

HABEAS CORPUS AND VOID JUDGMENTS

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In a string of recent opinions, Justice Gorsuch and Justice Thomas have posited that postconviction relief upon a writ of habeas corpus was historically unavailable except where the judgment of conviction was issued by a court lacking jurisdiction. In light of this history, Justices Gorsuch and Thomas have argued for a reconsideration of the modern scope of the writ, which generally allows for relitigation of alleged constitutional error in the course of criminal trial.

This Article argues that Justices Gorsuch and Thomas have the history half right. They are correct to assert that a valid judgment of conviction was a sufficient answer to the habeas inquiry. They are mistaken, however, on three fronts.

First, a want of jurisdiction was not the lone circumstance where a judgment of conviction was insufficient cause for confinement. Rather, a petitioner was entitled to relief whenever the custodian could not provide the court with “due process of law” justifying detention—“due process” not in the modern sense of the phrase, but as in lawful writs and precepts duly issued forth from a court of law. The jurisdiction of a convicting court was relevant because a judgment issued in excess of jurisdiction was void. Where a prisoner was held under a void judgment, it was as if they were held under no judgment at all. In this way, such petitioners stood in the same position as one subject to arbitrary detention by an executive officer.

Second, insofar as Justices Gorsuch and Thomas are using “jurisdiction” in its modern sense, their assertion that postconviction habeas relief was unavailable except for a want of jurisdiction is anachronistic. Eighteenth- and nineteenth-century jurists spoke of “jurisdiction” in a broader sense, as in “the power of a sovereign to affect the rights of persons,” a notion not limited to exercise of the judicial power. Jurisdiction could be analyzed through a variety of different, nonexclusive vectors. One vector particularly relevant to the habeas inquiry was “jurisdiction over the process”—power to issue particular writs and precepts, a power which could have various subject-matter, territorial, and personal limitations, many of which were constitutionally prescribed. This concept has been almost completely overlooked in the habeas literature.

Third, a want of jurisdiction was not the only condition that would render a judgment void ab initio. To give judgment is a volitional act. Thus, the traditional

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vices of the will—fraud and duress—could also render a judgment void. But when such cases finally came before the Supreme Court, consistent with the realist jurisprudence of the early twentieth century, the Justices described such circumstances as “denials of due process” rather than questions of the general law of judgments. This conceptual error, while harmless at first, eventually led to the total erosion of traditional habeas doctrine.

In light of this history, this Article concludes that the problem with modern habeas practice is not so much the breadth of inquiry, but the manner in which it proceeds. A habeas court has no power of vacatur over a final judgment of conviction, as it would were the judgment brought before it on a writ of error or on an appeal. Much like judicial review of statutes, a habeas court’s only power is to recognize what has already been done by operation of law.

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INTRODUCTION

It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.

—*Oliver Wendell Holmes, Jr.*¹

Habeas corpus jurisprudence has lost its way. For the past seventy-odd years, courts and commentators have sharply divided over the writ's proper function, particularly for petitions of prisoners held under a state-court judgment. All agree that the writ of habeas corpus prescribes an inquiry into the legality of confinement.² The disagreement lies in what makes confinement "lawful." Is someone lawfully confined if they are actually innocent?³ What if the defendant's trial was infected with federal constitutional error?⁴ Does final judgment of a court of competent jurisdiction not conclusively decide the issue?⁵ And what is the relationship between habeas corpus and due process of law?⁶

1 Hyde v. United States, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting).

2 See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 444–45 (1963); Jonathan R. Siegel, *Habeas, History, and Hermeneutics*, 64 ARIZ. L. REV. 505, 506 (2022); Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753, 757 (2013); see also RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 2.3 (7th ed. 2015) (cataloging various descriptions of the writ over time).

3 Cf. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHL. L. REV. 142, 150 (1970) (arguing that a "colorable showing of innocence" should be a threshold requirement for habeas relief); House v. Bell, 547 U.S. 518, 554–55 (2006) (declining to resolve whether "freestanding innocence claim[s]" are cognizable on habeas, *id.* at 555); Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1699–1716 (2008) ("[T]he wrongful conviction of an innocent person is such an egregious miscarriage of justice that several existing constitutional rights provide likely candidates for relief." *Id.* at 1699.); Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417 (2018) (highlighting the concept of "legal innocence," as opposed to "factual innocence," and how habeas doctrine "has become increasingly attentive to [such] claims," *id.* at 419).

4 Cf. Sanders v. United States, 373 U.S. 1, 8 (1963) ("Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985) (arguing that postconviction habeas is justified as a mechanism for guaranteeing a federal forum for litigation of criminal defendants' federal constitutional rights).

5 Cf. Bator, *supra* note 2, at 466 ("[It was a] black-letter principle of the common law that the writ was simply not available at all to one convicted of crime by a court of competent jurisdiction." (citing *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830))).

6 Cf. Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451, 465–66 (1966) ("If a seventeenth century lawyer ever urged that the function or office of habeas corpus was the 'vindication of due process,' he would undoubtedly have had in mind the use of habeas corpus to review executive detentions and to release persons wrongfully imprisoned by the crown."); Gary Peller, *In Defense of Federal Habeas Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 622 (1982) (arguing that "due process and competent state

In a string of recent opinions, Justice Gorsuch and Justice Thomas appear to have taken a firm stance on the scope of habeas inquiry. Drawing chiefly on Professor Paul Bator's interpretation of the history, Justices Gorsuch and Thomas have asserted that habeas corpus should primarily function as a check on unauthorized executive detention, not as a mechanism for postconviction relief.⁷ In this way, "the point of the writ was to ensure due process attended an individual's confinement, [and judgment following] a trial was generally considered proof he had received just that."⁸ But in 1953, the Supreme Court significantly departed from the historic office of the writ, deputizing federal district courts to inquire *de novo* into any federal constitutional claims raised by the petition.⁹

There are at least three clear problems with this theory of the writ. First, Bator built his theory solely with reference to cases decided by the federal Supreme Court—a methodological choice practically guaranteed to result in error, given the relatively small sample of habeas petitions that came before the Supreme Court in our nation's first century.¹⁰ Second, Bator neglected to engage with traditional notions of "jurisdiction," describing the nineteenth-century doctrine as "a less than luminous beacon" and brushing it to the side.¹¹ Most notably, Bator failed to account for the nineteenth-century concept of "jurisdiction over the process," or, in more modern parlance, power over the orders that issue forth from a court.¹² Third, and relatedly, this theory rests on an interpretation of the word "process" that is inconsistent with the original meaning of the term as used in the Fifth and Fourteenth Amendments. Habeas corpus is indeed "the instrument

court jurisdiction were identical during [the late nineteenth century]" and therefore habeas should be available whenever a valid due process claim is stated); Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 54–56 (2012) (arguing that habeas corpus and due process serve overlapping values but ultimately are independent from one another); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 691–92 (2009) ("[T]he origins of the Great Writ link it inextricably to core due process safeguards derived from the Great Charter and enshrined in our Constitution.").

7 See *Montgomery v. Louisiana*, 577 U.S. 190, 232–34 (2016) (Thomas, J., dissenting); *Edwards v. Vannoy*, 141 S. Ct. 1547, 1563 (2021) (Thomas, J., concurring); *Brown v. Davenport*, 142 S. Ct. 1510, 1520–22 (2022) (Gorsuch, J.).

8 *Davenport*, 142 S. Ct. at 1521.

9 *Id.* at 1522 (citing *Brown v. Allen*, 344 U.S. 443, 463 (1953)).

10 For similar critiques of Bator (and habeas scholarship more generally), see Peller, *supra* note 6, at 612; Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 579–80 (1993); and also PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 4–6 (2010), which notes analogous sampling errors with respect to English history.

11 Bator, *supra* note 2, at 470. For similar critiques of Bator (and habeas scholarship more generally), see Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1132 (1995); and Siegel, *supra* note 2, at 509.

12 See *infra* subsection I.C.2.

by which due process could be insisted upon”¹³—due process as in a valid writ or precept duly issued by a court of law, not as in an adjudicative proceeding according to the law of the land.¹⁴

Still, Justices Gorsuch and Thomas are not completely off track. Valid final process upon a judgment did generally provide conclusive evidence of the lawfulness of confinement.¹⁵ But it is imprecise to call a want of jurisdiction an “exception” to this rule. A judgment issued by a court lacking jurisdiction is void—i.e., it is as if there were no judgment at all. It was because the judgment was void, not because the adjudicating court lacked jurisdiction, that habeas relief was available.

The fundamental flaw in modern habeas practice is not so much the *scope* of the inquiry, but the *manner* in which that inquiry proceeds. Federal courts adjudicating a habeas petition do not have power of vacatur over judgments of conviction, regardless of whether those judgments originated in state or federal court. Vacatur of a judgment is the proper function of a writ of error. Rather, federal courts’ power to review a judgment on habeas is much like their power to review a statute in an ordinary case—where a judgment is void, it should be “set aside” and given no effect. But the reviewing court does not *make* the judgment (or statute) void; that has already been done by operation of law.¹⁶

It is possible that a substantial portion of the constitutional errors currently within the scope of modern doctrine could render a judgment void. With respect to judgments of the federal courts, erroneous adjudication of certain constitutional questions may render a judgment void because the federal courts “owe their existence to” and “derive their powers from the Constitution.”¹⁷ Thus, insofar as a given provision of the Constitution limits the judicial power, any judicial act that contravenes such a provision is “void for want of jurisdiction, or constitutional extent of power.”¹⁸ And with respect to the judgments of state courts, to the extent that the limitations on the federal judicial power are incorporated against the several states, contravention of said

13 *Davenport*, 142 S. Ct. at 1520 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 555 (2004) (Scalia, J., dissenting)).

14 See Max Crema & Lawrence B. Solum, *The Original Meaning of “Due Process of Law” in the Fifth Amendment*, 108 VA. L. REV. 447, 450–52, 465–66 (2022).

15 *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202–03 (1830).

16 See *infra* subsection III.A.4.

17 Cf. *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308, 308–09, 28 F. Cas. 1012, 1014 (C.C.D. Pa. 1795) (No. 16,857) (making the point as to the legislature); *Regents of the Univ. of Md. v. Williams*, 9 G. & J. 365, 410 (Md. 1838) (“The legislature, executive, and judiciary, are all creatures of the constitution . . .”).

18 See *Vanhorne’s Lessee* at 309, 28 F. Cas. at 1015.

limitations would produce the same result: nullity.¹⁹ As to *which* provisions of the Bill of Rights limited the judicial power, that question is one the Supreme Court was actively struggling with in the late nineteenth century²⁰—one we must continue to struggle with today.

I. POSTCONVICTION RELIEF FIRST PRINCIPLES

A. *The Source, History, and Scope of Federal Habeas Authority*

Notwithstanding the existence of the Suspension Clause, the Supreme Court has long held that the federal courts have no common law authority to issue the writ of habeas corpus; any such authority must be derived from statute.²¹ The first such grant of authority came in section 14 of the Judiciary Act of 1789:

[E]ither of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.²²

The statute provided no further detail about what “an inquiry into the cause of commitment” should entail. Over the years, federal habeas jurisdiction has been expanded beyond prisoners held in federal custody—first to prisoners held “by any authority or 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”;²³ then to prisoners who were “subjects or citizens of a foreign State, and domiciled therein,” for acts and omissions done pursuant to authority conferred by “any foreign State or Sovereignty, the validity and effect

19 See *infra* subsection I.D.2; cf. *Maxim*, 2 JOHN BOUVIER, A LAW DICTIONARY 124, 144 (Philadelphia, The Estate of John Bouvier, 5th ed. 1855) (“*Quod contra legem fit, pro infecto habetur*. What is done contrary to the law, is considered as not done.”).

20 See *Ex parte Bigelow*, 113 U.S. 328, 330 (1885) (candidly admitting as much).

21 *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93–94 (1807). But see Kovarsky, *supra* note 2, at 773–87 (arguing “that, in the absence of suspension, Article III ensures *federal* habeas process for *federal* prisoners,” *id.* at 773, contrary to Chief Justice Marshall’s hypothesis that the Suspension Clause “guarantees no federal habeas power at all,” *id.* at 774).

22 Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82. The Act also conferred authority on the federal courts “to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.” *Id.*, 1 Stat. at 81–82 (footnote omitted).

23 Force Act of 1833, ch. 57, § 7, 4 Stat. 632, 634–35.

whereof depend upon the law of nations, or under color thereof”;²⁴ and finally to “any person [who] may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.”²⁵ None of these statutes provided further clarity about what constituted sufficient justification for confinement. Accordingly, federal courts have resorted to the writ’s common law history in order to define its scope.²⁶

To those well-versed in the Supreme Court’s habeas jurisprudence, the writ’s history should be a familiar narrative. The various writs of habeas corpus “originated as a mesne process by which courts compelled the attendance of parties whose presence would facilitate their proceedings.”²⁷ “Among them all, however, only one came to be known as ‘The Great Writ.’”²⁸ According to the traditional account, that writ—the writ of habeas corpus *ad subjiciendum*—was developed by the common law courts in response to executive detention “with little explanation and even less process” in the lead-up to the English Civil War.²⁹ Upon issuance of the writ, the custodian of the detainee would be forced to provide “the factual and legal ground for the detention,” and based on this return, the issuing court would determine whether to “bail, discharge, or remand the prisoner to custody.”³⁰ For an imprisonment to be lawful, it had to be authorized either “by process from the courts of judicature, or by warrant from some legal officer,

24 Act of Aug. 29, 1842, ch. 257, 5 Stat. 539, 539–40.

25 Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385. Although Congress has made a number of amendments to the habeas corpus statutes since the turn of the twentieth century—most notably the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)—the operative phrase for when habeas relief is available has remained largely unchanged since 1867. See Act of June 25, 1948, ch. 646, 62 Stat. 869 (enacting Title 28 into positive law); *id.* § 2241 (c), 62 Stat. at 965 (repeating the “restrained of his or her liberty in violation of the constitution” language with regard to habeas); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (making no alterations to this phrase). For further discussion of the meaning of this phrase, see *infra* subsection III.A.1.

26 *E.g.*, *Bollman*, 8 U.S. (4 Cranch) at 93–94; *Ex parte Parks*, 93 U.S. 18, 21 (1876); *McNally v. Hill*, 293 U.S. 131, 136 (1934); *Fay v. Noia*, 372 U.S. 391, 402–14, 426–27 (1963); *Jones v. Hendrix*, 143 S. Ct. 1857, 1871–72 (2023); see also Forsythe, *supra* note 11, at 1084–88 (noting that this practice is a particular instance of the general interpretive principle that “Congress knows the common law and incorporates it into federal legislation when it legislates in that area of law, unless there is express legislative intent to the contrary,” *id.* at 1086).

27 Oaks, *supra* note 6, at 459; see also *Brown v. Davenport*, 142 S. Ct. 1510, 1520 (2022) (“Over the centuries, a number of writs of habeas corpus evolved at common law to serve a number of different functions.”).

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

29 *Id.* (citing *Darnel’s Case* (1627) 3 How. St. Tr. 1 (Eng.)).

30 Forsythe, *supra* note 11, at 1094; see also *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (“[T]he traditional function of the writ is to secure release from illegal custody.”).

having authority to commit to prison.”³¹ In other words, “the classical function of habeas corpus was to assure the liberty of subjects against detention by the executive or the military without any court process at all, not to provide postconviction remedies for prisoners.”³²

More recently, however, a number of historians and legal scholars have pointed out flaws in the traditional narrative. Having surveyed over 4,800 uses of the writ in the King’s Bench from 1500 to 1800, many of which were not covered by the leading treatise writers or printed case reports,³³ Paul Halliday suggests that “the potential oppressor [checked by the Great Writ] was not the king or his minions in far away Whitehall,” but rather “a justice of the peace who lived nearby, a legal amateur empowered to imprison using summary conviction process every time Parliament passed a statute defining a new regulatory misdemeanor.”³⁴ To frame the Great Writ as a tool limited to rectifying “executive” detention is at best slapping “anachronistic language” on a historical situation of considerable complexity.³⁵

Nor, however, was the Great Writ concerned with the vindication of the “rights” of the citizen, despite what certain other dissenters from the traditional narrative have claimed.³⁶

Habeas corpus and the other prerogative writs—*mandamus*, *certiorari*, *quo warranto*—[issued] not because they protected “rights,” a modern conceit, but because they addressed the wrongs committed by those who acted according to the king’s franchise: specific powers the king granted to others so long as they were not abused.³⁷

31 *Hamdi v. Rumsfeld*, 542 U.S. 507, 555 (2004) (Scalia, J., dissenting) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *132–33); see also *Edwards*, 141 S. Ct. at 1567 (Gorsuch, J., concurring) (“A court might issue the writ asking, ‘What is the reason for confinement?’ But if the return came back: ‘Because he’s serving a custodial sentence after being convicted of a crime,’ the inquiry was usually at an end.”).

32 Bator, *supra* note 2, at 475.

33 See HALLIDAY, *supra* note 10, at 3–5.

34 *Id.* at 30. As Professor Vladeck notes, “although Halliday is not the first to make at least some of these particular claims, his archival research provides the proof for which they had previously been wanting.” Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 946 (2011) (book review) (footnote omitted) (using the term “revisionism” not in a pejorative way, but “in its neutral context,” *id.* at 943 & n.12 (citing James M. McPherson, *Revisionist Historians*, PERSPECTIVES, Sept. 2003, at 5, 5)).

35 HALLIDAY, *supra* note 10, at 103.

36 See, e.g., Peller, *supra* note 6, at 582 (arguing that “federal habeas review is justified . . . by the actual refusal of state courts to vindicate federal rights during various periods in American history”); William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 440 (1961) (“[The federal habeas corpus] statute reaches not merely convictions void for lack of jurisdiction in the tribunal, but convictions secured in violation of constitutional rights.”).

37 HALLIDAY, *supra* note 10, at 34.

Reconceiving of habeas corpus as a check on the abuse of power by the agents of the sovereign is vital for making sense of the nineteenth-century American practice.³⁸

But even an improved understanding of the pre-Founding English practice cannot resolve all disputes over the writ's scope. As Professors Paul Halliday and Edward White have noted, "the system of separated tripartite powers, a two-tiered federal Union, and a republican form of government established by the American Constitution was a major departure from the English model."³⁹ Those differences make translating English doctrine into American practice a nontrivial task. To set ourselves off on the right path, we should begin our inquiry precisely where Bator did: with a close look at *Ex parte Watkins*, the seminal case on the Supreme Court's scope-of-the-writ jurisprudence.⁴⁰

B. A Close Look at *Ex parte Watkins*

Tobias Watkins had been detained pursuant to a judgment of the Circuit Court of the District of Columbia convicting him of unlawfully appropriating public moneys during his tenure as Fourth Auditor of the United States Treasury.⁴¹ He alleged that he was indicted and convicted of "no offence for which the prisoner was punishable in that court, or of which that court could take cognizance; and consequently that the proceedings [were] *coram non judice*, and totally void."⁴² In other words, the question before the Court was whether an erroneous conclusion as to the construction of a criminal statute withdrew a case from the adjudicating court's jurisdiction.⁴³

The Court held that it did not.⁴⁴ In doing so, Chief Justice Marshall's opinion for the Court elaborated upon the nature of the

38 See generally William M.M. Kamin, *The Great Writ of Popular Sovereignty*, 77 STAN. L. REV. 297 (2025) (providing a more detailed discussion of the relevance of Halliday's work for American habeas and laying out some potential implications of viewing habeas corpus as a tool for addressing abuses of sovereign power). It should be noted, however, that the writ was used for some purposes beyond calling into account agents of the sovereign—it also discharged individuals from so-called "private restraints" on their liberty. See sources cited *infra* notes 409–11 and accompanying text.

39 Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 673 (2008).

40 Forsythe, *supra* note 11, at 1125; Bator, *supra* note 2, at 466 (citing *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830)).

41 *Watkins*, 28 U.S. (3 Pet.) at 201.

42 *Id.*

43 See *id.* at 202 (asking rhetorically whether "the court [could], upon this writ, look beyond the judgment, and re-examine the charges on which it was rendered"); see also William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1830 (2008) (reading *Watkins* the same way).

44 *Watkins*, 28 U.S. (3 Pet.) at 203, 209.

jurisdictional exception to the bar on postconviction habeas relief: “An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous.”⁴⁵

According to Bator, it is in this sentence that “the Supreme Court accept[ed] the black-letter principle of the common law that the writ was simply not available at all to one convicted of crime by a court of competent jurisdiction.”⁴⁶ And from there, Bator skipped ahead forty years into the future to *Ex parte Lange*, the first Supreme Court grant of postconviction relief.⁴⁷ But we should not be so hasty.

For one thing, Bator has imprecisely stated the holding. As discussed above, Watkins had argued that the trial court’s misconstruction of the statute rendered the proceedings and subsequent judgment void. And the Court did not disagree that, if this were true, then Watkins would have good grounds for discharge. Put differently, the writ was “available” to Watkins, but his circumstances did not “merit” discharge.

For another, Bator has misunderstood the relevance of jurisdiction to the availability of habeas relief. Chief Justice Marshall was quite clear that (1) a *valid* judgment of conviction is sufficient cause for confinement, and (2) a *void* judgment of conviction is not. The debate was over when a judgment is a nullity. The answer that Chief Justice Marshall gave was that mere errors of law do not render a judgment void, provided that the court issuing the judgment has *general* jurisdiction over the subject matter of the dispute.⁴⁸ In other words, Chief Justice Marshall considered jurisdiction to be a necessary condition to make a judgment *valid*, not its absence a necessary condition to make a judgment *void*. He did not address what other conditions may or may not make a judgment void, an issue which was not before the Court in *Watkins*.

Contrary to the assumption that appears to underlie Bator’s article, *Watkins* cannot provide us with the answers to all of our questions about the proper scope of postconviction relief. It can, however, get us to ask the right questions.

Watkins tells us that a prisoner held under color of a conviction may only be granted relief where the judgment of conviction is a nullity, and that a judgment is a nullity if the court issuing it lacks jurisdiction. This explains why a prisoner convicted by a court that had no jurisdiction may be granted relief to the same extent as a prisoner held

45 *Id.* at 203.

46 Bator, *supra* note 2, at 466.

47 *Id.* at 467 (citing *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874)).

48 See *Watkins*, 28 U.S. (3 Pet.) at 205–07 (contrasting courts of general jurisdiction with “courts of limited jurisdiction,” *id.* at 205).

under no judgment at all: a nullity is something that has no “legal force, validity or efficacy.”⁴⁹ For such prisoners, it is *as if* there were no judgment. What *Watkins* does not explain is *why* this is so—why a want of jurisdiction turns what would otherwise be a valid judgment into “[n]othingness.”⁵⁰

As stated above, *Watkins* did tell us one circumstance where a judgment would be void, but did not expressly state whether a want of jurisdiction was the *exclusive* such condition. It did give us a hint as to how we might find such answers. In discussing postconviction relief, Chief Justice Marshall cited and discussed a number of cases where a judgment in a *civil* suit was attacked collaterally, indicating that the rules of decision for determining when a criminal judgment is void are analogous to those regarding the validity of judgments more generally.⁵¹

Bator also appeared to assume that when Chief Justice Marshall wrote “jurisdiction” in *Watkins*, he was referring exclusively to “the question of [a] court’s competence to deal with the class of offenses charged and the person of the prisoner,” which Bator considered to be the term’s proper definition.⁵² However, as an explanation for why the Supreme Court granted relief in cases beyond those two categories, Bator asserts that the concept of jurisdiction “soften[ed]” in the late nineteenth century (presumably firming back up at some point in the early twentieth century).⁵³

That narrative, of course, is not impossible, nor even implausible. But Bator’s assumption does run afoul of the principle of parsimony. If we know “jurisdiction” had a more expansive meaning in 1873 than it did in 1963, what should we hypothesize about its meaning in 1830: that it was closer to its meaning at the former point in time or the latter? The most parsimonious answer would be that linguistic drift occurred once, not twice. Moreover, the legal system simply functions much differently today from how it did in the early nineteenth century, and accordingly some notions of jurisdiction may have gotten “lost in translation” when we transitioned from a writ-based system to the modern code-pleading practice.⁵⁴ The next Section tests that hypothesis,

49 *Nullity*, NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828).

50 *Id.*

51 *Watkins*, 28 U.S. (3 Pet.) at 203–07 (citing *Skillern’s Ex’rs v. May’s Ex’rs*, 8 U.S. (4 Cranch) 137 (1807); *Kempe’s Lessee v. Kennedy*, 9 U.S. (5 Cranch) 173 (1809); and *Williams v. Armroyd*, 11 U.S. (7 Cranch) 423 (1813)).

52 Bator, *supra* note 2, at 470.

53 *Id.* at 471.

54 *Cf.* Siegel, *supra* note 2, at 509 (asserting that Justice Gorsuch and Justice Thomas have made this error in developing their positions on postconviction relief); *see generally* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777 (2004)

finding that the meaning of “jurisdiction” in the early nineteenth century was not only different from what Bator assumed it to be but in fact more workable and descriptive than its modern counterpart.

C. *The Nineteenth-Century Concept of Jurisdiction*

“[T]he classic, prosaic concept of jurisdiction and jurisdictionality in Anglo-American law . . . was most fully and confidently defined in the nineteenth century.”⁵⁵ Its origins, however, date back much further.⁵⁶ “Almost all modern commentators view the [traditional] jurisdiction doctrine as arcane.”⁵⁷ Undoubtedly it is a conceptually challenging problem in the law. The idea of jurisdiction trades almost exclusively on abstract notions, and it can be particularly difficult to translate the doctrine across eras and between different systems of government. The task is made all the more challenging because there have been various efforts between the doctrine’s heyday and now to consciously shift core principles of the doctrine.⁵⁸ Moreover, “[nineteenth-century] lawyers did not always break down the concept of ‘jurisdiction’ in precisely the same way we do.”⁵⁹ But as I will explore below, when understood on nineteenth-century terms, the traditional doctrine of jurisdiction starts to look much less byzantine.

(explaining how “the rise of code pleading,” *id.* at 783, affected modern understandings of Article III “arising under” jurisdiction, standing, and implied private rights of action, *id.* at 778).

55 Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 21 (1994).

56 See *infra* notes 66–67 and accompanying text.

57 Forsythe, *supra* note 11, at 1132. This is especially true in the habeas context. See, e.g., Bator, *supra* note 2, at 470 (“It would be useless to try to show that these decisions establish clear and sensible guidelines for the scope of the habeas corpus jurisdiction. Once the concept of ‘jurisdiction’ is taken beyond the question of the court’s competence to deal with the class of offenses charged and the person of the prisoner, it becomes a less than luminous beacon.”); Siegel, *supra* note 2, at 510 (“When a nineteenth-century habeas court said that it could examine only whether a sentencing court had jurisdiction, it did not really mean that.”).

58 Cf. Dane, *supra* note 55, at 24 n.61 (explaining how Justice Frankfurter, “both as academic and jurist,” was a key driver in “the erosion of the Idea of Jurisdiction and its partial replacement by a much more statist, order-bound, conception of judicial authority,” *id.* at 25 n.61); Erin Morrow Hawley, *The Supreme Court’s Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 WM. & MARY L. REV. 2027 (2015) (describing how, “[o]ver the last three decades, the Rehnquist and Roberts Courts have carried out a quiet revolution in the nature and meaning of jurisdiction,” *id.* at 2030, by giving the term a “more precise definition,” *id.* at 2031, and setting forth a clear-statement rule that “a provision is jurisdictional only when Congress plainly says so,” *id.* at 2043).

59 Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1565 n.23 (2002).

As the etymology of the term indicates, “jurisdiction” is most simply defined as the power to “say” what legal relations exist between third parties—i.e., what “the law” is. Thus, for a court to “have” jurisdiction, it must have been given power to affect the legal relations of the particular parties before it in the particular way that it purports to affect those legal relations, and all conditions necessary for the exercise of that particular power over those particular persons must be present. A court “exercises” jurisdiction whenever it declares or alters the legal relations of the parties before it. When a court lacks power to affect certain legal relations in the way it purports to, its actions have no legal force—legally speaking, nothing has happened. It is the same result that would occur if you or I were to purport to alienate property that didn’t belong to us or to marry two random people on the street.

The reason why nineteenth-century notions of jurisdiction seem so foreign to present-day jurists is that modern doctrine doesn’t have an intuitive, succinct way of describing what they used to call “jurisdiction over the process”: the power of a court to issue particular writs and precepts. “As remains the case today, courts primarily interacted with the world through process; whether that be writs summoning parties, committing convicted defendants to prison, or transferring the ownership of property.”⁶⁰ And power to issue process has constitutional significance: no person may be deprived of life, liberty, or property, without due *process* of law.⁶¹ If process justifying custody is invalid, then the prisoner is unlawfully held, giving him or her good grounds to be discharged on habeas corpus. The true connections between habeas corpus, jurisdiction, void judgments, and due process are only visible once we understand the nineteenth-century doctrine of jurisdiction in its historic context.

1. Origins of the Jurisdiction Concept

“Jurisdiction, in its most general sense, is the power to make, declare, or apply the law; when confined to the judiciary department, it is what we denominate the *judicial power*.”⁶² Although some modern jurists would claim that this definition of the concept is imprecise,⁶³ this conception of jurisdiction still lives on in modern public

60 Crema & Solum, *supra* note 14, at 469.

61 U.S. CONST. amends. V, XIV.

62 PETER S. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 21 (Philadelphia, Abraham Small 1824); see also *Jurisdiction*, WEBSTER, *supra* note 49 (using nearly the exact same wording).

63 See, e.g., *Wilkins v. United States*, 143 S. Ct. 870, 875 (2023) (“Jurisdiction, this Court has observed, is a word of many, too many, meanings.” (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006))).

international law.⁶⁴ And rightly so—the traditional idea of jurisdiction was closely intertwined with notions of sovereignty.

“The power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by the judgment of a court, is called *jurisdiction*.”⁶⁵ This idea of jurisdiction-as-sovereign-power can be traced back as least as far as Henry of Bracton’s *On the Laws and Customs of England*, in which he put forth the theory that “all jurisdiction flows from the crown.”⁶⁶ As Sir William Holdsworth explains, Bracton’s theory was more prescriptive than descriptive—at that time, local lords exercised over their tenants a “purely feudal jurisdiction [that] d[id] not depend upon a special grant from the crown.”⁶⁷ “However, the King’s judges continued to urge this theory until it became fully accepted.”⁶⁸ And when the American colonies declared their independence, they continued to adhere to Bracton’s theory of jurisdiction, albeit with a Lockean twist: “all power is . . . vested in, & consequently derived from the people.”⁶⁹

64 See RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S., pt. IV, intro. note (AM. L. INST. 2018) (“Jurisdiction refers to the authority of a state to make, apply, and enforce law.”).

65 Joseph H. Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241, 241 (1923); see also *INS v. Chadha*, 462 U.S. 919, 952 (1983) (defining legislative power granted by Article I similarly).

66 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 87 (1922). Bracton did not say these words directly, but the principle they are founded upon is present throughout his treatise. See, e.g., 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 167 (George E. Woodbine ed., Samuel E. Thorne trans., Belknap Press 1968) (“Those [liberties] concerned with jurisdiction and the peace—those connected with justice and the peace—belong to no one save the crown alone and the royal dignity, nor can they be separated from the crown, since they constitute the crown—for to do justice, give judgment and preserve the peace is the crown.” (cleaned up)).

67 1 HOLDSWORTH, *supra* note 66, at 64, 87.

68 Comment, *The Effect of Extra-Jurisdictional Decisions*, 34 ILL. L. REV. 567, 569 n.7 (1940); see also 1 HOLDSWORTH, *supra* note 66, at 89 (“The theory of the king and his lawyers, that no franchise could exist except by virtue of a royal grant, became the law for the future.”). For examples of statements from subsequent English jurists, see MATTHEW HALE, THE PREROGATIVES OF THE KING 201 (D.E.C. Yale ed., Selden Society 1976) (“[A]ll jurisdictions are derived from the crown and are exercised either by immediate commission from his Majesty or by grant over to his subjects . . .”); 7 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW *451 (Henry Gwillim & Bird Wilson eds., Farrand & Nicholas 1st American ed. 1811) (“In respect of the king, all jurisdiction is mediately or immediately derived from him . . .”); see also *Commonwealth v. Bell*, 1 Add. 156, 176 (Pa. Cnty. Ct. 1793) (“[F]or all jurisdiction rests in the Crown, and therefore the king’s court ought to be informed how the authority is derived . . .”).

69 VA. DECLARATION OF RIGHTS OF 1776, art. II; JOHN LOCKE, THE SECOND TREATISE: AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT § 243 (1689), reprinted in TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 100, 208–09 (Ian Shapiro ed. 2003) (“The power that every individual gave the society, when he entered into it, can never revert to the individuals again, as long as the

The corollary to Bracton's theory was that any exercise of jurisdiction exceeding the scope of permission granted by the sovereign is void—a legal nullity.⁷⁰ As Professors Henry Hart and Alfred Sacks tell us, “The characteristic sanction of an empowering arrangement is the *sanction of nullity*.”⁷¹ This common law principle can be seen across various bodies of private law, such as the law of corporations, contracts, and agency.⁷² “The sanction of nullity is [likewise] pervasive in the whole theory of American public law, although the point is not always appreciated.”⁷³ The idea behind the sanction of nullity, at least with respect to the judicial power, is that a judge who acts without jurisdiction has ceased to be a judge, ergo the phrase “*coram non iudice*.”⁷⁴ “It

society lasts, but will always remain in the community But if they have set limits to the duration of their legislative, and made this supreme power in any person, or assembly, only temporary; or else, when by the miscarriages of those in authority it is forfeited; upon the forfeiture, or at the determination of the time set, it reverts to the society, and the people have a right to act as supreme, and continue the legislative in themselves; or erect a new form, or . . . new hands, as they think good.”); accord THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (positing that legitimate governments “deriv[e] their just powers from the consent of the governed”); THE FEDERALIST NO. 49, at 261 (James Madison) (George W. Carey & James McClellan eds., 2001) (speaking of “the people” as “the only legitimate fountain of power”); MASS. CONST. of 1780, pt. 1, art. V (“All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.”); N.Y. CONST. of 1777, art. I (“[N]o authority shall, on any presence whatever, be exercised over the people or members of this State but such as shall be derived from and granted by them.”); see also TIMOTHY BROWN, COMMENTARIES ON THE JURISDICTION OF COURTS § 12 (Chicago, Callaghan & Co. 1891) (“Jurisdiction, being the power to judicially administer the law, must emanate from the sovereign power of the body politic it represents; it was originally derived from the crown.”).

70 Comment, *supra* note 68, at 569; see also THE FEDERALIST NO. 78, *supra* note 69, at 403 (Alexander Hamilton) (“There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.”).

71 HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 149 (tent. ed. 1958). For further discussion of nullity, see *infra* subsection III.A.4.

72 See, e.g., *R v. Spencer* (1766) 97 Eng. Rep. 1121, 1126–27; 3 Burr. 1827, 1839 (“Corporations cannot make bye-laws contrary to their constitution. If they do, they act without authority. . . . The bye-law is, in my opinion, clearly void.”); *Shearer v. Fowler*, 7 Mass. (7 Tyng) 31, 32 (1810) (discussing a situation where a “contract is void for want of power in one of the parties”); *Teakle v. Bailey*, 23 F. Cas. 816, 819 (C.C.D. Va. 1822) (No. 13,811) (“That an agent to sell cannot be himself the purchaser, under the power to sell, is well settled. Such a purchase is absolutely void.”).

73 HART & SACKS, *supra* note 71, at 174.

74 See *Stansbury v. Inglehart*, 20 D.C. (9 Mackey) 134, 159 (1889) (explaining that, when a court lacks jurisdiction, “in contemplation of law the person who purports to render judgment is not a judge”); see also *Baude*, *supra* note 43, at 1828; *Nelson*, *supra* note 59, at 1587 n.128; *Ryan C. Williams, Jurisdiction as Power*, 89 U. CHI. L. REV. 1719, 1731 & n.52 (2022).

is as if a private person said, referring to a lawsuit between A and B, I give judgment for B. Such conduct is mere eccentricity”; it has no legally binding effect.⁷⁵ And this corollary, the sanction of nullity, applies with no less force to the exercise of legislative power than it does to the exercise of judicial.⁷⁶

2. The Underappreciated Concept of “Jurisdiction over the Process”

Although most modern jurists only speak of jurisdiction as being comprised of two heads—subject-matter jurisdiction and personal jurisdiction—Founding-era lawyers broke down the concept in more varied ways.⁷⁷ Speaking of the concept in the general sense, Peter Du Ponceau explained that all jurisdiction “rests on one of three foundations, or on several of them together”:

1st. The place or territory over which it is exercised, and that is called jurisdiction over the place, *in locum*.

2d. The persons which are subjected to its action, and that is jurisdiction over the person, *in personam*.

3d. The subjects of which it takes cognisance, and that is jurisdiction over the subject matter, *in subjectam materiam*.⁷⁸

More specifically with respect to the judiciary, it was said that a court must have “jurisdiction over the persons, . . . over the cause, . . . [and] over the process,” or else its action would be *coram non judge*.⁷⁹ As

75 John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 341 (1998); Dane, *supra* note 55, at 23–24; *see also* 2 BRACTON, *supra* note 66, at 304 (“The judge, that his judgments may be valid, must have jurisdiction, ordinary or delegated.”).

76 *See* *St. Louis v. Ferry Co.*, 78 U.S. (11 Wall.) 423, 430 (1871) (“Jurisdiction is as necessary to valid legislative as to valid judicial action.”); *see also* HART & SACKS, *supra* note 71, at 174 (describing judicial review of statutes as the sanction of nullity’s “most familiar form”).

77 *See* Nelson, *supra* note 59, at 1565 n.23.

78 DU PONCEAU, *supra* note 62, at 21–22.

79 *Grumon v. Raymond*, 1 Conn. 39, 45 (1814); *see also* *Bigelow v. Stearns*, 19 Johns. 39, 40 (N.Y. Sup. Ct. 1821) (“I consider it perfectly well settled, that to justify an inferior magistrate in committing a person, he must have jurisdiction not only of the subject matter of the complaint, but also of the process and the person of the defendant.”); *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77, 80 (Pa. Ct. Com. Pl. 1781) (explaining that “a writ [is] void, where the court had no jurisdiction of the cause, or issued a writ, which they had no authority to issue”); 2 ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT 364–65 (Albany, W.C. Little & Co. 1858) (discussing the concept in these precise terms); 1 HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS § 215, at 260 (1891) (“For jurisdiction is not merely the authority to determine a controversy, but also the power to announce the sentence of the law, and . . . the power to command or forbid particular action or to award a

Professor Caleb Nelson notes, the terminology of “jurisdiction over the process” is “not in common currency today.”⁸⁰ That is unfortunate, because it is analytically useful to think of jurisdiction in this way.

“Process,” as used in this sense, carried the same meaning that a number of scholars have argued the term as used in the Fifth Amendment originally carried: “the ‘writs or precepts that go forth’ from a court.”⁸¹ Lawyers of the Founding era distinguished between three types of process: original process, “the means taken to compel the defendant to appear in court”; final process, which is “the process of execution”; and mesne process, “which issues . . . upon some collateral or interlocutory matter” that arises over the course of the action.⁸²

A court’s jurisdiction over the process might be limited in any of the three vectors identified by Du Ponceau: there might be territorial limits to a court’s issuance of process;⁸³ there might be certain classes of “persons” exempt from a court’s issuance of process;⁸⁴ or there might be certain subject-matter limitations on a court’s issuance of process.⁸⁵ Moreover, grants of jurisdiction, like other grants of power,

particular remedy . . .”); *Coram non judice*, BOUVIER’S LAW DICTIONARY (Boston, Bos. Book Co., new ed. 1897) (paraphrasing *Grumon*).

80 Nelson, *supra* note 59, at 1565 n.23. The concept is occasionally spoken of by modern commentators, albeit more along the lines of how Black explained the issue in his treatise. See, e.g., *Jurisdiction*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/jurisdiction> [<https://perma.cc/YPZ6-DZA7>] (“A jurisdictional question may be broken down into three components: . . . Whether there is jurisdiction to render the particular judgment sought.”).

81 Crema & Solum, *supra* note 14, at 465 (quoting *Process*, T. CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (London, S. Crowder 1765)); see also Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of “Due Process of Law,”* 77 MISS. L.J. 1, 82 (2007) (“[F]raming-era Americans would still have understood that ‘process of law’ referred primarily to written instruments that conferred authority.”).

82 *Process*, WEBSTER, *supra* note 49; Crema & Solum, *supra* note 14, at 452, 465 (citing 3 BLACKSTONE, *supra* note 31, at *279).

83 See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 727 (1878) (“Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them.”).

84 See, e.g., Nelson, *supra* note 59, at 1566, 1574–608 (explaining how the non-Eleventh Amendment form of state sovereign immunity acted as a limitation on the process issuable by federal courts).

85 This final vector of limitation is readily amenable to further subclassification. One possibility is a limitation on what kinds of process a court can issue—for instance, Congress may suspend issuance of writs of habeas corpus during a rebellion or invasion. See U.S. CONST. art. I, § 9, cl. 2. Another possibility is a limitation on the conditions under which a particular form of process may issue—“[i]f in an ordinary foreclosure case, a man and his wife being parties, the Court of Chancery should decree a divorce between them,” the Court of Chancery would have acted without jurisdiction to issue the divorce decree, even though it might have such jurisdiction in a proper case. *Munday v. Vail*, 34 N.J.L. 418, 422–23 (1871); see also JOHN D. WORKS, COURTS AND THEIR JURISDICTION 20–23 (Cincinnati, Robert Clarke Co. 1894) (discussing this type of jurisdictional defect); 1 BLACK, *supra* note 79,

were typically construed strictly.⁸⁶ Accordingly, it was a blackletter principle of the law that “courts which [we]re created by written law, and whose jurisdiction [has been] defined by written law, cannot transcend that jurisdiction,”⁸⁷ although there was at least some allowance for “infe[r]ring from the general nature of the court or the absence of specific limitations upon its powers” the existence of jurisdiction in a particular case.⁸⁸ Along this same line of thought is the principle that the “stream” of jurisdiction flowing from the sovereign could not be broken by any jurisdictional defect along the way. This could arise in two distinct ways. First, where “the alleged jurisdiction of a court to take any particular action is derived from a statute, and that statute is shown to be unconstitutional,” then the court lacks jurisdiction to take that action—such was the holding of *Marbury v. Madison*.⁸⁹ Second, the court must have jurisdiction at every step in the action, from original to final process, and a lack of jurisdiction at one step could cause a lack of jurisdiction at a later step if taking the former step was a jurisdictional requirement for the latter.⁹⁰ The reason for these two rules is

§ 215, at 261–62 (asserting that a court cannot “go beyond the issues and pass upon a matter which the parties neither submitted nor intended to submit for its determination”). Yet another is a limitation in degree rather than kind—for instance, there might be some maximum penalty that a court can give for a given offense, and the court would exceed its jurisdiction to go above that maximum. See, e.g., *In re Sweatman*, 1 Cow. 144, 150–51 (N.Y. Sup. Ct. 1823).

86 *Clark v. Brown*, 18 Wend. 213, 230 (N.Y. Sup. Ct. 1837) (“It is an old maxim that a statute which gives a new remedy ought not to receive a liberal construction; and perhaps a still older one, that a statute creating a new jurisdiction ought to be construed strictly.” (citation omitted)); *Hublely v. White*, 2 Yeates 133, 144 (Pa. 1796) (similar); 1 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 458 (London, W. Strahan 1780) (“An authority ought to be strictly pursued . . .”).

87 *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807); see also DU PONCEAU, *supra* note 62, at x–xi (“The common law . . . is a *system of jurisprudence* and nothing more. It is no longer the *source* of power or jurisdiction, but the *means* or instrument through which it is exercised.”).

88 1 BLACK, *supra* note 79, § 216, at 262.

89 *Id.*; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803) (“[I]f this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.”); see also *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 433 (1793) (opinion of Iredell, J.) (“Having a right thus to establish the Court, and it being capable of being established in no other manner, I conceive it necessarily follows, that they are also to direct the manner of its proceedings. Upon this authority, there is, that I know, but one limit; that is, ‘that they shall not exceed their authority.’ If they do, I have no hesitation to say, that any act to that effect would be utterly void, because it would be inconsistent with the Constitution, which is a fundamental law paramount to all others . . .”), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

90 See *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 718 (1838) (“[The question of jurisdiction] must be considered and decided, before any court can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction.”);

the same: “for as the stream cannot rise higher than its source, no jurisdiction can be derived from a void act.”⁹¹

Closer attention to the concept of jurisdiction over the process would be beneficial in many of today’s debates over what qualifies as jurisdictional error. But when it comes to habeas, particularly postconviction habeas, the concept of jurisdiction over the process is indispensable. It has been said that, at its core, habeas corpus acted as “the instrument by which due process could be insisted upon.”⁹² Justice Gorsuch (and Justice Scalia before him) was correct to make this assertion. Where they were led astray, however, was in their understanding of what “due process” meant.

3. The Original Meaning of “Due Process of Law”

Many originalists understand the Due Process Clauses to encompass only what is known in modern parlance as “procedural due process,” either the narrower conception—under which the clauses only guarantee that individuals will not be deprived of life, liberty, or property except as prescribed by established law—or the broader one—under which the clauses also guarantee that “judicial or executive deprivations follow fair procedures.”⁹³ On this reading, “due process” is primarily a constraint on the courts, “and, perhaps, [on] the executive with respect to prosecution and the enforcement of court judgments,” with (maybe) some bare minimum standards placed on the

Windsor v. McVeigh, 93 U.S. 274, 282 (1876) (“Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law.”); *see also* 1 BLACK, *supra* note 79, § 186 (explaining that the judgment must accord with the verdict in order to be valid—in other words, a jurisdictional prerequisite for the issuance of final process).

91 1 BLACK, *supra* note 79, § 216, at 263; *see also* James Wilson, Speech Delivered in the Convention for the Province of Pennsylvania (Jan. 1775), in 1 COLLECTED WORKS OF JAMES WILSON 32, 39 (Kermit L. Hall & Mark David Hall eds., 2007) (“That a void act can confer no authority upon those, who proceed under colour of it, is a selfevident proposition.”); *id.* at 42 (explaining that, as to both royal “[c]ommissions” as well as “the king’s writs,” where they are not “allowed by the common law, or warranted by some act of parliament,” they are “void; [they] ha[ve] no legal existence; [they] can communicate no authority”); A LAW GRAMMAR: OR, AN INTRODUCTION TO THE THEORY AND PRACTICE OF ENGLISH JURISPRUDENCE *83–84 (Dublin, James Moore 1791) (“FIRST, That whatever is exceptionable in the conduct of public affairs is not to be imputed to the king SECONDLY, . . . the prerogative of the Crown extends not to do any injury; it is created for the benefit of the people; and therefore cannot be exerted to their prejudice.”).

92 Brown v. Davenport, 142 S. Ct. 1510, 1520 (2022) (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 555 (2004) (Scalia, J., dissenting)).

93 John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 497 (1997).

legislature.⁹⁴ This interpretation, particularly in comparison to the robust doctrines that have come to be associated with “due process” in the past century, makes the Due Process Clauses seem relatively “trivial.”⁹⁵ But the original meaning of “due process of law,” at least with respect to the Fifth Amendment’s clause, was much more robust than that.

As Max Crema and Professor Lawrence Solum have explained, the guarantee that no person shall “be deprived of life, liberty, or property, without due process of law”⁹⁶ originally meant that no person could be deprived of those things except in conformance with “duly issued writs or precepts,” either issued by a court or arising by operation of law.⁹⁷ “The Clause therefore prohibits arbitrary deprivations and furthers separation of powers principles.”⁹⁸ It does so in (at least) four respects. For one, it requires “institutional coordination” to work a deprivation of life, liberty, or property: executive officials can only act pursuant to a judicial order authorized by the law of the land.⁹⁹ Second, it limits the extent to which the legislature can “alter[] the past legal consequences of past actions” with respect to life, liberty, and property.¹⁰⁰

94 Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1676 (2012).

95 Cf. Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 99 (stating that this was the expectation of the Framers).

96 U.S. CONST. amend. V.

97 Crema & Solum, *supra* note 14, at 462. Crema and Solum intimated that this interpretation of the clause would be narrower than even the narrowest version of procedural due process. See *id.* I am not so sure. As Chapman and McConnell have pointed out, “[C]ommon law remedies were inseparable from their corresponding writs.” Chapman & McConnell, *supra* note 94, at 1683 (citing Daniel J. Hulsebosch, *Writs to Rights: “Navigability” and the Transformation of the Common Law in the Nineteenth Century*, 23 CARDOZO L. REV. 1049, 1051 (2002)); accord Bellia, *supra* note 54, at 784. “A legal action was a discrete license to sue in a particular court for particular relief based on standardized facts The lawyer’s task was to fit his client’s grievance into one of the forms of action.” Hulsebosch, *supra*, at 1050. And although “judges [frequently] bent and stretched these forms of actions to make them fit new cases,” their willingness to do so “was often based on their sense of how far it was appropriate to bend and stretch the recognized forms of action.” James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CALIF. L. REV. 1815, 1818 (2000). Accordingly, the idea that the writs or precepts must be “duly” issued may well have included a norm that the issuing judge or magistrate adhere to the “the law of the land.” Cf. Crema & Solum, *supra* note 14, at 461–62 (defining the latter phrase to “guarantee that the king not act contrary to . . . ‘the Common Law, Statute Law, or Custom of England’” (quoting 2 EDWARD COKE, INSTITUTES *45)).

98 Crema & Solum, *supra* note 14, at 452.

99 See Chapman & McConnell, *supra* note 94, at 1683. As mentioned above, the notable exception here is process arising by operation of law. For further discussion of this topic, see Davies, *supra* note 81, at 54–62, 73–76.

100 Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1023 (2006) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring)); see also *United States v. Bryan*, 13 U.S. (9 Cranch) 374, 379

Third, it limits the extent to which Congress can authorize non–Article III officials to engage in adjudication involving life, liberty, or property.¹⁰¹ And fourth, it guarantees accountability to those deprived of life, liberty, or property by stripping the executive official working the deprivation of any immunity or legal authority to engage in such conduct.¹⁰²

* * *

So what does this all tell us about postconviction relief? For one thing, it explains what is sufficient cause for confinement: due process of law. “To make imprisonment lawful, it must either be, by process from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison”¹⁰³ Moreover, it illuminates how a petitioner who has been convicted by a court of law might nevertheless be eligible for discharge on habeas: a want of jurisdiction to issue final process. For the process issued by a court without

(1815) (arguments of counsel) (positing that “retrospective” civil legislation “would be virtually taking away private ‘property’ without ‘due process of law’” (emphasis omitted)). See generally Woolhandler, *supra*.

101 See generally Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007) (“American constitutions were widely understood to require an opportunity for ‘judicial’ proceedings when the government proposed to act upon core private rights.” *Id.* at 569.); Caleb Nelson, *Vested Rights, “Franchises,” and the Separation of Powers*, 169 U. PA. L. REV. 1429 (2021) (correcting an error he made in his previous article with respect to the classification of “franchises”); see also Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856) (“It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power.” *Id.* at 275 (emphasis added)). Here, the strictures placed on the states would be meaningfully different. States are not bound by Article III and accordingly are afforded much greater latitude in terms of prescribing what qualifies as a court and who can exercise judicial power. The Due Process Clause only requires the exercise of judicial power; it does not prescribe what a judicial official looks like.

102 Cf. HALE, *supra* note 68, at 15 (“For the king’s act in such case being void doth not justify or defend the instruments. . . . [F]or if it be wrong and contrary to the law, it is not the act of the king but of the minister or instrument that put it in execution and consequently such minister is liable to the coercion of the law to make satisfaction.”); JAMES WILSON, *Lectures on Law: The Subject Continued. Of Sheriffs and Coroners* (1791), in 2 COLLECTED WORKS OF JAMES WILSON, *supra* note 91, at 1012, 1015 (“With regard to process issuing from the courts of justice, the sheriff’s power and duty is, to execute it, not to dispute its validity From this general rule, however, one exception must be taken and allowed. He must judge, at his peril, whether the court, from which the process issued, has or has not jurisdiction of the cause.”); see also Crema & Solum, *supra* note 14, at 482 (“[T]he practical benefit of this focus on due process of law was to allow any person imprisoned or held against their will to test the validity of their capture through a suit or habeas action”).

103 1 BLACKSTONE, *supra* note 31, at *132–33; see also R v. Paty (1704) 92 Eng. Rep. 232, 234; 2 Ld. Raym. 1105, 1108–09 (opinion of Powys, J.) (explaining that “due process of law” means “that all commitments must be by a legal authority”).

jurisdiction is “mere waste paper”¹⁰⁴—“if *coram non judice*, the sentence is as if not pronounced.”¹⁰⁵ “By it, no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void.”¹⁰⁶ It is these two principles that form the foundation of the “Great Writ” of habeas corpus *ad subjiciendum*.

D. Identifying Jurisdictional Rules Relevant to Habeas

Identifying which legal directives to courts are “jurisdictional” is a conundrum that courts and commentators have wrestled with in recent years.¹⁰⁷ Indeed, this problem is so confounding that some have gone as far as to argue “that there is no hard conceptual difference between jurisdiction and the merits.”¹⁰⁸ And when it comes to nineteenth-century habeas doctrine, modern commentators are even more skeptical.¹⁰⁹

I am more optimistic about our line-drawing abilities. The jurisdictional issue is easiest when it concerns issues at the threshold: whether the court has the power over the parties, over the general subject matter, and to give the relief requested. Thankfully, “[q]uestions

104 *Voorhees v. Jackson*, 35 U.S. (10 Pet.) 449, 475 (1836).

105 *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 278 (1808).

106 A.C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS: INCLUDING ALL FINAL DETERMINATIONS OF THE RIGHTS OF PARTIES IN ACTIONS OR PROCEEDINGS AT LAW OR IN EQUITY § 117 (San Francisco, A.L. Bancroft & Co. 1873); *see also Ex parte Randolph*, 20 F. Cas. 242, 251 (C.C.D. Va. 1833) (No. 11,558) (opinion of Barbour, J.) (“[A] habeas corpus will not lie, where the imprisonment is under voidable process, but only where it is merely void; for void process is the same thing as if there were none at all; and then the party is in effect imprisoned, without any authority whatever.”).

107 *See, e.g.,* Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457 (2006) (proposing an institutional-competence model to jurisdictionality); Kontrick v. Ryan, 540 U.S. 443, 455 (2004) (“Clarity would be facilitated if courts and litigants used the label ‘jurisdictional’ not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.”); Hawley, *supra* note 58, at 2032 (“What the contemporary Court really wants to ask, and should have been asking all along, is this: Did Congress intend this provision to oust the federal courts of their power to adjudicate this case?”).

108 Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1614 (2003). *See generally id.*

109 *See* Forsythe, *supra* note 11, at 1132. Nor is this skepticism limited to one side of the debate. *See, e.g.,* Bator, *supra* note 2, at 470 (“It would be useless to try to show that these decisions establish clear and sensible guidelines for the scope of the habeas corpus jurisdiction.”); Siegel, *supra* note 2, at 510 (“When a nineteenth-century habeas court said that it could examine only whether a sentencing court had jurisdiction, it did not really mean that.”).

of jurisdiction usually come into play at the threshold of a proceeding. But not always.”¹¹⁰ As the New Jersey Supreme Court wrote in 1835:

A *void* judgment, is undoubtedly in a broad sense of the term, an erroneous one. But a judgment may be manifestly erroneous, and yet not a void one. . . . I do not mean to say that a court having a general jurisdiction upon any given subject, may not do a void act, or render a void judgment upon any matter within the general scope of that jurisdiction; and though the difficulty, as Chief Justice Marshall remarks, in *Griffith v. Frazier*, of distinguishing those cases in which a court may be said to have acted without authority, on a matter of general cognizance, may be perceived and felt, yet the difficulty of marking the precise line of distinction, does not prove that none exists.¹¹¹

As Professor Perry Dane has written, “The challenge, in making sense of the notion of excess of jurisdiction, is to draw sensible, intellectually respectable lines between abuses of jurisdiction and mere errors of law.”¹¹²

1. Hohfeld’s Fundamental Jural Relations

Like Professor Ryan Williams proposed in a recent article, we can gainfully analyze the concept of jurisdiction using Professor Wesley Newcomb Hohfeld’s “well-known scheme of jural relations.”¹¹³

To anticipate one possible objection: “readers might wonder about [the] originalist bona fides” of arguments that are as much “analytical” as they are “historical.”¹¹⁴ That concern is fair, but misplaced.

“Words and phrases express concepts, but words are not the same kinds of things as concepts.”¹¹⁵ Originalists care about the original meaning of words in the constitutional text because the meaning of

110 Dane, *supra* note 55, at 47 (footnote omitted).

111 *State v. Sheriff of Middlesex*, 15 N.J.L. 68, 71 (1835) (citing *Griffith v. Frazier*, 12 U.S. (8 Cranch) 9, 25 (1814)).

112 Dane, *supra* note 55, at 49; see also Sandra Day O’Connor, *Altered States: Federalism and Devolution at the “Real” Turn of the Millennium*, 60 CAMBRIDGE L.J. 493, 501–02 (2001) (U.K.) (“While reasonable minds may differ as to where those lines are, line-drawing is the essence of law. The difficulty of the task is no cause to shrink from it.”).

113 Williams, *supra* note 74, at 1728, 1728–32 (citing Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913)); see also Harrison, *supra* note 75, at 339–40 (using “Hohfeld’s analytical scheme” to supply the terminology for his analysis); HART & SACKS, *supra* note 71, at 141–55 (discussing the Hohfeldian relations in the context of private law).

114 Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2481 (2016).

115 Lawrence Solum, *Legal Theory Lexicon 094: Words and Concepts, Sentences and Propositions*, LEGAL THEORY LEXICON (Sept. 7, 2024), https://lsolum.typepad.com/legal_theory_lexicon/2019/03/legal-theory-lexicon-094-words-and-concepts.html [<https://perma.cc/L4HH-2YVZ>].

those words communicates “semantic content” (the concepts and propositions conveyed by words and sentences in a text), which in turn is given legal effect by way of construction, a practice constrained by the semantic content of the interpreted text.¹¹⁶ Hohfeld’s framework has nothing to say about how to interpret the text of the Constitution or other positive law; rather, it is a tool of construction that helps lawyers craft semantic content into coherent legal content. But if one is still unconvinced of using Hohfeld to facilitate originalist analysis, compare the concept of “jurisdiction” explored above in subsection I.C.1 with the definition he supplied for “power”: the relation where “[a] change in a given legal relation may result . . . from some superadded fact or group of facts which are under the volitional control of one or more human beings.”¹¹⁷

Hohfeld developed his framework out of a belief that, “in any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression.”¹¹⁸ That is precisely the malady plaguing the law of judgments (and constitutional law more generally). “Jurisdiction,” “power,” “rights,” “errors,” even “void” and “voidable”—these are the sorts of chameleon-hued words that Hohfeld had in mind.¹¹⁹ Hohfeld’s framework is essentially an exercise in what Professor David Plunkett has termed “metalinguistic negotiation,” helping author and reader to avoid falling into the trap of “‘merely talking past’ one another” in a dispute.¹²⁰ Moreover, “inadequacy and ambiguity of terms unfortunately reflect, all too often, corresponding paucity and confusion as regards actual legal conceptions.”¹²¹ Using Hohfeld’s scheme thus will help us not only better understand the historical doctrine, but also identify where it is logically deficient.

Hohfeld’s framework consists of two sets of four relations, with each relation having an “opposite” and a “correlative”¹²²:

116 See Crema & Solum, *supra* note 14, at 455–61; Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 98–102 (2010).

117 Hohfeld, *supra* note 113, at 44.

118 *Id.* at 29.

119 *Cf. id.* at 28 (noting “the express or tacit assumption that all legal relations may be reduced to ‘rights’ and ‘duties,’ and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests”); *Biden v. Texas*, 142 S. Ct. 2528, 2540 (2022) (repeating the adage that “[j]urisdiction . . . is a word of many, too many, meanings” (alteration and omission in original) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90 (1998))); see also *infra* subsection III.A.4.

120 David Plunkett, *Which Concepts Should We Use?: Metalinguistic Negotiations and the Methodology of Philosophy*, 58 INQUIRY 828, 836, 835–40 (2015).

121 Hohfeld, *supra* note 113, at 29.

122 “Each pair of correlatives must always exist together; when some person (A) has one of the pair, another person (B) necessarily has the other.” In contrast, “[n]o pair of

First-Order Relations		Second-Order Relations	
<i>correlatives</i>		<i>correlatives</i>	
<i>opposites</i>	right ¹²³	duty	<i>opposites</i>
	no-right	privilege	
			liability
			disability
			immunity

The first-order relations “identify possible conduct as forbidden, required, or permitted.”¹²⁴ In contrast, the second-order relations pertain to “capacities to alter existing legal arrangements.”¹²⁵ It is the relations of the latter set that we are primarily concerned with. Generally speaking, action that fails to comport with a legal directive implicating the second-order relations triggers the sanction of nullity.¹²⁶

As Hohfeld would tell us, “It [is] necessary to emphasize the importance of differentiating purely legal relations from the physical and mental facts that call such relations into being.”¹²⁷ On that same line of thought, we should likewise distinguish between “juridical acts” and “physical acts.”¹²⁸ This is especially important when it comes to the sanction of nullity. “Juridical acts are accomplished with physical acts, . . . but the two are distinct.”¹²⁹ For instance, when a judge pronounces the order of the court, she is accomplishing both the physical (either orally from the bench or in a written order) and the juridical

opposites can exist together. That is, when a person has a right, he cannot have a no-right with respect to the same subject matter and the same person. When he has a privilege, he cannot have a duty.” Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163, 166 (1919) (picking up the thread from his colleague’s work following Professor Hohfeld’s untimely death in 1918, *id.* at 166 n.5).

123 The term “right” has a certain “looseness of usage”—“[it] tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense.” Hohfeld, *supra* note 113, at 30. Here, Hohfeld is referring to the relation that exists when Person A owes a legal obligation to Person B, viewed from the perspective of Person B.

In other words, if X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place. If, as seems desirable, we should seek a synonym for the term ‘right’ in this limited and proper meaning, perhaps the word ‘claim’ would prove the best.

Id. at 32.

124 John Harrison, *Power, Duty, and Facial Invalidity*, 16 U. PA. J. CONST. L. 501, 508 (2013).

125 *Id.* at 509.

126 Harrison, *supra* note 75, at 341.

127 Hohfeld, *supra* note 113, at 20.

128 Harrison, *supra* note 124, at 513.

129 *Id.* at 513 n.44.

act of giving judgment on the case. When we say that her judgment is a nullity because she lacked jurisdiction, we more precisely mean that the judgment-as-judicial-act is void; we are not saying that the physical act of pronouncing the sentence never occurred. This “blending” error is even more common with the sanction of nullity as applied to statutes and judicial review.¹³⁰ “American courts have no general power of control over legislatures. Their power, *tout simple*, is to treat as null an otherwise relevant statute which they believe to be beyond the powers of the legislature, when that is necessary to the correct decision of a case within their jurisdiction.”¹³¹ Thus, when a court says that an unconstitutional statute is void *ab initio*, it is not entertaining a “fiction” that the legislature never debated and voted on the bill, or that it never became part of the code.¹³² Those physical acts occurred, but the intended judicial acts did not.

A concrete illustration of the physical-judicial distinction can be seen in *Howard v. United States*, a case decided by the Sixth Circuit in 1896.¹³³ The petitioner had been convicted of eight counts of mail fraud and given cumulative sentences for each count.¹³⁴ Because the physical mittimus (the final process authorizing commitment) for the second count authorized imprisonment “for the term of thirteen months” but did not specify the precise date when this term would begin, the petitioner claimed this omission rendered the mittimus void for uncertainty and, consequently, the restraint of his liberty unlawful.¹³⁵

The Sixth Circuit correctly rejected Howard’s contention. The physical copy of the mittimus “is merely evidence, and evidence only, of the judgment and sentence of the court and the mittimus issued thereunder.”¹³⁶ When understood in context, any superficial

130 Cf. Pierre Schlag, *How To Do Things With Hohfeld*, 78 LAW & CONTEMP. PROBS. 185, 193 (2015) (discussing this and other “errors of transposition”).

131 HART & SACKS, *supra* note 71, at 174.

132 *Contra* Siegel, *supra* note 2, at 525 (“The suggestion that a sentencing court loses jurisdiction because of a constitutional defect in the statute creating the crime being tried is not true. It is a fiction. Like all legal fictions, it is a statement known to be false but made and treated as though it were true in order ‘to reconcile a specific legal result with some premise or postulate.’” (quoting L.L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 513, 514 (1931))). Of course, in a certain sense, the concept of jurisdiction is a legal fiction, much in the same way that a corporation is a legal fiction—it is an artificial creation of the law, not merely an abstraction of an on-the-ground truth. But I wouldn’t say that makes all postulates related to such concepts false a priori (nor do I suppose that’s what Professor Siegel is trying to say here).

133 *Howard v. United States*, 75 F. 986 (6th Cir. 1896); see also Micah S. Quigley, *What Is Habeas?*, 173 U. PA. L. REV. 453, 482 & n.174 (2025) (discussing this case).

134 See *Howard*, 75 F. at 987.

135 *Id.* at 988.

136 *Id.* at 989.

uncertainty in the document standing alone could be clarified by reference to the record of the case in its entirety, which made clear that this term was to begin upon expiration of the term authorized by the mittimus issuing for the first count.¹³⁷ Even with this issue resolved, that still left open the question of the convicting court's "right and power . . . to impose cumulative and successive sentences"—i.e., whether the *juridical* issuance of such a mittimus was proper.¹³⁸

One final note on Hohfeld's scheme: the two sets of jural relations are not hermetically sealed from one another. Each conception is, of course, distinct from all the others; however, individual relations "can be aggregated in a variety of ways into some greater whole as *jural composites*."¹³⁹ For instance, "there can be duties with respect to the exercise of powers."¹⁴⁰ A familiar illustration of this concept is that, in order to exercise judicial power over a defendant, a court must give the defendant "notice and an opportunity to be heard."¹⁴¹ If it fails to comply with that duty, it cannot exercise power, and any purported exercise of power will be a nullity. Alternatively phrased, the defendant has a right to notice and an opportunity to be heard, and if this right is violated, he will possess an immunity against the court's exercise of power. Thus, a court's "power to set in operation the sanctions of the [criminal] law"¹⁴² may depend not only on some set of operative facts that exist external to the court, but also on whether the court has complied with the requisite duties for the exercise of that power, as well as any legal directives conferring immunity from criminal punishment in certain situations.

2. Creatures of the Constitution

Limitations on a court's jurisdiction can come from statute just as readily as they can from the Constitution.¹⁴³ But given that the most controversial postconviction relief concerns habeas for prisoners held under color of state law, our primary concern is with what constitutional provisions are "jurisdictional" in the relevant sense. Few federal statutes place any limits on a state court's criminal jurisdiction, and

137 *See id.* at 990.

138 *See id.* at 990, 990–91 (answering that question in the affirmative on the basis of general law).

139 Schlag, *supra* note 130, at 189.

140 Harrison, *supra* note 124, at 511.

141 *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993).

142 *Cf.* 1 BLACK, *supra* note 79, § 215, at 260 (defining "jurisdiction").

143 Williams, *supra* note 74, at 1785; *see also* 1 BLACK, *supra* note 79, § 216, at 262 ("[T]he jurisdiction of a particular court, in respect to the matters of which it may take cognizance, may be defined in the constitutional or statutory enactment which creates it, . . . or may be enlarged or abridged by subsequent legislation.").

state statutory limitations on jurisdiction are (broadly speaking) not cognizable on federal habeas. The Constitution, however, does place limitations on the states by way of the Fourteenth Amendment. But are those limitations placed on the state judiciaries?

To keep things simple, let's establish a few baseline assumptions. First, let's assume that the Bill of Rights is incorporated in its entirety against the several states by way of the Privileges or Immunities Clause.¹⁴⁴ Second, let's assume that the content of the incorporated rights is determined by the original meaning of the relevant provisions of the Bill of Rights, instead of the understanding of those rights at the time of the Fourteenth Amendment's ratification.¹⁴⁵

The Constitution does not expressly prescribe the consequences for a "violation" of its terms. But at least with respect to legislative action, it was well established at the time of the Founding what those consequences would be: nullity. The best explanation for the doctrine can be found in Justice Paterson's opinion in *Vanhorne's Lessee*.

What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution; they derive their powers from the Constitution: It is their commission; and, therefore, all their acts must be conformable to it, or else they

144 It is, of course, plausible that the Privileges or Immunities Clause did not incorporate the Bill of Rights (or any other rights) against the several states. See generally Ilan Wurman, *Reversing Incorporation*, 99 NOTRE DAME L. REV. 265 (2023) (impeaching proincorporation interpretations of the Fourteenth Amendment's legislative history); William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185 (2024) (suggesting that the Privileges or Immunities Clause did not "confer" federal rights, *id.* at 1237 (emphasis added)—nor even any rights at all; "rather, it recognized a restriction on state power to *abridge* [the rights of *general* citizenship]," *id.* (emphasis added), which would have included many of the rights secured by the first eight amendments as well as "retained natural rights and common-law rights," *id.* at 1235, while leaving states free to "regulate" those rights in a "reasonable, uniform, and impartial" manner, *id.* at 1198); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1465–66 (1992) (suggesting that "[i]ncorporation under the Privileges or Immunities Clause turns on whether the definition of a right of distinctively national citizenship includes its label" of "which level of government [the right] operate[s] against").

145 Originalists are not of one mind on this point. Compare *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2059 (2021) (Thomas, J., dissenting) (Fourteenth Amendment), with *Ramos v. Louisiana*, 140 S. Ct. 1390, 1396 (2020) (Gorsuch, J.) (Bill of Rights).

will be void. The Constitution is the work or will of the People themselves, in their original, sovereign, and unlimited capacity. . . .

. . . .

Could the Legislature have annulled these articles, [declaring the rights of the people]? Surely no. As to these points there was no devolution of power; the authority was purposely withheld, and reserved by the people to themselves. If the Legislature had passed an act declaring, that, in future, there should be no trial by Jury, would it have been obligatory? No: It would have been void for want of jurisdiction, or constitutional extent of power.¹⁴⁶

Under Justice Paterson's logic, the *entire* Constitution prescribes jurisdictional rules for all entities that derive their existence from it, and the consequence for contravening those rules is that the juridical actions in violation of the Constitution are legal nullities. And though Justice Paterson's opinion only discussed actions of the legislature, the judiciary is no less a "Creature[] of the Constitution" than its coordinate branches.¹⁴⁷

Of course, the governments of the several states do not derive their existence from the Federal Constitution. But the Constitution is more than just a charter of incorporation for the federal government; it is also "the supreme Law of the Land."¹⁴⁸ Thus, insofar as the Constitution incorporates certain provisions to limit the powers of the

146 Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308–09, 28 F. Cas. 1012, 1014–15 (C.C.D. Pa. 1795) (No. 16,857); *see also* Trs. of the Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 57, 62–63 (1805) (adopting the position advanced by plaintiff's counsel, who quoted Justice Paterson's opinion); Titus v. Latimer, 5 Tex. 433, 436 (1849) (using Justice Paterson's phrasing).

147 Regents of the Univ. of Md. v. Williams, 9 G. & J. 365, 410 (Md. 1838) ("The legislature, executive, and judiciary, are all creatures of the constitution, each confined in its action to the circumscribed sphere assigned it, and cannot rightfully exercise any power which is repugnant to that instrument, or not within their respective sphere of action."); St. George Tucker, *View of the Constitution of the United States*, in 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE app. at 140, 354–55 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803) ("[T]he federal constitution [is the instrument] from which the courts of the United States derive all their powers, in like manner as the legislative and executive departments derive theirs."); *see also* M'Mullen v. City Council of Charleston, 1 S.C.L. (1 Bay) 46, 46–47 (S.C. Super. Ct. 1787) ("[The municipal corporation is] the creature of the charter, which exists only in supposition or intendment of law. That this charter prescribes its utmost limits and bounds, beyond which it cannot pass. . . . Whenever, therefore, they proceed to take cognizance of things not cognizable by them, or not expressly given them by charter, such proceedings are *coram non iudice*, and void . . .").

148 U.S. CONST. art. VI, cl. 2; *see also* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 569 (2003) ("The Constitution was a novel type of legal document; it was not exactly like a statute, or a treaty, or a contract, or indeed anything that lawyers had previously had to interpret.").

states, acts of a state contrary to those provisions would be no less a nullity than like acts of the federal government.

To be clear, this is not to say that constitutional-error-correction habeas is consistent with the original meaning of the Constitution. There is a crucial difference between the legislative and the judicial powers with respect to the Constitution. “Legislation that is beyond enumerated federal power or contrary to an affirmative restriction thereon is, in general, invalid. The courts’ judgments, by contrast, are binding even when they rest on error concerning the applicable law, including the Constitution.”¹⁴⁹ But when a constitutional rule speaks to the power of the courts, judicial error on that point is “parallel” to a constitutional defect in legislative action.¹⁵⁰

The other thing to keep in mind here is that we are primarily concerned with the validity of the process authorizing the custodian to detain the prisoner—whether the adjudicating court had jurisdiction to issue final process. Not all constitutional rules implicate a court’s power to pronounce the sentence of the law in a criminal case. For example, let’s say that Court A issues a warrant to federal officials to search for evidence, but that warrant was not supported by probable cause and lacked sufficient particularity. In this instance, Court A would have exceeded the jurisdictional limit placed on it by the Fourth Amendment. Let’s say further that, pursuant to that warrant, federal officials found evidence that Defendant D committed a crime, and the government properly initiates prosecution of that crime before Court B. Prior to trial, D moves to suppress this evidence. Although Court B finds that Court A lacked jurisdiction to issue that warrant, it decides that the evidence shouldn’t be suppressed under *Leon’s* good-faith exception.¹⁵¹ The case proceeds to trial, the jury convicts D, and D is sentenced to a term of years. Does Court B lack jurisdiction to issue an order of commitment in this case? Surely not. And that is true even if *Leon* was wrongly decided or the court misapplied *Leon* to the facts. In ruling upon the motion to suppress, the court was simply determining the rights, duties, and privileges of D and the government; it made no decisions about its own power. Even under the broadest conception of the exclusionary rule, violation of the Fourth Amendment does not immunize a defendant against criminal punishment.

Unconstitutional searches are an easy case. As we will see, other cases, particularly with regard to the Sixth Amendment’s Confrontation and Compulsory Process Clauses, are much harder.¹⁵² But with

149 Harrison, *supra* note 124, at 514.

150 See Baude, *supra* note 43, at 1832–33; see also *infra* notes 526–27 and accompanying text.

151 See *United States v. Leon*, 468 U.S. 897, 913 (1984).

152 See *infra* Section II.C.

these general principles in mind, we can begin to understand and critically evaluate the historical evidence on the proper office of the Great Writ.

E. Nonjurisdictional Defects Resulting in a Void Judgment

But before we do that, we should first note a few circumstances that would result in a void judgment that aren't naturally categorized as jurisdictional defects. Perhaps because they were of rare occurrence, these nonjurisdictional defects weren't often talked about in opinions discussing void judgments, though occasionally they would be hinted at or mentioned obliquely.¹⁵³ But these other defects, particularly those of fraud and involuntary waiver, are crucial to understanding the transition between the writ's historic office and *Brown v. Allen*.¹⁵⁴

1. Disqualification of the Judge for Conflict of Interest

The first of these defects comes from the venerable maxim *nemo potest esse iudex in propria causa*—no one can be a judge in their own case.¹⁵⁵ Of the three issues I've listed here, this one is the closest to being “jurisdictional,” since this rule functions to work a Hohfeldian disability. My reason for deeming conflicts of interest nonjurisdictional is that the problem is not so much that the judge lacks sovereign authority, but that she is prohibited from using it in this instance.

It was a blackletter principle of the common law that three entities were necessary for there to be a valid judgment: *actor* (plaintiff), *reus* (defendant), and *iudex* (judge).¹⁵⁶ While there was unanimity amongst the leading authorities that having all three was a requirement, the explanations for *why* this was a requirement differed. According to Bracton, this was a requirement because that's simply what a *iudicium* was—

153 See, e.g., *Biddle v. Wilkins*, 26 U.S. (1 Pet.) 686, 691 (1828) (“The cause of action does not appear, and we cannot say that the subject matter was not within the jurisdiction of the Court, when it was rendered; or that there was any disability in the plaintiff, to sue in that Court; or that the judgment was void for any cause whatever.” (emphasis added)); *Ex parte Siebold*, 100 U.S. 371, 375 (1880) (“The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.” (emphasis added)).

154 *Brown v. Allen*, 344 U.S. 443 (1953).

155 1 BLACK, *supra* note 79, § 174, at 201.

156 See Nelson, *supra* note 59, at 1568 (noting that the presence of the adverse parties could be “actual or constructive”); Ann Woolhandler, *Adverse Interests and Article III*, 111 NW. U. L. REV. 1025, 1026 (2017).

“the threefold act of [those] three persons.”¹⁵⁷ It is unclear whether *iudicium* is best translated here to mean “judgment” or “judicial proceeding”—the word could mean either, and context does little to clarify which is more accurate.¹⁵⁸ For Coke, these were the component parts of a “judgement.”¹⁵⁹ To Blackstone, these were the “three constituent parts” of “every court.”¹⁶⁰ And each of these theories can be seen in opinions of the various state courts of last resort throughout the first half of the nineteenth century.¹⁶¹

So why is this not a jurisdictional issue? For that, we turn to Bracton’s discussion of “the crime of lese-majesty”—an offense against the Crown itself:

If [it proceeds] to judgment, we must then see who may and ought to judge. It is clear that it cannot be the king himself in his own suit, for he would thus be both *actor* and judge Nor can it be a justice, since in judicial matters he represents the person of the king whose deputy he is. Who then shall judge when the king himself must be the *actor* at the trial? . . . If it is a slight trespass which calls for a pecuniary penalty only, that is, a light pecuniary penalty, the justices may well sit without the peers. But if it is serious enough to involve ransom, the next thing to disherison, the peers ought there to be associated with the justices, lest the king, in person or through his justices without the peers, be plaintiff and judge.¹⁶²

Given that Bracton is the one who most prominently advanced the theory that the king is the font of all jurisdiction,¹⁶³ it would be quite the surprise for him to say that the king could *ever* lack jurisdiction. So rather than the judgment being void, there simply was no judgment.¹⁶⁴

157 See 2 BRACTON, *supra* note 66, at 302.

158 See *Iudicium*, CHARLTON T. LEWIS, AN ELEMENTARY LATIN DICTIONARY (1918) (defining the term to mean “a judgment, judicial investigation, trial, legal process, sentence” and defining *iudicatum* more narrowly to mean “a decision, judgment, decree”). Samuel Thorne’s translation of Bracton chooses “judicial proceeding” here and “judgment” merely one page later. 2 BRACTON, *supra* note 66, at 303 (translating “[i]tem consistit veritas iudicii in iusta sententiae prolatione et iusta et diligenti executione” to mean “truth in judgment consists in the just pronouncement of judgment and its just and diligent execution” (footnote omitted)).

159 1 COKE, *supra* note 97, at *39–40.

160 3 BLACKSTONE, *supra* note 31, at *25.

161 See, e.g., *Ex parte Pool*, 4 Va. (2 Va. Cas.) 276, 293 (1821) (“Here we have a *lis pendens* before a Judge. We have *actor, reus, et Judex.*”); *Johnston v. Commonwealth*, 4 Ky. (1 Bibb) 598, 599 (1809) (quoting 1 COKE, *supra* note 97, at *39–40); *Smith v. Nelson*, 18 Vt. 511, 559 (1846) (“To any and every court there must be *actor, reus* and *judex.*”).

162 2 BRACTON, *supra* note 66, at 334, 337 (brackets in original).

163 See *supra* note 66 and accompanying text.

164 Cf. *Coddington v. Stanton*, 7 N.J.L. 84, 84–85 (1823) (“There must always be a party to every proceeding, either in form or substance. If there is not a party, against whom can the court give judgment?”).

It is akin to claiming you made a contract with yourself—that’s just not what a contract is.

Leading treatises on the law of judgments identify a financial interest in the controversy, a familial relationship with one of the parties, and having acted as counsel for one of the parties as the conditions that would disqualify a judge.¹⁶⁵ While these treatises report that most conflicts of interest would have been merely a voidable irregularity at common law, in states where disqualification was prescribed by statute, it was treated as if it were a jurisdictional error.¹⁶⁶

2. Fraud in the Proceedings

Fraud in the proceedings could likewise result in a void judgment, though this was a bit of an “unsettled question” in the late nineteenth century.¹⁶⁷ Both Henry Campbell Black and A.C. Freeman appeared to favor the rule that a judgment either procured by fraud or founded upon a fraudulent cause of action can only be impeached collaterally by third parties, and only then when the two parties acted in collusion to defraud the court.¹⁶⁸ But not all authorities agreed, particularly when it came to criminal matters. One treatise, though generally concurring in the above doctrine, acknowledged an exception for when a defendant fraudulently obtained and produced as evidence a former conviction for purposes of barring prosecution.¹⁶⁹ Joel Prentiss Bishop’s well-known *Commentaries on the Criminal Law* went even further: “In principle, when a proceeding is entirely fraudulent, having no sound part whatever, there is no collateral or direct effect to be given it; it is as though it had not been”¹⁷⁰ Earlier sources tend to

165 See 1 BLACK, *supra* note 79, § 174, at 201–02; FREEMAN, *supra* note 106, §§ 144, 147.

166 1 BLACK, *supra* note 79, §§ 174, 266, at 202, 325 (explaining that the majority rule is for conflicts of economic interest to render the judgment “null and void,” whereas a conflict stemming from the judge’s relationship with a party would “have no greater effect than to make the judgment erroneous or voidable,” *id.* § 266); FREEMAN, *supra* note 106, §§ 145–46.

167 1 BLACK, *supra* note 79, § 290, at 362.

168 See *id.* §§ 291–93; FREEMAN, *supra* note 106, § 334; see also JOHN M. VANFLEET, *THE LAW OF COLLATERAL ATTACK ON JUDICIAL PROCEEDINGS* § 5 (Chicago, Callaghan & Co. 1892) (expressing the view that a case allowing impeachment of a judgment where the judge acted fraudulently was wrongly decided).

169 J.C. WELLS, *A TREATISE ON THE DOCTRINES OF RES ADJUDICATA AND STARE DECISIS* § 470 (Des Moines, Mills & Co. 1878) (citing *State v. Little*, 1 N.H. 257, 258–59 (1818)).

170 1 JOEL PRENTISS BISHOP, *COMMENTARIES ON THE CRIMINAL LAW* § 1011 (Cambridge Univ. Press, 6th ed. 1877) (allowing, however, for the equitable exception “that a party to the fraud is not permitted to rely on this imperfection”). Note here that Bishop is making a suggestion as to what *should* be the rule. In speaking as to doctrine, Bishop said, “[Fraud] renders null *or* voidable judicial proceedings; yet, to set them aside for fraud, one must take the steps required by established rules.” *Id.* § 1008, at 566 (emphasis added).

go even further than this latter view. For instance, Justice Story wrote in his conflict of laws treatise that “fraud in [the sentence], as in [all] other cases, will vitiate any judgment, however well founded in point of jurisdiction.”¹⁷¹ So too Justice McLean in *Stoddard v. Chambers*: “Fraud vitiates all transactions. It makes void a judgment, which is a much more solemn act than the issuing of a patent.”¹⁷² And that was the rule prior to the Founding—as Chief Justice De Grey wrote in *Rex v. Duchess of Kingston*: “Fraud is an extrinsic, collateral act; which vitiates the most solemn proceedings of courts of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal.”¹⁷³

To be clear, only certain species of fraud could render a judgment void. The fraud typically had to be “extrinsic or collateral to the matter tried, and not fraud in the matter on which the decree was rendered.”¹⁷⁴ For instance, a party could demonstrate collaterally that “fraud or deception practiced by [his opponent] . . . prevented [him] from fully exhibiting his case,”¹⁷⁵ or that his opponent obtained a default judgment by means of a falsified affidavit stating he had left the country.¹⁷⁶ Many courts also allowed for parties to introduce evidence that the court’s finding of jurisdiction was based upon fraud, even when such evidence would directly contravene the record.¹⁷⁷

171 JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 597 (Boston, Hilliard, Gray & Co. 1834); see also L.A. Sheridan, *Fraud and Surprise in Legal Proceedings*, 18 MOD. L. REV. 441, 442 (1955) (“There can be no doubt that once a decision has been shown to have been obtained by fraud, it ceases to be a fully valid judicial decision, even when it has emanated from the highest court for the United Kingdom.” (footnote omitted)).

172 *Stoddard v. Chambers*, 43 U.S. (2 How.) 284, 318 (1844).

173 *R v. Duchess of Kingston* [1776] 20 How. St. Tr. 355, 544. For other authority supporting this doctrine, see *Sanders v. State*, 85 Ind. 318, 330–32 (1882); *Cornett v. Williams*, 87 U.S. (20 Wall.) 226, 249–50 (1874); *Cheriot v. Foussat*, 3 Binn. 220, 250 (Pa. 1810); *Warren Mfg. Co. v. Etna Ins. Co.*, 29 F. Cas. 294, 296 (C.C.D. Conn. 1800) (No. 17,206); *Andrews v. Montgomery*, 19 Johns. 162, 164 (N.Y. Sup. Ct. 1821); 1 W.F. BAILEY, THE LAW OF JURISDICTION § 155 (Chicago, T.H. Flood & Co. 1899); 2 JOHN BOUVIER, INSTITUTES OF AMERICAN LAW § 3593, at 416 (Philadelphia, J. B. Lippincott & Co. new ed. 1872).

174 1 BAILEY, *supra* note 173, § 157, at 128. But see Comment, *Fraud: Relief in Equity Against Judgments Obtained by Fraud*, 9 CALIF. L. REV. 156, 157 (1921) (“In practice, however, these precise distinctions of the theorist are not observed and the doctrine has come to be applied as a rule of thumb.”).

175 1 BAILEY, *supra* note 173, § 162.

176 *Id.* § 160.

177 See, e.g., *Koehler v. Hill*, 15 N.W. 609, 623 (Iowa 1883) (“No court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alleging the existence of facts on which jurisdiction depends.” (quoting *People v. Cassels*, 5 Hill 164, 168 (N.Y. Sup. Ct. 1843)) (citing *Griffith v. Frazier*, 12 U.S. (8 Cranch) 9 (1814))); see also 1 BAILEY, *supra* note 173, § 160, at 130 (“A court of equity has inherent power, in an original action commenced therein, to set aside a judgment when by reason of fraud of the adverse party jurisdiction of the person of the defendant was not actually though apparently acquired.”).

More controversial was “whether allegations of perjury, or the use of forged documents as evidence in securing a judgment, are grounds for relief in an action in equity.”¹⁷⁸ In the late nineteenth century, the Supreme Court had set forth the doctrine that “[m]ere false testimony, or forged documents, are not enough if the disputed matter has been actually presented to and considered by the tribunal.”¹⁷⁹ However, if the adjudicator herself engaged in the conspiracy, that doctrine did not apply, and the judgment could be set aside for fraud.¹⁸⁰ Not all courts of last resort agreed with this doctrine, however.¹⁸¹

Why did some jurisdictions allow impeachment of judgments for fraud? One possible explanation is that this doctrine reflects the emphasis placed on “truth in judgment,”¹⁸² not to mention the manifest injustice that comes from denying a remedy to someone injured by fraud.¹⁸³ The more plausible explanation—one that is grounded in

178 1 BAILEY, *supra* note 173, § 164, at 133.

179 Moffat v. United States, 112 U.S. 24, 32 (1884) (citing United States v. Throckmorton, 98 U.S. 61 (1878) and Vance v. Burbank, 101 U.S. 514 (1880)). Shortly thereafter, however, the Court—without overruling *Throckmorton*—held that the availability of collateral relief in equity depended not on whether the fraud was extrinsic or intrinsic, “but on whether, according to the facts of the case, it appeared to be against conscience to permit the execution of the judgment.” Robert H. Dann, Comment, *Judgment: Equity: Relief Against Judgment Obtained by Perjury*, 12 CORNELL L.Q. 385, 391 (1927) (citing Marshall v. Holmes, 141 U.S. 589 (1891)); see also Note, *Fraud as a Basis for Setting Aside a Judgment*, 21 COLUM. L. REV. 268, 269 (1921) (“The Supreme Court of the United States, to show its utter impartiality, has ruled both ways, and left the spectacle of two cases, one of which holds that false evidence is a ground for reversal, the other that it is not, both of which have been followed, and neither of which has ever been overruled.” (footnotes omitted)).

180 See Note, *supra* note 179, at 268.

181 See 1 BAILEY, *supra* note 173, § 164, at 133 & nn. 4–5 (noting that Minnesota and North Carolina granted relief for such fraud “absolute[ly],” and that Michigan would do so in certain exceptional circumstances); Harold C. Dedman, *Intrinsic and Extrinsic Fraud and Relief Against Judgments*, 4 VAND. L. REV. 338, 340–41 (1951) (explaining that “[t]he British courts have not drawn the distinction between intrinsic and extrinsic fraud, their attitude being that fraud vitiates everything it touches,” *id.* at 340, and that “[t]he *Throckmorton* rule has been flatly rejected in Wisconsin,” *id.* at 341).

182 Cf. 2 BRACTON, *supra* note 66, at 302–03 (explaining that “[t]he judge must employ the truth of judgment, and truth in judgment consists in three things”: (1) “the indifferent and impartial acceptance of the parties”; (2) “diligent investigation”; and (3) “the just pronouncement of judgment and its just and diligent execution”); Lapham v. Campbell, 61 Cal. 296, 299 (1882) (“Truth, it is said, must be the basis of all judgments; and no Court will knowingly allow itself to be abused.”).

183 Cf. Gray v. Barton, 28 N.W. 813, 817 (Mich. 1886) (“It might be that a judgment at law might be so manifestly against conscience that a new trial would be granted in equity”); Dann, *supra* note 179, at 391 (“[I]t is difficult to see why the majority rule does not actively encourage perjury and in effect place a premium on obtaining judgments by false testimony The improbable prosecution and conviction for perjury is not a sufficient deterrent in view of the huge spoils which await those who will but practice such frauds.”).

principle, rather than policy—is that lawyers in this era conceived judgments to be in the nature of a contract,¹⁸⁴ and fraud, no less than a want of power, is a viable defense to formation.¹⁸⁵

Describing judgments as “contracts” was a bit imprecise even then,¹⁸⁶ and using this terminology certainly is misleading to the modern lawyer. When eighteenth- and nineteenth-century jurists spoke of a judgment being a “contract,” all we should understand them to be saying is that judgments are “juridical acts”—exercises of a Hohfeldian power altering the legal relations of the parties to the judgment.¹⁸⁷ And since any exercise of Hohfeldian power is by definition a “volitional” act,¹⁸⁸ any vices of the adjudicator’s will—fraud, duress, and the like—will have the effect of vitiating a judgment.¹⁸⁹

3. Invalid Waiver of a Condition Precedent to Jurisdiction

Keeping with the contract law theme, the other vitiating defect worth mentioning is involuntary waiver. It is a well-known maxim that “consent cannot confer upon a court jurisdiction of the subject-

184 See, e.g., *Sawyer v. Vilas*, 19 Vt. 43, 47 (1846) (“Judgments have frequently been held to be contracts . . .”); *Johnson v. Butler*, 2 Iowa 535, 537 (1856) (“We regard a judgment, as being a contract of the highest character.” (quoting *M’Guire v. Gallagher*, 2 Sand. S.C. 402, 403 (N.Y. Super. Ct. 1849))); JOSEPH CHITTY, A PRACTICAL TREATISE ON THE LAW OF CONTRACTS, NOT UNDER SEAL; AND UPON THE USUAL DEFENCES TO ACTIONS THEREON 2 (London, S. Sweet 1826) (“Contracts, or obligations, of record, are either judgments, recognizances, or statutes merchant, or staple; and these are of superior force, because they have received the sanction of, and are founded on, the authority of a court of record.”); 1 BLACK, *supra* note 79, § 7, at 10–11 (attributing this idea to Blackstone and noting its acceptance as a “recognized principle” (citing 3 BLACKSTONE, *supra* note 31, at *158–60)).

185 CHITTY, *supra* note 184, at 222 (“Fraud avoids a contract, *ab initio*, both at law and in equity, whether the object be to deceive the public, or third persons, or one party endeavor thereby to cheat the other.”); *id.* at 61 (“[T]he master is not bound if the servant’s act or contract do not fall within the general purview or scope of his powers, and be *wholly unconnected* with the business intrusted to his direction.”).

186 See 1 BLACK, *supra* note 79, §§ 9–10.

187 See *supra* notes 127–132 and accompanying text.

188 See Hohfeld, *supra* note 113, at 44; see also Corbin, *supra* note 122, at 168 (defining “power” to mean “[t]he legal relation of A to B when A’s own *voluntary* act will cause new legal relations either between B and A or between B and a third person” (emphasis added)).

189 See *Dial v. Farrow*, 26 S.C.L. (1 McMul.) 292, 293 (S.C. Ct. App. 1841); *Sanders v. State*, 85 Ind. 318, 321–22, 330 (1882) (“Duress is a species of fraud.” *Id.* at 330.); accord Courtney M. Cox, *This Is a Chapter About Deception*, in INTERSTITIAL PRIVATE LAW 41, 55 (Samuel L. Bray et al. eds., 2024) (“[R]eliance matters to deceit—indeed, is central to it—because it amounts to the allegation that the defendant wrongfully interfered with the plaintiff’s decisional autonomy.”); see also THOMAS ATKINS STREET, THE FOUNDATIONS OF LEGAL LIABILITY: A PRESENTATION OF THE THEORY AND DEVELOPMENT OF THE COMMON LAW 375 (1906) (explaining that the “deception of the court” that formed the basis of liability on a writ of deceit “was viewed as an offense against the king as well as a wrong against the individual who happened to be damaged”).

matter.”¹⁹⁰ But that statement shouldn’t be taken to its fullest extent. Although the parties could not confer upon the court judicial power where it otherwise had none, they could waive certain conditions precedent to the issuance of final process, the lack of which would have otherwise been treated as jurisdictional error.

The most familiar example of this is seen with our modern concept of personal jurisdiction. A court might not have power to issue a summons to compel an out-of-state defendant to appear before it. And because a court has to “get hold of the defendants” in order to proceed to an adjudication, this lack of power to issue the requisite mesne process results in a lack of power to hear and determine and ultimately issue final process on the judgment.¹⁹¹ However, a party can “waive” the necessity of compelling her presence by voluntarily appearing before the court or consenting to suit in a particular jurisdiction by contract or other means.¹⁹² But we shouldn’t think of this as conferring jurisdiction to issue such process by consent—a private party cannot confer *any* jurisdiction, as jurisdiction flows from the sovereign. Rather, the defendant’s waiver “cures” what would otherwise be a jurisdictional defect in the proceedings.¹⁹³

A less obvious (though still intuitive) example can be seen with “consent judgments,” which broadly construed include settlement

190 1 BAILEY, *supra* note 173, § 49; *see also* Capron v. Van Noorden, 6 U.S. (2 Cranch) 126, 127 (1804); Dan B. Dobbs, *The Decline of Jurisdiction by Consent*, 40 N.C. L. REV. 49, 49 (1961).

191 Nelson, *supra* note 59, at 1573 (quoting Hart v. Granger, 1 Conn. 154, 168 (1814)).

192 *See* Williams, *supra* note 74, at 1764. Strictly speaking, appearance is not always a “waiver” of a defense—as in a “voluntary [relinquishment] with full knowledge of the facts,” *Bos. & Me. R.R. v. Sargent*, 70 N.H. 299, 305 (1900)—but often a “forfeiture[—]the failure to make the timely assertion of a right,” *United States v. Olano*, 507 U.S. 725, 733 (1993)—or an “estoppel *in pais*”—where “a party [is] precluded by his acts and conduct from asserting a right to the detriment or prejudice of another party who, entitled to rely on such conduct, has acted upon it,” *Draper v. Oswego Cnty. Fire Relief Ass’n*, 82 N.E. 755, 756 (N.Y. 1907) (emphasis added). The difference between these three concepts is secondary here.

193 *See* Pawling v. Willson, 13 Johns. 192, 202 (N.Y. Sup. Ct. 1816) (speaking in such terms). Note, however, that not all defects can be “cured” by an appearance. “Appearance cures matters of form only, not of substance. The want of an original writ is not cured by an appearance. An appearance cannot alter the nature of the action or process, or convert a proceeding *in rem*, into a general action *in rem et personam*.” *Id.*; *see also* Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 719 (1838) (“[A]pppearance does not cure the defect of judicial power . . .”). Defects in jurisdiction over the cause or the process could, however, be cured (to some extent) by transferring the case to a court that had original jurisdiction to hear such a cause or issue such process. *See, e.g.,* Hinds v. Willis, 13 Serg. & Rawle 213, 214–15 (Pa. 1825) (holding that where a judgment of a justice of the peace exceeding his jurisdiction was subsequently affirmed on appeal by a court that would have jurisdiction to issue such a judgment in an original action before it, the judgment thence became merely erroneous, not void).

agreements sanctioned by court order, guilty pleas, and cognovit notes.¹⁹⁴ Ordinarily, in a case where there is a constitutional right to a jury trial, failure to try the case by jury renders the judgment void.¹⁹⁵ Parties have long been allowed to waive this right by agreement,¹⁹⁶ and even to set the terms of the judgment on the case, provided that the terms “come[] within the general scope of the case made by the pleadings.”¹⁹⁷ And such a consent judgment was typically given the same legal effect as any other judgment, whereby failure to abide by its terms was punishable as contempt of court.¹⁹⁸

Because waivers are acts of volition,¹⁹⁹ the traditional defenses to the formation of a contract—fraud, duress, mutual mistake (where applicable), perhaps even unconscionability—are available to render the waiver a nullity.²⁰⁰ For example, where a plaintiff’s attorney misled a carpenter to believe that there was a lucrative construction job soon to be underway in Illinois so that the carpenter would be lured into that state, where the statute of limitations had not yet expired, the Supreme Court of Iowa held that the judgment of the Illinois court was void for want of personal jurisdiction.²⁰¹ Waivers of the right to a trial, particularly confessions of guilt in criminal cases, were likewise policed for involuntariness.²⁰² On the civil side of things, voluntariness of waiver was monitored a bit less closely, but monitored nonetheless: “[W]here a decree is made by consent of counsel, there lies not an appeal or rehearing, though the party did not really consent But if such

194 See Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 45; 1 BLACK, *supra* note 79, § 15, at 21.

195 See *Windsor v. McVeigh*, 93 U.S. 274, 283 (1876); *State v. Mead*, 4 Blackf. 309, 309 (Ind. 1837); *Cancemi v. People*, 18 N.Y. 128, 135 (1858).

196 See *Kearney v. Case*, 79 U.S. (12 Wall.) 275, 281 & n.* (1871) (collecting cases).

197 *Pac. R.R. v. Ketchum*, 101 U.S. 289, 297 (1880).

198 Resnik, *supra* note 194, at 46–47.

199 See *Kennedy v. Manry*, 66 S.E. 29, 31 (Ga. Ct. App. 1909) (noting that the same may be true for estoppel in pais); see also *Adams v. Jones*, 1 F. Cas. 126, 127 (C.C.W.D. Pa. 1859) (No. 57) (“[I]nvolutionary delays . . . should not work a forfeiture of [one’s] rights.”).

200 1 BLACK, *supra* note 79, § 319; CHITTY, *supra* note 184, at 54–56. As with unconscionability as a defense to ordinary contracts, different courts have different thresholds for what makes a consent judgment unconscionable. Compare *Isbell v. Cnty. of Sonoma*, 577 P.2d 188, 193 (Cal. 1978) (contract of adhesion with a cognovit clause), with *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (plea bargaining).

201 *Dunlap & Co. v. Cody*, 31 Iowa 260, 262, 267–68 (1871). The Supreme Court of Iowa based its holding on a great weight of precedent establishing the proposition “that if the plaintiff had seized the defendant and carried him by force to Illinois, and there caused him to be served with a summons, the jurisdiction thereby acquired would be wrongful.” *Id.* at 266 (describing the doctrine as “no legal right can be founded upon an act of fraud or oppression,” *id.* at 263).

202 See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 12 (1979).

decree was by fraud and covin, the party may be relieved against it, not by rehearing, or appeal, but by original bill.”²⁰³

II. REEXAMINING THE HISTORICAL NARRATIVE

In his well-respected article on habeas, Professor Bator claimed that there was a “softening” of the “jurisdictional criterion” during the late nineteenth century.²⁰⁴ He cites cases such as *Ex parte Lange* (sentence beyond statutory authority), *Ex parte Wilson* (want of an indictment in prosecution of an “infamous” crime), and *Ex parte Siebold* (unconstitutional penal statute) as examples of this supposed doctrinal erosion.²⁰⁵ But Bator was mistaken on two counts, both of which could have been avoided by a genuine attempt to engage with the historical authorities on their own terms.²⁰⁶

First, Bator was wrong on the merits. Closer attention to “jurisdiction over the process” could have prevented his error. An in-existent or invalid indictment is jurisdictional because an indictment is analogous to an original writ.²⁰⁷ But unlike most original writs, a common law court has no power to create an indictment—only a grand jury has “jurisdiction” to produce such process.²⁰⁸ With respect to unconstitutional penal statutes and excessive sentences, jurisdiction over *final* process is at issue. A statute setting forth a substantive criminal prohibition also confers power to punish such conduct.²⁰⁹ If that statute is

203 *Monell v. Lawrence*, 12 Johns. 521, 535 (N.Y. 1815) (emphasis omitted) (citing *Bradish v. Gee* (1754) 27 Eng. Rep. 152, 152; 1 Amb. 229, 229).

204 Bator, *supra* note 2, at 471, 475.

205 *Id.* at 467–68 & nn. 55–56 & 59 (citing *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874); then *Ex parte Wilson*, 114 U.S. 417 (1885); and then *Ex parte Siebold*, 100 U.S. 371 (1880)). Others, even those that disagree with Bator’s thesis, have likewise expressed skepticism. See, e.g., Siegel, *supra* note 2, at 524–29 (describing these cases as involving a “set of defects that were fictionally deemed jurisdictional for habeas purposes,” *id.* at 527); Dane, *supra* note 55, at 49 (“As the doctrine evolved, it developed that almost any serious constitutional violation constituted a judicial act in excess of jurisdiction.”).

206 See Forsythe, *supra* note 11, at 1124–42 (making a similar point); Dallin H. Oaks, *Habeas Corpus in the States—1776–1865*, 32 U. CHI. L. REV. 243, 263 (1965) (noting that sentences in excess of authority and unconstitutional penal statutes were considered to “render [a] judgment void”).

207 See Davies, *supra* note 81, at 51; Chapman & McConnell, *supra* note 94, at 1742 (quoting Tucker, *supra* note 147, at 203); Crema & Solum, *supra* note 14, at 467.

208 See *Ex parte Bain*, 121 U.S. 1, 8–10 (1887) (canvassing state court holdings), *overruled in part* by *United States v. Cotton*, 535 U.S. 625, 631 (2002). For a more complete treatment of this issue, see generally Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398 (2006).

209 See, e.g., 1 Rev. Stat. § 5515 (1874) (authorizing sentences in lockstep with the penalties set out for violations of 1 Rev. Stat. § 5510 (1874)).

void, then no power has been conveyed to the court.²¹⁰ Similarly, when such a statute places limits on a court's power to issue punishment, any judicial acts exceeding the scope of its authorization are void unless the court can point to another source of authority sanctioning its particular exercise of power.²¹¹

Second, Bator was wrong on the history. The holdings of *Lange*, *Siebold*, and *Wilson* can only be considered doctrinal innovations if one limits their focus to the Supreme Court's habeas jurisprudence. State courts had long been finding that unauthorized sentences presented cognizable error on habeas,²¹² and most treatise writers of the era endorsed at least some form of this doctrine.²¹³ As for an unconstitutional penal statute rendering a judgment void, that proposition was the basis of the Supreme Court's decision in *Worcester v. Georgia*, with the majority opinion being authored by Chief Justice Marshall himself, writing a mere two years after he wrote *Ex parte Watkins* and using nearly identical language.²¹⁴ And with respect to the necessity of an indictment, the doctrinal roots are even deeper. As Chief Justice Marshall, riding circuit, wrote in 1809: "[T]he laws of the United States have erected courts which are invested with criminal jurisdiction. This

210 "That a void act can confer no authority upon those, who proceed under colour of it, is a selfevident proposition." *Wilson*, *supra* note 91, at 39.

211 *Cf.* *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812) (explaining that federal courts "possess no jurisdiction but what is given them by the power that creates them").

212 *E.g.*, *In re Sweatman*, 1 Cow. 144, 149–51 (N.Y. Sup. Ct. 1823); *Miller v. Allen*, 11 Ind. 389, 390 (1858).

213 *Compare* BROWN, *supra* note 69, § 106, at 288 ("Where the court has power to inflict a sentence of the nature, kind and character of the one pronounced, but not to its amount, term or extent, the excess, according to the best authorities, is absolutely void."), and I BAILEY, *supra* note 173, § 319 (similar), with VANFLEET, *supra* note 168, § 730, at 783 ("[I]n criminal causes where the court has power to fine, an excessive fine, or an excessive imprisonment which the court would have power to give in a proper criminal cause, is not void."). *But see* Seymour D. Thompson, *Void Sentences*, 4 CRIM. L. MAG. 797, 832–33 (1883) ("It is a confusion of legal principles to call this an excess of jurisdiction." *Id.* at 832.).

214 *See* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561–63 (1832) ("The act of the state of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity." *Id.* at 561 (emphasis added).); *see also* *Elkison v. Deliesseline*, 8 F. Cas. 493, 495–98 (C.C.D.S.C. 1823) (No. 4,366) (finding an odious state law to be "unconstitutional and void," *id.* at 496, for repugnance to the Commerce Clause and suggesting that the prisoner be entitled to habeas corpus, albeit from a court with power to issue the writ). Moreover, this was the prevailing doctrine in all but a few states, and even those critical of the Court's habeas jurisprudence expressed their agreement with the rule in *Siebold*. *See* 2 HURD, *supra* note 79, at 166; Thompson, *supra* note 213, at 826; 2 THOMAS CARL SPELLING, *A TREATISE ON INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES* § 1205, at 1041 (2d ed. 1901).

jurisdiction . . . can only be exercised through the instrumentality of grand juries.”²¹⁵

These are the easy cases. But some questions are much harder, as Justice Miller candidly admitted in *Ex parte Bigelow*:

This Article V of the Amendments, and Articles VI and VII, contain other provisions concerning trials in the courts of the United States designed as safeguards to the rights of parties. Do all of these go to the jurisdiction of the courts? And are all judgments void where they have been disregarded in the progress of the trial? Is a judgment of conviction void when a deposition has been read against a person on trial for crime because he was not confronted with the witness, or because the indictment did not inform him with sufficient clearness of the nature and cause of the accusation?²¹⁶

As we will see, the Court never gave a satisfying answer to these questions. There appear to have been two dividing lines between the cases where writ was issued and where it was not. (1) Did the alleged error appear on the face of the record? (2) Did the alleged error concern the admission of evidence? If the answer to either of these questions was no, then the claim was not cognizable on a writ of habeas corpus.²¹⁷

In the early twentieth century, we see the start of a second line of cases in the Court’s habeas jurisprudence involving fraud and duress in the proceedings. Much like *Lange*, *Siebold*, and *Wilson*, these cases were only a doctrinal “expansion” if one views the Supreme Court’s habeas jurisprudence in a vacuum.²¹⁸ Those issues are not jurisdictional—nor even constitutional—but they do render a judgment void. Much like assenting to a contract or waiving one’s rights, pronouncing a judgment is an act of volition. Consequently, where the adjudicator’s volition has been overrun, no judgment has been given—the purported judgment is no less void than if the adjudicator lacked power to give it.

The following Sections first walk through some of the disputed issues that Justice Miller was referencing in *Bigelow*, concluding that (1) the Double Jeopardy Clause was considered a limit on the judicial

215 *United States v. Hill*, 26 F. Cas. 315, 317 (C.C.D. Va. 1809) (No. 15,364); *see also* *Forsyth v. United States*, 50 U.S. (9 How.) 571, 576 (1850) (“An indictment upon which a prisoner can be held to answer must be found by a grand jury impanelled and sworn in pursuance of law, and before a court of competent jurisdiction.”).

216 *Ex parte Bigelow*, 113 U.S. 328, 330 (1885).

217 For the reasons discussed in the text accompanying notes 526–27 below, I am not convinced that this is a sensible line to draw—it has the tendency to leave the vindication of certain rights of the accused to the discretion of the trial court, the very entity that those rights run against. But that conclusion is the product of my own analysis, not the history.

218 *Contra* Bator, *supra* note 2, at 486–87; Peller, *supra* note 6, at 648–49; Forsythe, *supra* note 11, at 1126.

power; (2) the Self-Incrimination Clause was too, but was only cognizable on habeas in a certain procedural posture; and (3) the “jurisdictional” status of the Sixth Amendment was unclear in the late nineteenth century. The final Section of this Part then examines how the cases involving fraud and duress—erroneously spoken of as “denials of due process”—led to the gradual erosion of the Supreme Court’s habeas jurisprudence, a phenomenon which came to a head when the Court decided *Brown v. Allen*.

A. *Double Jeopardy (Cognizable)*

According to Bator, the downslide all began with the Court’s decision in *Ex parte Lange*.²¹⁹ As referenced above, the sentence given by the trial court had exceeded its statutory jurisdiction, and within two days of receiving his sentence, Lange paid the statutory portion of his fine and filed a petition for writ of habeas corpus.²²⁰ Unfortunately for Lange, his petition was heard by the same judge who sentenced him, and the judge vacated the former judgment and resentenced Lange to one year in prison.²²¹

Lange subsequently filed a second habeas petition with the Supreme Court, arguing that the circuit court lacked the power to vacate its initial judgment and impose a new sentence once the first judgment had been “enrolled.”²²² Justice Miller, writing for the majority, began his analysis with a simple proposition: “If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence.”²²³ After canvassing the common law doctrines of *autrefois acquit* and *autrefois convict*, Justice Miller explained that “[t]hese salutary principles of the common law have, to some extent, been embodied in the constitutions of the several States and of the United States.”²²⁴ And although it is debatable whether cases like Lange’s “are *positively* covered by the *language* of this amendment,” the majority found it to be “very clearly [within] the *spirit* of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection.”²²⁵

219 Bator, *supra* note 2, at 467, 475 (citing *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874)).

220 *Lange*, 85 U.S. at 164.

221 *Id.*

222 *Id.* at 165.

223 *Id.* at 168.

224 *Id.* at 170.

225 *Id.*

Rigorous legal analysis this is not. But Justice Miller explained further that “at the time this maxim came into existence[,] almost every offence was punished with death or other punishment touching the person.”²²⁶ As Akhil Amar has colorfully put it, “the phrase ‘life or limb’ [in the Double Jeopardy Clause] should be understood as a vivid and poetic metaphor for all criminal punishment.”²²⁷ And this “poetic” construction certainly seems consistent with James Madison’s more plainly written original proposal: “No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence”²²⁸

A purported violation of the Double Jeopardy Clause would come before the Court again in *Ex parte Bigelow*.²²⁹ The petitioner had been indicted on fourteen counts of embezzlement, and the trial court initially ordered the charges to be consolidated and impaneled a jury to hear the case.²³⁰ After the prosecutor gave his statement of the case, the court decided that the fourteen counts could not be tried together, discharged the jury, rescinded the order of consolidation, and then repaneled that same jury to try one of the fourteen counts.²³¹ “All of this was against his protest and without his consent.”²³² Bigelow was convicted of that one count and sentenced to five years imprisonment, which sentence was affirmed on direct appeal.²³³

The Supreme Court—without passing on the soundness of the decision to discharge the jury—found that the trial court did not exceed its jurisdiction, and therefore denied the petition.²³⁴ On the surface, *Bigelow* and *Lange* might seem in conflict.²³⁵ But closer inspection of the Court’s reasoning helps reconcile the seemingly divergent results.

226 *Id.* at 173.

227 Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1810 (1997); see also *People v. Goodwin*, 18 Johns. 187, 201 (N.Y. Sup. Ct. 1820) (asserting that this expression referred to “felonies”).

228 THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 465 (Neil H. Cogan ed., 2d ed. 2015) (quoting 1 THE CONGRESSIONAL REGISTER 427–28 (New York, Thomas Lloyd 1789)). The primary objection raised to Madison’s proposal was that, “instead of securing the liberty of the subject, it would be abridging the privileges of those who were prosecuted.” *Id.* at 478. Ironically, one member of Congress, then-Representative Egbert Benson, objected to Madison’s proposal on the grounds that its language “appeared rather doubtful.” *Id.* at 477.

229 *Ex parte Bigelow*, 113 U.S. 328 (1885).

230 *Id.* at 328–29.

231 *Id.* at 329.

232 *Id.*

233 *Id.* at 328–29.

234 *Id.* at 331.

235 Indeed, this would be a strange result, given that Justice Miller authored both *Bigelow* and *Lange*.

For one thing, Justice Miller's opinion placed great weight on the fact that the alleged defect in the judgment did not "clearly" appear on the face of the record.²³⁶ It was blackletter law in that era that a court of record's conclusion about its own jurisdiction was entitled to a presumption of correctness.²³⁷ This presumption operated similarly to the parol evidence rule: if the record recited facts requisite to confer jurisdiction, then those facts could not be controverted by extrinsic evidence; if the record was silent, those facts would be presumed, but the presumption could be rebutted by extrinsic evidence; if, however, the record related facts that "expressly, or by necessary implication" demonstrated a want of jurisdiction, no presumption in favor of jurisdiction would arise, and the court's judgment would be deemed void.²³⁸ Moreover, a few courts in this era went as far as to say that "where the court directly adjudges that it has jurisdiction . . . such adjudication will control the evidence contained in the record, though insufficient [to in fact confer jurisdiction],"²³⁹ and Justice Miller appeared to endorse that idea in *Bigelow*.²⁴⁰

Also lurking in the background here is dispute over what precisely constitutes double jeopardy. Under both the federal Constitution and the constitutions of those states with double jeopardy prohibitions, there was no doubt that an actual verdict of the jury triggered application of the double jeopardy rule, but there was serious disagreement over whether discharge of the jury carried the same consequence.²⁴¹ Indeed, this latter issue was covered at length in the Supreme Court of the District of Columbia's opinion affirming *Bigelow*'s conviction, with that court holding that "no rule touching the discharge of the jury has, by implication, been incorporated in or referred to by the [Fifth Amendment]," and that the power to discharge a jury was, in the absence of a statute, regulated by the common law alone.²⁴² Accordingly, the erroneous discharge had no jurisdictional effect.²⁴³

The Court considered the jurisdictional effect of the Double Jeopardy Clause twice more over the next four years, with both cases

236 *Bigelow*, 113 U.S. at 331.

237 See 1 BLACK, *supra* note 79, § 270, at 327–28; 1 BAILEY, *supra* note 173, § 138; 2 HURD, *supra* note 79, at 370.

238 2 HURD, *supra* note 79, at 370; accord *Slocum v. Wheeler*, 1 Conn. 429, 449 (1816).

239 1 BAILEY, *supra* note 173, § 138 (describing decisions in Illinois, Iowa, and California). Judge Bailey did not believe this doctrine to be well-founded. See *id.* § 139, at 115.

240 Cf. *Bigelow*, 113 U.S. at 331 ("[T]he question thus raised by the prisoner was one which [the court] was competent to decide, which it was bound to decide, and . . . its decision was the exercise of jurisdiction.").

241 See Janet E. Findlater, *Retrial After a Hung Jury: The Double Jeopardy Problem*, 129 U. PA. L. REV. 701, 702–09, 703 n.13 (1981).

242 *United States v. Bigelow*, 14 D.C. (3 Mackey) 393, 426 (1884).

243 *Id.*

presenting very similar fact patterns. *In re Snow* concerned a Utah man who had been convicted of three counts of cohabitation with more than one woman, but the three indictments described one continuous, three-year-long offense;²⁴⁴ *In re Nielsen* concerned a different Utah man who had been convicted of one count of cohabitation with more than one woman from “the 15th of October, 1885, . . . till the 13th of May, 1888,” and one count of adultery “on the 14th of May, 1888,” with one of the women with whom he was cohabitating.²⁴⁵ Both petitioned federal district courts in Utah for a writ of habeas corpus, both were refused, and both appealed this refusal to the Supreme Court.²⁴⁶

Both petitioners would be discharged. *Snow* was the easier case. In *Snow*, there was no question whether the separate counts concerned the same category of offense; the only question was whether the conduct constituted one factual offense.²⁴⁷ The Court found that it did, reasoning that there would be no limiting principle to a contrary result.²⁴⁸ “Not only had the court which tried them no jurisdiction to inflict a punishment in respect of more than one of the convictions, but, as the want of jurisdiction appears on the face of the judgment, the objection may be taken on *habeas corpus*”²⁴⁹ According to the Court, it was this fact that distinguished *Snow* from *Bigelow*.²⁵⁰ And although *Nielsen* was the more difficult case, the difficulty concerned the intricacies of double jeopardy doctrine, not habeas—with *Snow* having been decided, the only issue was whether the cohabitation and adultery charges constituted one and the same offense.²⁵¹

The decisions in these cases were all a bit light on analysis, and some treatise writers of that era disputed that the Double Jeopardy Clause placed any limitation on the judicial power.²⁵² Given these doubts and the skeptical dicta in *Bigelow*, further explanation seems worthwhile.

What was the language of the Double Jeopardy Clause intended to accomplish? One possibility is that it was intended to place the common law defenses of *autrefois acquit* and *autrefois convict* beyond the

244 *In re Snow*, 120 U.S. 274, 275–77 (1887).

245 *In re Nielsen*, 131 U.S. 176, 176–77 (1889).

246 *Snow*, 120 U.S. at 280; *Nielsen*, 131 U.S. at 176.

247 *Snow*, 120 U.S. at 280.

248 *Id.* at 282–83.

249 *Id.* at 285.

250 *Id.* at 286. The Court also cited *Crepps v. Durden*, (1777) 98 Eng. Rep. 1283; 2 Cowp. 640, for the proposition that this particular issue was cognizable collaterally. *Snow*, 120 U.S. at 283–86.

251 *Nielsen*, 131 U.S. at 182–85. The Court held that they did. *Id.* at 186–87.

252 See, e.g., 1 BAILEY, *supra* note 173, §§ 320–21 (apparently switching his position on the doctrine discussed *supra* note 239 and accompanying text); VANFLEET, *supra* note 168, §§ 83–86 (stating that he finds *Snow* and *Nielsen* inconsistent with *Bigelow*).

regulatory powers of Congress.²⁵³ Indeed, that would be consistent with the common understanding that the prohibitions contained in the Bill of Rights “f[e]ll within the class of restrictions on the legislative power.”²⁵⁴ Some, however, were also “considered as restrictions on the judicial power.”²⁵⁵

There is good reason to believe that the Double Jeopardy Clause sits in the latter camp. Admittedly, the plain language of the clause—“nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb”—is a bit hard to parse, particularly for the modern reader.²⁵⁶ But recall the language of James Madison’s original proposal: “No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence”²⁵⁷ Both of these phrasings seem to speak to judicial, not legislative, action, as it is the judicial power, by means of compulsory process, that would “subject” someone to a second trial or punishment.²⁵⁸

In support of this interpretation is the 1834 case *United States v. Gibert*.²⁵⁹ In that case, Justice Story, riding circuit, explained “that the great object of this clause was . . . to take away all discretion, and to forbid all courts of the United States from trying a man twice upon a good indictment for the same offence.”²⁶⁰ Analogous provisions in state constitutions were interpreted similarly. As the Supreme Court of Tennessee wrote in 1820:

The verdict of itself is an eternal protection against all other indictments for the same offence. Can any court set aside such verdict? The clause in our constitution before referred to, is a negative of such power. . . . If the verdict cannot be taken from the prisoner

253 For discussion of these two pleas, see Jay A. Sigler, *A History of Double Jeopardy*, 7 *AM. J. LEGAL HIST.* 283, 289–98 (1963); David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 *WM. & MARY BILL RTS. J.* 193, 218–21 (2005).

254 WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 120 (Philadelphia, Philip H. Nicklin 2d ed. 1829) (1825); see also Woolhandler, *supra* note 10, at 605–11 (listing reasons for this line of thought).

255 RAWLE, *supra* note 254, at 120.

256 U.S. CONST. amend. V; Davies, *supra* note 81, at 153–54 n.488 (stating that the ratified phrasing of the clause was “archaic” even in 1791); Rudstein, *supra* note 253, at 230–31 (explaining that “[t]he source of the [finally adopted] language is uncertain,” *id.* at 230).

257 THE COMPLETE BILL OF RIGHTS, *supra* note 228, at 465 (quoting 1 THE CONGRESSIONAL REGISTER, *supra* note 228, at 427–28).

258 Cf. *Subject*, WEBSTER, *supra* note 49 (defining “subject” to mean “[t]o cause to undergo”); *Subject*, SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (London, J.F. & C. Rivington, 6th ed. 1785) (“To submit; to make accountable.”).

259 *United States v. Gibert*, 25 F. Cas. 1287 (C.C.D. Mass. 1834) (No. 15,204).

260 *Id.* at 1301.

directly, neither can it indirectly by the failure of the court to give judgment upon it.²⁶¹

Further support of this reading can be found in antebellum state court opinions finding that the federal Double Jeopardy Clause “operates upon state courts *proprio vigore*.”²⁶² And during the first half of the nineteenth century, many state courts heard petitions, and even granted relief, on claims of double jeopardy.²⁶³

Given the text and drafting history of the clause, as well as a long line of precedent granting habeas relief for petitioners pleading *autrefois acquit* or *autrefois convict*, the late-nineteenth-century doubts over double jeopardy’s jurisdictionality seem unfounded.

B. *Compelled Incriminating Statements Entered into Evidence (Not Cognizable)*

There is no question that coerced confessions and other compelled incriminating statements entered into evidence did not raise a cognizable issue on habeas historically. But one should be careful not to wrench this doctrine from its historical context—modern Self-Incrimination Clause doctrine is far afield from its original meaning.

As Professor Thomas Davies has written, modern doctrine conceives of the Self-Incrimination Clause as guaranteeing a “trial right” against “admission of . . . compelled statements, or of ‘fruits’ of such statements, into evidence.”²⁶⁴ That, of course, was one function of the clause, but it was not its only—nor even its primary—function. Rather, as one might imagine by reading the clause in light of the Compulsory Process Clause,²⁶⁵ the paradigmatic situation contemplated by the Framers would have been the use of compulsory process to procure testimony or evidence that would incriminate the witness.²⁶⁶

261 *State v. Norvell*, 10 Tenn. (2 Yer.) 24, 25 (1820).

262 *People v. Goodwin*, 18 Johns. 187, 201 (N.Y. Sup. Ct. 1820); *accord* *State v. Moor*, 1 Miss. (1 Walker) 134, 138 (1823); *see also* Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 43–47 (2007) (collecting cases). The Supreme Court rejected this theory in *Fox v. Ohio*, 46 U.S. (5 How.) 410, 434–35 (1847).

263 *See, e.g., In re Spier*, 12 N.C. 329, 339, 1 Dev. 491, 503–04 (1828).

264 Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a “Trial Right” in Chavez v. Martinez*, 70 TENN. L. REV. 987, 991, 990–95 (2003).

265 U.S. CONST. amend. VI.

266 Davies, *supra* note 264, at 999–1006 (noting that the right would also be violated “if an arrestee was put under oath, a form of compulsion, during the post-arrest judicial examination,” *id.* at 1006); *see also* Randolph N. Jonakait, “Witnesses” in the Confrontation Clause: *Crawford v. Washington*, *Noah Webster*, and *Compulsory Process*, 79 TEMP. L. REV. 155, 169–79 (2006) (noting the synergy and similarities between the Self-Incrimination, Compulsory Process, and Confrontation Clauses).

The Self-Incrimination Clause was *not*, however, aimed at the conduct of the Framing-era equivalent of police officers, who “had no authority at all to interrogate even arrestees, let alone suspects.”²⁶⁷ The admissibility of coerced testimonial statements was regulated by the common law doctrine of “privately obtained, out-of-court confessions,” and it was not until 1897 that the Supreme Court incorporated this doctrine into its self-incrimination jurisprudence.²⁶⁸ At that point, however, police interrogation had already become an established practice, and thus “the Court never asked the hard question implied by the original Fifth Amendment right—whether police interrogation of suspects . . . was a constitutionally acceptable governmental practice.”²⁶⁹

This history is relevant to the scope of habeas review because it explains why violations of the Self-Incrimination Clause were cognizable issues on habeas, but only in a certain procedural posture. It was only when a witness was held in contempt for refusing to testify on the grounds that the answers would be incriminating that habeas was a viable remedy.²⁷⁰ The Self-Incrimination Clause therefore was intended to be a limitation on the judicial power, albeit one not particularly relevant to postconviction relief.²⁷¹

If the defendant did not hold his ground in the face of compulsion, however, the court’s abuse of power would not render the subsequent conviction void.²⁷² As the Supreme Court would explain in 1922, such violations would, “at most, [be] an error in the admission of testimony, which cannot be reviewed in a habeas corpus proceeding.”²⁷³ This statement was undoubtedly consistent with traditional doctrine,²⁷⁴ but it again skirts hard questions about the scope of the right: whether the trial court, *in addition to* the questioning officers, violates the Self-

267 Davies, *supra* note 264, at 1003.

268 *Id.* at 1033, 1033–38 (citing *Bram v. United States*, 168 U.S. 532 (1897)).

269 *Id.* at 1030, 1038.

270 See *Counselman v. Hitchcock*, 142 U.S. 547, 552, 586 (1892), *overruled by Kastigar v. United States*, 406 U.S. 441 (1972); *accord Emery’s Case*, 107 Mass. 172, 186 (1871); *Ex parte Rowe*, 7 Cal. 181, 183–84 (1857).

271 See *Ex parte Irvine*, 74 F. 954, 958, 965 (C.C.S.D. Ohio 1896) (Taft, J.) (“The general power of the court to compel, by its process of contempt, witnesses to appear, to be sworn, and to testify in causes pending before it, is clear. The power has, however, a limitation imposed by the fifth amendment to the constitution, which provides ‘that no person shall be compelled in any criminal case to be a witness against himself.’” *Id.* at 958 (quoting U.S. CONST. amend. V)).

272 See, e.g., *In re Moran*, 203 U.S. 96, 105 (1906).

273 *Collins v. McDonald*, 258 U.S. 416, 420–21 (1922) (italics omitted); see also *Baker v. Hudspeth*, 129 F.2d 779, 783 (10th Cir. 1942) (citing *Moran* for this proposition); *Sunal v. Large*, 157 F.2d 165, 171 (4th Cir. 1946) (same).

274 See *United States v. Burr*, 25 F. Cas. 55, 179 (C.C.D. Va. 1807) (No. 14,693) (Marshall, Circuit J.) (“If the court admit improper or reject proper testimony, it is an error of judgment; but it is an error committed in the direct exercise of their judicial functions.”).

Incrimination Clause when it enters coerced testimony into evidence—an “equitable construction” of the Fifth Amendment to prevent changes in investigatory practice from becoming an end run around a fundamental right.²⁷⁵

C. *The Sixth Amendment (Unclear)*

Some Sixth Amendment violations are clearly jurisdictional error. The most prominent is when a court denies the defendant the right to trial by jury, first presented to the Supreme Court in *Callan v. Wilson*.²⁷⁶ The government’s two arguments against discharge are revealing on this point. First, it argued “that the Constitution does not require that the right of trial by jury shall be secured to the people of the District of Columbia”; second, it argued “[t]hat the requirements of the Constitution are fully met, where the accused is accorded, at some stage of the prosecution against him, the right of trial by jury.”²⁷⁷ At no point did the government argue that this issue was not jurisdictional. And after rejecting those two arguments,²⁷⁸ the Supreme Court confirmed this issue’s status as such: “Except in that class or grade of offences called petty offences, . . . a judgment of conviction, not based upon a verdict of guilty by a jury, is void.”²⁷⁹

That much is clear.²⁸⁰ What is not clear, however, is *why* denial of the jury trial right is jurisdictional error—a question of much significance in determining whether compliance with the other Sixth Amendment provisions is mandatory for the exercise of judicial power. Two explanations come to mind.

275 Cf. *Downing v. Blanchard*, 12 Wend. 383, 384 (N.Y. Sup. Ct. 1834) (explaining that “equitable construction” refers to when “cases not within the letter of the [law] are sometimes holden to be within the meaning, because they are within the mischief intended to be prevented”); *accord* *Boyd v. United States*, 116 U.S. 616, 635 (1886) (“A close and literal construction deprives [the first eight amendments] of half their efficacy, and leads to gradual depreciation of the right[s], as if [they] consisted more in sound than in substance.”); *see also infra* Section II.D (discussing the issue of coerced testimony further).

276 *Callan v. Wilson*, 127 U.S. 540, 547 (1888).

277 *Id.* at 548, 551.

278 *Id.* at 548–49, 556–57.

279 *Id.* at 557, 548–49, 556–57.

280 Like the three issues identified above, the holding in *Callan* is only an innovation if one unduly narrows one’s focus to the Supreme Court’s habeas jurisprudence. The failure to try by jury in violation of a constitutional provision had long been held to be a jurisdictional issue, and in some states a nonwaivable one. *See, e.g.,* *Cancemi v. People*, 18 N.Y. 128, 136 (1858); *Work v. State*, 2 Ohio St. 297, 306 (1853); *Brown v. State*, 8 Blackf. 561, 561 (Ind. 1847); *State v. Harden*, 31 S.C.L. (2 Rich.) 533, 535, 538 (S.C. Ct. App. 1846). And a similar result has been found for judgments and process issued by courts not constituted in accordance with the Seventh Amendment. *See, e.g., Ex parte Randolph*, 20 F. Cas. 242, 253–54 (C.C.D. Va. 1833) (No. 11,558) (Marshall, Circuit J.) (process); *Webster v. Reid*, 52 U.S. (11 How.) 437, 456, 460 (1851) (judgment).

The first possibility is that this defect goes to “the organization of the court.”²⁸¹ In England as well as the several states, one of the most common uses of the writ was to discharge petitioners who had been convicted by an improperly constituted inferior court. For instance, in *In re Divine*, the warden produced a copy of the petitioner’s commitment that showed on its face “that the prisoner was duly convicted of the crime of petit larceny, at a court of special sessions of the peace held by three police justices,” as was required by the statute.²⁸² Counsel for the petitioner, however, introduced evidence “that the said court of special sessions . . . was in fact held by two of the police justices only,” and the district attorney introduced no evidence to the contrary.²⁸³ The court discharged Divine, reasoning that the two justices that tried and sentenced him did not constitute a lawful court, and therefore the alleged court’s judgment was a nullity.²⁸⁴ By way of analogy, both the judge and the jury need to be present in order for there to be a duly constituted court in an ordinary criminal case.

Another possibility is that the Sixth Amendment prescribes Hohfeldian duties for the exercise of power in a criminal case. Under this view, the power to try a criminal case is akin to the situation “where[] a tribunal possesses qualified and limited powers, authorizing [it] to act in certain specified cases only, and by special modes of proceeding,” and thus when it can be shown that the court acted “by modes of procedure which [it was] not authorized to adopt,” the court’s proceedings may be impeached collaterally.²⁸⁵ An example of this can be seen in the Treason Clause of the Constitution, which states that “[n]o Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”²⁸⁶ If a person were to be convicted of treason on the testimony of only one witness, then that conviction would be a nullity for failure

281 2 HURD, *supra* note 79, at 366 (citing *Brooks v. Adams*, 28 Mass. (11 Pick.) 441 (1831)).

282 *In re Divine*, 21 How. Pr. 80, 80 (N.Y. Sup. Ct. 1860).

283 *Id.* at 80–81.

284 *Id.* at 83; *accord Ex parte Richardson*, 16 S.C.L. 198, 200, Harp. 308, 311 (S.C. Const. Ct. App. 1824); *see also HALLIDAY, supra* note 10, at 104 (describing a case where the writ was available to a man who had been convicted “for refusing to pay for the maintenance of his illegitimate child” under a statute that required the conviction to be by *two* justices of the peace, but had only been convicted by one).

285 *Sanborn v. Fellows*, 22 N.H. 473, 489 (1851); *see also Sears v. Terry*, 26 Conn. 273, 284 (1857) (“The correct principle governing this class of cases, we believe to be, that where the legislature empowers a [body with authority] under particular circumstances as prerequisites, and in a manner particularly prescribed, these circumstances must actually exist and this manner of proceeding must be observed, and are both indispensable to the jurisdiction.”).

286 U.S. CONST. art. III, § 3, cl. 1.

to adhere to the constitutional mode of proceeding.²⁸⁷ In much the same way, when a court refuses to respect a defendant's right to trial by jury, a verdict found by the judge is a nullity—it exceeds a limit on the judicial power imposed by the Constitution.

Without more, it is hard to determine which of these theories is correct. But things become a bit clearer once we think about waiver of the right. It was widely understood that “the consent of the parties cannot confer the right to adjudicate upon any cause which the law has withheld from the cognizance of the particular court.”²⁸⁸ Thus, if the idea is that a judge without a jury is not a “court” in a criminal case, neither consent nor waiver nor failure to object could clothe that irregular tribunal with the judicial power in such cases.²⁸⁹ But that is not consistent with how nineteenth-century jurists thought of the right to trial by jury.²⁹⁰ As one federal court said: “The right of trial by jury, secured by the constitution of the United States, is for the benefit of the parties litigating in courts of justice, and is a privilege they may dispense with if they choose.”²⁹¹

Whatever the correct view of the jurisdictionality of the jury trial right, the Supreme Court did not treat ad hoc violations of the other Sixth Amendment rights as being defects cognizable on habeas. The authoritative case on this point is *Ex parte Harding*, which simply stated the conclusion without further elaboration: a denial of the right to compulsory process “goes only to the regularity of the proceedings, not to the jurisdiction of the court.”²⁹² Courts and commentators

287 Cf. HALLIDAY, *supra* note 10, at 100 (indicating that “the number of witnesses needed to convict” would be a statutory command which, if not respected, would render a conviction impeachable on habeas); *United States v. Burr*, 25 F. Cas. 55, 179 (C.C.D. Va. 1807) (No. 14,693) (Marshall, Circuit J.) (discussing this constitutional requirement).

288 1 BLACK, *supra* note 79, § 217, at 263; *see also* *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 719 (1838) (“[A]pppearance does not cure the defect of judicial power . . .”).

289 Cf. *Sharpe v. Robertson*, 46 Va. (5 Gratt.) 518, 599 (1849) (“The consent of parties, however formally made, cannot give to a tribunal so constituted the powers that belong to a Court, or clothe its orders with the force of judicial mandates.”); *accord* *Holloman v. Holloman*, 13 Miss. (5 S. & M.) 559, 563 (1846); *Williams v. Burrill*, 23 Me. 144, 153 (1843).

290 *But see* *Territory v. Ah Wah*, 4 Mont. 149, 171 (1881) (“[A defendant] has no power to consent to the creation of a new tribunal unknown to the law to try his offense.”); *Thompson v. Utah*, 170 U.S. 343, 353 (1898) (“The law in force, when this crime was committed, did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons.”); *see also* Stephen A. Siegel, *The Constitution on Trial: Article III’s Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, 52 SANTA CLARA L. REV. 373, 399 (2012) (discussing this theory more broadly).

291 *United States v. Rathbone*, 27 F. Cas. 711, 711 (C.C.S.D.N.Y. 1828) (No. 16,121) (Thompson, Circuit J.) (citing *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235 (1819)). The fact that the right is waivable makes it no less jurisdictional than service of process. *See* WORKS, *supra* note 85, at 32–33. For thorough consideration of the issue, *see* *Patton v. United States*, 281 U.S. 276, 293–313 (1930) (holding that trial by jury is waivable).

292 *Ex parte Harding*, 120 U.S. 782, 784 (1887).

subsequently treated this case as settling the matter.²⁹³ It was not until 1938 that the Court would address the Sixth Amendment again on habeas, seemingly changing course and discharging the petitioner because “compliance with [the Sixth Amendment’s] mandate [of assistance of counsel] is an essential jurisdictional prerequisite to a federal court’s authority to deprive an accused of his life or liberty.”²⁹⁴

Can these cases be reconciled with one another and the jury trial cases? The simplest explanation is that they *cannot*—either all Sixth Amendment violations deprive a court of authority to punish a defendant, or none of them do—and the reason denial of trial by jury is jurisdictional is that the jury constitutes part of the *judex* in criminal cases. An alternative possibility is that these cases reflect the doctrine that the defect in the jurisdiction must appear on the face of the record.²⁹⁵ There was no dispute that the petitioners in *Callan* had been tried without a jury.²⁹⁶ By contrast, the petitioner in *Harding* did not allege that the trial court denied him the use of *any* compulsory process; rather, the complaint was that the court violated his right by refusing to grant him a continuance so that certain material witnesses could testify in person.²⁹⁷ A more cynical explanation is that the Court is just making

293 See, e.g., *In re McKnight*, 52 F. 799, 801 (C.C.S.D. Ohio 1892); VANFLEET, *supra* note 168, § 88, at 120; 2 SPELLING, *supra* note 214, § 1208. But see BROWN, *supra* note 69, § 97 (“[A] trial by a different method than that prescribed by [the Constitution] would be a nullity and the judgment void.” *Id.* at 249.).

294 *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938).

295 See *supra* notes 236–40 and accompanying text.

296 See *supra* text accompanying note 277.

297 *Territory v. Harding*, 12 P. 750, 754–55 (Mont. 1887). Moreover, much like *Bigelow*, it is debatable whether the petitioner even stated a compulsory process violation. *Harding*’s witnesses resided in a foreign country—a place where the trial court’s process would not reach—and the prosecution had agreed to have the affidavits detailing what the witnesses would testify read into evidence before the jury. *Id.* at 755. At that time, the Compulsory Process Clause had been interpreted “merely to give to the accused the right to such process as is usually granted to compel witnesses to appear on the side of the prosecution against them,” and if “the person sought to be made a witness [were] beyond the process of the court, neither the accused nor the prosecution [would be] entitled to process against him.” *In re Dillon*, 7 F. Cas. 710, 712 (N.D. Cal. 1854) (No. 3,914). Additionally, in framing the Compulsory Process Clause, the First Congress rejected a suggestion that the accused also be conferred a right to a continuance where “he made appear to the court, that the evidence of the witnesses, for whom process was granted, but not served, was material to his defence.” THE COMPLETE BILL OF RIGHTS, *supra* note 228, at 626 (quoting 2 THE CONGRESSIONAL REGISTER, *supra* note 228, at 228); Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 98 & n.116 (1974). As Representative Hartley of Pennsylvania explained, “[I]n securing [the accused] the right of compulsory process, the government did all it could, the remainder must lay in the discretion of the court.” THE COMPLETE BILL OF RIGHTS, *supra* note 228, at 626 (quoting 2 THE CONGRESSIONAL REGISTER, *supra* note 228, at 228–29); *accord Harding*, 12 P. at 755.

a normative assessment of which petitioner is more deserving or which error is more egregious.²⁹⁸

All three of these explanations are unsatisfactory. The better explanation here is simply that constitutional criminal procedure was an underdeveloped area of the law. As Professor Ann Woolhandler has explained, the Court during this era increasingly recognized that “ad hoc official illegality” under an otherwise constitutional statute could nonetheless be violative of one’s constitutional rights to the same extent as official action under an unconstitutional statute.²⁹⁹ At the same time, the concept of harmless error was in its relative infancy, and “virtually any error—pleading errors, evidentiary errors, and constitutional errors—would be deemed presumptively prejudicial.”³⁰⁰ And while Congress would eventually pass legislation confirming application of the harmless error rule on direct appeal,³⁰¹ the concept of harmless *constitutional* error would not gain recognition in the federal courts until the 1960s.³⁰² It is therefore quite possible that concerns about allowing “[t]he criminal . . . to go free because the [trial judge] has blundered”³⁰³ may have seeped into courts’ minds. Take, for instance, the Supreme Court of Montana’s opinion in *Harding*:

We do not think the rule [at issue here] could ever work an injustice or hardship to a defendant, and, generally, in its operation it would give him a very great advantage. . . . If the affidavit should state the truth, the deposition would, in effect, be just like it, and one would be no more beneficial than the other to the defendant.³⁰⁴

Indeed, were the facts of that case to arise today, a modern court might well say that the alleged error was harmless (though that is certainly up for debate).

Unfortunately, the few cases we have from the nineteenth century where the accused was *completely* denied the right to use compulsory process or confront witnesses are cases where the accused was *also*

298 Cf. James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 2055–57 (1992) (suggesting that the line of demarcation for the scope of the writ is whether the petitioner’s claim is “nationally important,” *id.* at 2055).

299 Woolhandler, *supra* note 10, at 617–29.

300 Roger A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 MARQ. L. REV. 433, 435 (2009) (emphasis omitted).

301 *Id.* at 443–44, 444 n.64 (citing Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181).

302 Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 423 (1980).

303 Cf. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.) (discussing the exclusionary rule).

304 *Territory v. Harding*, 12 P. 750, 755 (Mont. 1887).

denied the right to trial by jury.³⁰⁵ As far as I can tell, the only federal case that even discusses the merits of an independent confrontation claim is *In re Bates*, which denied issuance of the writ on the grounds that the confrontation right doesn't attach to pretrial proceedings.³⁰⁶ Moreover, I have been unable to find any cases in the state courts granting discharge for a violation of the analogous provisions of their respective constitutions. Of course, the lack of evidence in the printed case reports does not definitively tell us "what the law 'was'" in the nineteenth century,³⁰⁷ but it hardly inspires any confidence in the conclusion that a Sixth Amendment violation other than trial by jury could ever be cognizable on habeas.

The best evidence in favor of that conclusion comes from the case of *Johnson v. Tompkins*, a false imprisonment action before Justice Baldwin, riding circuit.³⁰⁸ The plaintiff Johnson had traveled into Pennsylvania from New Jersey to recapture a man named Jack, whom Johnson claimed was his slave.³⁰⁹ A Pennsylvania state judge had verbally ordered the arrest of Johnson to institute proceedings for determining the legal relationship between Johnson and Jack.³¹⁰ Once Johnson was in custody, the judge then suggested that the proceedings be held

305 See, e.g., *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 249 (1864); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118–20 (1866); *Ex parte Field*, 9 F. Cas. 1, 3 (C.C.D. Vt. 1862) (No. 4,761); *Ex parte Stricker*, 109 F. 145, 148–49 (C.C.D. Ky. 1901).

306 *In re Bates*, 2 F. Cas. 1015, 1018 (D.S.C. 1858) (No. 1,099a). The petitioners had argued that "their commitment in the absence of [confrontation] and without the benefit of counsel, involves a denial of their constitutional and legal rights, and affects the whole proceedings subsequent to the arrest with such gross irregularity, that the commitment must be set aside." *Id.* at 1017. Judge Magrath seemed to agree with this proposition in the abstract. *Id.* at 1018 (asserting that, were the petitioners' allegations correct, the statute authorizing such proceeding "would be void, because it would tend to impair a constitutional right").

307 HALLIDAY, *supra* note 10, at 3. As was the case with the English history, it is possible that "[m]any more reports of habeas cases [in the several states] survive only in manuscript." *Id.* at 5, 4–6 (discussing the methodology he took); see also DAVID HACKETT FISCHER, *HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* 47–48, 62–63 (1970) (discussing the "fallacy of the negative proof," *id.* at 47).

308 *Johnson v. Tompkins*, 13 F. Cas. 840, 840, 854 (C.C.E.D. Pa. 1833) (No. 7,416).

309 *Id.* at 852. Given that slavery was such a politically fraught subject at the time, any judicial opinion that touches on it is more likely than usual to be plagued by strained, motivated reasoning employed to reach a certain result. See Justin Simard, *Citing Slavery*, 72 *STAN. L. REV.* 79, 107–13 (2020). For what it's worth (perhaps not much), Justice Baldwin outright denounced slavery in his charge to the jury, stating that "its existence is abhorrent to all our ideas of natural right and justice," albeit alongside a reminder that slavery is part of "the law of the land." *Tompkins*, 13 F. Cas. at 843.

310 *Tompkins*, 13 F. Cas. at 849. Baldwin found this order, apparently made "without oath, affirmation or any probable cause whatever," to be "in direct violation" of the Fourth Amendment and the analogous provision of the Pennsylvania Constitution. *Id.*

before Tompkins, a justice of the peace.³¹¹ During the proceedings, “no witnesses were examined, no oath or affirmation was administered by the justice, or any question [on the merits] put to [Johnson].”³¹² Jack informally testified “that he was born a slave, and that he had lived with Mr. Johnson as such; he admitted his slavery till he was thirty, when he alleged he was free by the will of Judge Berrian, of New Jersey.”³¹³ Tompkins did not require the actual will to be produced to corroborate Jack’s statement, “nor was Jack called on to verify his statement on oath, though he was a competent witness against Mr. Johnson, if he was a free man or only a servant for years.”³¹⁴ In addition to Jack’s informal testimony, two other witnesses were examined before Tompkins.³¹⁵ All of this was apparently done *ex parte*.³¹⁶

Justice Baldwin found that this manner of proceeding was contrary to the Sixth Amendment’s guarantee that the accused “be informed of the nature and cause of the accusation against him, and . . . be confronted with the witnesses,” as well as the Pennsylvania Constitution’s guarantee of the “right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, and to meet the witnesses face to face.”³¹⁷ On account of this defect in the proceedings, Justice Baldwin instructed the jury that

all the proceedings then of the defendants which took place, either for the purpose of taking the Jersey party before the justice or judge to prove the property of the plaintiff or to establish a charge of kidnapping . . . were without any warrant or authority of law, wholly unqualified and illegal.³¹⁸

Because the elements of false imprisonment and habeas corpus were substantially the same, it is plausible that Baldwin’s reasoning in

311 *Id.*

312 *Id.* at 850.

313 *Id.*

314 *Id.*

315 *Id.*

316 *Id.*

317 *Id.* (first quoting U.S. CONST. amend. VI; and then quoting PA. CONST. of 1790, art. IX, § 9).

318 *Id.*; *see also* *Greene v. Briggs*, 10 F. Cas. 1135, 1139 (C.C.D.R.I. 1852) (No. 5,764) (Curtis, Circuit J.) (seeming to read the other Sixth Amendment rights as part and parcel of “trial by jury,” which “in all criminal cases . . . is absolutely to exist”); BROWN, *supra* note 69, § 101, at 273 (“[A] trial is not a trial, and the court has no jurisdiction, whenever the record shows that the defendant was denied a constitutional immunity or right, and as a consequence the judgment is void.”).

support of false imprisonment liability could likewise justify discharge on habeas corpus.³¹⁹

But perhaps not. Rollin Hurd's treatise, for instance, asserted that relief on habeas would not be available no matter how "flagrant" the compulsory process or confrontation violation, citing *Stewart's Case*, a decision of the New York Court of Common Pleas.³²⁰ In a vacuum, however, this statement might be a bit misleading. The petitioner in *Stewart's Case* did indeed allege "that she was prohibited from producing witnesses on her own behalf, and from cross-examining witnesses produced against her," and likewise the court indeed disclaimed the power "to review the correctness of the decision of the magistrate" on a writ of habeas corpus.³²¹ But the court also described what had been done by the committing magistrate as an "injustice," and insisted "that there should be [a remedy for this injustice] no one can doubt," even if it wasn't one the Court of Common Pleas could provide.³²² And as the Court of Common Pleas predicted, Stewart would be discharged upon habeas corpus *and* certiorari in an original action before the New York Supreme Court.³²³

Unfortunately, there does not appear to be any report of Stewart's subsequent action before the New York Supreme Court available via the standard electronic databases that could give us further insight into its *ratio decidendi*.³²⁴ Nonetheless, Stewart's eventual discharge should

319 See 3 BLACKSTONE, *supra* note 31, at *127–38; see also *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351–52 (1872) (discussing false imprisonment liability); *In re Ayers*, 123 U.S. 443, 485–86 (1887) (discussing habeas).

320 2 HURD, *supra* note 79, at 334 (citing *Stewart's Case*, 1 Abb. Pr. 210 (N.Y. Ct. Com. Pl. 1855)).

321 *Stewart's Case*, 1 Abb. Pr. at 212, 213.

322 *Id.* at 212.

323 *Id.* at 213 n.*. Contrary to modern naming conventions, "Supreme Court" was (and still is) the name of New York's court of general jurisdiction. 1847 N.Y. Laws 323–24. Although the reporter does not explicitly say that the discharge was on habeas corpus in addition to certiorari, that fact is implied by the use of the word "discharge." As explained in Hurd's treatise:

As the certiorari alone removes not the body, so the habeas corpus alone removes not the record itself, but only the prisoner, with the cause of his commitment; . . . [the court] cannot upon the bare return of the habeas corpus, give any judgment, or proceed upon the record of indictment, order or judgment, without the record itself be removed by certiorari

2 HURD, *supra* note 79, at 356 (emphasis added) (quoting 3 BACON, *supra* note 68, at *427). Note, however, that unlike the modern usage of the writ by the federal Supreme Court, the common law writ of certiorari "only brings up for review jurisdictional questions." 2 BAILEY, *supra* note 173, § 409, at 562.

324 One Sarah Stewart (quite possibly the same woman) successfully petitioned the New York Supreme Court for discharge from commitment upon habeas corpus and certiorari in 1859, but that discharge was from an illegal commitment for a different crime than the one at issue in the above case. Compare *People v. Stanley*, 18 How. Pr. 179, 180–81 (N.Y.

caution us against taking the broadest interpretation of the above passage in Hurd's treatise. Nor is the lesson here that a proceeding upon habeas corpus aided by certiorari is something unusual. Rather, it appears to have been the ordinary course of proceeding for postconviction relief in the nineteenth century,³²⁵ and many of the foundational cases of this era were petitions for both writs.³²⁶

Based on the available evidence, my conclusion is that ordinary, instancial confrontation and compulsory process violations were not cognizable on habeas in this era (with or without certiorari), but that certain violations of those clauses that were so flagrant as to constitute a *total denial* of those rights *might* have been cognizable.³²⁷ There certainly is authority in favor of ad hoc Sixth Amendment violations being cognizable error, but there is a distinct absence of any decisions directly on point in the body of recorded case law.³²⁸ The evidence to the contrary, however, is hardly conclusive. If forced to draw a line, it seems that admission of constitutionally prohibited evidence or rejection of constitutionally required evidence was ordinarily merely "error committed in the direct exercise of [a court's] judicial functions,"³²⁹ but where such constitutional violations were so flagrant as to

Sup. Ct. 1859) (larceny), *with Stewart's Case*, 1 Abb. Pr. at 210 (vagrancy and disorderly conduct).

325 See 2 HURD, *supra* note 79, at 356; BROWN, *supra* note 69, § 113, at 300.

326 *E.g.*, *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874); *Ex parte Harding*, 120 U.S. 782 (1887); *Ex parte Crow Dog*, 109 U.S. 556 (1883); *Ex parte Jackson*, 96 U.S. 727 (1878). Nor was this power restricted to the Supreme Court. See *In re Wood*, 140 U.S. 278 (1891) (noting that the appellant had petitioned the Circuit Court for the Southern District of New York for both writs in order to be discharged from commitment following conviction in state court). For earlier cases, see *Ex parte Wilson*, 10 U.S. (6 Cranch) 52 (1810); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807); *Ex parte Bennett*, 3 F. Cas. 204 (C.C.D.C. 1825) (No. 1,311).

327 *Cf.* Kamin, *supra* note 38, at 335 ("[W]e might hypothesize that while certain kinds of constitutional error rise to the level of a genuine *affront to the sovereignty* of We the People, others are more aptly conceptualized as *incidental mistakes* on the part of sentencing courts earnestly endeavoring to be faithful to our sovereign commands—and that only errors of the former sort would be cognizable as 'jurisdictional defects' in the sense invoked throughout the case law debated by Justices Kagan and Gorsuch."). In contrast to the discussion above, Professor Kamin suggests that constitutional errors rise to the level of an affront to popular sovereignty when those errors are of a "systemic" nature. *Id.* at 338–40 (citing Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1 (2010)).

328 As far as I am aware, Timothy Brown's 1891 treatise on jurisdiction is the only authority in direct support of the broadest interpretation of the Sixth Amendment, and he mainly relies on dicta from *In re Nielsen* and cases relating to the denial of the right to trial by jury. See BROWN, *supra* note 69, § 97, at 249 & n.1 (citing *In re Nielsen*, 131 U.S. 176, 182 (1889)); *id.* § 101, at 271–73, 272 n.2.

329 *United States v. Burr*, 25 F. Cas. 55, 179 (C.C.D. Va. 1807) (No. 14,693) (Marshall, Circuit J.).

constitute “a complete defect in the proceedings,”³³⁰ the trial lost its judicial character, and any resulting judgment would be a mere nullity.³³¹

D. *The Road to Brown v. Allen*

Not until 1915 do we see Supreme Court Justices start to mislabel certain defects in the proceedings as “jurisdictional” when they would not have been historically. The importance of the cases from this period has hardly been lost on other scholars.³³² What other commentators have overlooked is that these initial cases, while incorrectly reasoned, were generally consistent with the traditional “void judgments” theory of postconviction relief. The problem was not necessarily the outcomes reached, but how the Court got there. By describing vices of the adjudicator’s will as denials of due process, the Court obscured the reasons why a judgment might become void, and consequently introduced confusion into habeas doctrine.³³³

Frank v. Mangum,³³⁴ the first such case, concerned the petition of Leo Frank, who had been convicted in Georgia state court of murdering the thirteen-year-old Mary Phagan.³³⁵ Whether it was on account of the victim’s young age, the brutal circumstances of her murder, the fact that the primary suspect belonged to a minority community, or a combination of these factors, “[n]o trial in Georgia’s history rivaled Leo Frank’s for public interest.”³³⁶ That public interest manifested itself in the worst possible way. As Justice Holmes described in his dissent:

330 WILLIAM S. CHURCH, A TREATISE OF THE WRIT OF HABEAS CORPUS § 348 (San Francisco, Bancroft-Whitney Co. 1886) (quoting *Ex parte Gibson*, 31 Cal. 619, 625 (1867)).

331 Cf. BROWN, *supra* note 69, § 97, at 250 (“[A] trial ceases to be a legal trial by a deviation from [the constitutionally prescribed] course.”).

332 Compare Forsythe, *supra* note 11, at 1139 (“[T]here is no real break with the Court’s jurisdiction doctrine that cannot be logically explained as merely an expansion of that doctrine until *Frank v. Mangum* and *Moore v. Dempsey*.”), with Peller, *supra* note 6, at 644–49 (asserting that *Frank* broke new ground in holding that “due process was satisfied by the defendant’s opportunity to be heard before a state *appellate* court of competent jurisdiction,” *id.* at 648, whereas *Moore*’s innovation was that “the due process clause [established] independent standards of fairness by which to evaluate state procedures,” *id.*).

333 Cf. Woolhandler, *supra* note 10, at 630–31 (advancing a similar thesis).

334 *Frank v. Mangum*, 237 U.S. 309 (1915).

335 Eric M. Freedman, *Leo Frank Lives: Untangling the Historical Roots of Meaningful Federal Habeas Corpus Review of State Convictions*, 51 ALA. L. REV. 1467, 1474–75 (2000).

336 *Id.* at 1475 (alteration in original) (quoting LEONARD DINNERSTEIN, THE LEO FRANK CASE 36 (Notable Trials Library ed. 1991) (1987)). Frank’s trial has been described as “the most dramatic expression of southern anti-Semitic feeling.” Howard N. Rabinowitz, *Nativism, Bigotry and Anti-Semitism in the South*, 77 AM. JEWISH HIST. 437, 442 (1988).

The trial began on July 28, 1913, at Atlanta, and was carried on in a court packed with spectators and surrounded by a crowd outside, all strongly hostile to the petitioner. On Saturday, August 23, this hostility was sufficient to lead the judge to confer in the presence of the jury with the Chief of Police of Atlanta and the Colonel of the Fifth Georgia Regiment stationed in that city, both of whom were known to the jury. On the same day, the evidence seemingly having been closed, the public press, apprehending danger, united in a request to the Court that the proceedings should not continue on that evening. Thereupon the Court adjourned until Monday morning. On that morning when the Solicitor General entered the court he was greeted with applause, stamping of feet and clapping of hands, and the judge before beginning his charge had a private conversation with the petitioner's counsel in which he expressed the opinion that there would be "probable danger of violence" if there should be an acquittal or a disagreement, and that it would be safer for not only the petitioner but his counsel to be absent from Court when the verdict was brought in. At the judge's request they agreed that the petitioner and they should be absent, and they kept their word. When the verdict was rendered, and before more than one of the jurymen had been polled there was such a roar of applause that the polling could not go on until order was restored. The noise outside was such that it was difficult for the judge to hear the answers of the jurors although he was only ten feet from them.³³⁷

To say that the trial was "dominated by a hostile mob" would be putting it lightly.³³⁸

The majority agreed with the proposition that the petitioner's "narrative of disorder, hostile manifestations, and uproar, [would], if it stood alone, and were to be taken as true, . . . [be] inconsistent with a fair trial and an impartial verdict," thus denying the defendant due process of law.³³⁹ However, because the above allegations were considered by both the trial court and the state supreme court "at times and places and under circumstances wholly apart from the atmosphere of the trial, and free from any suggestion of mob domination" and "found by both of the state courts to be groundless except in a few particulars as to which the courts ruled that they were irregularities not harmful in fact to defendant," the federal courts should not disturb that judgment.³⁴⁰ To the majority, the phrase "due process of law" only meant "that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard according to the

337 *Frank*, 237 U.S. at 345–46 (Holmes, J., dissenting).

338 *Id.* at 346 (describing petitioner's allegations).

339 *Id.* at 332, 332–33, 335 (majority opinion).

340 *Id.* at 333–34.

usual course of law in such cases,” and where the state supplies sufficient “corrective process,” such as a motion for a new trial or an appeal to a higher court, no violation of the Fourteenth Amendment has occurred.³⁴¹

The opinion of the *Frank* majority is one of the clearest demonstrations of the semantic shift with regard to the word “process” in the Due Process Clauses. Towards the middle of the nineteenth century, based on an erroneous reading of Coke’s *Institutes*, courts and commentators had begun to equate “due process of law” with “the law of the land.”³⁴² Even still, the original meaning of “process” remained intact, as is evident from Justice Curtis’s opinion in *Murray’s Lessee*.³⁴³ In *Frank*, however, the Court spoke of “process” in the Due Process Clause as being synonymous with “proceedings,”³⁴⁴ rather than referring to the writs and precepts that “issue[] forth” from a court of law.³⁴⁵ What’s especially remarkable is that the Court nonetheless recognized the other meaning “process” might have when it explained that “[t]he rule at the common law . . . seems to have been that a showing in the return to a writ of *habeas corpus* that the prisoner was held under *final process* based upon a judgment or decree of a court of competent jurisdiction, closed the inquiry.”³⁴⁶

Justice Holmes, writing for himself and Justice Hughes, dissented. He disagreed with the proposition that a trial court, admittedly of competent jurisdiction, “retains jurisdiction although, in fact, it may be dominated by a mob, and that the rulings of the state court as to the fact of such domination cannot be reviewed. . . . Mob law does not become due process of law by securing the assent of a terrorized jury.”³⁴⁷ On its own terms, Holmes’s argument is correct, and it is clear that he has the right intuitions here. His error is in speaking in terms of constitutional law.

Strictly speaking, “due process of law” does not require that a trial be free of mob domination. Rather, it means that a person may only

341 *Id.* at 334–35.

342 Crema & Solum, *supra* note 14, at 509–25 (attributing the original error to Justice Story).

343 *See Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856).

344 *See Frank*, 237 U.S. at 326 (giving a more extended definition of “due process of law”); *see also id.* at 327 (“[I]t is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, *the proceedings in the appellate tribunal are to be regarded as a part of the process of law* under which he is held in custody by the State . . .” (emphasis added)).

345 *Process*, JOHN BOUVIER, A LAW DICTIONARY (Philadelphia, T. & J.W. Johnson 1839) (explaining the etymology of the term). *See generally* Crema & Solum, *supra* note 14.

346 *Frank*, 237 U.S. at 330 (second emphasis added).

347 *Id.* at 347 (Holmes, J., dissenting).

be “deprived of life, liberty, or property” by a government official possessing proper, valid authorization—here, final process upon judgment in a criminal case. Where the officer possesses a court-issued precept authorizing the official action, the only question is whether that process is void. Final process is void if the underlying judgment is void. A judgment in a criminal case is void if it is not based upon a valid guilty verdict. A jury’s verdict, a volitional act, is void when it is a product of duress—something which all nine Justices seemed to think was present in this case. The jury’s verdict being void, so too the judgment and the process issued upon it, and without valid process authorizing the deprivation, said deprivation is unconstitutional.

It seems like a stretch to say that all of these rules of decision are derived from the Due Process Clause. To be sure, some of them—like that a permanent deprivation of life, liberty, or property generally requires final process upon a judgment or decree—are clearly within the clause’s “domain.”³⁴⁸ Others—such as the requirement that a judgment in a criminal case must be founded upon a jury’s guilty verdict (absent waiver by the accused)—clearly come from other positive enactments.³⁴⁹ But what about the effect of duress? If we reject the proposition that the Due Process Clause “incorporates” certain fundamental procedural rights, then surely we should likewise reject the proposition that the clause “incorporates” general principles of duress.³⁵⁰ Rather, it is the operation of the “general law” of duress that supplies the rules of decision voiding the jury’s verdict.³⁵¹

Another aspect of the problem here is that it was well-established constitutional law that the Fourteenth Amendment did not require

348 Cf. Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 533–34 (1983) (sketching out the contours of the concept of a positive enactment’s “domain”). As Professor Nelson suggests, Judge Easterbrook’s precise conception of “domain” might be a bit unsatisfactory: it is worth thinking about when federal law “operates simply as an overlay on top of state law” versus when it “le[aves] a gap for principles of general jurisprudence to fill.” Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 538, 539, 537–39 (2006).

349 See U.S. CONST. amend. VI.

350 Whether the guarantee of “an impartial jury” in the Sixth Amendment is fairly read to require that the jury’s decision not be influenced by outside coercion is a closer call. On initial impression, I am inclined to say it does not—“impartial” seems to connote the same sort of rules discussed in subsection I.E.1. Cf. *Impartial*, WEBSTER, *supra* note 49 (listing “an impartial judge” as an example of the term used in context).

351 See Nelson, *supra* note 348, at 523–25; see also Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 661–62 (2013) (“When a state legislature enacts a statute, the state’s courts naturally draw upon various doctrines of unwritten law . . . as they think about how the statute fits into the rest of the state’s legal system. Often, the courts think of those overarching doctrines of unwritten law as operating outside of the statute, and as having force unless a particular statute opts out of them.”).

trial by jury in either civil or criminal cases.³⁵² If that understanding is correct, then whether a judgment in a criminal case must be founded upon a jury's verdict of guilty depends on *state* law, and it was likewise well established that erroneous applications of state law neither contravened the Due Process Clause³⁵³ nor presented a cognizable issue on habeas corpus.³⁵⁴ Thus, even if the Court had interpreted the Due Process Clause correctly, whether *Frank* was correctly decided depends on whether and to what extent the right to a jury trial in criminal cases has been incorporated against the states.

The Court would see a substantially similar fact pattern arise again out of the state courts only eight years later. "A Committee of Seven was appointed by the Governor [of Arkansas] in regard to what the committee called the 'insurrection' in the county"—i.e., the racial strife that ensued following an event where "a number of colored people assembled in their church were attacked and fired upon by a body of white men, and in the disturbance that followed a white man was killed."³⁵⁵ The Committee allegedly had black witnesses "whipped and tortured until they would say what was wanted, among them being the two relied on to prove the petitioners' guilt."³⁵⁶ One of the Committee of Seven was on the grand jury, and "blacks [were] systematically excluded from both grand and petit juries."³⁵⁷ "The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result," and that appeared to have influenced defendants' counsel, who "had no preliminary consultation with the accused, called no witnesses for the defence although they could have been produced, and did not put the defendants on the stand," as well as the jury, who came out of deliberations "in less than five minutes."³⁵⁸ In short, these facts describe pervasive fraud and duress in the conduct of the proceedings, undoubtedly rendering any purported judgment void.

This time around, the views of Justice Holmes carried a majority of the Court. Justice Holmes began his analysis by citing *Frank* for the proposition that mob domination of a trial constituted "a departure from due process of law."³⁵⁹ He distinguished the outcome of that case from the one before him on the grounds that where "the whole

352 See *Frank*, 237 U.S. at 340 (first citing *Walker v. Sauvinet*, 92 U.S. 90 (1876) (civil); and then citing *Maxwell v. Dow*, 176 U.S. 581 (1900) (criminal)).

353 See *Leeper v. Texas*, 139 U.S. 462, 467–68 (1891).

354 See *In re Converse*, 137 U.S. 624, 631 (1891). But see *infra* subsection III.A.3.

355 *Moore v. Dempsey*, 261 U.S. 86, 88, 87 (1923).

356 *Id.* at 89.

357 *Id.*

358 *Id.*

359 *Id.* at 91, 90–91 (citing *Frank v. Mangum*, 237 U.S. 309, 335 (1915)).

proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong”—the mere existence of “corrective process” does not preclude the habeas court from granting relief (or at least issuing the writ).³⁶⁰

As Justice McReynolds acknowledged in dissent, it is hard to reconcile the outcome in *Moore* with that in *Frank*.³⁶¹ Undoubtedly, the degree of “mob domination” infecting the proceedings in *Moore* was noticeably greater than that in *Frank*, and this rationale is how Justice Holmes reconciled the seemingly divergent holdings in a subsequent case.³⁶² But just like Justice Holmes’s conclusory distinction in *Moore* itself, that reasoning is unsatisfactory. Certainly the threat of physical violence present in *Frank* was enough “to overcome the mind and will of a person of ordinary firmness”—the traditional test for duress at common law.³⁶³ Moreover, it is difficult to see why the degree of mob domination matters for whether “corrective process” can be effective. Perhaps Justice Holmes believed that the decision of the state courts in the corrective proceedings at issue in *Moore* was “special, partial [or] arbitrary” (a violation of established due process doctrine at the time),³⁶⁴ but if that were the case, then one is left to wonder why Justice Holmes didn’t just say so explicitly.

The Court continued the “due process” absorption of nonjurisdictional defenses to a judgment in the 1935 case of *Mooney v. Holohan*.³⁶⁵ The petitioner, convicted of first-degree murder in California state court, alleged that “the sole basis of his conviction was perjured testimony, which was knowingly used by the prosecuting authorities in order to obtain that conviction, and also that these authorities deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him.”³⁶⁶ On the return, the state’s attorney general argued that Mooney’s petition “failed to raise a Federal question.”³⁶⁷ The Court rejected that argument, stating that due process is not satisfied when “a State has contrived a conviction . . . through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance . . . is as inconsistent with the rudimentary demands of justice as is the obtaining of a

360 *Id.* at 91, 92.

361 *Id.* at 93 (McReynolds, J., dissenting).

362 See Forsythe, *supra* note 11, at 1139–40 (citing *Ashe v. United States ex rel. Valotta*, 270 U.S. 424 (1926), as evidence that *Moore* did not overrule *Frank*).

363 *United States v. Huckabee*, 83 U.S. (16 Wall.) 414, 432 (1873).

364 *Caldwell v. Texas*, 137 U.S. 692, 698 (1891); accord *Frank*, 237 U.S. at 334–35.

365 *Mooney v. Holohan*, 294 U.S. 103 (1935).

366 *Id.* at 109, 110.

367 *Id.* at 111.

like result by intimidation”—clearly a reference to *Frank and Moore*.³⁶⁸ However, because Mooney had not yet petitioned for a writ of habeas corpus in state court, Mooney’s federal petition was dismissed without prejudice for failure to exhaust state remedies.³⁶⁹ But had the Court ordered his discharge, its holding would have been largely consistent with traditional theories of what makes a judgment void.³⁷⁰

The next year, the Court considered on direct review *Brown v. Mississippi*, a case where the defendants had been convicted in state court “solely upon confessions shown to have been extorted by officers of the State by brutality and violence.”³⁷¹ The Supreme Court of Mississippi had affirmed the convictions on two grounds: “(1) that immunity from self-incrimination is not essential to due process of law, and (2) that the failure of the trial court to exclude the confessions . . . [was] mere error reversible on appeal, but not a violation of constitutional right.”³⁷² Consistent with longstanding precedent, the Court agreed that the privilege against self-incrimination was not incorporated against the states; it disagreed, however, that self-incrimination was the issue at hand.³⁷³ According to the Court, states were free to regulate the procedure of criminal trials as they saw fit, even if that meant dispensing with the traditional protections for the accused found in the Fifth and Sixth Amendments. In doing so, however, a state was not free to “substitute trial by ordeal.”³⁷⁴

The Court then proceeded to give three examples of what might constitute “trial by ordeal”: the situation in *Moore v. Dempsey*, where “[the] accused [was] hurried to conviction under mob domination” and the state failed to supply adequate corrective process; the situation in *Powell v. Alabama*, where the state denied the accused the aid of counsel; and the situation in *Mooney v. Holohan*, where the state, “through the action of its officers, contrive[d] a conviction . . . ‘by the presentation of testimony known to be perjured.’”³⁷⁵ The Court then held that “the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions

368 *Id.* at 112.

369 *Id.* at 113–15.

370 *See supra* subsection I.E.2.

371 *Brown v. Mississippi*, 297 U.S. 278, 279 (1936).

372 *Id.* at 280.

373 *See id.* at 285 (citing *Twining v. New Jersey*, 211 U.S. 78 (1908), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964)).

374 *Id.*

375 *Id.* at 286 (first citing *Moore v. Dempsey*, 261 U.S. 86, 91 (1923); then citing *Powell v. Alabama*, 287 U.S. 45 (1932); and then quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

obtained by violence.”³⁷⁶ Given the citations to *Moore* and *Mooney*, although the Court did not state so outright, the clear implication was that denial of the assistance of counsel and conviction resting upon a coerced confession would be cognizable issues on habeas.

The former would soon be confirmed in *Johnson v. Zerbst*, albeit on Sixth Amendment grounds.³⁷⁷ Justice Black, writing for the Court, appeared to embrace the “duties necessary for the exercise of power” theory of the Sixth Amendment:³⁷⁸ “Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court’s authority to deprive an accused of his life or liberty.”³⁷⁹ And because assistance of counsel is a requirement for the benefit of the accused, “[w]hen this right is properly waived [by the defendant], the assistance of counsel is no longer a necessary element of the court’s jurisdiction to proceed to conviction and sentence.”³⁸⁰ In other words, the requirements of the Sixth Amendment are akin to the requirement that a court have the power to compel the defendant’s appearance.³⁸¹ Accordingly, the Court remanded the case so the district court could determine whether this right was in fact waived.³⁸²

The early 1940s would see two more additions to this set of due process violations. *Walker v. Johnston* said that where a defendant “was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right”—an issue probably better conceived of as an involuntary waiver of the right to trial by jury, but the Court seemed to classify this as a due process problem.³⁸³ One year later, *Waley v. Johnston* confirmed the dicta in *Walker* about coercion and extended the principle to the conduct of law enforcement officers, not just prosecutors, explaining that “a conviction on a plea of guilty

376 *Id.* Not long after, the Court would extend this holding to cases where the confession was coerced without definitive proof of physical violence. See *Chambers v. Florida*, 309 U.S. 227, 238–39 (1940).

377 *Johnson v. Zerbst*, 304 U.S. 458 (1938). *Powell* held that denial of assistance of counsel was a denial of due process of law. *Powell*, 287 U.S. at 66–68.

378 See *supra* Section I.C.

379 *Zerbst*, 304 U.S. at 467.

380 *Id.* at 467–68.

381 See *supra* subsection I.E.3.

382 *Zerbst*, 304 U.S. at 469.

383 *Walker v. Johnston*, 312 U.S. 275, 286 (1941) (footnote omitted). The reason I believe that the Court conceived of this as a denial of due process is because it cited *Mooney* (which also involved prosecutorial deception, but of the court and jury) rather than *Zerbst* (which involved involuntary waiver of a Sixth Amendment right). See *id.* at 286 n.14. That distinction would have been meaningful for habeas doctrine at the time, but it has little relevance to a “void judgment” theory of habeas.

coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession.”³⁸⁴ During this same time period, on direct review of a state habeas petition, the Court held that conviction based on the coerced confession of a coconspirator would deny the defendant due process and render the trial void.³⁸⁵ And in 1951, once again on direct review of a state postconviction proceeding, the Court would hold that where the defendants’ coerced confessions were used to obtain their convictions, the state *had* to provide a remedy of some sort, or else the federal courts would provide one on habeas corpus.³⁸⁶ Thus, while *Brown v. Allen*’s merits consideration of a coerced confession claim was a novelty for purposes of federal habeas, it was an exceedingly incremental one, one that had been foreshadowed in dicta seventeen years prior.³⁸⁷ It was what the opinions said, not what the Court did, that marked the change in habeas doctrine.

III. OTHER LESSONS AND SUGGESTIONS FOR MODERN DOCTRINE

The lessons from this history have implications beyond habeas corpus. For instance, the circuit split on whether a criminal statute’s constitutionality is an issue of subject-matter jurisdiction³⁸⁸ can be easily resolved with citation to two famous Chief Justice Marshall opinions: *Ex parte Watkins* and *Worcester v. Georgia*.³⁸⁹ And the notion of “jurisdiction over the process” seems like it might be useful in unraveling thorny issues in civil litigation, such as standing and universal injunctions.³⁹⁰ However, this is an article on habeas, after all—and an already

384 See *Waley v. Johnston*, 316 U.S. 101, 104 (1942) (first citing *Bram v. United States*, 168 U.S. 532, 543 (1897) (finding a coerced confession to be a violation of the Self-Incrimination Clause); and then citing *Chambers v. Florida*, 309 U.S. 227 (1940) (same but under Due Process)).

385 See *Lisenba v. California*, 314 U.S. 219, 237 (1941).

386 See *Jennings v. Illinois*, 342 U.S. 104, 110–11 (1951) (“If their allegations are true and if their claims have not been waived at or after trial, petitioners are held in custody in violation of federal constitutional rights.”).

387 See *Brown v. Allen*, 344 U.S. 443, 474–76 (1953); see also *Brown v. Mississippi*, 297 U.S. 278, 281 (1936). At no point did any of the various opinions in *Brown v. Allen* cite *In re Moran*, 203 U.S. 96 (1906), which it was effectively overruling. See *supra* Section II.B.

388 See *Petition for a Writ of Certiorari at 1–2, Herrera v. United States*, 143 S. Ct. 2636 (2023) (No. 22-827); *Class v. United States*, 138 S. Ct. 798, 806 (2018) (punting on the issue).

389 See *supra* note 214 and accompanying text.

390 Cf. *Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring) (expressing doubt that universal injunctions are within the scope of federal courts’ authority); *Bellia, supra* note 54, at 817–32 (“The question of standing [prior to code pleading] was generally inseparable from the question whether the plaintiff had a cause of action for a recognized remedy.” *Id.* at 818.).

lengthy one at that—so I will restrict my discussion accordingly. But first, two non-lessons.

First, just because an issue didn't present cognizable error in the late nineteenth century doesn't mean we should reflexively adopt the late nineteenth century approach. This is particularly true of coerced confessions, where courts are faced with some hard questions about how to construe the Self-Incrimination Clause in light of changed investigatory practices since the Founding.³⁹¹ Instead of mechanically porting old doctrine into modern context, courts should look at the logic of the holdings and attempt to translate it into modern parlance.³⁹² Failure to do so risks denying relief to a prisoner to whom it would have been due under the historic office—a serious injustice.³⁹³

Second, the fact that modern interpretation of the Due Process Clauses is inconsistent with their original meaning does not necessarily imply that the litany of doctrines currently derived from those clauses is unfounded.³⁹⁴ For example, as this Article has shown, *Moore v. Dempsey* and its progeny *do* have historic foundation, albeit not of constitutional status.³⁹⁵ Accordingly, courts should hesitate before overturning or undermining the freewheeling criminal procedure jurisprudence of the past century. “Overzealous revisionism can . . . recreate long-solved problems—and ultimately require judges to reconstruct the same doctrinal edifices they themselves had too hastily torn down.”³⁹⁶ That said, understanding the history of habeas corpus in light of the original meaning of due process and traditional notions of jurisdiction does suggest some revisions worth making. Those revisions are discussed below.

391 See *supra* text accompanying note 269; cf. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867) (“The legal result must be the same, for what cannot be done directly cannot be done indirectly.”).

392 Cf. Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 *FORDHAM L. REV.* 935, 942 (2015) (arguing that, in order to understand historical periods such as the American Founding, scholars must “appreciat[e] that it is a foreign world” and “reckon[] with it on its own foreign terms”); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 *BYU L. REV.* 1621, 1649–54 (discussing “immersion” as a part of the originalist methodology). To be clear, this is not to say that these holdings should be taken as unimpeachable—jurists of the past were no less prone to shoddy legal analysis than are the jurists of today. An appeal *ad novitatem* is no less a fallacious argument than one *ad antiquitatem*. See FISCHER, *supra* note 307, at 297–300.

393 See *infra* subsection III.A.2.

394 See Crema & Solum, *supra* note 14, at 452–53.

395 See *supra* subsection I.E.2.

396 Richard M. Re, *Reason and Rhetoric in Edwards v. Vannoy*, 17 *DUKE J. CONST. L. & PUB. POL'Y* 63, 76 (2022).

A. *What the History Clarifies*

1. The Meaning of “Restrained of His or Her Liberty in Violation of the Constitution”

This phrase from the 1867 Act³⁹⁷ is perhaps the most important phrase in all of modern habeas doctrine. It might also be the most misunderstood.

In *Fay v. Noia*, Justice Brennan famously declared that “the historic office of the Great Writ [was] to redress detentions in violation of fundamental law,” suggesting that habeas provides a remedy whenever there is an erroneous denial of constitutional right.³⁹⁸ As many others have pointed out, including Justice Brennan himself in that very same opinion, that interpretation seems preposterous in light of the fact that the Act purports to provide a remedy for prisoners restrained of their liberty “in violation of federal law,” yet federal courts in the nineteenth century repeatedly rejected the proposition that mere errors of federal law warranted discharge.³⁹⁹ Despite the facial absurdity of Justice Brennan’s interpretation, that is still the prevailing interpretation today.⁴⁰⁰

By contrast, Professor Lewis Mayers has asserted that the 1867 Act was “drafted to implement the thirteenth amendment,” and that there is “no evidence” in the legislative history that it was “intended to implement the fourteenth amendment’s due process and equal protection clauses.”⁴⁰¹ And even if it was, Mayers suggests, it certainly wasn’t intended “to be a comprehensive procedure for the review of state convictions” by the lower federal courts—indeed, how could its drafters have foreseen the expansion of due process to encompass a litany of fundamental rights “yet undreamed of”?⁴⁰²

Mayers is half right. There can be no doubt that the 1867 Act was primarily aimed at providing a remedy for “persons held in slavery or involuntary servitude contrary to the Constitution of the United States.”⁴⁰³ But the language of the statute was written in the broadest possible terms—indeed, as its “presumptive draftsman” Representative William Lawrence of Ohio put it, the effect of the statute was “to make the jurisdiction of the courts and judges of the United States

397 Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

398 See *Fay v. Noia*, 372 U.S. 391, 412, 424 (1963).

399 See *id.* at 412.

400 See 17B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4263 (3d ed. 2025).

401 Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 52, 53 (1965).

402 See *id.* at 58, 54.

403 See *id.* at 34 (quoting an unprinted bill introduced into the U.S. House of Representatives on January 8, 1866).

coextensive with all the powers that can be conferred upon them.”⁴⁰⁴ As the Supreme Court said in *Bostock v. Clayton County*, “unexpected applications of broad language reflect only Congress’s ‘presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions.’”⁴⁰⁵ So if a state prisoner is “restrained of his or her liberty in violation of the constitution,” then this statute applies, and the prisoner has a remedy.⁴⁰⁶

The reason why the 1867 Act was necessary was because the habeas corpus statutes in force at the time only authorized “an inquiry into the cause of commitment.”⁴⁰⁷ As Rollin Hurd’s treatise explains, “the term ‘commitment’ ha[d] a technical signification, importing a detainer under legal process,” i.e., “to be construed as equivalent to ‘imprisonment in gaol’” and not a general authority to “exercise the common law functions of *parens patriae*.”⁴⁰⁸ At common law, however, “the writ of habeas corpus [would] be granted . . . for the purpose of inquiring into *any* alleged illegal restraint, [including] of the wife, child, ward or apprentice.”⁴⁰⁹ The purpose of the 1867 Act, therefore, would presumably be to extend the writ to all cases where the restraint is prohibited by federal law—whether the restraint be of a private character (such as slavery) or of a public one.⁴¹⁰

There are only two provisions of the Constitution that regulate public restraints of liberty: the Due Process Clauses of the Fifth and Fourteenth Amendments. Thus, where the custodian is a state official, the inquiry under the 1867 Act is the same as it is under the 1789 Act for prisoners in gaol: “Where the return shows a detainer under legal process, the only proper points for examination are the existence, validity and present legal force of the process”⁴¹¹ For the typical postconviction relief action, the key question will be the validity of final

404 *Id.* at 36, 37 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866)).

405 *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020) (alteration in original) (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 101 (2012)).

406 Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

407 Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82.

408 2 HURD, *supra* note 79, at 152, 150, 151.

409 *Id.* at 450 (emphasis added).

410 A different example of a private “restraint” in violation of federal law—specifically statutory, not constitutional law—would be unlawful child custody under the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069. Of course, ICWA provides its own remedy, *see* 25 U.S.C. § 1916(a) (2018), but if it did not, one could have been had under the 1867 Habeas Corpus Act. It is not certain whether that would still be true given 28 U.S.C. § 2241’s amended language: it is unclear whether § 2241(c)’s use of the word “prisoner” (1) limits issuance of the writ to “prisoner[s]” only, and (2) if it does, whether a child in wrongful custody is properly deemed a “prisoner” in the relevant sense. In any event, the point is of academic interest only.

411 2 HURD, *supra* note 79, at 332.

process—whether the underlying judgment is void.⁴¹² Where the process is invalid, the state prisoner will have been deprived of their liberty without due process of law, and therefore restrained in violation of the Due Process Clause. In such cases, the 1867 Act provides a remedy.

In his recent article, Micah Quigley argues that a restraint on liberty is only unlawful if the violation of federal law rendered a judgment jurisdictionally defective.⁴¹³ As an example, Quigley cites *Ex parte Bridges*, where a state court had convicted the petitioner of perjury committed in federal court, a subject within the exclusive jurisdiction of the federal courts.⁴¹⁴ Because “it was clearly in violation of *the laws of the United States* for the state court to try and imprison the defendant for the crime in question[,]’ . . . the resulting custody was in violation of the statute.”⁴¹⁵

But this interpretation does not quite accord with the text of the 1867 Act. It is correct to say that the state court’s assertion of jurisdiction was unlawful by reason of the federal perjury statute, but it is the restraint itself—the act of the jailer, not of the court—that must violate federal law. And being confined under void process does not violate the federal statute at issue in *Bridges*. It does, however, violate the Fourteenth Amendment’s Due Process Clause.⁴¹⁶

Indeed, this is precisely what the district court held in *Bridges*.⁴¹⁷ As Judge Erskine’s opinion explains, the writ of habeas corpus “was, at Runnymede, built into that portion of . . . the great charter which protects the personal liberty and property of all freemen, by giving security from arbitrary imprisonment and arbitrary spoliation.”⁴¹⁸ “The very essence of the 29th chapter of the charter is, among other immunities from oppression, incorporated into the fifth article of amendment of the national constitution,” a protection extended to run against the states by way of the Fourteenth Amendment.⁴¹⁹ After concluding that the state court had no jurisdiction over the crime at issue, Judge Erskine held that, “[since] the state court did not have jurisdiction of the case, its judgment is utterly void, and the petitioner is restrained of his

412 There is a small set of circumstances (e.g., a pardon) that would render a judgment void *after* the judgment has been given that would nonetheless be cognizable on habeas corpus. See, e.g., *Ex parte Wells*, 59 U.S. (18 How.) 307, 309 (1856); *Ex parte Grossman*, 267 U.S. 87, 122 (1925); *Ex parte Watkins (Watkins II)*, 32 U.S. (7 Pet.) 568, 578–79 (1833). These issues would all go to “the present legal force” of final process.

413 Quigley, *supra* note 133, at 491.

414 *Id.* at 491–92 (citing *Ex parte Bridges*, 4 F. Cas. 98, 104–05 (C.C.N.D. Ga. 1875) (No. 1,862) (Bradley, Circuit J.)).

415 *Id.* at 492 (quoting *Bridges*, 4 F. Cas. at 105).

416 See *supra* subsection I.C.3.

417 *Bridges*, 4 F. Cas. 98.

418 *Id.* at 100.

419 *Id.*

liberty *in violation of the constitution*, and the act of 1867 affords a proper and legal remedy to administer relief.”⁴²⁰

When someone is imprisoned under void process, they are deprived of their liberty without due process of law. It is the imprisonment itself, the restraint on their liberty, that violates the Due Process Clause. It is this violation of federal law, not others, that is relevant to postconviction relief under the 1867 Act.

2. The Correct Outcomes in *Edwards v. Vannoy* and *Montgomery v. Louisiana*

The historical analysis in the foregoing Parts also provides us with insight on the correct outcomes in the Supreme Court’s two most recent scope-of-the-writ cases: *Edwards v. Vannoy*, where the Court held that jury unanimity was a “procedural” rule that did not apply “retroactively,”⁴²¹ and *Montgomery v. Louisiana*, where the Court held that the Eighth Amendment’s prohibition on mandatory sentences of life without parole for juvenile offenders was a “substantive” rule that did.⁴²²

Let’s start with two assumptions. First, assume that *Ramos v. Louisiana* and *Miller v. Alabama*, the underlying cases that produced the “new rule” of constitutional law, are correctly decided.⁴²³ Second, assume that *Teague*’s substantive/procedural distinction is a proxy for what sorts of claims would have been traditionally within the scope of habeas inquiry.⁴²⁴

Let’s begin with *Edwards*. The Due Process Clause demands that all deprivations of liberty under color of state law be authorized by a valid court order—here, final process upon a valid judgment. Whether the court order is valid depends on whether the court lawfully exercised the judicial power in issuing it. There is no question that the court convicting *Edwards* gave judgment of its own volition, nor any question about whether it had jurisdiction over the person or the cause. The only question is whether the convicting court had jurisdiction to issue final process.

As a general matter, it is true that “[t]he legal force of [a] judgment has nothing to do with whether the judge has correctly named the winner and the loser. . . . There are, however, important limits to

420 *Id.* at 103 (emphasis added).

421 *See Edwards v. Vannoy*, 141 S. Ct. 1547, 1560–61 (2021).

422 *See Montgomery v. Louisiana*, 577 U.S. 190, 208–09 (2016).

423 *See generally Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (jury unanimity); *Miller v. Alabama*, 567 U.S. 460 (2012) (mandatory life without parole for juveniles).

424 *Cf. Edwards*, 141 S. Ct. at 1570–71 (Gorsuch, J., concurring) (citing *Teague v. Lane*, 489 U.S. 288 (1989)) (making this assertion).

the judgment power.”⁴²⁵ In criminal cases, one such limit is that “a judgment of conviction [must be] based upon a verdict of guilty by a jury,” absent lawful waiver of that right.⁴²⁶ And in criminal cases, “[a] ‘verdict, taken from eleven, [is] no verdict’ at all.”⁴²⁷ The fact that “Louisiana law permitted guilty verdicts if at least 10 of the 12 jurors found the defendant guilty” at the time of Edwards’s conviction makes no difference⁴²⁸—that rule of decision is preempted by the contrary requirement of the Sixth Amendment, as imposed on the states by the Fourteenth. Because the judgment of conviction authorizing Edwards’s detention is void, he should have been discharged then, and he should be discharged now.

It is disappointing that the Court failed to grant relief to Thedrick Edwards. It is fair to say that the nineteenth-century concept of jurisdiction is not always a “luminous beacon,”⁴²⁹ but the right answer here was hardly lurking in the shadows. As Richard Re has pointed out, one need not rely on much more than common sense to see it: “What indeed is a criminal judgment in a jury case, other than a report of what a properly constituted jury decided?”⁴³⁰ Thankfully, only two states allowed nonunanimous jury verdicts prior to *Ramos*, and one of them—Oregon—has held on state law grounds that *Ramos* applies retroactively.⁴³¹ Surprising no one, Louisiana has held that it does not.⁴³²

With respect to *Montgomery*, it seems, as Justice Scalia asserted in dissent, a bit odd to describe the rule from *Miller* as “substantive”—the other rules in that category tend to “place, as a matter of constitutional interpretation, certain kinds of primary, private individual *conduct* beyond the power of the criminal law-making authority to proscribe.”⁴³³ And to be fair to Justice Scalia, if we blind ourselves to everything but doctrine, he does have a point: if this rule is “substantive,” then what the heck does “substantive” mean anyway?

425 Baude, *supra* note 43, at 1810; *see also supra* subsection I.C.2.

426 Callan v. Wilson, 127 U.S. 540, 557 (1888); *see also* United States v. Rathbone, 27 F. Cas. 711, 711 (C.C.S.D.N.Y. 1828) (No. 16,121); JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES § 348, at 231 (Boston, Little, Brown & Co. 1873) (describing a guilty plea in open court as a “conviction”).

427 *Ramos*, 140 S. Ct. at 1395 (quoting JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 88–89 n.4 (Boston, Little, Brown & Co. 1898)).

428 *Edwards*, 141 S. Ct. at 1553.

429 *Brown v. Davenport*, 142 S. Ct. 1510, 1521 (2022) (quoting Bator, *supra* note 2, at 470).

430 Re, *supra* note 396, at 74.

431 *See* *Watkins v. Ackley*, 523 P.3d 86, 103 (Or. 2022).

432 *State v. Reddick*, 351 So. 3d 273, 283 (La. 2022).

433 *Montgomery v. Louisiana*, 577 U.S. 190, 222 (2016) (Scalia, J., dissenting) (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (emphasis added)).

I'm not sure that anyone knows. But what I do know is that the majority had the right side of the debate—if *Miller* is correct, then prisoners who have a claim under that holding would be able to assert it within the traditional framework of the writ.

Let's step through the logic. The Due Process Clause demands that all deprivations of liberty be authorized by a valid court order—once again, final process upon a valid judgment. For the judgment to be valid, the court issuing it must have jurisdiction over the cause, over the person, and over the particular order it gave.⁴³⁴ In *Montgomery*, there was no question that the court had jurisdiction over the cause (murder) or over the defendant (a citizen of Louisiana).⁴³⁵ What was lacking was jurisdiction to issue the sentence of life without parole.

A court must be able to point to the source of its jurisdiction.⁴³⁶ For the court that convicted Henry Montgomery, that source was supposed to be section 14:30(C) of the Louisiana Revised Statutes which purported to authorize imposition of “punish[ment] by life imprisonment at hard labor without benefit of parole, probation or suspension of sentence”⁴³⁷—precisely the sort of sentencing scheme the *Miller* Court held to be unconstitutional when applied to juvenile offenders.⁴³⁸ Because that subsection contravenes the Eighth Amendment's prohibition on cruel and unusual punishment, the court's sentence is void, “for as the stream cannot rise higher than its source, no jurisdiction can be derived from a void act.”⁴³⁹ And because final process executing this void sentence cannot justify Montgomery's detention, he must be discharged.

Perhaps this examination of *Montgomery* can help clarify what the Court means when it labels a rule “substantive” (though it would be better to dispense with *Teague* altogether).⁴⁴⁰ Such rules appear to pertain to Hohfeldian disabilities *in rem*: the disability relation is between the government and “the people” in the aggregate.⁴⁴¹ “Procedural” rules, by contrast, seem to be Hohfeldian rights and immunities personal to each particular defendant—although every defendant has them, it is within each defendant's power to waive her protections as she so chooses. Again, how that makes one type of rule “substantive”

434 See *supra* subsection I.C.2.

435 See *State v. Montgomery*, 181 So. 2d 756, 757–58 (La. 1966).

436 See *supra* notes 86–91 and accompanying text.

437 LA. STAT. ANN. § 14:30(C)(2) (2015), *invalidated by State v. Comeaux*, 239 So. 3d 920 (La. Ct. App. 2018).

438 *Miller v. Alabama*, 567 U.S. 460, 479 (2012).

439 1 BLACK, *supra* note 79, § 216, at 263.

440 See *infra* subsection III.B.3.

441 See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 712–17 (1917).

and the other “procedural” is a mystery to me, but that perhaps is just an indication of *Teague’s* incoherence: “[I]nadequacy and ambiguity of terms unfortunately reflect, all too often, corresponding paucity and confusion as regards actual legal conceptions.”⁴⁴² But if we are unwilling to do away with *Teague*, we should at least do away with its terminology.

3. The Unavailability of Freestanding Innocence Claims for State Prisoners

This issue, first brought to the Court in *Herrera v. Collins*,⁴⁴³ has received much academic attention.⁴⁴⁴ Admittedly, there is something undeniably compelling about the idea that a prisoner who is *actually innocent* should have a procedural vehicle to prove their rightful freedom. But it is not a valid habeas claim.

There are two possible reasons why freestanding innocence is not a cognizable issue for prisoners held under color of state process. For one thing, outside of perhaps common law crimes,⁴⁴⁵ provided that a valid criminal enactment exists, the guilt or innocence of a state prisoner is a question of state law.⁴⁴⁶ If on a writ of error the federal courts “have no power to revise the decision of [a] state court” on “a question, depending altogether upon the state laws,”⁴⁴⁷ then under *Ex parte Watkins*, the same would be true respecting questions of state law on habeas.⁴⁴⁸ “[A]ppellate ‘arising under’ jurisdiction over a state court judgment [exists only] if it can be shown at the time of appeal that federal law is determinative of a right or title asserted on appeal.”⁴⁴⁹ And because postconviction habeas corpus was—and still should be—considered an exercise of “appellate jurisdiction,” constitutional limitations on Supreme Court jurisdiction over state court judgments

442 Hohfeld, *supra* note 113, at 29; accord *Edwards v. Vannoy*, 141 S. Ct. 1547, 1572 (2021) (Gorsuch, J., concurring).

443 *Herrera v. Collins*, 506 U.S. 390, 404–05 (1993).

444 See, e.g., Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303 (1993); Stephanie Roberts Hartung, *Habeas Corpus for the Innocent*, 19 U. PA. J.L. & SOC. CHANGE 1 (2016); sources cited *supra* note 3.

445 Fourteen states still “recognize the common law authority of judges to convict for conduct that is not criminalized by statute.” Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 982, 979–83 (2019). It seems plausible, though not certain, that guilt of a common law crime is properly deemed an issue of general law.

446 *Cf. Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842), *overruled by* *Eric R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

447 *M’Bride v. Lessee of Hoey*, 36 U.S. (11 Pet.) 167, 172 (1837).

448 See *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 203 (1830).

449 Anthony J. Bellia Jr., *The Origins of Article III “Arising Under” Jurisdiction*, 57 DUKE L.J. 263, 331, 329–31 (2007) (first citing *Owings v. Norwood’s Lessee*, 9 U.S. (5 Cranch) 344 (1809); and then citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821)).

apply likewise to limit the lower federal courts' jurisdiction on habeas corpus.⁴⁵⁰

The problem is, however, that there is arguably a federal "ingredient" in every habeas case: the petitioner is asserting a right—namely, his liberty—that "is protected by federal law."⁴⁵¹ In other words, in cases where the validity of process depends on a question of state law, we have a situation where the question of state law is logically antecedent to the question of federal law. Under modern doctrine, that would mean no jurisdiction in such cases (and in cases of antecedent questions of general law).⁴⁵²

But it is not clear that modern doctrine is correct on this point. Prior to ratification of the Fourteenth Amendment, the Supreme Court had long asserted appellate jurisdiction to review antecedent questions of state law that "immediately respected" a question of federal law, and if anything, the Judiciary Act of 1867 only broadened this jurisdiction.⁴⁵³ Early cases under the Due Process Clause split on whether federal appellate review extended to questions of state law that were jurisdictional,⁴⁵⁴ with the Supreme Court eventually coming to rest on the negative position.⁴⁵⁵ Given that the original meaning of

450 *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100–01 (1807); *see also* 2 HURD, *supra* note 79, at 330 ("The phrase 'appellate jurisdiction' does not however, necessarily import a subordination of one court or officer to another, although that is its more usual signification. It may signify the power to act judicially upon a question or right, *notwithstanding* a supposed conclusion against it, resulting from an alleged judgment. And this is its true signification as applied to the writ of habeas corpus."). Whatever the constitutional limitations of federal appellate jurisdiction over state court judgments may be, it appears that Congress intended to run up against them with the Act. *See* CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866) (statement of Rep. Lawrence).

451 *Bellia*, *supra* note 449, at 337, 338.

452 *See* *Fox Film Corp. v. Muller*, 296 U.S. 207, 210–11 (1935).

453 Michael G. Collins, *Reconstructing* *Murdock v. Memphis*, 98 VA. L. REV. 1439, 1453–57, 1488–97 (2012).

454 *Compare In re Ah Lee*, 5 F. 899, 900–02, 907 (D. Or. 1880) (noting that petitioner's claim that the convicting judges were not lawfully judges under the state constitution presented a valid due process claim, but denying relief on the basis of the *de facto* official doctrine), *and* *Kennard v. Louisiana ex rel. Morgan*, 92 U.S. 480, 481 (1876) ("Our authority does not extend beyond an examination of the power of the courts below to proceed at all."), *with* *Yick Wo v. Hopkins*, 118 U.S. 356, 365–66 (1886) ("The question whether his imprisonment is illegal, under the constitution and laws of the State, is not open to us. . . . [J]udicial propriety is best consulted by accepting the judgment of the State court upon the points involved in that inquiry."), *and* *Walker v. Sauvinet*, 92 U.S. 90, 92–93 (1876) ("All questions arising under the Constitution of the State alone are finally settled by the judgment below. . . . Due process of law is process due according to the law of the land. . . . Here the State court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States.").

455 *Woolhandler*, *supra* note 10, at 627–28.

the Due Process Clause requires deprivations of life, liberty, and property to be authorized by “writs issued lawfully by a court of *competent jurisdiction*,” perhaps the aforementioned line of cases is worth revisiting.⁴⁵⁶

Even if federal appellate jurisdiction does extend to subsidiary state law questions, however, there is a second problem: a court’s power to issue final process does not depend on the *correctness* of a jury’s guilty verdict, just the existence of one. To be sure, a legislature most likely could make it so—if actual guilt can be a jurisdictional fact for “inferior” courts, it stands to reason that it could likewise be made one for courts of a more general jurisdiction.⁴⁵⁷ But whether a state’s legislature has in fact added any “other requirements for the valid exercise of power by [a] court” beyond the traditional ones is a question of interpretation, and the present tendency is to presume that most directives from the legislature “are not jurisdictional and that a judgment rendered in violation of such [directives] is not void and is not open to collateral attack.”⁴⁵⁸ Given the historical tradition of actual guilt not being a requirement for the validity of convictions from courts of general jurisdiction, as well as the maxim that judgments cannot be impeached for their correctness, it seems highly unlikely that the legislature of every state in the Union actually intended for this to be a jurisdictional requirement.⁴⁵⁹

The same logic should hold true for writs of habeas corpus brought for federal prisoners. Crucially, however, most postconviction litigation for federal prisoners is not by habeas corpus, but by § 2255 motion—a statutory procedure modeled after a writ of error coram nobis.⁴⁶⁰

At common law, error coram nobis was a procedure used to correct “errors which do not appear in the record . . . [that] go to the very

456 Crema & Solum, *supra* note 14, at 509 (emphasis added). *But see* Woolhandler, *supra* note 10, at 627 (“It is, of course, hard to imagine a less appropriate task for the federal courts than policing state compliance with state law.”). If that line of cases is in fact incorrect, then it might not matter much whether or not the Bill of Rights is incorporated against the states, as most state constitutions contain guarantees equivalent to those found in the Fifth and Sixth Amendments.

457 *See* Woolhandler, *supra* note 10, at 589–90; *see also* RESTATEMENT (FIRST) OF THE L. OF JUDGMENTS § 4(d) (AM. L. INST. 1942) (indicating that additional requisites for a valid judgment are generally up to the discretion of the legislature).

458 RESTATEMENT (FIRST) OF THE L. OF JUDGMENTS § 8 cmt. d (AM. L. INST. 1942); *see also* Hawley, *supra* note 58, at 2033–48 (noting that the modern presumption has not always been the rule historically and that the antebellum Supreme Court may have even employed the opposite presumption).

459 *See* CHURCH, *supra* note 330, § 247, at 317; Baude, *supra* note 43, at 1827.

460 *See* Act of June 25, 1948, ch. 646, 62 Stat. 869, 967–68 (codified as amended at 28 U.S.C. § 2255); *United States v. Hayman*, 342 U.S. 205, 216–17 (1952).

foundation and validity of the judgment.”⁴⁶¹ “But this writ d[id] not lie to correct any error in the judgment of the court, nor to contradict or put in issue any fact directly passed upon and affirmed by the judgment itself.”⁴⁶² Thus, the common law office of coram nobis, although suitable for many fact-bound claims now brought up on habeas, would have been inappropriate for freestanding innocence claims.

However, over the course of the nineteenth century, usage of error coram nobis was extended in criminal cases beyond its common law foundations—an example of the phenomenon that “when human liberty is at stake, we find the law searching out remedies, contemporary or old, in order that justice be done.”⁴⁶³ Much like the expansion of the use of habeas corpus, this practice was met with hostility. As one particularly grumpy judge put it: “The writ of coram nobis appears to be the wild ass of the law which the courts cannot control.”⁴⁶⁴

In the years immediately after § 2255’s enactment, the federal courts did not allow for consideration of ordinary “[e]rrors of law [or] the sufficiency of the evidence.”⁴⁶⁵ But there are two reasons why that might not foreclose the issue.

One possibility is that Congress enacted § 2255 with an understanding that it would be used in accordance with evolving standards of “doing justice.” Although that would be an unusual presumption about congressional intent in most cases, it may be appropriate here, given the protean use of coram nobis in the years leading up to enactment. And unlike with writs of habeas corpus, Congress did give courts power to “*vacate* . . . the sentence.”⁴⁶⁶ Whether § 2255 should be interpreted this way depends on whether the statutory language referring to a “sentence [] imposed in violation of the Constitution or laws of the United States”⁴⁶⁷ should be read *in pari materia* with the equivalent language in § 2241(c)(3) or as a static reference to what that phrase was understood to mean in 1948.

Another possible argument is that, in amending § 2255’s limitation on “second or successive motion[s],” Congress has indicated that relief is available where “newly discovered evidence . . . establish[es] by

461 THOMAS W. POWELL, *THE LAW OF APPELLATE PROCEEDINGS* 106–07 (Philadelphia, T. & J.W. Johnson & Co. 1872).

462 FREEMAN, *supra* note 106, § 94, at 65 (“If this could be, there would be no end to litigation.”).

463 ELI FRANK, *CORAM NOBIS: COMMON LAW, FEDERAL, STATUTORY, WITH FORMS* ¶ 1.04, at 8 (1953).

464 *Anderson v. Buchanan*, 168 S.W.2d 48, 55 (Ky. Ct. App. 1943) (Sims, J., dissenting).

465 FRANK, *supra* note 463, ¶ 5.02[a], at 96.

466 28 U.S.C. § 2255(a) (2018) (emphasis added); *cf. infra* notes 486–88 and accompanying text; *see also* 1 BAILEY, *supra* note 173, § 141, at 116 (noting that coram nobis was considered a “direct attack”).

467 28 U.S.C. § 2255(a) (2018).

clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense.”⁴⁶⁸ Even if those claims were not within the scope of § 2255’s original enactment, these subsequent amendments arguably make it “too late in the day” to reconsider whether claims of “factual” innocence on newly available evidence present good grounds for relief.⁴⁶⁹ For claims of “legal” innocence, however, the same argument could not be made.⁴⁷⁰

None of this is to say that actually innocent prisoners held under color of state process are left out in the cold. Many state legislatures have taken the same approach as Congress did with respect to postconviction relief,⁴⁷¹ and where they have done so, similar reasoning to that given above should apply. Those prisoners just won’t have a federal forum for their claim.

4. The Void/Voidable Distinction and How Habeas Is Different from a Writ of Error

Eighteenth- and nineteenth-century courts and commentators frequently drew a distinction between a *void* judgment, which could be impeached in a habeas action, and a *voidable* one, which could not.⁴⁷² But the precision of these terms is lacking. “The simple dichotomy of ‘void’ and ‘voidable’ is not adequate to describe the various subtle ways in which the law refuses to a greater or less extent to give effect to contracts, marriages and other [juridical] acts.”⁴⁷³

468 *Id.* § 2255(h)(1).

469 *Cf.* *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 78 (1992) (Scalia, J., concurring in judgment) (discussing an implied private right of action under Title IX of the Education Amendments of 1972).

470 This would only apply to “legal” innocence claims based on statutory construction. *See* Litman, *supra* note 3, at 438–42. It would be unfortunate if this were the case—as Professor Litman notes, many of the critiques levied against litigating claims of factual innocence and against habeas relitigation more generally “apply with less force to claims of legal innocence.” *Id.* at 453, 453–63.

471 *See, e.g.*, ALASKA R. CRIM. P. 35.1; MD. CODE CRIM. PROC. § 7-102 (2024); D.C. CODE § 23-110 (2024).

472 *See, e.g., Ex parte Randolph*, 20 F. Cas. 242, 251 (C.C.D. Va. 1833) (No. 11,558) (Barbour, J.); 2 HURD, *supra* note 79, at 332.

473 A.M. Honoré, *Degrees of Invalidity*, 75 S. AFR. L.J. 32, 32 (1958) (using the term “juristic” in a manner synonymous with how “juridical” was used in the text accompanying notes 127–32 *supra*); *see also* *State v. Richmond*, 26 N.H. 232, 237–39 (1853) (“There is in our books great looseness and no little confusion in the use of the terms *void* and *voidable*, growing, perhaps, in some degree, out of the imperfection of our language. There are at least four kinds of defects which are included under these expressions, while we have but those two terms to express them all.” *Id.* at 237.); FREDERICK S. WAIT, *A TREATISE ON FRAUDULENT CONVEYANCES AND CREDITORS’ BILLS, WITH A DISCUSSION OF VOID AND VOIDABLE ACTS* §§ 408–09, at 564, 565 n.1 (New York, Baker, Voorhis & Co., 2d ed. 1889)

As used historically, the void/voidable terminology could encompass a few different, sometimes overlapping pairs of concepts. Anglo-American lawyers sometimes distinguished between a juridical act being “not void *ab initio*, but voidable onely upon *contingent*.”⁴⁷⁴ Alternatively, they sometimes used these terms to distinguish between acts “void *ipso facto*” and those “voidable by due processe of law” or “sentence declaratory.”⁴⁷⁵ Nor were these two sets of concepts overlapping. For instance, fraud would vitiate a juridical act “*ab initio*,” but failure to timely bring an action to declare the act void might cause the courts to treat this lack of diligence as conclusive evidence that no fraud occurred (even though it did so in fact).⁴⁷⁶ In such circumstances, the juridical act is void *ab initio* and by operation of law, but subject to become valid by prescription. To draw an analogy, the defense of laches here is a bit like a claim of adverse possession, where “the title, once matured, relates back to the beginning of the adverse holding.”⁴⁷⁷ These clarifying modifiers were rare, however, and particularly so in the nineteenth century; most of the time, jurists simply used “void” and “voidable.”

The void/voidable distinction is confusing for another reason. The term “void” can be used both to describe the effect of the juridical act and the class of juridical acts marred by a particular quality of defect. The term “voidable” only describes the latter, and once the

(expressing similar frustration); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 191–92 (New York, O. Halsted, 1827) (likewise).

474 See, e.g., JOHN MARCH, REPORTS: OR, NEW CASES 42 (London, W. Lee 1648) (discussing grants of office made to minors).

475 See, e.g., AN ANSWER TO A BOOK, INTITULED, THE DOCTRINE AND DISCIPLINE OF DIVORCE 14 (London, William Lee 1644); MARCH, *supra* note 474, at 84–87 (distinguishing between acts “absolutely void without sentence declaratory” or “*ipso facto* void,” *id.* at 84, and acts which “shall not be void before an act done to make them void, which is Sentence declaratory, or deprivation,” *id.* at 85); see also HENRY HOME, LORD KAMES, PRINCIPLES OF EQUITY 208, 304 (Michael Lobban ed., 3d ed. 2014) (1760) (using “void *ipso facto*,” *id.* at 208, and “void *ipso jure*,” *id.* at 304, to mean similar things); JOHN GODOLPHIN, THE ORPHAN’S LEGACY: OR, A TESTAMENTARY ABRIDGMENT 70 (London, Robert Vincent 1701) (1674) (“It was resolved, That such Administration granted by the Metropolitan, was not void, but voidable by Sentence, because the Metropolitan hath Jurisdiction of all places within his Province.”); WILLIAM PRYNNE, THE SOVERAIGNE POWER OF PARLIAMENTS AND KINGDOMES pt. 2, 86 (London, Michael Sparke Sr. 1643) (“[A] Marriage, Bond, or deed made by Duresse or Menace, are good in Law, and not meerly void, but voidable only upon a Plea and Tryall.”).

476 See CHITTY, *supra* note 184, at 222–23 (reciting the maxim “[v]igilantibus et non dormientibus succurrunt jura,” *id.* at 223); see also David Kaiser, Comment, *Presumptions of Law and of Fact*, 38 MARQ. L. REV. 253, 253 (1955) (“A *presumption of law* has been defined as a deduction which the *law* expressly directs to be made from particular facts. In actuality it is a *rule of law* which declares that one fact is presumed to exist if another fact or set of facts is proved.”).

477 3 AM. JUR. 2D *Adverse Possession* § 237 (2024).

proper action is taken to avoid the juridical act, the “voidable” juridical act becomes “void” in the first sense.

These two “chameleon-hued words are a peril both to clear thought and to lucid expression” in analyzing what issues make a judgment liable to collateral attack.⁴⁷⁸ As discussed in Section I.B above, the crucial concept here is the legal effect of the judgment, so let’s use the word “void” to describe a juridical act that has no effect on the legal relations of those privy to it, with no further connotations. Let’s use “voidable” to describe a juridical act for which someone has a Hohfeldian “power” to make it void, with no further connotations. For the “further connotations,” let’s incorporate some modifying phrases, albeit with words more familiar to a modern ear.⁴⁷⁹

There are a variety of ways in which a nullity might be analyzed:

Temporal. At what point in time did the juridical act become a nullity? Was it void from the occurrence of the defect (*ex tunc*) or only from the time when the defect was recognized (*ex nunc*)?⁴⁸⁰ Did the occurrence of the defect prevent formation of the juridical act (void ab initio)?

Mechanical. How did the juridical act become a nullity? Was it void by operation of law? Is it only voidable by judicial decree?⁴⁸¹ Even if it is void by operation of law, might the nullity be subject to prescription if not confirmed as such by a judicial declaration?⁴⁸²

Relational. Is the juridical act void as to all parties, or only to certain individuals? If it is only voidable by judicial decree, or if it requires judicial confirmation to avoid prescription, who can seek such judicial action?⁴⁸³

The historical authorities help guide us towards what aspects of nullity matter for the habeas inquiry. It was a fundamental maxim that

478 Hohfeld, *supra* note 113, at 29.

479 To accomplish this, we can draw from the analogous body of law in civilian jurisprudence—a time-honored tradition for common lawyers. Cf. Walther Hug, *The History of Comparative Law*, 45 HARV. L. REV. 1027, 1039 (1932) (“[B]oth Glanville and Bracton were interested in and made use of the civil law . . . [as] a means for developing the English legal system.”).

480 See REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 680 (1990); Nikolaos A. Davrados, *A Louisiana Theory of Juridical Acts*, 80 LA. L. REV. 1119, 1259–60 (2020).

481 I MARCEL PLANIOL, *TREATISE ON THE CIVIL LAW* 227, 229 (La. State L. Inst. trans., 12th ed. 1939); accord 6 BACON, *supra* note 68, *66–67; Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2232 (1985).

482 As Professor Scalise notes, traditional civilian thought treats prescription as an essential quality of an “absolute nullity,” but that is “too simplistic” a way of looking at the subject. Ronald J. Scalise Jr., *Rethinking the Doctrine of Nullity*, 74 LA. L. REV. 663, 715, 709, 709–13 (2014).

483 Cf. *id.* at 678–83 (noting that both absolute nullities and relative nullities can be either unilaterally or multilaterally void/voidable).

a writ of habeas corpus will not act as a substitute for a writ of error.⁴⁸⁴ Some commentators have interpreted that maxim to mean that the conclusions of law made by the sentencing court must be given deference, either partial or complete.⁴⁸⁵ But rather than being a statement about the standard or scope of review, it appears that this maxim was a statement about the power of courts to affect the legal relations of the parties before them.

As Professor A.J. Bellia has explained, “Each form of proceeding carried with it unique procedural incidents, *a particular form of relief*, and specific forms of judgment and execution.”⁴⁸⁶ To say that a writ of habeas corpus will not be made a substitute for a writ of error is to say that the habeas court does not have the power to *vacate* the judgment underlying commitment—it only has power to *recognize* that the judgment is void and set it aside. In this way, a court’s power to review judgments on habeas is not altogether dissimilar to a court’s power to review a statute or final agency action.⁴⁸⁷ Habeas courts could give relief only to prisoners held under void judgments because a writ of habeas corpus was not the form of process “due” for relieving prisoners held under voidable ones.⁴⁸⁸ In other words, the vector of nullity we are concerned with is mechanical: Is the judgment void by operation of law or by some external exercise of power (such as a pardon)? If so, then postconviction relief is available.

B. *Limitations on the Writ Worth Reconsidering*

In a supposed effort to be faithful to the writ’s historic office, the Supreme Court has crafted a number of “equitable and prudential” limitations on when a prisoner may get habeas relief.⁴⁸⁹ In truth, that’s

484 See, e.g., *Ex parte Reed*, 100 U.S. 13, 23 (1879), *abrogated by* *Brown v. Davenport*, 142 S. Ct. 1510 (2022); *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38, 42–43 (1822).

485 E.g., Forsythe, *supra* note 11, at 1170.

486 Bellia, *supra* note 54, at 784 (emphasis added).

487 Compare HART & SACKS, *supra* note 71, at 174 (“American courts have no general power of control over legislatures. Their power, *tout simple*, is to treat as null an otherwise relevant statute which they believe to be beyond the powers of the legislature, when that is necessary to the correct decision of a case within their jurisdiction.”), and John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REGUL. BULL. 119 (2023) (arguing that 5 U.S.C. § 706(2) did not give federal courts power of vacatur in reviewing final agency action), with 2 HURD, *supra* note 79, at 330 (“[Habeas corpus] is not, strictly speaking, a power of revision, which includes properly the power to affirm or reverse the judgment or order and so establish or destroy it; but a power to arrest the execution of a void judgment or order. It acts directly on the effect of the judgment, to wit, the imprisonment; but only collaterally on the judgment itself.”).

488 See *supra* note 475 and accompanying text.

489 *Brown v. Davenport*, 142 S. Ct. 1510, 1523 (2022) (quoting *Danforth v. Minnesota*, 552 U.S. 264, 278 (2008)). But see David LaRocca, *Two Wrongs Make a Right*, in BAD

a post hoc justification—fashioning extratextual limitations on habeas relief is of a much older vintage, dating back to the 1886 decision of *Ex parte Royall*.⁴⁹⁰

In *Royall*, the petitioner was “held under State process for trial on an indictment charging him with an offence against the laws of the State,” laws which he claimed were “repugnant to the Constitution.”⁴⁹¹ The Court agreed that the federal circuit court had the power to hear the petition and discharge the prisoner, if his claim be proved.⁴⁹² However, the Court affirmed denial of the writ, holding that the circuit court “is not bound in every case to exercise such a power immediately upon application being made for the writ,” and even has discretion to require that the petitioner first seek a writ of error in the state courts before hearing the petition.⁴⁹³

The Court reasoned its holding as follows:

We cannot suppose that Congress intended to compel [the lower federal] courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily and thereupon “to dispose of the party as law and justice require” does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.⁴⁹⁴

This is not a very good interpretation of the statute’s text. In the nineteenth century, the phrase “as law and justice may require” was most frequently used by the Supreme Court in its orders remanding a case back to the court below.⁴⁹⁵ The clearest evidence of its meaning can be seen in *Wilson v. Barnum*, where the last sentence of the Court’s opinion “remanded [the case] to the Circuit Court, to be there

ARGUMENTS: 100 OF THE MOST IMPORTANT FALLACIES IN WESTERN PHILOSOPHY 230 (Robert Arp et al. eds., 2019).

490 *Ex parte Royall*, 117 U.S. 241 (1886).

491 *Id.* at 245, 248.

492 *Id.* at 250.

493 *Id.* at 251, 253.

494 *Id.* at 251 (quoting 1 Rev. Stat. § 761 (1875)).

495 See, e.g., *The Mary Ann*, 21 U.S. (8 Wheat.) 380, 390–91 (1823); *Lord v. Veazie*, 49 U.S. (8 How.) 251, 256 (1850); *United States v. Clark*, 94 U.S. 73, 76 (1877).

proceeded in *as law and justice may require*,”⁴⁹⁶ but the Court’s official order appended to the opinion directed the case to be “remanded to the said Circuit Court, to be proceeded in *according to law*.”⁴⁹⁷

Given this phrase’s established meaning, it should be understood as an invitation not to invent limitations and barriers to relief on the writ in pursuance of some vague notion of “justice,” but to dispose of the petitioner “*ex debito justitiae*,”⁴⁹⁸ just as courts had been disposing of habeas petitioners since prior to the Founding.⁴⁹⁹ As Justice Jackson once said, “[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken”⁵⁰⁰ Given this history, all that phrase should be understood to mean is that a habeas court should “do entire justice, so far as [it] can, to the prisoner, by placing him in the precise position in which, under the law, he ought to be placed.”⁵⁰¹

As for *Royall*’s second justification, one might well be skeptical of whether this can fairly be deemed “interpretation” rather than the Court inserting its policy preferences into the statute—indeed, I myself harbor such skepticism. But to play devil’s advocate, there was at least a similar practice in a few state courts when hearing petitions of prisoners held under color of federal law, and perhaps the Court was reading that practice into the backdrop of the common law against which Congress was legislating.⁵⁰² That may well justify the doctrine of not issuing the writ while the trial was ongoing, which was the actual issue decided in *Royall*. But I struggle to see why comity requires the prisoner to seek a writ of error in the state judiciary before seeking habeas corpus from the federal courts. As Bator put it, “[I]f a job can be well

496 *Wilson v. Barnum*, 49 U.S. (8 How.) 258, 262 (1850) (emphasis added).

497 *Id.* (emphasis added).

498 *Cf.* A LAW GRAMMAR, *supra* note 91, at *498 (explaining that when a remedy is “a matter of right,” it is something “which the subject may demand *ex debito justitiae*,” and contrasting that with a remedy that is “merely a matter of favour,” *id.* at *497–98).

499 Like a writ of mandamus, habeas corpus was considered “a writ of right,” but not “a writ of course,” meaning that the court could refuse to grant the petition where no probable ground for relief was shown, but once that showing was made, the court was bound to grant the writ as a matter of course. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 4–7 (1980); *Bell v. Pike*, 53 N.H. 473, 474–75 (1873) (discussing mandamus); *State v. Whitaker*, 19 S.E. 376, 376–77 (N.C. 1894) (contrasting habeas with prohibition); *see also* Lee Kovarsky, *The New Negative Habeas Equity*, 137 HARV. L. REV. 2222, 2237 (2024) (interpreting this phrase similarly).

500 *Morissette v. United States*, 342 U.S. 246, 263 (1952).

501 *In re Sullivan*, 5 R.I. 27, 28 (1857) (crafting a remedy in light of the statutory directive “to dispose of the party brought before [it] on *habeas corpus*, ‘as law and justice shall require’”).

502 *See* 2 HURD, *supra* note 79, at 175, 190–97.

done once, it should not be done twice.”⁵⁰³ If Congress provided the option to have the federal courts do that job, then it seems like state prisoners may choose whichever forum they think will do the job best.

In any case, the exhaustion-of-state-remedies doctrine is now codified at 28 U.S.C. § 2254(b), so unless that can be deemed a “suspension” of the writ, it is too late in the day to debate whether the precise holding of *Royall* was correct. But to the extent that the other limitations on the writ are following in *Royall*'s footsteps,⁵⁰⁴ it is worth reconsidering whether these doctrines should apply to claims of error that would void a judgment.

1. Procedural Default

The doctrine of procedural default applies whenever someone brings a claim on habeas that they failed to timely raise in the direct proceedings. In such cases, the habeas court will not pass on the claim unless the petitioner can show cause and prejudice worthy of excusing the default.⁵⁰⁵

Like many of the judicially crafted limitations on habeas, procedural default bears a resemblance to a traditional equitable defense—in this case, laches.⁵⁰⁶ “Unreasonable delay in asserting one’s rights calls forth reliance on the part of others. The danger is that the delay may be deliberate, that is, opportunistic.”⁵⁰⁷ Indeed, the current version of this doctrine was created out of a concern that a less strict rule “may encourage ‘sandbagging’ on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off.”⁵⁰⁸

That justification admittedly has a certain appeal. But current doctrine goes too far. For one thing, it should not apply to *all* claims where the prisoner failed to raise the issue in accordance with a state procedural rule.⁵⁰⁹ Certain jurisdictional issues can neither be waived

503 Bator, *supra* note 2, at 451.

504 *Cf.* *Withrow v. Williams*, 507 U.S. 680, 716–18 (1993) (Scalia, J., concurring in part and dissenting in part).

505 *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977).

506 *But cf.* Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 NW. U. L. REV. 139, 152–53 (2014) (“[T]he procedural default doctrine bears a kinship to the traditional equitable defense of unclean hands.” *Id.* at 152.).

507 Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1128 (2021) (discussing the related maxim “[e]quity aids the vigilant and diligent”).

508 *Sykes*, 433 U.S. at 89.

509 *Contra* *Engle v. Isaac*, 456 U.S. 107, 129 (1982).

nor forfeited.⁵¹⁰ Constitutional rights “intended for the security and benefit of the individual,” by contrast, “may [generally] be waived and relinquished.”⁵¹¹ The traditional rule, however, is that “every reasonable presumption should be indulged against [their] waiver.”⁵¹² Constitutional rights may also be forfeited.⁵¹³ A right that cannot be waived likewise cannot be forfeited, “but the converse is not true.”⁵¹⁴

Courts assessing procedural default should be cognizant of these differences. Where the jurisdictional defect cannot be waived, the doctrine of procedural default should not apply. If a defendant waived their rights “without any inducement from the government,”⁵¹⁵ that waiver ordinarily should foreclose consideration of the issue. The same should be true where the right is forfeited by wrongdoing.⁵¹⁶ For waiver induced by government negotiation and for forfeiture by inadvertence, current doctrine is fine, albeit perhaps unduly strict.

Finally, given procedural default’s equitable origins, a claim of default should be subject to equitable defenses like unclean hands.⁵¹⁷ In certain ways, current doctrine does take this into account, allowing for “some interference by officials” to constitute cause.⁵¹⁸ But the government should also be estopped from taking advantage of a defendant’s failure to timely assert their rights when it itself blew procedural deadlines, either in the course of direct proceedings or in defending against collateral attack. “Between equal equities the law will prevail.”⁵¹⁹ And as a general matter, habeas courts should be more attuned to the possibility of the government looking to score a windfall by operation of procedural default. Equity has historically served to combat opportunism by sophisticated actors against less sophisticated parties.⁵²⁰ It seems like an inversion of principles for an “equitable” doctrine to so strongly

510 See, e.g., *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 126 (1804); *Nelson*, *supra* note 59, at 1605 n.223 (collecting cases).

511 *United States v. Gibert*, 25 F. Cas. 1287, 1316 (C.C.D. Mass. 1834) (No. 15,204) (Davis, J., concurring).

512 *Hodges v. Easton*, 106 U.S. 408, 412 (1882).

513 See, e.g., *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (citing *Reynolds v. United States*, 98 U.S. 145, 158–59 (1879)).

514 *Freytag v. Comm’r*, 501 U.S. 868, 895 n.2 (1991) (Scalia, J., concurring in part and concurring in judgment).

515 Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 804 (2003).

516 “The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts.” *Reynolds*, 98 U.S. at 158; see also *Smith*, *supra* note 507, at 1123–25 (“Equity will not allow a wrongdoer to profit from his own wrong.” *Id.* at 1123.).

517 See *Smith*, *supra* note 507, at 1127–28.

518 *Amadeo v. Zant*, 486 U.S. 214, 222 (1988) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

519 *Smith*, *supra* note 507, at 1119.

520 *Id.* at 1076–77, 1089.

favor “the richest, most powerful, and best represented litigant[s]” of each respective jurisdiction.⁵²¹

2. Inadequacy of § 2255 Motions

As discussed above, the primary mechanism for postconviction relief for federal prisoners comes by § 2255 motion, a motion which is made to “the court which imposed the sentence.”⁵²² Generally speaking, that procedure acts as a preclusive substitute for writs of habeas corpus for federal prisoners unless “the remedy by motion is inadequate or ineffective to test the legality of his detention.”⁵²³

“Traditionally, courts have treated [this] clause as covering unusual circumstances in which it is impossible or impracticable for a prisoner to seek relief from the sentencing court,” such as when that court has since been dissolved, or when the prisoner is detained at a location inordinately far away.⁵²⁴ It also has been held to apply where “a prisoner challenges ‘the legality of his *detention*’ without attacking the validity of his *sentence*.”⁵²⁵ History tells us another circumstance where this clause should apply: when the sentencing court held that it had jurisdiction over the petitioner’s objections to the contrary.

The reason why a § 2255 motion is “inadequate or ineffective” to relitigate claims of a want of jurisdiction can be seen by reference to the historical justification for why a court’s finding that it has jurisdiction should not be given preclusive effect: “[A]ll courts are so far judges of their own privileges, . . . but to make them, or any court, final judges of them, exclusive of every body else, is to introduce a state of confusion, by making every man judge in his own cause, and subverting the measures of all jurisdictions.”⁵²⁶ Or as was more expansively explained in 1836:

The constitutions of judicial tribunals are to be carefully distinguished from those laws which are made for the enlarging, defining or circumscribing the rights and liabilities of individuals constituting the community, over which the powers of legislation are

521 Cf. *Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of rehearing en banc)).

522 28 U.S.C. § 2255(a) (2018).

523 *Id.* § 2255(e).

524 *Jones v. Hendrix*, 143 S. Ct. 1857, 1866 n.2, 1866–67 (2023).

525 *Id.* at 1867.

526 *Yates v. People*, 6 Johns. 337, 469 (N.Y. 1810) (quoting *R v. Paty* (1704) 91 Eng. Rep. 431, 431; 2 Salk. 503, 504); see also *Baude*, *supra* note 43, at 1848 (suggesting as a resolution to the “bootstrapping” conundrum that “[j]urisdiction [should be treated as] a legal question settled by final judgment like any other, except that a court’s judgment cannot conclusively resolve its jurisdiction *in that very case*,” *id.* at 1846, 1848).

exercised. From the former, a court derives its existence, its mode of being, and the essential qualities of its nature. They confer upon it its powers, define its jurisdiction, and limit its capacity. In expounding these fundamental laws, in which its judges have, if not a personal, yet an official interest, it can claim no right to bind the conscience or control the judgment of any other tribunal, not subordinate, before which the question may arise, whether its construction and judgment were right or wrong. It must be resolved by looking at the law itself.⁵²⁷

This rule has a certain common sense appeal. If someone has asserted a right to do something, they should not be the final judge over whether their actions are lawful. By that same token, why should one have to make an official complaint to that person before one can seek review of that person's actions, particularly when one protested the actions when they were being made?

This is all the more true when one considers that the § 2255 motion is reviewed by the judge whose actions are being challenged.⁵²⁸ For certain claims that may come up on § 2255 motion, having a judge familiar with the record review the claim “is highly desirable” when that claim concerns highly fact-bound issues that don't concern the judge's conduct, such as ineffective assistance of counsel and *Brady* violations.⁵²⁹ It is likewise desirable to have a judge intimately familiar with the record hear the motion when that judge would be bound by vertical stare decisis to find differently. But absent some information not available to the judge when she made her initial determination that she had jurisdiction, what is the point of forcing the petitioner to go before her and make the same claim again?

In most cases, judges should fairly be “assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.”⁵³⁰ But “judges, however stalwart, are human.”⁵³¹ “Human error there is bound to be, judges being men and women, and men and women being what they are.”⁵³² It is one thing to presume impartiality when a judge has to pass on acquittal when she has already found probable cause, or to hear and decide the same case after having been reversed on appeal.⁵³³ A rational individual might change her mind when she is presented with new information, whether that information be the

527 *Voorhees v. Jackson*, 35 U.S. (10 Pet.) 449, 452 (1836) (arguments of counsel).

528 *See* 28 U.S.C. § 2255 app. r. 4(a) (2018).

529 *Id.* § 2255 app. r. 4 advisory committee's note (2018) (quoting *Carvell v. United States*, 173 F.2d 348, 348–49 (4th Cir. 1949)) (giving the reason behind the rule).

530 *United States v. Morgan*, 313 U.S. 409, 421 (1941).

531 *Pennekamp v. Florida*, 328 U.S. 331, 357 (1946) (Frankfurter, J., concurring).

532 *Furman v. Georgia*, 408 U.S. 238, 468 (1972) (Rehnquist, J., dissenting).

533 *See Withrow v. Larkin*, 421 U.S. 35, 56–57 (1975).

full and complete telling of the facts or the authoritative interpretation of the law. But to change one's mind based on the same facts and the same legal arguments is just as likely to be an irrational, arbitrary decision as it is to be a rational, open-minded one. Indeed, "like treatment under like circumstances" is a basic requirement of fair-minded decisionmaking.⁵³⁴ It is a "fundamental maxim of jurisprudence" that "[t]he law does not require the doing of a futile act."⁵³⁵ Returning to the same judge with the same claim making the same arguments on the same facts with the hopes of getting a different decision is the definition of futility. In such cases, a § 2255 motion is inadequate for the purposes of reviewing detention.

3. Nonretroactivity of Constitutional Rules

The idea that Supreme Court precedent creates "new rules" of constitutional law is a distinctly modern notion.⁵³⁶ If the measuring stick for the legitimacy of limitations on habeas relief is whether they cohere with the traditional practice, then *Teague* fails to measure up.

That may be conclusive reasoning for some. But things are a bit more complicated than that. For one, *Teague* has more or less been codified in 28 U.S.C. § 2254(d), so for this limitation to fall, there would need to be something constitutionally impermissible about it. Moreover, even if § 2254(d) is unconstitutional, *Teague* is different from the other limitations in that it is a doctrine of stare decisis as much as it is a doctrine of habeas.

Full treatment of the constitutional permissibility of § 2254(d) and *Teague* is a subject beyond the scope of this Article. Still, their application to void judgments presents a different set of constitutional issues than their application under modern doctrine, so it is worthwhile giving a brief sketch of why these doctrines should be reconsidered.

Section 2254(d) raises two constitutional problems. The first is that it raises a problem under Section 5 of the Fourteenth Amendment. As the Court said in *City of Boerne v. Flores*, "Congress' power under § 5, however, extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment. . . . Congress does not enforce a constitutional right by changing what the right is. It has been given the power

534 *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (Roberts, J.).

535 Brent E. Newton, *An Argument for Reviving the Actual Futility Exception to the Supreme Court's Procedural Default Doctrine*, 4 J. APP. PRAC. & PROCESS 521, 522, 523 n.8 (2002) (first quoting *Mehrtash v. Mehrtash*, 112 Cal. Rptr. 2d 802, 805 (Cal. Ct. App. 2001); and then quoting *Ohio v. Roberts*, 448 U.S. 56, 74 (1980)).

536 *See Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 106–08 (1993) (Scalia, J., concurring).

‘to enforce,’ not the power to determine what constitutes a constitutional violation.”⁵³⁷

Under § 2254(d)(1), Congress provides that federal courts hearing a habeas petition “on behalf of a person in custody pursuant to the judgment of a State court” shall give preclusive effect to “any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”⁵³⁸ If the claim of federal right would render a judgment void, this provision has the practical effect of dictating to the habeas court the legal content of the Constitution—the federal court is forbidden from treating the judgment as void unless it would have been under “clearly established Federal law”⁵³⁹ at the time of the state court adjudication. This is hardly any different from the provision of the Religious Freedom Restoration Act found unconstitutional in *City of Boerne*, which had the express purpose of restoring free exercise doctrine to what it was prior to *Employment Division v. Smith*.⁵⁴⁰

The other problem with § 2254(d) is in the same vein. Insofar as it “undertak[es] to validate a judgment of a court which was void for want of jurisdiction,” § 2254(d) is unconstitutional as “an attempted exercise of judicial power by the legislature” and a violation of the Due Process Clause.⁵⁴¹ There is little question that had Congress passed a law saying that Henry Montgomery’s sentence of life without parole was valid, that statute would have been unconstitutional. That would be no different from a statute transferring title of person A’s property to person B.⁵⁴² But does that principle still hold true when Congress legislates with general application and prospective effect?

As for *Teague*, if it is merely an interpretation of the habeas corpus statutes, then it should be overturned as a misinterpretation of “as law and justice may require.” But *Teague* is arguably a species of stare decisis—a doctrine of “federal common law, or as it was once called, general law.”⁵⁴³ “From the standpoint of historical practice, there is nothing extraordinary about the idea that precedents might generate

537 *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

538 28 U.S.C. § 2254(d)(1) (2018).

539 *Id.*

540 See 42 U.S.C. § 2000bb (1993) (announcing a purpose to overturn *Emp. Div. v. Smith*, 494 U.S. 872 (1990)), *invalidated by City of Boerne*, 521 U.S. 507.

541 1 BLACK, *supra* note 79, § 218, at 266.

542 *Cf. Harrison, supra* note 93, at 518 (“The A-to-B law is the archetypal legislative deprivation and always has been.”).

543 Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 59 & n.208 (2015) (quoting John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 505 (2000)).

legitimate reliance interests, or that those interests might sometimes cause a federal court to continue drawing rules of decision from a precedent that the court now believes to be wrong.”⁵⁴⁴ Indeed, the relevance of reliance interests can be clearly seen in *Edwards*, the most recent application of *Teague*: as the majority noted, “[A]pplying *Ramos* retroactively would potentially overturn decades of convictions obtained in reliance on *Apodaca*.”⁵⁴⁵

Like other forms of prospective overruling, *Teague* differs from traditional *stare decisis* concerns in that it “treats reliance interests in a (slightly) more fine-grained way,” considering them on a “transaction-by-transaction” basis rather than “precedent-by-precedent.”⁵⁴⁶ Moreover, because *Teague* applies on collateral review only, it is a form of “selective prospectivity,” albeit one that is less ad hoc than the practice sworn off in *Harper v. Virginia Department of Taxation*.⁵⁴⁷ *Teague* is also problematic in that it is one-sided—its application only favors the government, never the prisoner.⁵⁴⁸ If a state court misapplied binding Supreme Court precedent in a way that favored the state, and then the Supreme Court overturned that precedent prior to final adjudication on the prisoner’s habeas petition, should that prisoner go free? If one feels like that would be a miscarriage of justice, then should one not feel the same way about *Teague*?

It is one thing to justify *Teague* as a doctrine of second best, in that it “move[s] the law as close as possible to the outcomes [one’s] legal theory would dictate, in light of what other judges and institutions will do.”⁵⁴⁹ But if *Teague* is leading to results that would not be justified under the historic office of the writ, then it should be discarded.

CONCLUSION

As the Supreme Court has repeatedly recognized, habeas corpus and due process are intrinsically linked.⁵⁵⁰ What the Court has missed, however, is what “due process of law” actually entails. The Due Process Clauses do not merely require that the procedures prescribed by positive law are followed when a person is deprived of life, liberty, or

544 *Id.* at 60.

545 *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021).

546 Nelson, *supra* note 543, at 60.

547 *See Harper v. Va. Dep’t of Tax’n*, 509 U.S. 86, 97 (1993).

548 *Cf. Harrison*, *supra* note 543, at 541 (“Problematic exercises of the power over precedent are those in which the legislature is acting in order to influence results and not for systemic reasons.”).

549 *Cf. Adrian Vermeule, Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 60 (2009) (describing the “strategic legalist judge,” *id.* at 59–60).

550 *See, e.g., Fay v. Noia*, 372 U.S. 391, 402 (1963); *Brown v. Davenport*, 142 S. Ct. 1510, 1520 (2022).

property; rather, they demand that all such deprivations be done “by a legal authority,” typically someone acting under the authorization of a lawfully given court order.⁵⁵¹ The grounds of inquiry on habeas corpus, therefore, are (1) the existence of authorization for the commitment, (2) the validity of such authorization, and (3) the present legal force of such authorization.⁵⁵² But the variety of subsidiary issues that may arise on any one of these three grounds is much broader than many realize.

The Supreme Court departed from the framework of nullity in *Brown v. Allen*. That was a mistake. But the ultimate result—providing relief for a broader class of constitutional claims on habeas—was not wholly illegitimate. If we are to return the writ to its historic office, we should be careful not to hastily discard all the developments that followed the modern departure.

551 R v. Paty (1704) 92 Eng. Rep. 232, 234; 2 Ld. Raym. 1105, 1109 (opinion of Powys, J.); Crema & Solum, *supra* note 14, at 462.

552 See *supra* subsection III.A.1.