107, 111-16 (1891) (same); Ex parte Johnson, 167 U.S. 120, 124-25 (1897) (same).
108 See, e.g., Ex parte Crouch, 112 U.S. 178, 180 (1884) (“It is elementary learning that if a prisoner is in the custody of a state court of competent jurisdiction, not illegally asserted, he cannot be taken from that jurisdiction and discharged on habeas corpus issued by a court of the United States, simply because he is not guilty of the offense for which he is held.”); Ex parte Parks, 93 U.S. 18, 21 (1876) (“Where the proceedings are not only erroneous, but entirely void, as where the court is without jurisdiction of the person or of the cause, and a party is subjected to illegal imprisonment in consequence, the Superior Court, or judge invested with the prerogative power of issuing a habeas corpus, may review the proceedings by that writ.”); Ex parte Watkins, 28 U.S. 193, 202-03 (1830) (“The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be.”).
109 E.g., In re Mills, 135 U.S. at 265.
110 Ex parte Crosby, 38 Nev. 389 (1915).
111 Ex parte Moore, 28 S.D. 339 (1911).
112 Ex parte Kan-Gi-Shun-Ca, 109 U.S. 556, 568-69, 571 (1883).
American person;\textsuperscript{113} and many other related questions. Of the most important cases involving affecting Indian Country criminal jurisdiction identified by the Indian Law and Order Commission, nearly half are habeas cases (and one, United States v. Kagama,\textsuperscript{114} involved the congressional response, the Major Crimes Act,\textsuperscript{115} to one of the habeas cases, Ex parte Crow Dog,\textsuperscript{116} and largely parroted that case’s rhetoric and reasoning).\textsuperscript{117}

2. Defining Jurisdiction

In the course of focusing on jurisdiction, habeas courts zeroed in on two preconditions they deemed necessary for jurisdiction—personage (who the person is) and place (where the person’s conduct occurred). The focus on personage and place allowed habeas courts to racialize Native Americans, which facilitated the diminishment of Natives’ political authority as Natives were treated alternately as nations and racial groups, and also to legalize the dispossession of Native American lands. Habeas had its own rules regarding jurisdiction; in habeas cases, jurisdiction meant the subset of conditions that courts declared made a detention legal. But the law of jurisdiction that developed in habeas, particularly the subset of detention conditions that habeas courts identified as relevant to a detainers’ jurisdiction, spilled into other areas of law and informed more generally applicable theories of federal and state power.

a. Personage – Race

Habeas courts emphasized the primacy of race and citizenship to jurisdiction,\textsuperscript{118} which partially reflected the statutory law at the time. Federal versus territorial courts’ jurisdiction depended on whether a defendant or victim was Native American; state courts’ jurisdiction depended on the same. So too did the authority of Bureau of Indian Affairs’ officials; BIA officials possessed authority over persons who were Native American or persons doing business with Native Americans.\textsuperscript{119} Therefore, in order to determine whether a detention was jurisdictionally sound, habeas courts zeroed in on whether persons were Native Americans. Similar to freedom petition proceedings, habeas courts developed a body of law that contributed to the legal construction of Native Americans as a racial group. They examined whether petitioners were “Indians by

\textsuperscript{113} US ex rel. Scott v. Burdick, 46 N.W. 571, 573-74 (Dakota 1875).
\textsuperscript{114} 118 U.S. 375 (1886).
\textsuperscript{115} 18 U.S.C. 1155.
\textsuperscript{116} 109 U.S. 556 (1883).
\textsuperscript{118} E.g., Ex parte Mayfield, 141 U.S. at 111-16; Ex parte Reynolds, 20 F. Cas. 582, 585-86 (C.C.W.D. Ark. 1879).
\textsuperscript{119} Asher, supra note TK at 49-51 (describing John Heo’s habeas petition to free himself from BIA directives).
had “blood of the race”; where they resided; how they lived (whether on individually or communally owned land); the manner in which they committed a crime; their affiliation and association with a tribe; who they were married to; parentage; reputation in the community; whether their “usages and customs … belong[] to their race”; and so on.

In addition to other harms that are often associated with racialization, the racialization of Native Americans in particular was one mechanism to diminish Native Americans’ political authority. Racializing Native nations provided a reason to deny Native populations the authorities that a re enjoyed by governments. Foreign governments have rights that racial groups do not. These include rights denied to Native tribes—the ability to sue in federal court, the ability to make treaties, authority over membership and citizenship, and the ability to govern their people (and others). The

120 In re Wolf, 27 F. 606, 609 (W.D. Ark. 1886); see also Ex parte Mayfield, 141 U.S. 107 (1891); Quagon v. Biddle, 5 F.2d 608, 609 (8th Cir. 1925); Ex parte Pero, 99 F.2d 28, 29-30 (7th Cir. 1938).
121 In re Wolf, 27 F. 606, 609 (W.D. Ark. 1886); see also Ex parte Gon-shay-ee, 130 U.S. 343, 343-45 (1889); Ex parte Reynolds, 20 F. Cas. 582, 582 (C. Ct. 1879) (“[h]er mother had Indian blood in her veins.”); id. at 585 (“defining the nationality of persons according to the quantum of … blood in the veins of the person”).
122 In re Wolf, 27 F. 606, 609 (W.D. Ark. 1886).
123 In re Now-Ge-Zhuck, 69 Kan. 410, 76 P. 877, 877 (Kan. 1904); Ex parte Pero, 99 F.2d 28, 30 (7th Cir. 1938).
124 Ex parte Gon-shay-ee, 130 U.S. 343, 345 (1889).
126 Ex parte Reynolds, 20 F. Cas. 582, 583 (C. Ct. 1879); Ex parte Kenyon, 14 F. Cas. 353 (C. Ct. 1878).
127 Ex parte Pero, 99 F.2d 28, 30 (7th Cir. 1938).
128 Ex parte Pero, 99 F.2d 28, 30 (7th Cir. 1938).
129 Ex parte Pero, 99 F.2d 28, 30-31 (7th Cir. 1938); Asher, supra note TK at 49-51 (describing John Heo’s habeas petition, which asserted “cultural transformation” as grounds to leave a reservation).
131 Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831) (denying tribes standing to sue under Article III as foreign states).
133 United States v. Rogers, 45 U.S. 567, 572 (1846) (denying tribes’ ability to offer citizenship to whites, reasoning that Native peoples “have never been acknowledged or treated as independent nations”).
government denied Native Americans these powers by insisting that Native Americans were different from nations—they were tribes or races, not political communities.\textsuperscript{135}

Habeas courts also developed tests to determine who was Native American that facilitated the diminishment of Native authority.\textsuperscript{136} One measure of whether the Bureau of Indian Affairs retained jurisdiction over an individual was whether an individual had voluntarily disaffiliated from their tribe.\textsuperscript{137} That portion of the legal test provided an incentive for Native Americans to break ties with tribes in order to free themselves from the BIA’s control. At the time, BIA agents claimed the authority to force individuals to remain on reservation lands, to remain in marriages,\textsuperscript{138} and to send children to schools designed to minimize their affiliation with Native culture, among other things.\textsuperscript{139}

b. Place

Habeas courts maintained that jurisdiction focused on place in addition to personage.\textsuperscript{140} Similar to the function of habeas courts’ focus on personage, habeas courts’

\begin{itemize}
  \item \textsuperscript{135} United States v. Kagama, 188 U.S. 375, 381 (1886) (affirming congressional authority to regulate tribes because “[t]he relation of the Indian tribes living within the borders of the United States ... to the people of the United States, has always been an anomalous one, and of complex character”); Montoya v. United States, 180 U.S. 261, 265 (1901) (“These characteristics the Indians have possessed only in a limited degree, and when used in connection with the Indians, especially in their original state, we must apply to the word ‘nation’ a definition which indicates little more than a large tribe or a group of affiliated tribes possessing a common government, language, or racial origin, and acting, for the time being, in concert. Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word.”). See generally Gregory Ablavsky, \textit{“With the Indian Tribes”: Race, Citizenship, and Original Constitutional Meaning}, 70 Stan. L. Rev. 1025, 1033-45 (2018).
  \item \textsuperscript{136} Tribal membership was firmly unidirectional: Individuals could choose to disaffiliate with a tribe, which suggests tribes are nations, but tribes could not extend citizenship to anyone who wanted to affiliate with and become a member of a tribe, which treats tribes as racial groups rather than nations. United States v. Rogers, 45 U.S. 567, 572 (1846).
  \item \textsuperscript{137} Ex parte Kenyon, 14 F. Cas. 353, 355 (C.C.W.D. Ark. 1878) (“[T]he petitioner had clearly abandoned the Indian nation.”); Ex parte Pero, 99 F.2d 28, 29–35 (7th Cir. 1938); Ex Parte Mayfield, 141 U.S. 107, 116 (1891) (“As Mayfield was a member of the Cherokee Nation by adoption, if not by nativity....”); Ex parte Reynolds, 20 F. Cas. 582, 582 (8th Cir. 1879) (“It is not contended that Reynolds and Puryear are Indians by birth—that is, that they belong to the race generally, or to the family of Indians; but it is claimed that they are Indians in law, by reason of their marriage to persons who do belong to the family of Indians—who belong to the Choctaw Nation or Tribe of Indians.”).
  \item \textsuperscript{138} See Harring, supra note TK, at 180-85 (describing what BIA authority could look like); Blackhawk, Paradigm, supra note TK, at 1840-42.
  \item \textsuperscript{139} Ex parte Wilson, 140 U.S. 575, 575–79 (1891) (describing jurisdiction as concerned with place); Ex parte Reynolds, 20 F. Cas. 582, 585–86 (C.C.W.D. Ark. 1879) (“In order to make jurisdiction complete in this court, the court must have the right under the law to take cognizance of the
focus on place bolstered a theory of jurisdiction that furthered the American colonial project at the time—a territorial theory that imagined authority could be exercised over a given place. Under a territorial theory of jurisdiction, by determining the place, one could determine where and whether jurisdiction existed.

A territorial understanding of jurisdiction, and in particular, the mere fact that Native Americans happened to be in a place over which the United States asserted authority, had provided the legal basis for the United States’ claims of authority over Native Americans and Native American land. Early administrations insisted that Natives were subject to federal laws because they were “within the limits of the United States.” The territorial theory of jurisdiction facilitated the dispossession of Native American lands by minimizing Native claims to title. Johnson v. M’Intosh, for example, had relied on one outgrowth of the territorial theory of jurisdiction, the doctrine of discovery, to justify the United States claim to title over lands. Cherokee Nation v. Georgia had similarly rejected Native nations’ power to sue in federal court as foreign governments precisely because Native nations “reside within the acknowledged boundaries of the United States” and “they are considered as within the jurisdictional limits of the United States.”

offence. Such right, as far as this court is concerned, depends upon three things: First, the nature of the offence; second, the status as to nationality of the person committing it and the person against whom it is committed; and, third, the place where it is committed.”); Ex parte Farley, 40 F. 66, 71 (C.C.W.D. Ark. 1889); Quagon v. Biddle, 5 F.2d 608, 608–10 (8th Cir. 1925); In re Wolf, 27 F. 606, 609 (W.D. Ark. 1886).


142 E.g., In re Wolf, 27 F. at 610.

143 Gregory Ablavsky, Sovereign Metaphors in Indian Law, 80 Montana L. Rev. 11, 14 (2019); Gregory Ablavsky, Beyond The Indian Commerce Clause, 124 Yale L.J. 1012, 1061-81 (2015).

144 See Letter from Henry Knox to George Washington (June 15, 1789), in 2 Papers of George Washington: Presidential Series 490, 493 (Dorothy Twohig ed., 1987) (“The time has arrived when it is highly expedient, that a liberal system of justice should be adopted for the various indian tribes within the limits of the United States.”); Letter from George Washington to the Comm’rs to the S. Indians (Aug. 29, 1789), in 3 Papers of George Washington, at 551-52, 556 (providing instructions about negotiations “with the independent tribes or nations of Indians within the limits of the united States, south of the river Ohio”); Letter from Edmund Randolph to George Washington (Sept. 12, 1791), in 8 Papers of George Washington: Presidential Series 524, 524-26 (Mark A. Mastromarino ed., 1999) (discussing constitutional authority over negotiations with “Indian tribes, within the limits of the United States”).

145 Johnson v. M’Intosh, 21 U.S. (5 Pet.) 543, 573, 587-88 (1823) (explaining that the first Europeans to arrive at the land had “the sole right of acquiring the soil” and “unequivocally acceded to that great and broad rule”). See Robert Williams, The American Indian in Western Legal Thought: The Discourses of Conquest (New York: Oxford University Press 1990).

Ex Parte Crow Dog, the habeas case that precipitated modern criminal jurisdiction in the area of Native American affairs, relied on the territorial theory of jurisdiction to lay the basis for extensive federal authority over tribes. Crow Dog wrote that the reservation was “within the geographical limits of the territory of Dakota” and therefore “under the laws of the United States.” It was because “the locus in quo of the alleged offense” was “territorially” within the United States that United States courts could have authority over it (though Congress had not yet exercised that authority). Kagama later echoed this claim when it upheld the Major Crimes Act: Congress had plenary authority over Native Americans because “Indians are within the geographical limits of the United States” and “[t]he soil and the people within these limits are under the political control of the Government.

The emphasis on place as integral to jurisdiction furthered the colonial project in more specific ways as well. Precisely demarcating places complimented the federal government’s goal of making land exchangeable in order to support westward expansion. The process of westward expansion required a market in land to provide an incentive for colonial settlement. But in order for land to be exchanged, land had to be precisely marked. Habemas facilitated the precise marking and designation of lands as habeas courts determined whether particular lands fell within the purview of the federal government, states, and/or tribes. Habeas proceedings formalized treaties and customary agreements between states, tribes, and the federal government and sorted through conflicting practices in order to cleanly categorize land. Habeas proceedings also zeroed in on more particular determinations about certain parcels of land, such as whether land that belonged to the federal government or to tribes had been allotted—transferred over to individual tribe members. By clearing up conflicting claims of authority over land, habeas facilitated a land system that drove Westward expansion.

Habeas courts also fused personage and place to support the colonial project of the time. For example, habeas courts reasoned that states had jurisdiction over individual

147 109 U.S. 556, 559 (1883).
148 109 U.S. at 561.
149 118 U.S. 375, 379 (1886).
150 Id.
151 See generally Aziz Rana, The Two Faces of American Freedom (Harvard University Press 2010); id. at 105 (“Control of such land was believed necessary for republican and utopian visions of empire, because expansion would create a permanent condition of peace as well as the moral and economic basis for freedom.”).
153 See sources cited supra note TK.
154 E.g., Ex parte Pero, 99 F.2d 28, 29-35 (7th Cir. 1938).
155 See Rana, supra note TK, at 105.
Native Americans who had accepted allotments of land. The federal government allotted land by doling out particular parcels to individual Native Americans.\textsuperscript{156} Separating the parcels into individual, sellable plots facilitated the sale of parcels to white settlers, which, in turn, had the effect of diminishing Native communities.\textsuperscript{157} Accepting an allotment did not change whether particular land was part of a reservation.\textsuperscript{158} However, habeas courts reasoned, it altered an individual’s relationship to the government and therefore the government’s authority over the individual. Courts insisted that allotment represented a choice to live in accordance with private ownership norms that courts associated with white citizens.\textsuperscript{159} Courts therefore concluded that accepting an allotment meant that a Native American became subject to state law.\textsuperscript{160} While accepting allotment did not diminish a reservation, it expanded states’ authority over persons. It would later expand states’ authority over places if and when an individual sold the land to someone other than a Native American.

3. \textit{Plenary Power Origins}

Habeas proceedings also produced doctrines that formed the jurisprudential architecture for the continued subordination of Native Americans. \textit{Ex parte Kan‐gi‐shun‐ca (Crow Dog)} laid the groundwork for the plenary power doctrine that justifies extensive federal authority over Native American affairs.\textsuperscript{161} The case arose from Crow Dog’s murder of another member of the Sioux nation.\textsuperscript{162} Crow Dog was tried in a district court sitting as a territorial court for violations of territorial laws against murder. After the

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\footnote{156}{Babbitt v. Youpee, 519 U.S. 234, 237 (1997); Robert N. Clinton et al., American Indian Law: Cases and Materials 147-52 (3d ed. 1991); Judith V. Royster, The Legacy of Allotment, 27 Ariz. St. L. J. 1 (1995). Between 1887 and 1934, allotment took away 90 million acres from Natives, two-thirds of the land they had owned fifty years earlier. Office of Indian Affairs, Dep’t of the Interior, Indian land Tenure, Economic Status, and Population Trends 6 (1935). See 10 Cong. Rec. 2059 (1880) (statement of Sen. Coke during hearings on S. Bill No. 1509, a predecessor to the Dawes Act) (“The policy of the bill is to break up this large reservation, to individualize the Indians upon allotments of land ... to aid them with stock and with agricultural implements, and by building houses upon their allotments of land, to become self-supporting, to be cultivators of the soil; in a word, to place them on the highway to American citizenship, and to aid them in arriving at that conclusion as rapidly as can be done.”).}
\footnote{158}{See \textit{Mattz}, 412 U.S. at 497 (“[A]llotment ... is completely consistent with continued reservation status.”).}
\footnote{160}{\textit{E.g., In re Now-Ge-Zhuck}, 69 Kan. 410, 76 P. 877, 880 (1904).}
\footnote{161}{109 U.S. 556 (1883).}
\footnote{162}{Id. at 557.}
\end{footnotes}
supreme court of the territory affirmed his conviction, he filed a habeas petition challenging the courts’ authority over him. The Court granted Crow Dog’s habeas petition, concluding that the district court lacked jurisdiction to try him because Congress had not authorized criminal jurisdiction over crimes between Native Americans on reservations.

Although the Court granted Crow Dog’s habeas petition because Congress had not provided for criminal punishment for crimes between Native Americans on Native lands, the Court went out of its way to say that with “a clear expression of the intention of congress,” Congress could enact a criminal code for crimes involving Native Americans. In the closing of the opinion, the Court previewed habeas courts’ racialization of Native Americans, insisting that Natives “were separated by race … from the authority and power” that the federal government imposed upon them. While the ostensible uniqueness of Native Americans temporarily insulated them from federal oversight, the Court quickly shifted to relying on the distinctive features of Native Americans as reasons for extensive federal authority over them. The Court described the dispute as whether “the superiors of a different race” could impose “the responsibilities of civil conduct” on Native Americans in order to discipline “the strongest prejudices of their savage nature.” The Court also underscored the expansive scope of the federal government’s powers over natives, whom the Court depicted “as wards, subject to a guardian.” They were “subject[s]” “not … citizens” for whom “appropriate legislation” was needed “to secure to them an orderly government.”

The ideas from Crow Dog’s habeas case formed the basis for what became the plenary power doctrine over Native American affairs. Sarah Cleveland has described the plenary

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163 Id. at 557-58.
164 Specifically, the Court found that a provision that excluded from federal jurisdiction such crimes had not yet been repealed. Id. at 570.
166 The same reasoning was previewed in George F. Canfield, The Legal Position of the Indian, 15 Am. L. Rev. 21, 25-26 (1881).
167 109 U.S. at 571.
168 109 U.S. at 569.
169 Id. at 569-70. See also id. at 570 (describing Native Americans as people “who were to be urged, as far as it could successfully be done, into the practice of agriculture, and whose children were to be taught the arts and industry of civilized life, and that it was no part of the design to treat the individuals as separately responsible and amenable, in all their personal and domestic relations with each other, to the general laws of the United States, outside of those which were enacted expressly with reference to them as members of an Indian tribe”).
power doctrine as having several defining features, including a sweeping authority that is subject to few limitations.\textsuperscript{171} The theory led the Court to affirm Congress’s creation of the Dawes Commission, the infamous body that was formed to take land from Native American tribes through a process of cession or allotment.\textsuperscript{172} A Senate Report by the Dawes Commission invoked the reasoning from \textit{Crow Dog} to justify subjecting the Cherokee Nation to the Dawes Act (the Cherokee Nation was originally exempt from the Dawes Act). The report referred to the “non-American” “deplorable state of affairs” in the Cherokee Nation, which left the United States “no alternative” but to fulfill its “constitutional obligation[]” over land and people “within its jurisdiction.”\textsuperscript{173} Congress responded to the report by substantially limiting the authority of the Cherokee Nation and the other “Five Civilized Tribes.”\textsuperscript{174} The same plenary power principle surfaced as a justification for trimming Natives’ legal remedies against the federal government for allegedly unlawfully taking tribal lands in violation of treaties.\textsuperscript{175} And it appeared more recently in a habeas case that limited tribes’ ability to prosecute nontribal members for crimes committed against tribal members.\textsuperscript{176}

4. Refining & Generating Detention Schemes

Habeas proceedings also identified gaps in detention schemes, which fueled their expansion. For example, \textit{Ex Parte Crow Dog} ruled in favor of the detainee,\textsuperscript{177} concluding that Congress had not exercised the full scope of its powers over Native Americans.\textsuperscript{178}


\textsuperscript{175} \textit{Lone Wolf v. Hitchcock}, 187 U.S. 553, 566 (1903) (citing \textit{Kagama}). Joseph William Singer, \textit{Lone Wolf or How to Take Property by Calling It a “Mere Change in the Form of Investment,”} 38 Tulsa L. Rev. 37, 45 (2002)(describing the case as having “legitimated … what is probably the most massive uncompensated taking of property in United States history”). For modern uses, see United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2323-24 (2011) (citing and quoting \textit{Lone Wolf}, 187 U.S. at 565). \textit{Lone Wolf} also cited \textit{Chae Chan Ping}, an immigration habeas case announcing the plenary power doctrine in the area of Native American affairs. 187 U.S. at 18-19.


\textsuperscript{177} \textit{Ex parte Kan-gi-shun-ca}, 109 U.S. 556, 557 (1883); Gulig & Harring, supra note TK, at 89 (arguing that \textit{Crow Dog} “set[] the stage for the modern plenary power doctrine”); Cleveland, supra note TK, at 59 (same).

\textsuperscript{178} \textit{Ex parte Kan-gi-shun-ca}, 109 U.S. 556, 572 (1883).
There are several indications that the government selected *Crow Dog* as the case to bring to the Court, knowing that if they lost, that would lead to cries for additional federal intervention. The government’s brief to the Supreme Court hardly suggests they cared whether they won or lost. It is a mere 13 pages and almost exclusively quotes the lower court decisions in the case; after quoting the opinions, it ends “Without further elaboration, we think it clear that the jurisdiction of the district court … should be sustained.”

The reasoning in the Supreme Court’s eventual decision stoked fears that Crow Dog would get away with his crime if he was not tried in federal court. The Court described the tribal justice system as “red man’s revenge” and depicted federal law as an attempt to restrain “the strongest prejudices of their savage nature.” Relying on the principles spelled out in *Ex Parte Crow Dog*, as well as the concerns that the Court had raised about the lack of federal jurisdiction over crimes between Native Americans, Congress enacted the Major Crimes Act that provided for federal jurisdiction over certain enumerated crimes committed by tribal members on reservation lands. Several legislators specifically noted that the legislation was a response to *Crow Dog*, as the government did in briefing when the Major Crimes Act was challenged. Relying on *Crow Dog*, the Court upheld the Act just three years after *Crow Dog* had suggested the need for it.

A similar dynamic played out in *Matter of Heff*. In that case, the Court granted a habeas petition after it concluded that federal laws regulating the sale of liquor to Native Americans would get away with his crime if he was not tried in federal court. The Court described the tribal justice system as “red man’s revenge” and depicted federal law as an attempt to restrain “the strongest prejudices of their savage nature.” Relying on the principles spelled out in *Ex Parte Crow Dog*, as well as the concerns that the Court had raised about the lack of federal jurisdiction over crimes between Native Americans, Congress enacted the Major Crimes Act that provided for federal jurisdiction over certain enumerated crimes committed by tribal members on reservation lands. Several legislators specifically noted that the legislation was a response to *Crow Dog*, as the government did in briefing when the Major Crimes Act was challenged. Relying on *Crow Dog*, the Court upheld the Act just three years after *Crow Dog* had suggested the need for it.

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179 Harring.


182 109 U.S. at 571; id. (describing tribes’ “free though savage life”). *See also Ex parte Mayfield*, 141 U.S. 107, 115-16 (1891) (“The policy of congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization.”).

183 *Kagama*, 118 U.S. 375; Act Cong. Marc. 3, 1885, § 9, 23 Stat. 385, 18 U.S.C. §§ 1151, 1153. *See* Cleveland, supra note TK, at 59 (noting that “[t]he Major Crimes Act … had been adopted in reaction to the Court’s decision in *Crow Dog*”).

184 Statement of Rep. Cutcheon (“We all remember the case of Crow Dog… He returned to his reservation, feeling, as the Commissioner says, a great deal more important than any of the chiefs of his tribe.”); Statement of Rep. Budd (“[T]he Supreme COufrt of the United States decided, in the case of *Ex parte Crow Dog* …, that the district court of Dakota was without jurisdiction … If offenses of this character cannot be tried in the courts of the United States ther eis no tribunal in which the crime of murder can be punished.” (quoting report of the Secretary of the Interior)).

185 Brief of the United States 15, United States v. Kagama, 118 U.S. 375 (1886).

Americans did not apply to individuals who were Indian citizens.\footnote{187} The Court concluded that Native Americans became citizens after federal statutes extinguished tribal authority and individual Natives disaffiliated with tribes (whether through allotment or otherwise), and that citizenship was incompatible with federal plenary authority. In response to \textit{Heff}, Congress adopted the Burke Act, which deferred Native citizenship resulting from the Dawes Act until Native Americans no longer held their lands in trust.\footnote{188} In a later case interpreting the Burke Act, the Court explained that Native citizens could “remain[] Indians by race,” which allowed Congress to retain “jurisdiction over the individual members of this dependent race.”\footnote{189} This is another example of how the racialization of Native Americans fueled federal power over them.

Other habeas cases likewise tweaked the contours of federal authority over Natives without meaningfully constraining it. For example, habeas courts decided which arm of the federal government could detain Natives without questioning the detentions themselves. In \textit{Ex parte Bi-a-lil-le}, the Court rejected the Secretary of War and Secretary of Interior’s detention of several Navajo members at a military fort for “threaten[ing] serious trouble upon the Navajo reservation.”\footnote{190} The Navajo members filed a habeas petition challenging their confinement, and the court ordered their release.\footnote{191} The court rejected the government’s suggestion that the Navajos could be held as prisoners of war under the federal government’s war powers;\footnote{192} instead, the court reasoned, the federal government’s authority to address Native American affairs came from its plenary authority over all manner of Native American affairs, not simply wartime exigencies.\footnote{193}

As was true for slavery-related petitions, some Native American affairs habeas petitions resolved competing claims to detention. That is, here too, habeas provided a way to sort out who could detain individual Native Americans, and habeas functioned as a mechanism for obtaining custody and control over certain individuals. In \textit{In re Lelah-pue-ka-chee}, the court addressed a habeas petition filed by a Native woman’s husband to take custody of her, and to release her from a school.\footnote{194} In that case, the habeas proceeding ultimately upheld the government’s authority over the Native woman rather than her husband’s; the court concluded that the Indian agent had been validly appointed as the

\textit{In re Heff}, 197 U.S. 488, 501-02, 508-09 (1905). A mere ten years later, in \textit{United States v. Nice}, the Court reversed this holding, concluding that “citizenship is not incompatible with tribal existence or continued guardianship, and so many be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection.” 241 U.S. 591, 598 (1916).


100 P. 450, 451 12 Ariz. 150 (1909).

\textit{Id.}

\textit{Id.}

The court also rejected the designation of the Navajos as prisoners of war. \textit{Id.}

\footnote{192} The court also rejected the designation of the Navajos as prisoners of war. \textit{Id.}

\footnote{193} Similar to \textit{Crow Dog}, the court underscored that detentions had to be “expressly authoriz[ed]” by “the acts of Congress.” \textit{Id.} at 451.

\footnote{194} 98 F.429 (D. Ct. 1899).
woman’s guardian, and that she could not be taken away from the school by her husband.\footnote{Id. The court also suggested she could not be forced to stay at the school.}

Also similar to how habeas was used in the area of slavery, habeas protected the federal government’s authority by immunizing federal officers who exercised authority over Native American affairs. In \textit{Rainbow v. Young}, state officers arrested two Indian policemen at the Winnebago Indian Reservation for removing an individual from the reservation.\footnote{Rainbow v. Young, 161 F. 835 (8th Cir. 1908).} A federal court freed the Indian policeman via a habeas petition, confirming the federal government’s broad powers over Native American affairs.\footnote{Rainbow v. Young, 161 F. 835, 835–36 (8th Cir. 1908).}

C. Immigration

Habeas corpus also played a significant role in the emergence of restrictive federal immigration laws at the end of the 19\th century. Before that point, there was no real federal immigration system that regulated who could enter or remain in the United States. Habeas corpus played a significant role in overseeing the immigration-related detentions and removals that began the modern immigration regime. Habeas courts cemented the importance of citizenship, expanding or modifying extant theories of jurisdiction to justify emerging immigration restrictions. Habeas courts generated two key components of modern immigration law—the plenary power doctrine, which provided for expansive federal authority over immigration and noncitizens subject to few limitations, and the entry fiction, under which the federal government retains expansive powers over certain noncitizens who are within the United States’ borders. And as in the area of Native American affairs, habeas also played a significant role in refining and generating expanded detention schemes.

1. Jurisdiction Redux

In immigration-related detentions, habeas courts focused on issues of jurisdiction, specifically whether the executive had jurisdiction over the person(s) they detained. Habeas courts fused jurisdiction’s focus on citizenship and place to justify sweeping powers over certain persons no matter where they were in the United States.

a. Race & Citizenship

Habeas courts’ focus on jurisdiction emphasized the primacy of citizenship.\footnote{See, e.g., \textit{United States ex rel Tisi v. Tod}, 264 U.S. 131, 132-33 (1924) \textit{Ex Parte Mayfield}, 141 U.S. at 111-16; \textit{Ex Parte Reynolds}, 20 F. Cas. 582, 585-86 (C.C.W.D. Ark. 1879).} Habeas courts insisted that ascertaining whether a detainer had jurisdiction meant that habeas proceedings should focus on the citizenship of an individual, not whether an individual met other preconditions for immigration-related detentions such as having prior qualifying criminal convictions, relying on public benefits (i.e., being a “public
charge”), or being involved in prostitution. Courts maintained that the focus on jurisdiction allowed courts to inquire into citizenship, but not other preconditions for detention, exclusion, or removal.

Habeas courts’ decision to focus on citizenship as integral to jurisdiction led them to produce a body of law that racialized newly targeted groups of immigrants. Courts developed different analytical tools to mark certain categories of noncitizens in racial terms. Thus, in determining whether a habeas petitioner was an American citizen, habeas courts examined whether they “belong[] to the Chinese race”; whether a petitioner’s testimony about local, Chinese customs was credible; a petitioner’s parentage; the demeanor and mannerisms of Chinese witnesses; a person’s “appearance and language”; “discrepancies between the testimony of [a] petitioner and … white witness[es]”; and an examination of photographs of family members for similarities. In these proceedings, habeas courts designated certain categories of immigrants as forever foreign. They warned that whether certain persons stay “for a shorter or longer time,” “they continue to be aliens.”

As in the case of Native American affairs, racialization diminished the stature and agency of Chinese immigrants. As a nation, China was an economic power with whom

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199 E.g., United States ex rel. Turner v. Williams, 194 U.S. 279, 291-92 (1904) (alienage is critical to jurisdiction, not other preconditions for detention); Chin Yow v. United States, 208 U.S. 8, 10-11 (1908) (granting writ to allow determination in court about citizenship); Ng Fung Ho v. White, 259 U.S. 276, 281-85 (1922) (same); United States ex rel Tisi v. Tod, 264 U.S. 131, 132-33 (1924) (“Such knowledge [of seditious character of the printed matter] is not, like alienage, a jurisdictional fact.”); In re Day, 27 F. 678, 680-81 (Cir. Ct. 1886) (declining to redetermine whether detainees were public charges because that did not go to jurisdiction).


201 In re Look Tin Sing, 21 F. 905 (C. Ct. D. Cal. 1884).

202 Woe Y Ho v. United States, 109 F. 88, 891 (9th Cir. 1901); United States v. Chung Fun Sun, 63 F. 261 (N.D.N.Y. 1894); United States v. Chin Len, 187 F. 544 (2d Cir. 1911); Woo Jew Dip v. United States, 192 F. 471, 473-74 (5th Cir. 1911).

203 Lee Sing Far v. United States 94 F.834, 836-37 (9th Cir. 1899).

204 Lee Sing Far v. United States, 94 F. 834, 837 (9th Cir. 1899); In re Tom Mun, 47 F. 722 (N.D. Cal. 1888) (relying on records in “the Six Company’s book,” a major conglomerate of Chinese-owned businesses). For more on the Six Companies, see Lucy Salyers, Laws Harsh as Tigers 40-42 (UNC Press 1995).

205 Gee Fook Sing v. United States, 49 F.146 (9th Cir. 1892).

206 In re Tom Mun, 47 F. 722 (N.D. Cal. 1888).

207 Yee Chung v. United States, 243 F. 126 (9th Cir. 1917).

208 Fong Yue Ting, 149 U.S. at 724.
many political elites in the 1800s desperately wanted to cultivate trade and partnerships. Yet the racialization of Chinese immigrants depicted them as too foreign to assimilate and unable to live according to valuable American customs, business, and practices.

The concept of jurisdiction was sufficiently malleable such that courts could curate the kinds of errors that could be addressed in habeas proceedings and in the process legitimate sometimes mistaken exercises of government authority. In immigration habeas proceedings, courts reasoned that sufficiently egregious errors in the administrative process could establish a jurisdictional error in a detention. But minor errors did not undermine a detainer’s jurisdiction, and courts designated as minor errors things such as administrative officials’ racist or xenophobic bias.

b. Race and Place (Again)

As in the area of Native American affairs, some immigration-related habeas proceedings emphasized the importance of place, including the physical borders of the

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209 Lew-Williams, supra note TK, at 55-62.

210 See supra TAN TK (outlining reasoning in Chae Chan Ping and Fong Yue Ting); Lew-Williams, supra note TK, at 97-137 (documenting local and vigilante violence seeking to expel and subordinate Chinese immigrants).

211 This phenomenon was also present in the Court’s post-conviction habeas cases. Over a span of several years, the Court went back and forth on whether trials dominated by violent mobs could be sufficiently serious errors that went to the sentencing courts’ jurisdiction. Compare Moore v. Dempsey, 261 U.S. 86 (1923) (granting writ on this basis) with Frank v. Mangum, 237 U.S. 309 (1915) (error did not go to jurisdiction but court reasoned that “It follows as a logical consequence that where, as here, a criminal prosecution has proceeded through all the courts of the state, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of Federal rights sufficient to oust the state of its jurisdiction to proceed to judgment and execution against him”).

212 Low Wah Suey, 225 U.S. at 468 (explaining that cognizable claims in habeas are those alleging “that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to the executive”); Wong Wing v. United States, 163 U.S. 228, 238 (1896)(imposing a punishment with criminal trial and criminal process meant “that the commissioner, in sentencing the appellants … acted without jurisdiction”).

213 See Yamataya v. Fisher, 189 U.S. 86, 102 (1903)(“If the appellant’s want of knowledge of the English language put her at some disadvantage … that was her misfortune, and constitutes no reason … for the intervention of the court by habeas corpus.”); Woey Ho v. United States, 109 F. 888, 891 (9th Cir. 1901) (“It may be said that the present case comes nearer the border line, beyond which courts must not go, than the case of Lee Sing Far, but it is enough to say that it does not cross it.”); Lee Sing Far v. United States, 94 F.834, 837 (9th Cir. 1899) (“It does not necessarily follow that, because four witnesses have testified positively that she was born in San Francisco, there being no witness to the contrary, their statements upon this question must be accepted as true. If such a rule were adopted and followed, there would be no more Chinese remanded in such cases.”)
United States and whether a person was outside the United States seeking entry into it or had been born outside the United States. \footnote{Chae Chan Ping, 130 U.S. at 606-10; Ekiu v. United States, 142 U.S. 651, 660 (1892).} Habeas courts reasoned that persons seeking entry into the United States lacked the constitutional rights of persons who were already admitted. \footnote{Ekiu v. United States, 142 U.S. 651 (1892) ("It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law."); United States v. Ju Toy, 198 U.S. 253, 263-64 (1905).} They also upheld the federal government’s authority to expel people from the United States if they had been born outside the United States. \footnote{Fong Yue Ting, 149 U.S. 698.}

But the government’s authority to exclude and expel was never entirely about place. Instead, habeas courts sampled from different theories, some of which maintained that sovereignty derived from the people, or at least a particular subset of them, who had granted authority to the government. \footnote{Gordon S. Wood, The Creation of the American Republican, 1776-1787. 174-89 (1969); Alison Lacroix, The Ideological Origins of American Federalism, 221} Thus, in Chae Chan Ping, the Court upheld a challenge to the Chinese Exclusion Act on the ground that [t]he power of exclusion of foreigners” is “an incident of sovereignty belonging to the government of the United States” \footnote{130 U.S. at 604.} that “must be traced up to the consent of the nation itself." \footnote{130 U.S. at 606, 609. See also Fong Yue Ting, 149 U.S. at 711-12.}

In its application, this theory of jurisdiction also deemphasized place in important ways. For example, habeas courts insisted that a person had not truly entered the United States, and gained the legal protections accompanying entry, if they had not lawfully entered the United States or been granted official admission to enter. \footnote{130 U.S. at 604.} This theory allowed the federal government to maintain plenary control over persons who were

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\footnote{Ekiu, 142 U.S. at 661 ("Putting her in the mission-house as a more suitable place than the steam-ship, pending the decision of the question of her right to land, and keeping her there, by agreement between her attorney and the attorney for the United States, until final judgment upon the writ of habeas corpus, left her in the same position, so far as regarded her right to land in the United States, as if she never had been removed from the steamship."); United States v. Ju Toy, 198 U.S. 253, 263-64 (1905); Kaplan v. Tod, 267 U.S. 228, 229-31; Chin Yow v. United States, 208 U.S. 8, 12-13 (1908) ("If we regard the petitioner, as in Ju Toy's Case it was said that he should be regarded, as if he had been stopped and kept at the limit of our jurisdiction, still it would be difficult to say that he was not imprisoned.... But we need not speculate upon niceties. It is true that the petitioner gains no additional right of entrance by being allowed to pass the frontier in custody for the determination of his case.").}
physically present in the United States. This concept became known as the entry fiction.\textsuperscript{221} The narrowest interpretation of the entry fiction is that persons stopped at the border have not truly entered the United States even though ports of entry may be physically in the United States.\textsuperscript{222} The broader interpretation is that persons who physically entered the United States but were not lawfully admitted have not truly entered the United States and crossed the border, and therefore cannot avail themselves of the full panoply of constitutional protections.\textsuperscript{223}

Relying on this conception of the border, habeas proceedings reinforced expansive government authority over noncitizens in the United States on the theory that they had received the government’s official assent to entry.\textsuperscript{224} This idea turned a little on place, but also on consent: The government’s decision to admit an individual represented consent of “the people” of the United States to some portion of membership.\textsuperscript{225} The entry fiction was the nominal reason that habeas courts allowed the federal government to separate immigrant families at the beginning of the 20\textsuperscript{th} century.\textsuperscript{226} Although the federal government had allowed children to live with their parents for several years while deportation proceedings were not practicable, the “entry” fiction allowed the government to insist that the children had not truly entered the United States, and thus could be deported and separated from their families.\textsuperscript{227}

2. \textit{Generating Plenary Power}

Habeas proceedings produced other doctrines that extended far beyond particular detention schemes and that formed the ideological and jurisprudential architecture for the continued subordination of particular groups. As in the area of Native American law, habeas petitions in immigration law generated the now infamous plenary power doctrines that justifies the subordination and control of immigrant communities.\textsuperscript{228} In one case, ...
Chae Chan Ping, a Chinese-American laborer who was detained upon returning to the United States after visiting China filed habeas petitions challenging the government’s ability to exclude them from the United States. He argued, among other things, that laws passed after he had left the United States could not be applied to him as he sought to reenter. In another, Fong Yue Ting, Chinese-American laborers residing in the United States were arrested for failing to obtain the required documentation allowing them to stay in the United States. That scheme was never fully implemented and enforced, but the Court upheld it anyways.

Also similar to the Native American affairs cases, the Court reasoned in capacious terms about the government’s authority over this particular group. Explaining why Congress had the power to enact the Chinese Exclusion Act, the Court proclaimed “we are but one people, one nation” and “[t]o preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation.” The Court continued that “such aggression and encroachment” could come “from vast hordes of [foreign nation’s] people crowding in upon us” or “the presence of foreigners of a different race in this country, who will not assimilate with us.” The Court’s reasoning drew from the racial ideologies that motivated the detention schemes themselves.

administrators which has long distinguished immigration law form other branches of administrative law.”

229 Chae Chan Ping, 130 U.S. 581 (1889).
230 Chae Chan Ping, 130 U.S. 581.
231 Fong Yue Ting v. United States, 149 U.S. 698 (1893).
233 See Chae Chan Ping, 103 U.S. at 605-07.
234 130 U.S. at 606.
235 Id. In Fong Yue Ting, after quoting this passage from Chae Chan Ping, the Court concluded “[The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.” 149 U.S. at 707.
236 See, e.g., Chae Chan Ping, 130 U.S. at 595 (explaining the motivation behind immigration restrictions was that people “saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them, unless prompt action was taken to restrict their immigration’’); id. (“In December, 1878, the convention which framed the present constitution of California, being in session, took this subject up, and memorialized congress upon it, setting forth, in substance, that the presence of Chinese laborers had a baneful effect upon the material interests of the state, and upon public morals; that their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization.”) Gabriel J. Chin, Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power, in Immigration Stories 7, 7 (David A. Martin & Peter H. Schuck eds., 2005).
Here too, the doctrines born in the immigration habeas cases have taken on a life of their own. The ideas about governmental power at the heart of the habeas cases were trotted out in service of decisions that allowed the government to exclude spouses of American citizens with little to no explanation, and decisions allowing the government to summarily deport noncitizens raising asylum claims. These ideas formed the basis of decisions that the Court relied on to uphold President Trump’s ban on entry into the United States by nationals of several Muslim-majority countries. The ideas about power and structure at the heart of the immigration habeas cases from the 1800s had far-reaching consequences for future immigrant communities and racial and religious minorities.

3. Refining & Operationalizing Detention Schemes

Habeas proceedings also identified fixable errors that the government could address to solidify and expand detention systems. This feedback system helped to legitimate detention schemes by ostensibly requiring them to conforming to legal rules, albeit ones that did not meaningfully constrain the government’s power. In one set of cases about governmental power to regulate immigration, the Court struck down inspection and detention schemes that were instituted by states in order to screen out immigrants who were viewed as undesirable at the time. Ruling for the habeas petitioner, the Court concluded that states lacked the jurisdiction and authority to regulate immigration in that way. In response, the federal government adopted inspection and detention schemes that were substantially similar to the ones that states had enacted.

237 Gabriel J. Chin, Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power, in Immigration Stories 7, 7 (David A. Martin & Peter H. Schuck eds., 2005); Lew-Williams, supra note TK at 193. Scholars have documented how plenary power has become a kind of shadow over the Court’s cases that appears in different forms. See Hiroshi Motomura, Immigration Law After A Century of Plenary Power: Phantom Constitutional Norms and Constitutional Interpretation, 100 Yale L.J. 545, 554-61, 580-604 (1990).

238 Kerry v. Din, 135 S. Ct. 2128 (2015) (plurality opinion) (citing Fiallo v. Bell, 430 U.S. 787, 798 (1977) as reason for additional judicial deference, which cited Chae Chan Ping, see 430 U.S. at 792).


242 Chy Lung v. Freeman, 92 U.S. 275, 276–78 (1875) (state law excluded “lewd or debauched” women).

243 Id.

244 Low Wah Suey v. Backus, 225 U.S. 460 (1912) (excluding women on grounds that she was engaged in prostitution); see Lew-Williams, supra note TK at 44-45 (describing origins of Page
Habeas also identified gaps in detention schemes. Individuals challenging their detentions would argue that they did not fall within the group of persons subject to the detention schemes. For example, *Chew Heong v. United States* addressed an 1882 statute that prohibited the arrival of new Chinese laborers and allowed existing residents to come and go from the United States with a customs certificate. Congress later amended the statute to say that a customs certificate was the only accepted evidence for reentry; Chew Heong had departed the country prior to passage of both statutes. He argued that the statute was inconsistent with a treaty guaranteeing Chinese laborers the ability to enter and exit the United States. The Court ultimately sided with him, concluding that the statute had to be interpreted consistent with the treaty if that was a permissible interpretation. Congress responded by enacting the 1888 Chinese Exclusion Act which amended exclusion laws by barring all Chinese laborers who had left the United States from returning whether or not they had certificates.

In other cases arising out of the government’s earlier anti-Chinese exclusion laws, habeas petitioners argued that prior residents were not subject to the Chinese Exclusion Act and that merchants were not subject to the requirements for entry into the United States. When courts agreed with these interpretations, Congress responded by closing the gaps just two years later—requiring everyone, even prior residents, to obtain certificates, and subjecting merchants to the restrictions as well. Some of the decisions Congress was responding to were not even Supreme Court decisions. And habeas courts’ separation of powers rhetoric about the importance of legally authorized detentions bolstered Congress’s expansion of the detention schemes.

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245 112 U.S. 536 (1884).
246 Act of May 6, 1882, ch. 126, §§ 4-6, 15, 22 Stat. 58, 61.
248 112 U.S. at 536-37.
249 Plaintiffs’ Statement of Case by Attorney Riordan at 11-13, Chew Heong (No. 1088). He also made a due process clause. See id. at 40-41.
250 112 U.S. 536
252 *In re Chin Ab On*, 18 F. 506 (1883).
253 *In re Low Yam Chow*, 13 F. 605 (1882); *In re Tun Yeeong*, 19 F. 184, 187-88 (N.D. Cal. 1884). For a discussion about how these cases furthered elite imperial interests, see Beth Lew Williams, The Chinese Must Go 60-62.
255 *Li Sing v. United States*, 180 U.S. 486, 495 (1901); Chung Fook v. White 264 U.S. 443, 444-46 (1924); *Ex parte Kan-gi-shun-ca*, 109 U.S. at 572 (detention “requires a clear expression of the intention of congress”); *Kagama*, 118 U.S. at 383 (“The decision in that case admits that if the intention of congress had been to punish, by the United States courts, the murder of one Indian
In some of the habeas cases, courts offered preemptive justifications for future legislative restrictions on immigration. In *Chae Chan Ping*, for example, which upheld the Chinese Exclusion Act, the Court opined that prior exclusion acts “enforcement … was attended with great embarrassment, from the suspicious nature, in many instances of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of the oath.” When Congress subsequently required Chinese immigrants to prove their residence with the testimony of white witnesses, the Court pointed to that language as evidence of the historical practice justifying the additional restrictions.

The availability of habeas corpus also helped to justify or legitimate private enforcement of immigration laws. Legal processes modeled on habeas or habeas itself could expand detention systems. Under the Geary Act, the law that required Chinese laborers to obtain certificates of residence to remain in the United States, any Chinese person could be arrested for deportation upon a complaint “filed by any party on behalf of the United States.” Occasionally judges issued warrants for arrest based on the complaints of private parties even though the Attorney General and Department of Treasury officials had warned them not to. Judicial oversight also validated private participation in law enforcement by purportedly overseeing its excesses. Judges oversaw deportations carried out by private shipping companies.

III.

A. Habeas

Some might pause over whether to drawing any lessons from the preceding habeas cases because extrapolating from the cases could risk replicating the colonial projects the cases furthered. But ignoring the cases would obscure important realities about how habeas actually functioned and generate a selective picture of the writ.

by another, the law would have been valid.”); *Ekiu*, 142 U.S. at 660 (“An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful…As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law.”); Bridges v. Wixon, 326 U.S. 135, 149 (1945).

256 130 U.S. at 598.

257 *Fong Yue Ting*, 149 U.S. at 729-30.


259 Salyers, supra note TK , at 87 (citing correspondence between judges, Attorney General and U.S. attorneys); Lew-Williams, supra note TK at 206-07.

260 See supra note TK (45) (on keeping in mission houses)

261 Beth Lew-Williams, supra note TK at 77 (“The customs service relied on private support not just to capture unauthorized migrants, but also to deport them ….”); id. at 84-86.
1. The Structure of Habeas

In all three areas, habeas analyzed the legality of detentions of individuals who concededly lacked particular constitutional rights. Native Americans regularly filed writs of habeas corpus, even though, at the time, the Supreme Court had held that they were not citizens and Congress continued that state of affairs by statute. Indeed, while habeas courts maintained that a core function of the writ was to determine whether individuals could be detained because they were Native Americans, the Court was issuing decisions holding that the federal government was not constrained by individual rights guarantees in the Constitution when legislating in the area of Native American affairs. The same was true in immigration. The Court repeatedly affirmed that noncitizens seeking entry into the United States could file writs of habeas corpus testing the legality of their detentions even though they lacked individual rights, including due process rights, with respect to entering the United States. Habeas courts’ reliance on freedom petitions reflected a similar dichotomy: *Dred Scott v. Sandford* held that even free Black persons could not be citizens with rights under the Constitution, and yet habeas courts routinely adjudicated habeas petitions that were filed by enslaved or free Black persons. Habeas was not exclusively or even primarily about vindicating a particular set of individual rights, unless individual rights include the right to have the government act within the bounds of the law.

Habeas courts played an important role in constructing the polity and the terms of individuals’ membership in the polity. A core function of habeas corpus was to determine who could be citizens, which individuals were citizens, and the terms of an individuals’ citizenship and membership in the polity. That was the aim of freedom petitions; it was also occasionally an element of fugitive slave habeas proceedings, since courts would determine whether an individual was a fugitive slave or free. In both Native American affairs and immigration, habeas performed a similar function. Habeas courts generated racially productive bodies of law to separate Native Americans from American citizens and determine which Native Americans had become citizens through assimilation, disaffiliation with a tribe, or otherwise. Habeas courts performed similar inquiries in immigration cases—ascertaining which groups of persons could be citizens, and which particular individuals bore the hallmarks of citizenship. It was a habeas case that determined citizens of Puerto Rico were citizens of the United States as well.

Habeas courts reviewed executive and court-ordered detentions in similar ways. Jurisdiction served as a moniker for courts’ conclusion about what constituted the key preconditions for detention. In Native American affairs cases, for example, district courts sitting in their capacity as district courts had jurisdiction over certain enumerated crimes committed by Native Americans (or against Native Americans). Yet the only precondition for court-ordered detention that habeas courts would review was whether a defendant (or victim) was Native American. Habeas courts’ understanding about what made a detention jurisdictionally sound was inextricably bound up with race. Habeas played out similarly in immigration. There too, immigration officers had jurisdiction over certain individuals (all noncitizens, or certain subgroups of noncitizens) who committed certain acts that made them removable. Yet the primary element that habeas courts tied to an officer’s jurisdiction was an individual’s citizenship. As in the area of Native American affairs, habeas courts solidified the importance of citizenship and race as a basis for federal power.
over different groups; and they generated and reinforced visions of constitutional governance that sounded in that register. Immigration habeas cases, Native American habeas cases, and freedom petitions all sorted individuals into different legal regimes based on their citizenship, and in all three areas, citizenship was fused with race.

The case studies also suggest that existing legal frameworks that depict habeas as solely a mechanism for protecting individual liberty are skewed. One partial coping mechanism would be to stop indulging in the myth of habeas as the great writ of liberty. Adopting that coping mechanism could help us conduct a more accurate constitutional analyses of habeas, in part by debunking common arguments against expanding the writ or letting the writ run to certain areas. For example, *DHS v. Thuraissigiam* warned about how the additional layer of judicial review would “overwhelm”[^262] and “augment the burdens” on the government.[^263] That orientation toward habeas tells only half the story because it misses how habeas proceedings benefit the government by solidifying and augmenting its powers.

The entire corpus of cases also debunks *DHS v. Thuraissigiam*’s suggestion that “habeas has traditionally been a means to secure release” from unlawful detention and not “to obtain additional …. review of [a] claim.”[^264] When courts concluded that a detention was not authorized by law in the area of Native American affairs, the effect was to shift a case from territorial court to district court, or district court to state court – to obtain additional review of any claim in another tribunal. The upshot of an individual making a prima facie showing of citizenship in an immigration habeas proceeding was that a court would order a full blown judicial trial to determine whether an individual was a citizen.[^265] In these respects, habeas was all about obtaining more process and more review of certain claims, and that additional process did not reliably correlate with release.

### 2. Judicial Power

The cases are largely consistent with what Kovarsky described as a theory of habeas power—the idea that habeas reserves to judges the ability to determine when custody is legal, and to establish the rules for when detentions are illegal. But that muscular exercise of judicial power did not translate into what we might think of as individual liberty, even though the structural theories of habeas suggest that it will. Habeas imbued people with the authority to kidnap and force individuals into slavery and immunize kidnappers from any legal consequences. It functioned as a mechanism for owners to claim slaves. Even when enslaved individuals used the writ to claim their freedom, habeas reinforced the institution of slavery by preserving slavery as the default, background law. Habeas separated particular individuals who should not be slaves from individuals who should be, preserving the logic of the system. And by cementing the racial categories at the heart

[^262]: 140 S. Ct. at 1967.
[^263]: 140 S. Ct. at 1967.
[^264]: 140 S. Ct. at 1963.
[^265]:
of slavery, habeas contributed to the racial hierarchy at the base of the institution of slavery and later racial discrimination as well.

Habeas proceedings effectuated similar processes in both Native American affairs and immigration. Habeas courts identified individuals as foreigners or Native Americans. Sorting individuals along these lines implied that the categories of Native American, foreigner, and citizen were legally determinate, separate, and long-lasting. This fueled the federal government’s assertion of plenary power over Natives even after they became citizens of the United States and over immigrants even after they had physically entered the United States (lawfully or unlawfully). By refining and enforcing the categories that drove the emerging immigration restrictions (the difference between Asian and Chinese immigrants and white citizens) and laws regarding Native American affairs (the difference between Native Americans and whites), habeas reinforced the logic and structure of those areas of law, such as they were. Habeas also facilitated the subordination and control of Native communities by racializing Native Americans and facilitated the dispossession of Native lands.

B. Remedies And Race

In some ways, the usages of habeas in the 19th century represent a familiar story about the epiphenomenal nature of race and colonialism in American law. Until now, habeas was not part of that story; to the extent that it is, habeas is depicted as, at best, a force against the institution of slavery or the nativist elements of immigration law or, at worst, a less than ideally effective remedy. The reality is more complicated. Even a decarceral mechanism like habeas furthered racial subordination and exclusion, and not merely by failing to provide relief in some subset of cases. Habeas provided a way to extend and augment power through legal channels and it supplied the legal architecture that constructed and reinforced problematic ideas about race and colonialism.

1. Construction of Freedom And Race

Scholars of race and the law have emphasized the importance of attending to details in the processes of racialization, meaning the specific mechanics of how race is constructed. The habeas schemes reflect one component of the process of racialization. Habeas proceedings constructed racial categories by generating and reinforcing ideas about who gets to be free and on what terms. Whether individuals could be free depended on the racial categories and lines that were the focal point of habeas proceedings.

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268 Crenshaw, supra note TK at 1369 (suggesting that civil rights scholars should “expos[e] the centrality of race consciousness”).
In this way, habeas proceedings served as an engine for racial inequality by generating and reinforcing racialized ideas about who could be free. Habeas proceedings freed persons who carried out the kidnappings and renditions of Black persons and allowed masters and slaveowners to claim persons as slaves. Habeas proceedings also enforced federal authority over Native Americans, reaffirming Indian agents’ guardianship over Native Americans and immunizing federal Indian agents from state laws. Even habeas proceedings trained at freeing some persons from slavery preserved the institution and premise of slavery by separating out particular individuals from the larger institution they treated as legitimate.

Habeas proceedings also clarified who enjoyed more contingent, partial freedom. In both Native American affairs and immigration, habeas courts, when granting writs of habeas corpus, would simultaneously tell the federal government that it could detain those individuals. Thus, even where habeas operated to the benefit of particular individuals, it galvanized more far-reaching detention measures and control over subordinated groups. Habeas functioned as an empowering constraint by identifying gaps in detention schemes that Congress could and would shore up by legalizing more detentions. Individually successful habeas petitions generated draconian congressional responses, including the Major Crimes Act, which extended federal jurisdiction over Native Americans on Native lands, a law deferring Native citizenship for decades, and statutes excluding Chinese merchants, to name a few. Habeas proceedings served as both a means to ascertain whether a detention was authorized by law and as a way to make racialized detention schemes lawful. Habeas proceedings also generated the plenary power theories that justified and still justify the continued subordination of Native Americans and immigrants. And the continued availability of habeas offered a promise of liberation and the superficial appearance of constraint.

The story that emerges is consistent with Ariela Gross and Alejandro de la Fuente’s historical study of three slave economies in the lead up to the Civil War. In their study, de la Fuente and Gross concluded that the law of freedom, laws governing newly freed slaves, not the law of slavery, defined blackness and created the legal boundaries between black and white. Laws limiting residence, property ownership, trades, and civic rights, they argued, created the legal framework for racial subordination and the racial hierarchies that would allow segregation to persist for the next century.

2. Critical Remedies

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269 Tushnet, The Rights Critique.


271 Tushnet, The Rights Critique.

These usages of habeas also call to mind the critique of rights, which, at its core, maintained that rights are unstable and indeterminate, at best, and actively harmful at worst.\textsuperscript{273} As Russell Robinson,\textsuperscript{274} Reva Siegel,\textsuperscript{275} and others have shown, equal protection doctrine now preserves racial hierarchies as much as it disrupts them. Courts have interpreted the equal protection clause to forbid the government from adopting race-conscious measures that are designed to remove vestiges of discrimination.\textsuperscript{276} Robinson argued that the Court’s approach to LGBT rights, which focused on whether the government harbored animus toward particular groups, offered a welcome contrast to the more formal approach in equal protection doctrine, which prohibited any race conscious measures whether they were designed to further segregation or integration.\textsuperscript{277} But as Melissa Murray showed, animus can also be inverted to subvert equality.\textsuperscript{278} In Masterpiece Cakeshop, the Court held that a civil rights commission harbored animus toward a baker who refused to sell a wedding cake to a same-sex couple.\textsuperscript{279} These scholars have illustrated how rights may legitimate existing hierarchical systems and justify the continued subordination of disadvantaged groups.\textsuperscript{280}

The habeas proceedings replicated a similar dynamic even when rights were not in the picture. Habeas was one way that power could be seized through legal channels; habeas solidified the power of some groups over others and allowed power to be taken away from some groups. Federal and state governments used habeas to expand their own powers, or to bolster the powers of certain groups relative to others.

The indeterminacy of concepts like jurisdiction allowed courts to selectively focus on personage as an element of jurisdiction, which they linked to citizenship and race. That indeterminacy does not mean anything goes, but it does mean that courts had considerable flexibility to decide between minimally plausible competing theories. Thus, while all of the statutory preconditions for detention could have gone to a detainer’s jurisdiction, habeas courts elected to focus only on two statutory preconditions for jurisdiction, race and place. That choice fused the concept of jurisdiction, whether the government had authority over certain individuals, with race and place.

The malleability of remedies also means that they can be wielded in service of government power. At times, habeas functioned as a power of the state. Expansive grants of habeas jurisdiction legalized the acts of carrying out federally permitted kidnappings

\textsuperscript{273} Tushnet,\textit{ Essay on Rights}, supra note TK at 1366.

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and renditions of Black persons. Some states used habeas as a mechanism to clear up title to slaves as one facet of slave economies. Habeas proceedings also solidified the federal government’s authority over Native Americans by securing federal officials’ authority in general, as well as their authority over particular individuals. And habeas proceedings cemented the idea that detentions were just fine so long as Congress authorized them, which solidified contested exercises of congressional power.

Remedies, like rights, can also perpetuate and reinforce existing hierarchies rather than challenge them. Habeas preserved the institution of slavery even as individuals sought to challenge it by refining the racial categories that drove slavery and legitimating the larger system by focusing on more particularized and specific forms of injustice. 281 Habeas performed a similar function in both immigration and Native American affairs. It supported existing social hierarchies by reaffirming the distinctions between Chinese immigrants and Americans and between Native Americans and white citizens. It distinguished particular illegal actions (the detention of Chinese Americans or Native Americans who had disaffiliated from their tribes) from broader systems that perpetuated subordination and inequality, such as the very basis for federal power over Native Americans or the exclusion laws that targeted at Chinese immigrants. 282 And it legitimated racial hierarchies by generating racially productive bodies of law in all three areas. Habeas also cleared the path for expansive federal authority over Native Americans, immigrants, and Black Americans. It protected the federal government’s choice to permit kidnaping and renditions of Black Americans into slavery. And it contributed to the racialization of groups in ways that diminished their political authority while expanding the United States’ authority over them.

Yet habeas specifically and remedies and federal courts more generally often avoid confronting questions of race and racial inequality. The core of habeas and remedies focuses instead on questions of comparative institutional competence, which frequently generates rules about the kinds of processes and judicial review that must accompany detentions. In that frame, there are not many points for thinking about how habeas and remedies affect racial hierarchy and how race affects habeas and remedies. One reason for this omission may be because habeas and remedies are trans-substantive: Habeas is supposed to provide an overarching framework for reviewing all detentions, whether in the area of immigration, Native American affairs, state and local criminal law, or otherwise. But to achieve that perspective, habeas and remedies abstract away from substantive inquiries that might vary depending on the particular context in which habeas is operating.

As Part I suggested, scholars have approached questions about habeas through these lenses of the separation of powers and checks and balances. To argue about habeas is to argue about comparative institutional competence to review whether detentions are

281 Crenshaw Williams, at 1350; id. at 1352 (“By accepting the bounds of law and ordering their lives according to its categories and relations, people think that they are confirming reality—the way things must be. Yet by accepting the view of the world implicit in the law, people are also bound by its conceptual limitations.”).

282 Siegel, why equal protection no longer protects.
authorized by law. But that approach leaves much outside the frame, including questions about who is being detained and by whom, and what substantive interests are being safeguarded and protected by judicial power. A focus on comparative institutional competence might perceive race, but the law of habeas has developed in such a way that these concerns are on the periphery.

3. Constitutional Structure

The usages of habeas in the 19th century raise difficult questions about using the framework of constitutional structure, meaning the separation of powers, checks and balances, and federalism as tools to identify and remedy racial subordination. In particular, the cases sound notes of caution about recent suggestions that constitutional structure is a better way to remedy racial inequality than rights. To be sure, there is no hermetic separation between structure and rights. First Amendment rights, for example, prohibit legislatures from acting for certain reasons and empower courts to hear certain challenges. And the primary virtue of the separation of powers is (supposedly) its promise to protect the rights and welfare of individuals.

Nonetheless, some scholars have urged that instead of rights, scholars, litigants, and disempowered groups should focus on questions of constitutional structure, and specifically how and where power is allocated in the government. They argue that one way to achieve the goals of the civil rights movement and the empowerment of historically disadvantaged groups such as Indian tribes and racial minorities would be to shift our attention to questions of constitutional structure, which they use to mean federalism, the distribution of authority between different levels of government, and the separation of powers, the distribution of authority within the federal government. In urging a turn to federalism, the separation of powers, or checks and balances, some scholars have invoked the critique of rights, arguing that rights “pose a threat” to historically

\[ \begin{align*}
284 & \text{Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513 (1991).} \\
285 & \text{These scholars did not always associate themselves with the rights critique, although some of them explicitly did so. See Blackhawk, Power & Indian Country, supra note TK, at 44-45 (invoking rights critique as a basis to focus on power and structure); Blackhawk, Paradigm, supra note TK at 1856 (urging a focus on power rather than rights critique’s “deconstruction”); cf. Gerken, Foreword, supra note TK at 54 (noting that the “rights strategy isn’t free from normative complications”).} \\
286 & \text{Gerken, Foreword, supra note TK at 47 (“Federalism reimagined thus reveals that the benefits of minority control can extend not just to Southern racists, but to blacks and Latinos.”)}
\end{align*} \]
disadvantaged communities and “disempower minorities.” These scholars present constitutional structure as a way to achieve substantive equality and justice. Their bottom line is that “[r]ather than rights, subordinated communities ought to demand the power to define their own laws, their own systems of governance.” They therefore urge a focus on power and constitutional structure, rather than rights.

The habeas cases, however, are all about power and structure. The central focus of the habeas cases was on questions of jurisdiction and authority, not rights. In all three areas, the common claim was to argue that the federal or state government lacked the power to detain individuals—not because of the individuals’ rights, but because of federalism or the separation of powers. Packaging the claims in that language and orienting the claims around those concerns did not further the project of racial equality.

The idea that habeas and the principles of separation of powers, checks and balances, federalism, and institutional competence that guide habeas are somehow sufficient to curb abuses of government power, including racial subordination, is possible only by erasing how habeas functioned in the 19th century. The separation of powers and checks and balances benefitted racial subordination and furthered the project of American colonialism. Separated powers became a justification for deferring to congressional and executive determinations that particular groups of immigrants constituted a threat to the country; it also supplied a justification for why Congress could authorize more and more detentions. Checks and balances allowed habeas courts to refine detention schemes without meaningfully constraining them. When habeas did invalidate

287 Blackhawk, Paradigm, supra note TK, at 1859-60 (“[R]ights are feared in Indian Country rather than sought…. [R]ights still pose[] a threat to the power of Native Nations over a hundred years later.”).

288 Blackhawk, Paradigm, supra note TK, at 1859 (“[R]ights have been whittled away to offer a limit on government action only. Rarely do rights require affirmative government action, and, to the extent that they do, … often work to disempower minorities by keeping subordinated groups from achieving minority status.”); Blackhawk, Power & Indian Country, supra note TK, at 44-45 (“ ‘Rights’ were often invoked as a means to undermine the sovereignty of Native Nations … [F]ederal rights undermined justice in Indian country.”)

289 Gerken, Foreword, supra note TK at 47 (“[L]ocalism can serve the same constitutional values as the First and Fourteenth Amendments.”); Heather K. Gerken, Federalism As The New Nationalism, 123 Yale L.J. 1889, 1895 (2014) (“Structure thus furthers the same aims as the First and Fourteenth Amendments. Because federalism and localism allow national minorities to rule as local majorities, decentralization ‘turns the tables,’ allowing the usual losers to win and the usual winners to lose.”).

290 Blackhawk, Paradigm, supra note TK, at 1856; Maggie Blackhawk, Federalism Indian Law as Paradigm in public Law, 132 Harv. L. Rev. 1787, 1798 (2019) (“[T]he national government has best protected Native peoples by bestowing power, not rights.”).

291 Maggie Blackhawk, On power & Indian Country, Women & Law: Joint Publication, 39, 40-41 (2020) (“Justice is more often concerned with the language of rights…. In Indian Country, this simple story doesn’t hold …. Instead, jurisdiction is synonymous with justice. Rather than the language of rights, it is the language of sovereignty that empowers Native people.”).
government action, it was often government actions that challenged the institution of slavery. Other times, when habeas courts provided a check on other government institutions, they would simultaneously identify other, permissible ways for the federal government to pursue the same policies.

The abstract concepts of structure were not up to the task of exposing the centrality of race to the legal regime; nor was they sufficient to remedy racial subordination. Nothing about judicial power, the separation of powers, or checks and balances requires those principles to serve particular interests, particularly the interests of racial minorities and the less powerful. Nothing about courts as institutions vis a vis the executive or legislative branches makes them better equipped to effectuate the interests of historically subordinated groups, including racial minorities.

Yet scholars often invoke the separation of powers or checks and balances to explain why habeas is an instrument for freedom and a mechanism to protect individual liberty. Gerald Neuman, for example, argued that habeas preserves the separation of powers by ensuring that detentions are authorized by law. David Cole’s reliance on Hart’s *Dialogue* invoked the idea of checks and balances to depict courts as necessary overseers of the political branches and stopgaps to invalidate government actions that harmed individuals. Fallon and Meltzer invoked similar ideas when habeas corpus as a mechanism to keep the government within the bounds of the law.

But as the case studies make clear, nothing about judicial power, the separation of powers, or checks and balances requires different institutions to serve different interests, much less the interests of the less powerful. To the extent that habeas functioned as one component in a system of separated powers, it did so by ensuring that one branch of government (the legislature) wrote the laws while another branch of government (the executive) enforced them. As described above, that feature of habeas factored into expanding detention schemes. When the Court concluded in *Ex Parte Crow Dog* that Congress had not authorized territorial courts to hear criminal cases involving two Native Americans on Native lands, Congress responded by enacting the far-reaching Major Crimes Act, which still governs federal Indian law today. When courts concluded that merchants were exempt from exclusion laws, Congress responded by excluding them. When the Court concluded that Native Americans who disaffiliated with tribes because citizens who were no longer proper objects for the federal government’s plenary powers, Congress responded by deferring their citizenship. A system of separated powers facilitated Congress’s ability to write more draconian laws.

Separated powers also meant that habeas functioned as a mechanism to sort individuals, based on race and citizenship, into separate justice systems. Determining whether detentions were authorized and whether particular detainers had jurisdiction pulled habeas courts into the business of generating bodies of law trained at distinguishing groups who Congress wanted to detain—distinguishing Native Americans from white citizens, black people from white people, and Chinese immigrants from citizens. Immigration habeas proceedings determined whether an individual was entitled to a judicial proceeding to determine their citizenship, or whether instead they were relegated to the administrative processes to challenge their detention and exclusion. Native American affairs habeas proceedings determined whether, based on courts’ conclusion
about the identity of the perpetrator or the victim, a case belonged in district court, territorial court, or state court. That was also the upshot of *Dred Scott*—sorting individuals into state court rather than federal court because of a racialized construction of citizenship.

The habeas cases also reveal that, as an institution, courts did not provide a noticeably different perspective than the political branches or ensure that any additional or different interests oversaw government power. Here, it is instructive to compare the reasoning in the cases upholding exercises of power with the reasoning of the legislators who exercised that power. When Congress enacted the Chinese Exclusion Act, Senator Sherman stated “*C*urrent sentiment in this country [*is*] that we should prohibit races so distinct, so alien, so different in habits, civilization, religion, and character from ours, from coming to our country.”292 When President Cleveland signed the Act, he stated that Chinese migrants had “purposes unlike our own and wholly disconnected with American citizenship.”293

The Court’s screeds in the *Chinese Exclusion Cases* sound in a similar register. The Court linked the federal government’s power to exclude immigrants to the idea that “the presence of foreigners of a different race in this country, who will not assimilate with us” could “be dangerous to its peace and security.”294 In many ways, this is entirely unsurprising. As a presidential hopeful in the 1880 and 1884 elections, Justice Field, who authorized the opinion in *Chae Chan Ping*, took virulently anti-Chinese immigration positions. He described the question as “whether the civilization of this coast, its society morals, and industry, shall be of American or Asiatic type”295 and his campaign argued for the need to protect American institutions from “the oriental gangrene.”296

The same occurred in the area of Native American affairs. The legislative history to the Major Crimes Act evinces some congressional representatives’ concern with “civilizing the Indian race,” and “teach[ing] them regard for the law, and show[ing] them that they are not only responsible to the law, but amendable to its penalties.”297 The legislative history is also rife with expressions of concern about relying on tribal governance systems to address crimes by tribal members: “[I]t will hardly do to leave the punishment of the crime of murder to a tribunal that exists only by the consent of the Indians of the reservation … punished according to the old Indian custom.”298 Again the Court’s reasoning sounded in a similar register. *Ex parte Kan-gi-shun-ca* depicted Natives as

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292 Lew Williams supra note TK, at 186.

293 Lew Williams, supra note TK, at 188.

294 130 U.S. at 606.

295 Carl B. Swisher, Stephen J. Field: Craftsman of the Law 221 (1969)

296 Paul Kens, Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age 205-09 (1997).

297 Statement of Rep. Cutcheon

298 Statement of Rep. Cutcheon
“aliens and strangers … separated by race” who led a “savage life” and pursued “red man’s revenge.”

It is also instructive to compare the theories under which courts sustained the laws and the theories that executive or congressional lawyers offered to justify the laws. In both immigration and Native American affairs, the federal government initially argued for a more limited theory of government power than courts ultimately embraced to sustain the laws that Congress enacted. Thus, to the extent that courts brought a different perspective to these matters than other branches of the federal government, it was one that resulted in more capacious federal powers.

In the case involving the Major Crimes Act, the federal government argued that the source of Congress’s power was one of its enumerated powers, the Indian Commerce Clause. The federal government argued that the clause allowed the United States to legislate “intercourse” with Native Americans, and that the power to create criminal laws to regulate Native Americans was incidental to that power, and therefore within the scope of Congress’s powers under the Necessary and Proper Clause. Specifically, the government argued “If [Native Americans] are permitted to murder each other, it is certainly an interference with intercourse; because the number with whom intercourse will be held is thereby diminished.”

The Court, however, rejected the suggestion that Congress’s powers derived from or were limited by the Indian Commerce Clause and the Necessary and Proper Clause. Instead, the Court maintained, they were an incident of sovereignty derived from the doctrine of discovery—because the United States had conquered the lands and the people, it assumed full power over them. And because the powers derived from conquest and sovereignty, they were plenary, unlimited, and subject to minimal review.

Similarly, in the Chinese Exclusion cases, Chae Chan Ping, the federal government attempted to tie its authority to enact the Chinese Exclusion Act to certain enumerated powers, including the power to regulate foreign commerce, the power to establish uniform rules of naturalization, and the Necessary and Proper Clause. But again, the

299 109 U.S. at 571.
300 Brief for the United States at 14, United States v. Kagama, 118 U.S. 375 (1886) (No. 1246); U.S. Const. art. I, § 8.
301 Brief for the United States at 4-6 United States v. Kagama, 118 U.S. 375 (1886) (No. 1246); U.S. Const. art. I, § 8.
302 Brief for the United States at 24, United States v. Kagama, 118 U.S. 375 (1886) (No. 1246).
303 Kagama, 118 U.S. at 375, 377-78.
304 Id.
305 Brief for the United States at 5, Chae Chan Ping. The government also pointed to Article I, section 9, which prohibits “[t]he migration or importation of such persons as any of the states now existing shall think proper to admit” before 1808 as evidence that Congress did have the authority to exclude foreigners. See id.
Court went even broader than that, holding that the federal government could exclude foreigners as an incident of sovereignty in order to protect its very sovereignty. And again, because this power was an incident of sovereignty, it was plenary, unlimited, and subject to minimal review—and not tied to whatever limits might exist under particular enumerated powers.

Or consider how federalism operated in these areas. Because the federal government and the states pursued similar immigration exclusion laws, federalism merely meant selecting which level of government would enact a policy. As Beth Lew-Williams and K-Sue Park have documented, the federal government often enacted restrictive immigration and naturalization laws in response to state and local violence in order to placate state and local jurisdictions. Federalism also unified states and the federal government in opposition to immigrants. The ideology of federalism viewed the states and the federal government as sharing a common authority against outsiders. It also pressed the federal government into service to defend states’ ability to govern in the face of perceived threats posed by racialized others. And it preserved the states and the federal government’s vision of white colonial government.

Similarly, in the area of Native American affairs, states and the federal government both sought to assert their authority at the expense of tribes and minimize tribes’ claims to govern. Federalism obligated the federal government to protect states’ authority at the expense of tribes and “facilitated new and more aggressive claims” over tribes.306 While federalism gave the federal government expansive power over Native American affairs, it did so partially to protect the states against them. And when states did seek to exercise their powers, it was hardly in pro-Native ways. States pursued theories of jurisdiction that allowed them to regulate Native persons on Native lands and to assume jurisdiction at the expense of tribes.

Some scholars who urge a turn toward constitutional structure may be invoking constitutional structure as a stand in for the idea that power and authority should be shared with tribes or racial minorities. But as Gregory Ablavsky suggested, at a minimum, federalism refers to the distribution of authority between the federal government and the states.307 Embracing federalism thus risks legitimating all exercises of power by the states or the federal government, no matter their goal. Embracing the separation of powers of checks and balances likewise fails to center questions about whose interests are being served by an institution: It allows power to be separated in ways that further racial hierarchies, and it allows the branches to check one another to the same end.

The focus on constitutional structure centers questions such as the benefits of competition versus concentration, or checks and balances versus separation. But those formal visions are not substantive. They are decidedly agnostic about questions such as what set of interests is exercising power, who power is being exercised over, and to what end power is being exercised. The frameworks about theoretical institutional competence deprioritize the consideration of issues that concern racial equality and inclusivity. Those

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306 Ablavsky, Empire States, supra note TK, at 1827.

frameworks and the principles of constitutional structure they invoke, and that we hold dear, are not enough to combat racial subordination; they can perpetuate it and they have.

Conclusion

Given this history, it is fair to ask why the mythology of habeas as a great bulwark of liberty has persisted. Part of the answer might be that Native American affairs, immigration, and the law of slavery are sometimes historically neglected, or at least treated as unique or aberrational. Another contributing factor might be that the groups who sought to avail themselves of the writ were nonwhite individuals who were viewed as meaningfully different from white Americans. White immigrants had successes in testing the legality of extradition without habeas proceedings generating bodies of law about expansive authority over white immigrants; so did white citizens challenging certain instances of federal detention. But to describe the writ as the Great Writ of Liberty tells only their stories, and it would mistakenly suggest that habeas corpus and structural protections of liberty are sufficient to combat abuses of government power, including racial subordination.

While this article has focused on how habeas became part of the legal architecture of racial subordination and exclusion in the 19th century, this may not be a phenomenon only of the past. Consider DHS v. Thuraissigiam. In that case, the detainee challenged the government’s expedited removal system that allowed immigration officers to make final determinations against an individual’s asylum or entry claim without the benefit of judicial review. Mr. Thuraissigiam’s habeas petition provided the vehicle for the Court to make the broad pronouncement that persons who are physically but not lawfully present in the United States lack due process rights at all, in addition to chipping away at the scope of the Suspension Clause. The unbounded rhetoric about the scope of the Due Process Clause will be a boon for the government for decades to come. As the dissent noted, the majority was far from clear about how broadly its due process analysis applied—how far from the border, how long after an alleged entry, and to what classes of immigrants (unlawful arrivals versus overstays) did it apply? The government has since expanded the expedited removal system to apply anywhere in the United States.

Or consider the area of Native American affairs, where in the last several decades, habeas has been the vehicle to dramatically curb tribes’ authority to protect tribal members. Habeas’s focus on jurisdiction allows habeas courts to continually police tribes’
jurisdiction and specifically to curb it. That is, given habeas’s focus on jurisdiction, habeas provides a forum that is uniquely devoted to focusing on whether a tribe has jurisdiction, to the exclusion of other issues. For that reason, habeas was the mechanism to curb Native nations’ authority to prosecute nontribal members in *Oliphant v. Suquamish Indian Tribe*. Habeas was also the vehicle for the Court to announce that the rule from *Oliphant*, that tribes cannot prosecute non-members of the tribe, applied to members of other tribes as well. Because of these decisions, only the federal government can prosecute individuals for crimes that occur in Indian country when the victim of the crime is Native American. The results have been disastrous: The remote location of some of the reservations in relation to federal prosecutors’ offices makes the crimes more difficult to prosecute—difficulties that are reinforced by prosecutors’ resource constraints and ability to select which cases to prosecute. Federal prosecutors declined to prosecute two-thirds of Indian country cases involving sex crimes. Native American women are much more likely than white women to be victims of sexual violence, and non-Indians commit almost 96% of the violence against Native women.

Habeas proceedings have also fused considerations of personage and place in other ways that facilitated the dispossession of Native lands. In particular, courts relied on who resided on particular land as evidence of what kind of place the land was—reservation or state. In a later habeas case challenging a state’s authority over an enrolled member of the Cheyenne River Sioux Tribe, the Court explained that determining whether land remained a reservation (or whether instead Congress had disestablished or diminished the reservation) allowed courts to examine “the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with” the area, as in “who actually moved onto opened reservation lands.” “Subsequent demographic history,” such as “[w]here non-Indian settlers flood[]” into particular lands, indicated that an area has “long since lost its Indian character,” is evidence of “diminishment.” This theory of jurisdiction is about both place and personage: Jurisdiction is still about place, but a place acquires its character based on who is there, and it allows white citizens to extinguish

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314 https://indianlaw.org/issue/ending-violence-against-native-women
316 *Id.* at 471-72.
tribal authority through their mere presence. Relying on this method, courts have concluded numerous reservations were diminished or disestablished.

Much of the renewed focus on habeas corpus focused on war on terror litigation, where habeas has hardly operated as a meaningful check on the government’s detention authority in that arena. Over a decade after the Court decided Boumediene, there remain over forty people detained at Guantanamo Bay. Most of the individuals released from Guantanamo Bay never filed a habeas petition. And the individuals who did were only released because the executive branch negotiated their release—not because the executive branch was following a court order to release them.

Today, habeas is the mechanism for federal courts to oversee state and local criminal justice systems that are overwhelmingly filled with men of color. There too, habeas has generated rulings that water down criminal procedure protections related to custodial interrogations and the effective assistance of counsel.

The case studies suggest that this is part of habeas itself. We should not expect habeas to be a cure all for expansive detentions or sweeping exercises of government power, particularly in areas where historically disadvantaged groups are invoking the writ. Today, various scholars have attributed habeas’s ineffectiveness to the volume of habeas petitions that are filed today. The case studies suggest there are other dynamics in play as well. Although habeas is supposedly a mechanism to limit government power, it can also extend and cement government power. It has provided one way to seize power over disadvantaged groups. The examples from the 19th century provide a fuller picture of the political economy of habeas and make for a not so great writ after all.


319 Berghuis v. Thompkins

320 Harrington v. Richter