The Body Snatchers: How the Writ of Habeas Corpus was taken from the People of the United States

Joshua J Schroeder
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Joshua J. Schroeder, J.D.

INTRODUCTION: THE PROBLEM OF JUDICIAL INFIDELITY

The Great Writ, known as habeas corpus (meaning “produce the body”), exists to vindicate due process as a matter of overarching and superintending judicial power. Habeas corpus is thus “founded in natural justice, in honesty and right, . . . which properly arises ex aequo et bono,” and is granted “as a matter of right, ex merito justitiae.” And due process expounded by habeas corpus review “answers precisely to the definition of justice, or natural law, as given by Justinian in the

* Dedicated to Joseph Angel Ureño; through faith and perseverance all things are possible.
** The capitalization, spelling, and punctuation of some source quotations have been modernized.

1 Leyra v. Denno, 347 U.S. 556, 561–62 (1954); Fay v. Noia, 372 U.S. 391, 402–03 (1963) (“Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man’s imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office. . . . History refutes the notion that until recently the writ was available only in a very narrow class of lawless imprisonments.”). See also Ex parte Young, 209 U.S. 123, 168 (1908) (“In some of the cases the writ has been refused as matter of discretion; but in others it has been granted, while the power has been fully recognized in all.”) (Emphasis added).

2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1 (13th ed., 1886) [hereinafter STORY, EQUITY]; Fay, 372 U.S. at 438 (habeas corpus is “governed by equitable principles”).

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1335 [hereinafter STORY, CONSTITUTION].
This is so because due process is rooted in equity as a fundamental law of the land. Equity is right judgment and fundamentally produces justice. When justice is not found in a judicial determination, its inequity is revealed and is thus liable to be overturned.
as an imprudent decision made beyond the Court’s power.\(^7\) Essentially, habeas corpus is a writ to review the facts underlying criminal determinations de novo in civil court for their equity in order to release any person who has been unjustly committed to prison.\(^8\)

The controlling precedent to date regarding habeas review is *Boumediene v. Bush*, which held that “prudential barriers . . . are not relevant here.”\(^9\) The Court decided to ignore cases that “involved federalism concerns” for they too are prudential and “are not relevant here.”\(^10\) Furthermore the *Boumediene* Court refused “to hold that the present [habeas] cases turn on the political question doctrine.”\(^11\) Thus, with prudential concerns set aside, habeas corpus is revealed as a writ of sheer equity.\(^12\) This indicates that the court’s power to issue writs of habeas corpus is exactly coeval with its basic and fundamental equitable power.\(^13\) As a result, federal courts should issue habeas corpus within and without the United States liberally, without fear, in order to

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\(^7\) Kastely, *supra* note 6, at 8, 14–15 (Justice is discovered through a “purposive evaluation that can be conducted only through persuasive discourse” after a law is made public. “Discourse thus is crucial to the practice of discovering and pursuing justice in law.” And finally: “Despite our diverse commitments, we are connected as a community in so far as we have law and a shared desire for justice.”). *Cf.* Vanhome’s Lessee v. Dorrance, 2 U.S. 304, 308 (1795) (laws “made against natural equity” are void).

\(^8\) *STORY, CONSTITUTION, supra* note 3, at § 1333; Ex parte Watkins, 28 U.S. 193, 202 (1830); Ex parte Randolph, 20 F. Cas. 242, 251 (C.C.D. Va. 1833) (No. 11,558) (Opinion of Barbour, Dist. J.) (“void process is the same thing as if there were none at all”), and at 254 (Opinion of Marshall, C.J.) (“We must not view the statement or certificate of the account as a judgment, or the warrant which coerces payment, as judicial process.”). See *Fay v. Noia*, 372 U.S. 391, 440 (1963) (“[T]he availability of the Great Writ of habeas corpus in the federal courts for persons in the custody of the States offends no legitimate state interest” and ensures that prisoners may “eventually win their freedom by means of federal habeas corpus.”).


\(^10\) *Boumediene*, 491 U.S. at 793.

\(^11\) *Id.* at 755.

\(^12\) *Id.* at 780 (“Habeas ‘is, at its core, an equitable remedy.’”) (quoting *Schlup v. Delo*, 513 U.S. 298, 319 (1995)).

\(^13\) *See* *STORY, EQUITY, supra* note 2, at § 1341a, n.1 (“I think there would be no difficulty in showing, that the power . . . to issue a habeas corpus is not derived solely from the statute, but is also an inherent power in the court, derived from the common law.”) (internal quotation marks omitted) (quoting *The People v. Mercein*, 8 Paige Ch. 47, 55, 56 (N.Y. Ch. 1839) (Opinion of Chancellor Walworth)); *STORY, CONSTITUTION, supra* note 3, at § 1333 (“This writ is most beneficially construed; and is applied to every case of illegal restraint, whatever it may be . . . .”), and at § 1335 (“the common law was deemed by our ancestors a part of the law of the land, brought with them upon their emigration”).
vindicate due process wherever the court has jurisdiction.14 And the equitable power, as habeas corpus review reveals, should be wielded liberally to wholly overturn unjust cases based in English feudalism that violate the Rule of Law.15

The Rule of Law is the fundamental requirement that the laws are applied equally, to each person, regardless of their race, gender, sexual orientation, state citizenship, station, beliefs, wealth, property ownership, or any other distinguishing factor.16 The concept of the Rule

14 Story, Constitution, supra note 3, at § 1333 (“This writ is most beneficially construed; and is applied to every case of illegal restraint, whatever it may be . . . .”); Ex parte Milligan, 71 U.S. 2, 122 (1866) (“One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.”).
15 Chisholm v. Georgia, 2 U.S. 419, 458 (1793) (Opinion of Wilson, J.) (The Rule of Law is the opposite of the feudal concept “that all human law must be prescribed by a superior.”); Frederick Douglass, The Fifth of July Speech (July 5, 1852) (“The right of the hunter to his prey stands superior to the right of marriage, and to all rights in this republic, the rights of God included! For black men there is neither law nor justice, humanity nor religion.”). See, e.g., Brown v. Board of Education, 347 U.S. 483, n.13 (1954) (noting the duty to decide the shape of the Court’s “equity powers” in order to chart a course to alleviate the injustice perpetrated by racial segregation in public schools. Brown and other Warren Court cases, however, are of limited use because they merely abrogated unjust cases only in certain circumstances, for example: “We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”) (abrogating Plessy v. Ferguson, 163 U.S. 537 (1896)). But does “separate but equal” have a place elsewhere? Apparently so. Plessy remains good law outside of the field of public education.
16 Marbury v. Madison, 5 U.S. 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men.”). See Susan B. Anthony, Address of Susan B. Anthony (1872), in An Account of the Proceedings on the Trial of Susan B. Anthony on the Charge of Illegal Voting at the Presidential Election in Nov., 1872, at 151, 178 (1874) [hereinafter Anthony, Address] (the Rule of Law is the notion that all people are “equals before the law” so that no one can be above the law); John Adams, A Defence of the Constitutions of Government of the United States of America, Letter III (1787) [hereinafter Adams, A Defence] (“In America . . . all are equal by law and by birth” incident to the sovereignty of the people.); Mass. Const. pt. I, art. XX (1780) (instituting the separation of powers in order to secure the Rule of Law); U.S. Const. art. I, II, & III, amend. XIV (promising the equal protection of the laws); Nixon v. Administrator of General Services, 433 U.S. 425, 484–86, n.1 (1977) (Stevens, J., concurring) (The due process of the laws yields to the Rule of Law recognized by the equal protections clause even if a single person is appealing to due process to make themselves above the law. Such a person is “a legitimate class of one.” Not even presidential privileges can raise someone above the law. Thus the Rule of Law is paramount. As Justice Stevens recounted, establishing President Nixon as a “legitimate class of one” was required in order to avoid punishing Nixon as the Seventeenth Century English Parliament punished unpopular Lords—with Bills of Attainder and Pains and Penalties. The absurdity of Bills of Attainder, which traditionally accompanied impeachment proceedings, was showcased during the debates over whether to impeach the Earl of Danby.) (citing The Earl of Carnarvon’s remarkable Speech (1678), in 4 The Parliamentary History of England 1073–74 (1808)); United States v. Burr, 25 F. Cas. 55 (C.C.D. Va. 1807) (No. 14,694) (The Rule of Law also shields each
of Law is ancient. And it was an explicit and essential part of the founding U.S. social compact. The infidelity of the Supreme Court to the founding principle of the Rule of Law ultimately led to the bloody and costly Civil War. Expressly in order to overturn antebellum judicial decisions that violated the Rule of Law—each which scandalously conceded feudal sovereignty to the states—the Thirteenth, Fourteenth, and Fifteenth Amendments were created to ensure a rebirth

person from being singled out by people empowered by the government, including the President. The same presidential privileges (in both Nixon and Burr, the privilege of keeping presidential papers secret) cannot be used to steal the rights of due process from someone. If presidential papers are not produced in the course of a public trial and they contain evidence essential to procure a sentence of guilt, then the case must be dismissed, or jury instructions must be tailored for the protection of the accused, or else the Court will fall down on its duty to check the powers of a President attempting to place himself above the law.)

17 See, e.g., JAMES WILSON, 1 THE WORKS OF JAMES WILSON i (1804) (From the inscription on the title page: “Legum omnes servi sumus, ut liberi esse possimus.”) (quoting Cicero, Pro Cluentio 53.146 (“We are all slaves to the law so that we might be free.”)).

18 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (The Declaration’s reference to “the Consent of the Governed” as the sovereign font of government power, was meant to be inclusive of the whole American people so that each governed individual is rightfully placed under the Rule of Law); Chisholm v. Georgia, 2 U.S. 419, 458 (1793) (Opinion of Wilson, J.) (Wilson argued against the feudalistic principle of the Rule of Men “that all human law must be prescribed by a superior”—instead asserting that the Americans proclaimed the powers of government subject to the consent of the governed and formed a government where the law would be prescribed by equals under the law. Wilson suggested that the source of the principle he was contending against was likely William Blackstone, the author of the Commentaries); James Otis, A Vindication of the British Colonies 6, 27 (1769) [hereinafter Otis, Vindication].

19 The Taney Court exemplified a judicial arbitrariness that sped the nation into Civil War: Compare Dred Scott v. Sandford, 60 U.S. 393, 469, 484–85, 487–90 (1857) (declaring the Missouri Compromise in Justice Grier’s words “unconstitutional and void” even though it was already repealed by Congress in order to treat a black man differently from everyone else—in fact the Court announced the equality of nations to establish the inequality of human beings) (nullifying The Missouri Compromise (1820)), and Ableman v. Booth, 62 U.S. 506, 526 (1858) (showing clear favor to pro-slavery laws by declaring the Fugitive Slave Act of 1850 constitutional even after the declaring the Missouri Compromise unconstitutional in order to overrule the State of Wisconsin’s issuance of habeas corpus in order to treat black folk differently from everyone else) (impliedly nullifying the JUDICIARY ACT OF 1789, ch. 20, §14, 1 Stat. 73), with Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (Opinion of Chief Justice Taney, riding circuit) (using § 14 of the Judiciary Act to issue habeas corpus in order make it impossible for the Lincoln Administration to arrest John Merryman before trying him for treason, and so that even a treasonous and dangerous white man would have the benefit of habeas corpus even to the extreme of making it impossible to charge him with a crime when it is precluded to even the most peaceful and virtuous black man to end his enslavement). Cf. Abraham Lincoln, Amnesty for All Political or State Prisoners, (Feb. 14, 1862) (“Every department of the government was paralyzed by treason,” including “the Federal courts.” Lincoln was perhaps referring to Chief Justice Taney’s refusal to hear the treason case against Merryman and departing from Chief Justice Marshall’s example in United States v. Aaron Burr.).
of the U.S. founding principles. One of these principles given new birth was the Rule of Law, which the Equal Protection Clause expressly recognized. The distinctly American rebirth of the Rule of Law commanded that the natural right of self-defense against slavery be extended to each individual in the United States equally.

The liberal availability of the writ of habeas corpus, which reveals the full scope of the Court’s equitable power in order to uphold due

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20 President Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863), available at http://avalon.law.yale.edu/19th_century/gettyb.asp (“Fourscore and seven years ago our fathers brought forth on this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal . . . . [T]his nation under God shall have a new birth of freedom, and that government of the people, by the people, for the people shall not perish from the earth.”); U.S. Const. amends. XIII, XIV, XV (these amendments pursued the ideals of the Declaration of Independence namely natural human liberty, equality, and that just powers of government only come from the consent of the governed by abolishing slavery, establishing the equal protection of the laws, and extending the right to vote to everyone regardless of “race, color, or previous condition of servitude”). See Ex parte Wilson, 114 U.S. 417, 424, 427–29 (1885) (invoking the Thirteenth Amendment to reinvigorate the U.S. social compact).

21 U.S. Const. amend. XIV. See Mass. Const. pt. I, art. XXX (1780) (this section reveals that Rule of Law was the very purpose of the Separation of Powers, which was adopted into the U.S. Constitution from the start); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, n.27 (1952) (Jackson, J., concurring) (the Rule of Law was cited as the purpose of asserting the judicial power against the other branches of government). Cf. Plato, *Laws* 4.715d (“Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.”); Aristotle, *Politics* 3.16 (“it is more proper that law should govern than any one of the citizens”); Cicero, Pro Cluentio 53.146 (“We are all slaves to the law so that we might be free.”).

22 The Declaration of Independence para. 2 (U.S. 1776) (Human beings are naturally created equal, and because the U.S. government does not abrogate that natural equality by its government form and instead endeavors to secure these natural rights as the primary end of government, human beings were meant to retain their natural equality before the law.). Compare John Dickinson & Thomas Jefferson, *A Declaration by the Representatives of the United Colonies of North-America, Now Met in Congress at Philadelphia, Setting Forth the Causes and Necessity of Their Taking Up Arms* (1775), available at http://avalon.law.yale.edu/18th_century/arms.asp#b2 [hereinafter Declaration of Self-Defense] (In later years, the African American slaves continued to “exhibit to mankind the remarkable spectacle of a people attacked by unprovoked enemies [i.e., white Southerners], without any imputation or even suspicion of offence. They [i.e., the Southerners] boast[ed] of their privileges and civilization, and yet proffer[ed] no milder conditions than servitude or death.”), with President Abraham Lincoln, *The Emancipation Proclamation* (Sept. 2, 1862) (in force on Jan. 1, 1863) (“I hereby enjoin upon the people so declared to be free to abstain from all violence, unless in necessary self-defence.”). Cf. The Continental Congress, *Declaration of Rights and Grievances* para. 20 (Oct. 14, 1774) (accusing Britain of creating “a system formed to enslave America”).
process of the laws, was a thinking decision made by the framers. Due process of the laws, in turn, ensured fidelity with the United States’ original stand against tyranny as a matter of self-defense. Self-defense, as the founders understood it, was a natural right of the highest order. The very legitimacy of the American Revolution itself hung upon the natural right of each human being to defend him or herself from bodily harm and enslavement in order to establish and reestablish liberty and peace. Thus upon habeas corpus a presumption of freedom arises on

23 *The Federalist* Nos. 83, 84 (Alexander Hamilton); *Ex parte Bollman*, 8 U.S. 75, 95 (1807) (Hamilton noted that the 14th section of the Judiciary Act was created “under the immediate influence of” the Suspension Clause because Congress “must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give, to all the courts, the power of awarding writs of habeas corpus.”); U.S. Const. art. I, § 9, cl. 2 & art. III. See generally John Adams, *Thoughts on Government* (1776) (The U.S. Separation of Powers included that the Judiciary be totally separated from the Legislature in order that our Republics follow the Rule of Law which is the idea that the law should be equally applied to every individual without political interests getting in the way.).

24 Martin v. Hunter’s Lessee, 14 U.S. 304, 381–82 (1816) (Opinion of Johnson, J.) (“under a liberal extension of the writ of injunction and the habeas corpus ad subjiciendum, I flatter myself that the full extent of the constitutional revising power may be secured to the United States, and the benefits of it to the individual”).

25 Declaration of Self-Defense, supra note 22 (The Americans were of “one mind resolved to die freemen rather than to live as slaves.”); John Adams, Diary (Mar. 5, 1773), in 2 THE WORKS OF JOHN ADAMS 317 (1850) (Saying of his successful defense of the soldiers that perpetrated the Boston Massacre arguing that they did so in self-defense: “It was, however, one of the most gallant, generous, manly, and disinterested actions of my whole life, and one of the best pieces of service I ever rendered my country. Judgment of death against those soldiers would have been as foul a stain upon this country as the executions of the quakers or witches anciently.”). *Cf.* HENRY LOUIS GATES, JR., THE TRIALS OF PHILLIS WHEATLEY 20–21 (2003) (attributing a poem on the Boston Massacre immortalizing the names of the Boston citizens including Crispus Attucks who were shot down by the red coats and showing a split of opinion among the Americans over the events of the massacre that appeared in the Boston Evening-Post on March 12, 1770 to Phillis Wheatley).

26 See Letter from Benjamin Banneker to Thomas Jefferson (Aug. 19, 1791) (Noting that “the present freedom and tranquility which you enjoy you have mercifully received... is the peculiar blessing of Heaven.”); James Otis, *The Rights of the British Colonies* 9, 43–44 (1764) [hereinafter Otis, *The Rights*] (Otis said that “the delectable state of nature” is that which includes the “natural equality and liberty of mankind.” Otis continued: “The Colonists are by the law of nature free born, as indeed all men are, white or black.” Then Otis made it abundantly clear that African Americans were included in the Revolution’s struggle against slavery saying: “It is a clear truth, that those who every day barter away other mens liberty, will soon care little for their own.” Otis decried the enslavement of African people as “a shocking violation of the law of nature” such that it “makes every dealer in it a tyrant, from the director of an African company to the petty chapman in needles and pins on the unhappy coast.” This, of course, was required. A people cannot, without unbearable irony, wage a revolution against slavery without including slaves in that struggle. Otis cited directly to
behalf of every person committed in the United States to hold this natural right of self-defense sacrosanct.27

For example in his boisterous speech of March 23, 1775 Patrick Henry announced that the American contest against England was “nothing less than a question of freedom or slavery.”28 Then Henry vociferously announced his allegiance to freedom, saying that if he consented to the enslavement of Americans: “I should consider myself as guilty of treason towards my country, and of an act of disloyalty toward the Majesty of Heaven, which I revere above all earthly kings.”29 With his fellow Revolutionaries Henry proclaimed: “An appeal to arms and to the God of hosts is all that is left us!”30 And finally Patrick Henry made a ringing proclamation which would come to define the Revolution: “Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God! I know not what course others may take; but as for me, give me liberty or give me death!”31

Cf. Baron de Montesquieu, 1 The Spirit of the Laws 5–6 (1748) (Montesquieu was certainly aligned with the Americans on the fundamentals, though his tone was a bit different from that of the American Revolutionary: “Man in a state of nature . . . would feel nothing in himself at first but impotency and weakness; his fears and apprehensions would be excessive . . . In this state, every man, instead of being sensible of his equality, would fancy himself inferior: there would, therefore, be no danger of their attacking one another; peace would be the first law of nature.”); U.S. CONST. pmbl (the preamble points back to the U.S. social compact, noting that the purposes of ordaining the constitution included securing the peace and liberty of individuals).

27 See, e.g., John Quincy Adams, Transcript of Oral Argument at 43, United States v. The Amistad, 40 U.S. 518 (1841), available at http://avalon.law.yale.edu/19th_century/amistad_002.asp [hereinafter Quincy Adams, The Amistad] (“Is there a law of Habeas Corpus in the land?”). See The Amistad, 40 U.S. at 561, 595 (based upon the idea that “all men are presumed to be free,” centering this presumption upon the idea that “it can never be presumed that either state intends to provide the means of perpetrating or protecting frauds.”) (overruling The Antelope 23 U.S. 66, 118 (1825) (This case pitifully adopted the presumption of slavery from Le Louis in which Sir Walter Scott flatly stated: “It is pressed as a difficulty . . . what is to be done if a French ship laden with slaves is brought in. I answer without hesitation, restore the possession which has been unlawfully devested.”) (quoting Le Louis [1817] 2 Dodson 210, 255 (Eng.) (Opinion of Sir William Scott))).


29 Id.
30 Id.
Meanwhile a black woman slave named Phillis Wheatley became the undoubted U.S. national poet during the Revolution.32 Phillis Wheatley’s poem *America* captured the sentiment of the Revolutionaries when she said: “Thy Power, O Liberty, makes strong the weak / And (wond’rous instinct) Ethiopians speak . . . O Britain See / By this New England will increase like thee.”33 And again in her *Liberty and Peace*:

*Perish that Thirst of boundless Power, that drew

*On Albion’s Head the Curse to Tyrants due.

*But thou appeas’d submit to Heaven’s decree,

*That bids this Realm of Freedom rival thee.*34

Thereby Phillis Wheatley announced the founding principles of the United States: “To every Realm shall *Peace* her Charms display, / And Heavenly *Freedom* spread her golden Ray.”35 These principles of natural peace and liberty were hotly contested by William Blackstone who was convinced, as was John Locke, that human nature was war and property.36 Thus England’s tree of liberty was choked at the root by

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32 John C. Shields, *Phillis Wheatley’s Struggle for Freedom in her Poetry and Prose*, in *PHILLIS WHEATLEY, THE COLLECTED WORKS OF PHILLIS WHEATLEY* 240 (John Shields ed., 1988) (“Wheatley’s straightforward and forceful political poems chronicle with dutiful loyalty important moments of the American Revolution and should grant her recognition as certainly the most ardent female poet of the Revolution, if not” the Revolution’s “most prominent poetic defender[].” Shields leaves open the to the reader’s choice to favor Phillip Freneau as a Revolutionary and national poet on par with Wheatley, but during the most important moments of the Revolution he was off in the West Indies writing about the beauty of nature and even his political poetry does not seem to claim the title of national poet. In contrast, Wheatley’s poetry emphatically does.). See generally Gates, supra note 25.


34 Phillis Wheatley, *Liberty & Peace* (1784), reprinted in *WHEATLEY*, supra note 32, at 154–56 [hereinafter Wheatley, *Liberty & Peace*] (Wheatley fought against the principles of the English Crown which were the exact opposite—warfare and therefore feudal slavery.).

35 *Id.;* Shields, supra note 32, at 240 (In this couplet “Wheatley has captured, perhaps for the first time in poetry, America’s ideal mission to the rest of the world, a mission which the country pursues now with the most profound sense of duty and urgency in its two hundred years of participation in world affairs.”). Cf. HANNAH ARENDT, ON REVOLUTION 213 (1963) [hereinafter ARENDT, REVOLUTION] (“For the Greek word for beginning is ἀρχή, and ἀρχή means both beginning and principle.”); HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 479 (1951) [hereinafter ARENDT, THE ORIGINS] (“that a beginning be made man was created”) (quoting St. Augustine, *De Civitate Dei*, 12.20)).

36 JOHN LOCKE, TWO TREATISES OF GOVERNMENT, Second Treatise § 87 (1690); 1 WILLIAM BLACKSTONE, COMMENTARIES **94, 103 (“Thus were this brave people gradually conquered into the enjoyment of true liberty; being insensibly put upon the same footing, and made fellow-citizens with their conquerors.”); Wheatley, *Liberty & Peace*, supra note 34
conquest,\textsuperscript{37} and it has therefore always been the case in England that the only protection for liberty is the acquisition of property from the conquering King.\textsuperscript{38}

Sir William Blackstone rejected the natural human right of self-defense as an absurdity asserted by “over-zealous republicans” that would produce anarchy “equally fatal to civil liberty, as tyranny itself” and concluded therefore that “the king is irresistible and absolute.”\textsuperscript{39} But Blackstone was refuted by the sheer reality of the American Revolution—because the assertion of self-defense in 1776 did not end in anarchy but in the birth of the United States.\textsuperscript{40} The king too was proved to be resistible and finite.\textsuperscript{41} Eventually Blackstone’s royal gambit was also overruled by the Supreme Court in \textit{Chisholm v. Georgia} as an absurd violation of the Rule of Law.\textsuperscript{42} But from the beginning, as the English oppressed the Americans, John Adams argued in colonial court that the colonists “had a Right to resist” legalized civil forfeiture and

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\item \textsuperscript{37} Sir Henry Vane the Younger, \textit{A Healing Question} \textsuperscript{4–5} (1660) [hereinafter Vane, \textit{Healing Question}] (After perhaps the first exposition of a Tree of Liberty, Vane expounded that the problem with England is that “there be never so many fair branches of liberty planted on the root of a private and selfish interest” and thus “they will not long prosper, but must, within a little time, wither and degenerate into the nature of that whereinto they are planted. And hence indeed sprung the evil of that Government which rose in and with the Norman conquest. The root and bottom upon which it stood, was not public interest, but the private lust and will of the Conqueror, who by force of arms did at first detain the right and freedom which was, and is, due to the whole body of the people: For whose safety and good, government itself is ordained by God, not for the particular benefit of the rulers, as a distinct and private interest of their own.”).
\item \textsuperscript{38} Otis, \textit{The Rights}, supra note 26, at 10, 21 (Otis thus repudiated James Harrington’s \textit{The Commonwealth of Oceana} (1656) because it based the British government’s power upon property. Otis drew a line between himself and Harrington and concluded: “It will never follow from all this, that government is rightfully founded upon property, alone.”).
\item \textsuperscript{39} 1 WILLIAM BLACKSTONE, \textit{COMMENTARIES} *251.
\item \textsuperscript{40} John Quincy Adams, \textit{Speech on Independence Day} (July 4, 1821), available at http://teachingamericanhistory.org/library/document/speech-on-independence-day/ [hereinafter Quincy Adams, \textit{Independence Day}] (“[T]here was no anarchy. From the day of the Declaration, the people of the North American union, and of its constituent states, were associated bodies of civilized men and christians, in a state of nature, but not of anarchy.”).
\item \textsuperscript{41} Id.
\item \textsuperscript{42} Chisholm v. Georgia, 2 U.S. 419, 458 (1793) (Opinion of Wilson, J.) (describing this structure as “the English maxim, that the King or sovereign is the fountain of justice” which supports the false idea “that all human law must be prescribed by a superior” instead of through “CONSENT of those, whose obedience they require”), at 471 (Opinion of Jay, C.J.), and at 450 (Opinion of Blair, J.).
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impressment upon the sea.\textsuperscript{43} Instead of a nation driven by racial privilege, conquest, and property ownership the United States was founded upon the ideal that human beings could simply live in the shelter of each other’s happiness.\textsuperscript{44}

The doctrine of feudal sovereignty pretended to ground itself in the British Common Law, but it was actually pure infidelity to the English Common Law and fundamental British equity.\textsuperscript{45} It mutilated the prudential doctrine of sovereign immunity by appropriating the natural right of self-defense by using it to justify a state of absolute warfare allegedly to defend the corporation of the Crown.\textsuperscript{46} And finally it obstructed Heaven’s Justice by declaring that “the King or sovereign is


\textsuperscript{44} \textit{The Declaration of Independence} para. 2 (U.S. 1776) (declaring the natural rights of “Life, Liberty, and the Pursuit of Happiness” and that when “any Form of Government becomes destructive of these Ends” the people have a right to repeal it and establish a new government “in such Form, as to them shall seem most likely to effect their Safety and Happiness.”). \textit{Cf.} Story, \textit{Constitution, supra note 3}, at § 215; James Wilson, \textit{Considerations on the Nature and Extent of the Legislative Authority of the British Parliament} (1774) (“the happiness of the society is the first law of every government” and arguing for a limited legislature so that the “first maxims of jurisprudence are ever kept in view—that all power is derived from the people—that their happiness is the end of government”).

\textsuperscript{45} Vane, \textit{Healing Question, supra note 37}, at 4–5.

\textsuperscript{46} \textit{Id.} See \textit{Chisholm}, 2 U.S. at 447 (Iredell, J., dissenting) (“The King, accordingly, in England is called a corporation.”). \textit{Cf. Michael Walzer, Regicide and Revolution 72, 74 (1974) [hereinafter Walzer, \textit{Regicide}]} (the French Revolutionaries in the political party known as The Mountain led by Robespierre also made this blunder when they instituted Terrorism as a government policy); Luther v. Borden, 48 U.S. 1, 46 (1849) (The Taney Court unconstitutionally justified Rhode Island’s declaration of martial law “for the purposes of self-defense” and thus allowed the state militia to utterly violate Martin and Rachel Luther’s constitutional rights under the Third, Fourth and Fifth Amendments—and of course turned a blind eye to Rhode Island’s violation of their fundamental, natural human right of self-defense.).
the fountain of Justice.” Justice Blair wisely declared in response: “The Constitution of the United States is the only fountain from which I shall draw; the only authority to which I shall appeal.” Thus the U.S. written constitution is a bulwark against such bombastic claims that justice itself could flow from mere mortals acting above the law and incident only to the fact that they wore crowns and carried orbs, scepters and owned other bobbles.

Forgetting the omnipotence of God, secular authors like Michael Walzer have taken feudal license to another level, and are willing to appropriate self-defense as a “domestic analogy” to justify a ruler’s part in orchestrating mass terror killings merely by publicly dissociating himself with the terrorism perpetrated by his agents. Walzer singularly focused on the national dissociation of Sir Arthur Harris by the Crown’s refusal to honor such a terrorist with a high feudal title of peerage, which confers the right to sit in Parliament. Such an abominable mechanism that facilitates government run terror can only exist to justify the oxymoron of feudal sovereignty, which fundamentally legitimizes slavery and warfare according to a manmade self-defense or self-preservation of the state corporation. Basing sovereignty upon the

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47 Chisholm, 2 U.S. at 458 (Opinion of Wilson, J.). Cf. 1 WILLIAM BLACKSTONE, COMMENTARIES **266, 270–71.
48 Chisholm, 2 U.S. at 450 (Opinion of Blair, J.). See also Chisholm, 2 U.S. at 471 (Opinion of Jay, C.J.).
49 Marbury v. Madison, 5 U.S. 137, 177 (1801); Otis, The Rights, supra note 26, at 59 (thus the founders concluded that “infallibility belongs not to mortals”). Cf. Cicero, De Legibus 1.15.43 (“nature is . . . the foundation of justice”).
50 MICHAEL WALZER, JUST AND UNJUST WARS 58, 113, 324 (1977) [hereinafter WALZER, JUST] (Walzer noted that Churchill was correct, and even just, in his self-justification of the terror bombings of Dresden by simply dishonoring Sir Arthur Harris, who led the attacks—Walzer truly believes that Justice is won simply by preserving the national corporation at whatever cost of human life and without regard to the natural law. His misappropriation of the right to self-defense is set forth as such: “Nations have similar rights in international society, above all the right not to be ‘blotted out,’ deprived forever of sovereignty and freedom.” According to Walzer, apparently the nation as a corporate entity has sovereignty and a right to self-defense but not individual, natural people.).
51 Id.
52 Id. But see ROGER WILLIAMS, THE BLOODY TENENT OF PERSECUTION FOR CAUSE OF CONSCIENCE 137 (1644) [hereinafter WILLIAMS, BLOODY] (Williams was the first to proclaim in writing that “the sovereign, original, and foundation of civil power, lies in the people.”); Vane, Healing Question, supra note 37, at 4–5 (Walzer’s idea of a nation’s self-defense cannot be reconciled with Vane’s idea of sovereignty which resides “in the whole body of the people”); Otis, The Rights, supra note 26, at 17 (agreeing with Sir Henry Vane the Younger and Roger Williams that the supreme sovereign power resides “in the whole body of the people,” as a matter of God’s omnipotent choice) (emphasis in the original); Chisholm, 2 U.S. at 419, 457, 459 (Opinion of Wilson, J.) (Justice Wilson noted that the “league between
institution of slavery is an oxymoron because sovereignty is defined as the freedom opposite of slavery.\(^{53}\) Thus the way Walzer and the feudalists define sovereign immunity is exactly the opposite of the actual definition of sovereign immunity.\(^{54}\)

Actual sovereign immunity is a “voluntary decision . . . to respect the dignity of” a fellow nation according to the Law of Nations’ principles of comity and grace.\(^{55}\) This voluntary decision is traditionally recognized by judges in the interest of keeping promises and preserving peace.\(^{56}\) Even the Eleventh Amendment, which allowed the states to avoid federal jurisdiction in order to break their promises with out of state creditors, was ratified explicitly “because it might be essential to the preservation of peace.”\(^{57}\) It is a “universal principle of interpretation” that “cessante legis prœmio, cessat et ipsa lex”—thus when the purposes of a constitutional provision exceed the purposes of the constitution it “abrogates itself.”\(^{58}\) In contrast, neither of these objectives of keeping the bar and feudal barbarism” in England was “rude and degrading.” Thus in England “sovereignty is derived from a feudal source, and, like many other parts of that system so degrading to man, still retains its influence over our sentiments and conduct, though the cause by which that influence was produced never extended to the American states.”); Thomas Paine, Common Sense 75–79 (1776) [hereinafter Paine, Common] (Paine said “that William the Conqueror was an usurper is a fact not to be contradicted.” Paine conceded, however, that a sovereign people long suffering under the tyranny of a usurper always consent to it at some point in the past as the people of Israel did: “Nevertheless the people refused to obey the voice of Samuel, and they said. Nay, but we will have a king over us, that we may be like all the nations, and that our king may judge us, and go out before us and fight our battles. . . . WE HAVE ADDED UNTO OUR SINS THIS EVIL, TO ASK A KING. These portions of scripture are direct and positive.”) (quoting 1 Samuel 10–12).

\(^{53}\) Aristotle, Politics I.6, I.8, I.12; Chisholm, 2 U.S. at 472 (Opinion of Jay, C.J.) (“Sovereignty is the right to govern; a nation or State sovereign is the person or persons in whom that resides . . . here, it rests with the people . . . our Governors are the agents of the people, and, at most, stand in the same relation to their sovereign in which regents in Europe stand to their sovereigns.”).

\(^{54}\) WALZER, JUST, supra note 50, at 58, 113, 324.


\(^{56}\) Id. (interpreting federalism with the “prevailing notions of comity”) (citing The Schooner Exchange v. McFaddon, 11 U.S. 116, 138, 147 (1812) (recognizing that comity and grace are exercised in the interest of peace. There is an “implied promise that while necessarily within it and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.” This is so “because all sovereigns impliedly engage not to avail themselves of a power over their equal which a romantic confidence in their magnanimity has placed in their hands.”)).


\(^{58}\) STORY, CONSTITUTION, supra note 3, at §§ 459–60 n.1 (“cessante legis prœmio, cessat et ipsa lex”) (citing Chisholm, 2 U.S. at 457 (Opinion of Jay, C.J.)); Corbit’s Case, supra note 43 (John Adams expounded an American and non-feudalistic theory about statutory construction for the express purpose of avoiding an arbitrary construction: “It is a good rule, to consider the title of an act, in order to ascertain its construction and operation in
promises or preserving peace was furthered by giving form to the King’s sovereign immunity against suits brought by his subjects. Instead of giving form to the King’s sovereign immunity against suits brought by his subjects, martial law and absolute warfare were established.

Following the American Revolutionary tradition the Boumediene v. Bush Court rejected feudal sovereign immunity and properly asserted itself as a visible sovereignty to correct cases “where the underlying detention proceedings lack the necessary adversarial character.” The Supreme Court unflinchingly stepped in to protect the natural rights of foreign, non-citizens being held indefinitely, incommunicado at the U.S. military base in Guantanamo Bay, Cuba. Unfortunately, even in the face of such a decision of the Supreme Court to vindicate due process, the Court released many decisions after Boumediene that abdicated the Court’s duty to expound due process in domestic cases involving U.S. citizens, both criminal and civil. Failing to expound due process in all respects.”; Funk v. United States, 290 U.S. 371, 385 (1933) (The maxim that *cessante ratione legis, cessat ipsa lex* “means that no law can survive the reasons on which it was founded. It needs no statute; it abrogates itself.”) (internal quotation marks omitted) (quoting Beardsley v. City of Hartford, 50 Conn. 529, 542 (1883)); Fox v. Snow, 6 N.J. 12, 22 (1950) (per curiam) (Vanderbilt, C.J., dissenting) (“*cessante ratione legis, cessat et ipsa lex* (the reason for the law ceasing, the law itself ceases”) (citing Beardsley, 50 Conn. at 542); Milborn’s Case [1609] 7 Coke 7a (Eng.) (Opinion of Lord Coke) (“*Ratio legis est anima legis, et mutate legis ratione, mutatur ex lex*” (the reason for a law is the soul of the law, and if the reason for a law has changed, the law is changed)).

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59 Hall, 440 U.S. at 416. See also Chisholm, 2 U.S. at 457, 459 (Opinion of Wilson, J.) (Justice Wilson noted that the “league between the bar and feudal barbarism” in England was “rude and degrading.” Thus in England “sovereignty is derived from a feudal source, and, like many other parts of that system so degrading to man, still retains its influence over our sentiments and conduct, though the cause by which that influence was produced never extended to the American states.” Thus in order to keep promises and preserve peace (objectives that encompass the very purposes furthered by observing comity and grace) federal jurisdiction was powerfully exercised over Georgia.).

60 See, e.g., WALZER, JUST, supra note 50, at 323–25 (justifying terror bombings perpetrated by England—and inviting the United States to justify its nuclear bombing of Hiroshima based on the same principle, according every nation’s right not to be “blotted out”).

Cf. John Adams, Copy of the Information and Draft of His Argument, Court of Vice Admiralty, Boston, Oct. 1768—Mar. 1769, in JOHN ADAMS, 2 LEGAL PAPERS OF JOHN ADAMS 199, available at https://www.masshist.org/publications/apde2/view?id=ADMS-05-02-02-0006-0004-0002 [hereinafter Hancock’s Case] (It is an emanation of the “arbitrary power [that] sits upon her brazen throne and governs with an iron scepter” which the American Revolutionaries vigorously rejected.); Chisholm, 2 U.S. at 457, 458 (Opinion of Wilson, J.) (It is a violation of the Rule of Law based upon “[t]he principle is that all human law must be prescribed by a superior.”).

61 Boumediene v. Bush, 553 U.S. 723, 791 (2008). See Vane, Healing Question, supra note 37, at 16 (a Supreme Court is meant to be a “visible sovereignty”).

62 Boumediene, 553 U.S. at 732–34.

cases involving U.S. citizens threatens to render meaningless the very due process the Court endeavored to preserve for foreign persons captured by U.S. agents abroad.\footnote{64 See Tuaua v. United States, 788 F.3d 300, 304–05 (D.C. Cir. 2015) (decided as if the dissents in \textit{Boumediene} prevailed) (citing Dred Scott v. Sandford, 60 U.S. 393, 404–05 (1857)), \textit{cert. denied}, 136 S. Ct. 2461 (2016). \textit{Cf. Boumediene}, 553 U.S. at 801 (Roberts, C.J., dissenting), and at 838–39 (Scalia, J., dissenting) (The Court’s dissenters did not seem to perceive \textit{Dred Scott’s} formative influence over the analysis of the \textit{Insular Cases} as the standard limit upon the extension of Due Process and other lesser rights to people living in the so-called unincorporated territories.); Campbell v. Hall [1774] 1 Cowp. 204, 211–12 (Eng.) (\textit{Tuaua, Dred Scott, and Downes} should be overruled for adopting the same position that the House of Lords did in \textit{Campbell}, which was candidly overruled by the American Revolution and the Declaration of Independence.). \textit{But see} Marbury v. Madison, 5 U.S. 137, 176–77 (1803) (“The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. . . . Between these alternatives there is no middle ground.”).}

However, the Court’s very assertion of habeas jurisdiction in \textit{Boumediene} indicates that the Supreme Court has the power to properly
expound justice for all persons regardless of prudential or political concerns. In fact the Court declared its opinion as one in search of “fidelity to freedom’s first principles.” This fidelity, the Court announced, is whence “the judicial authority to consider petitions for habeas corpus relief derives.” Accordingly, the Supreme Court reasserted its age old prerogative to protect all persons “from arbitrary and unlawful restraint,” which spells death to “the personal liberty that is secured by adherence to the separation of powers.”

This article seeks to further expound the role of habeas corpus in securing the Court’s “fidelity to freedom’s first principles.” Part I of this article sets forth a statutory construction of the AEDPA, expounds the common law of habeas corpus under the Suspension Clause, and presents a jurisdictional test for impermissible advisory statements that should be vigorously wielded in future cases to remedy judicial infidelity arising from feudalism. Part II responds to recent attempts to redefine the Court’s prudential interests to undermine de novo review, demonstrates how habeas corpus fulfills its fundamental role of ensuring the supremacy and uniformity of federal laws, and finally makes a great return to the objects of the U.S. social compact which includes the role of habeas corpus in vindicating the sovereignty and dignity of each natural human being within the jurisdiction of the U.S. Courts.

PART I: FEUDALISM TAKES FORM IN AMERICA

English feudalism infiltrated U.S. Courts through two roots. First, sovereign immunity feudalism, or the absolute immunity of the state

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65 Boumediene, 553 U.S. at 791.
66 Id. at 797.
67 Id.
68 Id.
69 Boumediene, 553 U.S. at 797.
70 Estep v. United States, 327 U.S. 114, 141 (1946) (Frankfurter, J., concurring) (“Habeas corpus ‘comes in from the outside,’ after regular proceedings formally defined by law have ended, ‘not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.’”) (quoting Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting)); Falbo v. United States, 320 U.S. 549, 561 (1944) (Murphy, J., dissenting) (“The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution.”).
71 Chisholm v. Georgia, 2 U.S. 419, 455–56 (1793) (Opinion of Wilson, J.) (Both of these forms of feudal immunity are “perversions” that only differ from the other in degree.). See Luther v. Borden, 48 U.S. 1, 43–47 (1849) (hiding these perversions in the shadows of hypothetical evils to solve hypothetical problems). Compare Ashcroft v. Al-Kidd, 563 U.S.
corporation, was reawakened through *Hans v. Louisiana*’s insertion of sovereign immunity equity jurisprudence into its interpretation of the Eleventh Amendment by mere implication. Second, qualified immunity feudalism, or the absolute immunity of the government official, was inserted into the U.S. equity jurisprudence in suits arising from former President Nixon’s illegal acts. Both of these perversions of equity are closing in on federal habeas corpus jurisdiction regardless of express statutory text to the contrary. And finally, like a curtain drawn around them, the *Luther v. Borden* political question doctrine shrouds both in penumbra.

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72 *Hans v. Louisiana*, 134 U.S. 1, 10–15 (1890) (relying on Justice Iredell’s analysis of “the old law” which is feudalism) (citing *Chisholm*, 2 U.S. at 437–45 (1793) (Iredell, J., dissenting)). *See 1 WILLIAM BLACKSTONE, COMMENTARIES *243 (suits against the King arise in equity and are heard only as a matter of grace because of the controlling maxim that the king can do no wrong). *But see Ex parte Yerger*, 75 U.S. 85, 105 (1868) (“Repeals by implication are not favored.”).


74 Compare *Armstrong*, 135 S. Ct. at 1385–86 (creating a formal bar to *Ex parte Young* jurisdiction), with *Ayala*, 135 S. Ct. at 2198 (using *Harlow’s* objective reasonableness standard to fashion another feudal bar to habeas jurisdiction). *See Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003) (the phrase “clearly established law must be objectively unreasonable” awkwardly imports the common law standard for absolute Presidential immunity originating from *Harlow* into the AEDPA to abrogate alternative grounds for jurisdiction in the statute’s text).

75 *Luther v. Borden*, 48 U.S. 1, 43–47 (1849) (using the political question doctrine to block federal courts from upholding the constitutional guarantee of “a republican form of government” and turning a blind eye to the feudal sovereign immunity of Rhode Island when it declared martial law during time of peace under its feudal English charter in order to essentially give feudal qualified immunity to Rhode Island’s officers when they violated Rachel and Martin Luther’s Third, Fourth and Fifth Amendment rights).
It is worth noting that in *Nixon v. Fitzgerald* and *Harlow v. Fitzgerald* the facts closely resemble those of *The Bankers Case*.\(^{76}\) Only what occurred over many years from 1677–96 in England happened in a matter of days in America.\(^{77}\) In *The Bankers Case*, King Charles II gave his sovereign word that he would repay the debts he took out “to stop the gaps produced by his profligate life and reckless commitments.”\(^{78}\) But years later he reneged on his promise.\(^{79}\) His creditors finally approached the Court of Exchequer with their “Letters Patent under the Great Seal, for granting the Annuity or Sum.”\(^{80}\) But Lord Somers declared “it was not enough” and that “no Treasure is, or can be issued out of the Receipt, without such a Warrant under the Great or Privy Seal.”\(^{81}\) “The King Himself” must issue such a warrant, regardless of all former promises and great seals and receipts and letters patent.\(^{82}\) The King must also make his warrant under the Great or Privy Seal—other forms of royal warrants are not enough.\(^{83}\)

To reach this conclusion Somers had to pit the King whose most fundamental power is to collect taxes, against his Barons who are the tax collectors of the kingdom.\(^{84}\) Thus in English Courts feudalism presents two layers of inquiry.\(^{85}\) First as to the King, he is untouchable according

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\(^{76}\) Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) (granting the President “absolute immunity from damages liability predicated on his official acts”), and at 766–67 (White, J., dissenting) (“It is a reversion to the old notion that the King can do no wrong.”); The Bankers Case [1696] 14 How. St. Tr. 1, 32 (Eng.) (Opinion of Lord Somers).

\(^{77}\) Compare Thomas Turnor, *The Joyful News of Opening the Exchequer to the Gold-Smiths of Lombard Street, and their Creditors* 7–8 (May 7, 1677) (King Charles II officially accepting responsibility for his debts), and The Bankers Case [1696] 14 How. St. Tr. 1, 32 (Eng.) (Opinion of Lord Somers) (The Court denying jurisdiction to pay out the King’s debts based on his sovereign immunity and the nicety of feudal form), with *Nixon*, 457 U.S. at 737 (“At a news conference on January 31, 1973, . . . Mr. Nixon took the opportunity to assume personal responsibility for Fitzgerald’s dismissal. . . . A day later, however, the White House press office issued a retraction of the President’s statement.”).


\(^{79}\) Id.

\(^{80}\) The Bankers Case [1696] 14 How. St. Tr. 1, 32 (Eng.) (Opinion of Lord Somers).

\(^{81}\) Id. at 32–33.

\(^{82}\) Id. at 57.

\(^{83}\) Id. at 58.

\(^{84}\) Murray’s Lessee v. Hoboken Land Improvement, Co., 59 U.S. 272, 282 (1856) (citing Coke, 4 *Institutes* 115).

\(^{85}\) Id.; Vinogradoff, *supra* note 78, at 352–53 (“the sword of justice is suspended over the heads of the acting officer, while the Crown or State remains immune in principle, though it may sometimes grant assistance to its servants by way of grace”) (citing Tobin v. The Queen [1864] 16 CB (NS) 310, 353–57 (Eng.)).
to the equitable maxim that “the King can do no wrong.”\textsuperscript{86} And second as to the Barons, they can do wrong but are covered by the King’s immunity if he allows it “by way of grace.”\textsuperscript{87} The Barons are also simply powerless to remedy royal wrongs.\textsuperscript{88} And, as in Sir Treby’s opinion in \textit{The Bankers Case}, the Court will shield the government and its ministers solely based upon empty claims of state necessity arising from hypothetical facts and hypothetical dilemmas emanating out of sheer judicial cowardice and caprice.\textsuperscript{89} This is how feudal sovereign and qualified immunity functions to block suits against the government and its ministers.\textsuperscript{90} The first U.S. Supreme Court candidly and forcefully overruled this entire branch of English equity jurisprudence in the United States in \textit{Chisholm v. Georgia}.\textsuperscript{91}

Similarly to King Charles II’s assumption of liability regarding his creditor’s claims, President Nixon proudly “assume[d] personal responsibility for Fitzgerald’s dismissal” saying: “It was a decision that was submitted to me. I made it and I stick by it.”\textsuperscript{92} Then a day later “the White House press office issued a retraction of the President’s statement.”\textsuperscript{93} In both \textit{The Bankers Case} and \textit{Nixon} the question was

\textsuperscript{86} Vinogradoff, \textit{supra} note 78, at 352–53 (citing Tobin v. The Queen [1864] 16 CB (NS) 310, 353–57 (Eng.)).

\textsuperscript{87} \textit{Id.}

\textsuperscript{88} \textit{The Bankers Case} [1696] 14 How. St. Tr. 1, 53–54 (Eng.) (Opinion of Lord Somers) (they are “only ministerial”).

\textsuperscript{89} Vinogradoff, \textit{supra} note 78, at 351 (“Suppose the king be indebted to the petitioners, and also to the army, the fleets, &c. Now who shall direct the payment of these debts, the barons, or the treasurer? Who is the best judge of the state of the kingdom, and of its necessities? So that suppose there was only 4000£ in the exchequer, and we were threatened with a foreign invasion, how shall this money be disposed? Says the treasurer, to raise men to pay the army and our fleets, that by their assistance we may prevent the enemy from coming amongst us. No, say the barons, we must pay the bankers with this money, though at the same time we open the gates, and let in Hannibal to our utter ruin and destruction.”) (internal quotation marks omitted) (quoting \textit{The Bankers Case} [1696] 14 How. St. Tr. 1, 26 (Eng.) (Opinion of Sir Treby)).

\textsuperscript{90} See, e.g., Luther v. Borden, 48 U.S. 1, 46 (1849) (approving of “the declaration of martial law by the legislative authority of the State, made for the purposes of self-defence”).

\textsuperscript{91} \textit{Chisholm v. Georgia}, 2 U.S. 419, 437–45 (1793) (Iredell, J., dissenting) (quoting large portions of Lord Somers’ opinion in \textit{The Bankers Case} and contending that actions against a state should only lie as “a matter of grace, and not on compulsion”—but Justice Iredell’s early attempt to extend this line of feudal sovereign immunity to the United States was vigorously overruled by the rest of the Court), at 465 (Opinion of Wilson, J.), at 451 (Opinion of Blair, J.) (“no State in the Union should, by withholding justice, have it in its power to embroil the whole Confederacy in disputes of another nature”), at 468 (Opinion of Cushing, J.), and at 475–78 (Opinion of Jay, C.J.).


\textsuperscript{93} \textit{Id.}
whether the President or King would be held to their word. 94 Like the King in *The Bankers Case*, the *Nixon* Court gave the President absolute immunity and allowed him to break his word.95 As a result, like the Barons in *The Bankers Case*, the *Harlow* Court granted the President’s “wicked ministers” qualified immunity and they were relieved of liability as well.96

Of course, the “absolute immunity” granted to a former, disgraced President is still a form of qualified immunity that only matches the King’s sovereignty by analogy.97 As the Court held in *Nixon v. Administrator of General Services*, the President may still be drawn into court as “a legitimate class of one.”98 He or she is thus merely the first minister sworn to “preserve, protect and defend the Constitution of the United States,” the written constitution being the chosen instrument of the people’s sovereignty as a whole.99 Though the *Fitzgerald* cases’ treatment of the President and his ministers are analogous to the King and his Barons neither *Fitzgerald* case amounts to the full-fledged feudal sovereignty of the Crown.100 To reach that level of feudal infidelity in America one must look to *Hans v. Louisiana.*101

Nevertheless the *Fitzgerald* cases do offer uncanny similarities to the dual operation of feudal sovereign and qualified immunity to shield potentially the entire English government from legal action.102 Sir William Blackstone revealed feudal sovereign and qualified immunity as an oxymoron when he said “no man shall dare to assist the crown in contradiction to the laws of the land,” but at the same time “that the king himself can do no wrong.”103 The effect of this oxymoron is that whenever the King assumes responsibility for the wrongs committed by

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95 *The Bankers Case*, 14 How. St. Tr., at 32–33, 57–58; *Nixon*, 457 U.S. at 737, 749.
96 1 WILLIAM BLACKSTONE, COMMENTARIES **244–46.
97 *Nixon*, 457 U.S. at 749 (it only extends to “damages liability predicated on his official acts”).
99 U.S. CONST. art. II, § 1, cl. 8 (the Presidential Oath of Office).
100 *Nixon*, 457 U.S. at 749; *Harlow*, 457 U.S. at 818.
101 134 U.S. 1, 16 (1890).
102 Cf. Tobin v. The Queen [1864] 16 CB (NS) 310, 353–57 (Eng.).
103 1 WILLIAM BLACKSTONE, COMMENTARIES *244. See Le Louis [1817] 2 Dodson 210, 255 (Eng.) (Opinion of Sir William Scott) (presuming slavery according to the oxymoron of the free trade in human flesh).
any of his ministers, they are covered by the King’s immunity.\(^{104}\) In such cases English Courts must find that wicked men are good.\(^{105}\) However, whenever the King wants he can remove his endorsement from the actions of his wicked ministers.\(^{106}\) In fact he can command them to perpetrate terror and massacres in his name, and then he can disassociate himself from their actions by punishing them.\(^{107}\)

The prosecution of government officials for violating the law of the land was always up to “the King himself” according to the equitable maxim that “the king can do no wrong.”\(^{108}\) This was a system of sheer arbitrariness that arose under a government that was emphatically a Rule of Men.\(^{109}\) It caused turbulent cycles of violence under Bills of Attainder and Bills of Pains and Penalties.\(^{110}\) This system was unequivocally rejected in America as of July 4, 1776—when the U.S. social compact was struck.\(^{111}\) It was expressly precluded by the provisions of the U.S. Constitution.\(^{112}\) And it was totally overruled by the first U.S. Supreme Court.\(^{113}\) Thus it is heralding to witness cycles of feudal jurisprudence resurrected in U.S. Courts out of sheer cowardice.

Ultimately the Court’s decisions in *Bivens v. Six Unknown Fed. Narcotics Agents* and *Baker v. Carr* fell short and obscured the fundamental habeas common law right to bring a *vi et armis* claim against the government.\(^{114}\) The holes in these decisions left the way open

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\(^{104}\) Vinogradoff, *supra* note 78, at 353; Tobin v. The Queen [1864] 16 CB (NS) 310, 353–57 (Eng.).

\(^{105}\) 1 WILLIAM BLACKSTONE, COMMENTARIES *244.*


\(^{107}\) WALZER, *JUST,* *supra* note 50, at 113, 324.

\(^{108}\) *The Bankers Case*, 14 How. St. Tr., at 57–58; Tobin v. The Queen [1864] 16 CB (NS) 310, 353–57 (Eng.).

\(^{109}\) Chisholm v. Georgia, 2 U.S. 419, 458 (1793) (Opinion of Wilson, J.).


\(^{111}\) Nevada v. Hall, 440 U.S. 410, 415, 426 (1979) (citing *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776)).

\(^{112}\) U.S. CONST. art. I, § 9, cl. 2–3, 8, and art. I, § 10, cl. 1–3, and art. IV, § 4.

\(^{113}\) Chisholm v. Georgia, 2 U.S. 419, 437–45 (1793) (Iredell, J., dissenting) (quoting large portions of Lord Somers’ opinion in *The Bankers Case* and contending that actions against a state should only lie as “a matter of grace, and not on compulsion”—but the rest of the Court vigorously overruled Justice Iredell’s early attempt to extend this line of feudal sovereign immunity.), at 465 (Opinion of Wilson, J.), at 451 (Opinion of Blair, J.), at 468 (Opinion of Cushing, J.), and at 475–78 (Opinion of Jay, C.J.). See STORY, *CONSTITUTION,* *supra* note 3, at § 1672.

\(^{114}\) 3 WILLIAM BLACKSTONE, COMMENTARIES *138* (noting that trespass *vi et armis* was the way one sued for false imprisonment); Eric M. Freedman, *Habeas Corpus in Three
for feudalism to rise again. Thus it is no surprise that in a litany of cases spanning across many areas of the law the procedural niceties of feudal sovereign and qualified immunity formality must now be satisfied on habeas review. However, just as feudalism requires, even its “qualified” forms are subterfuge for a blanket formal presumption that state officers and judges are not capable of “an unwise or injurious action.” In fact Attorney General John Ashcroft was granted impunity.


115 Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397–98 (1971) (remanding to the Second Circuit to decide whether “respondents were immune from liability by virtue of their official position”), and at 410 (Harlan, J., concurring) (the Court did nothing to stop Justice Harlan from concluding “the sovereign still remains immune to suit”); Baker v. Carr 369 U.S. 186, 218–21, 225–26 (1962). See Butz v. Economou, 438 U.S. 478, 486 (1978) (extending Bivens qualified immunity to government agents); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (through judicial creep the Court developed an objective reasonableness standard to obstruct de novo review—this ought to be called “absolute” immunity—under the dual prongs of determining (1) whether an officer unreasonably violated (2) a clearly established law.; Zivotofsky v. Clinton, 132 S. Ct. 1421, 1426–30 (2012) (construing Baker as a justification for jurisdiction, and giving rise to the resurrection of cases Baker intentionally abrogated like Luther v. Borden). But see Dr. Bonham’s Case [1610] 8 Co. Rep. 114a, 118a (Eng.) (the vi et armis case that inspired the American Revolution); Ex parte Watkins, 28 U.S. 193, 201, 208–09 (1830) (a case that is found to be coram non judice is “totally void” and “furnishes no protection to the officer who executes it”) (citing Wise v. Withers, 7 U.S. 331, 337 (1806) (a successful federal vi et armis claim against the state militia)).

116 Numerous recent cases turn upon one or both of these prongs, and it seems that the objective reasonableness standard from Harlow has been imported into the Court’s statutory construction of the AEDPA ever since Justice O’Connor’s opinion in Williams v. Taylor. See, e.g., Ayala, 135 S. Ct. at 2198 (the decisive inquiry in this case was whether the trial determination “was contrary to, or involved an unreasonable application of, clearly established Federal law”); Al-Kidd, 563 U.S. at 735 (“(1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.”) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); San Francisco v. Sheehan, 135 S. Ct. 1765, 1775–76 (2015) (citing qualified immunity decision Al-Kidd and habeas decision Lopez v. Smith side by side).

117 1 WILLIAM BLACKSTONE, COMMENTARIES **245–46. See Al-Kidd, 563 U.S. at 735, 743; Tobin v. The Queen [1864] 16 CB (NS) 310, 353–57 (Eng.) (the praecipe actions are controlled by the sovereign immunity maxim that the King can do no wrong so they the action will not lie against the King—it overawes a petition of right) (quoting The Bankers Case [1696] 14 How. St. Tr. 1, 83 (Eng.) (Opinion of Lord Somers)). Cf. STORY, CONSTITUTION, supra note 3, at § 1672 (noting the strict separation of America from England over the issue of sovereign immunity but concluding that “the constitutions, both of the national and state governments, stand in need of some reform, to quicken the legislative action in the administration of justice”).
for locking away U.S. citizens without suspicion for any crime according to feudal immunity.\textsuperscript{118}

In contrast to England, where “[t]he Common Law starts . . . from the well-known maxim ‘The King can do no wrong,’”\textsuperscript{119} the Common Law in America starts from the written maxim that “the Writ of Habeas corpus shall not be suspended.”\textsuperscript{120} In fact as the Americans contended, feudalism entails two degrees of perversion from equity jurisprudence as it was administered before the Norman Conquest and before the English government allowed the King to lock any person away in the Tower of London with impunity.\textsuperscript{121} Seemingly oblivious to this fact, the Supreme Court recently attempted to feign a number of equitable standards while actually effecting a feudalistic denial of jurisdiction.\textsuperscript{122} These standards amount to what seem to be a swarm of \textit{ad hoc} rules the Court only divines when it wants a case to be dismissed.\textsuperscript{123} Arbitrarily applying a presumption of government immunity in this way is irrebuttable feudalism.\textsuperscript{124}

For example, the Court can force petitioners to prove any variation of judge made standards like that the officer or judge was not “plainly


\textsuperscript{119} Vinogradoff, \textit{supra} note 78, at 350.

\textsuperscript{120} U.S. CONST. art. I, § 9, cl. 2.

\textsuperscript{121} Chisholm v. Georgia, 2 U.S. 419, 455 (1793) (Opinion of Wilson, J.).


\textsuperscript{123} See, e.g., Ohio v. Clark, 135 S. Ct. 2173, 2181–82 (2015) (even using the “testimonial” standard from \textit{Crawford} to arbitrarily exclude a whole class of testimony based on the speaker’s age to justify denying an accused’s right to face one’s accusers—it is almost as if the Court is saying that children are not people and cannot bear testimony like animals, or like the African Americans under the Fugitive Slaves Law, even when their testimony is the basis for prosecution) (citing \textit{Crawford} v. Washington, 541 U.S. 3 (2004)).

\textsuperscript{124} Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) (“The Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights”). See Montgomery v. Louisiana, 136 S. Ct. 718, 728–37 (2016) (arbitrarily creating a new rule showing that the rule from \textit{Teague v. Lane} against new rules is arbitrarily applied); Foster v. Chatman, 136 S. Ct. 1737, 1747 (2016) (proving the feudal impediments of \textit{Ayala} are arbitrarily applied); Kernan v. Hinojosa, 136 S. Ct. 1603, 1604–06 (2016) (per curiam) (refusing to overrule an unconstitutional ex post facto law merely because of procedural posture), and at 1606–07 (Sotomayor, J., dissenting).
incompetent,” and that their violation was not a “reasonable harmless error,” or an “extraordinary circumstance” that resulted in “extreme malfunctions.” The Court can require “scientific proof” of a less unconstitutional method of administering a punishment, or it can hijack an established judicial standard to arbitrarily dismiss constitutional violations. Moving far beyond one, two, or four iterations of feudal form, the Supreme Court actually seems to make new feudal obstructions as it goes.


128 Feudal forms obstruct de novo review in order to undermine fundamental human rights—even fundamental rights expressly set forth in the U.S. Constitution: Kerry v. Din, 135 S. Ct. 2128, 2132–33 (2015) (arguing that only terminology has changed since the year 1215, when the Magna Carta was first set forth in the field of Runnymead to undermine the fundamental rights to move and reside with one’s spouse); Clark, 135 S. Ct. at 2181–83 (blocking the fundamental human right to face one’s accusers and ignoring the prohibition of Bills of Attainder by distinguishing child witnesses from Sir Walter Raleigh’s unjust trial regardless of the word and spirit of the constitution); Glossip, 135 S. Ct. at 2741 (requiring “scientific proof” of a less cruel and unusual way of killing someone before it can be challenged according to the Eighth Amendment); Heien v. North Carolina, 135 S. Ct. 530, 537–39 (2014) (applying feudal sovereign immunity principles to a Fourth Amendment exclusionary rule case for the first time to refuse de novo review of Fourth Amendment cases even where the police admittedly misread and misapplied the law); Teva v. Sandos, 135 S. Ct. 831, 836–37 (2015) (removing de novo review of substance and procedure regarding patent construction on appeal whether or not the trial court adhered to the Seventh Amendment right to the jury); B&B Hardware, Inc. v. Hargis Industries, Inc., 135 S. Ct. 1293, 1300–01, 1303–05, 1309–10 (2015) (B&B gave determinations of the Trademark Trial and Appeals Board the weight of res judicata over the determinations of independent Article III Courts effectively denying a de novo review. Thus B&B raised “grave and doubtful questions as to the Lanham Act’s consistency with the Seventh Amendment and Article III of the Constitution.”) (internal quotation marks omitted); Wellness Int’l Network v. Sharif, 135 S. Ct. 1932, 1939, 1948 (2015) (making an exception to Stern’s exception that an Article I Bankruptcy Court can adjudicate a common law claim if the parties expressly or impliedly, “knowingly and voluntarily consent to adjudication by a bankruptcy judge” without considering the Court’s role in vindicating human rights unalienable); Armstrong v. Exceptional Child Center, 135 S. Ct. 1378, 1385–86 (2015) (overruling the supreme law of
Feudal forms are multifarious and arbitrary. They leech off of equity to create inequity. They pervert the common law. Each represents a novel barrier to the de novo review of the facts. The inequity of feudalism asserted through the Court’s equitable power is an unbearable oxymoron and should be spoken of as equity cannibalism. The seemingly endless novelty of feudal standards, and the fact that they only seem to be raised when the Court is going to dismiss a case, the land based solely on the “sheer complexity” of the law; San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 (2015) (using the two-pronged feudal qualified immunity test to abrogate even the fundamental human right of self-defense); Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513, 519 (2014) (overruling the fundamental human right to be compensated for work which is the ancient and paramount maxim at equity qui sentit commodum sentire debet et onus (‘those who get the benefit should also carry the burden’) by excluding de novo review of all facts regarding employment claims beyond bargained for “principle activities” that are “properly presented to the employer at the bargaining table”); Utah v. Strieff, 136 S. Ct. 2056, 2060 (2016) (disregarding an unreasonable, suspicionless search according to the discovery a warrant after the search—this is tantamount to using a general warrant or writ of assistance).

See supra note 128. Texas v. United States, 86 F. Supp. 3d 591, 676 (S.D. Tex. 2015) (Opinion of Judge Andrew Hanen) (using equity for an inequitable purpose of granting a preliminary injunction to halt President Obama’s executive order to give relief to millions of undocumented individuals); Sarah Stillman, Where are the Children: For Extortionists, Undocumented Migrants have become Big Business, THE NEW YORKER (Apr. 27, 2015), http://www.newyorker.com/magazine/2015/04/27/where-are-the-children (In 2013 Judge Hanen argued the undocumented parents should be rounded up on criminal conspiracy and that the children’s kidnappers should go free. He later used equitable power to issue a preliminary injunction against Obama’s executive order to “defer the deportation for nearly five million undocumented immigrants now living in the country, including almost four million parents of U.S. citizens and permanent residents.”); United States v. Countrywide Home Loans, Inc., 822 F.3d 650, 655–56 n.9, 664 n.16, 666 (2d Cir. 2016) (rendering judgment as a matter of law on a criminal judgment against the banks who caused the 2008 market crisis—using sheer equity to overturn the jury in order to establish inequity and injustice); Jesse Eisinger, Another Blow to Holding Banks Accountable for the Financial Crisis, THE NEW YORKER (May 26, 2016), http://www.newyorker.com/business/currency/another-blow-to-holding-banks-accountable-for-the-financial-crisis.
indicate that they are insurmountable and arbitrary niceties of form and procedure that cannot be rebutted with evidence.\textsuperscript{134} The recent habeas case \textit{Davis v. Ayala} exemplifies the Court’s movement toward feudal form.\textsuperscript{135} In fact \textit{Ayala} applied a reasonable harmless error standard to respect this feudal presumption in order to suggest that \textit{de novo} federal habeas review could never lie.\textsuperscript{136} However, \textit{Ayala}’s standard has no statutory or common law basis other than sheer feudalism and reveals the two-pronged reasonable harmless error test to be subterfuge for a final dogmatic presumption of government legitimacy.\textsuperscript{137} \textit{Ayala}’s reasonable harmless error analysis rests solely on the two prongs of (1) the unreasonable application of (2) clearly established law.\textsuperscript{138}

By giving these prongs dogmatic force, \textit{Ayala} hypocritically disregarded the Harmless Error Statute of the Judiciary Act even after it expressly stated that the Court’s interpretation of the Harmless Error Statute “subsumes the limitations imposed by AEDPA.”\textsuperscript{139} It also

\begin{thebibliography}{9}
\bibitem{135} \textit{Ayala}, 135 S. Ct. at 2198.
\bibitem{136} \textit{Id.} at 2198–99 (engaging in an arbitrary, feudalistic second layer of review by examining the question of whether “the harmlessness determination itself was unreasonable”) (internal quotation marks omitted) (quoting Fry v. Plier, 551 U.S. 112, 119–20 (2007)).
\bibitem{137} Tracing the roots of \textit{Ayala} to prove it’s “reasonable harmless error” standard is solely based upon a feudal concept: \textit{Ayala}, 135 S. Ct. at 2198–99 (quoting Fry v. Plier, 551 U.S. 112, 119–20 (2007)) (citing \textit{Lockyer v. Andrade}, 538 U.S. 63, 75–76 (2003) (“clearly established law must be objectively unreasonable”) (citing Williams v. Taylor, 529 U.S. 362, 409–10 (2000) (Part II of Justice O’Connor’s majority opinion interpreting AEDPA § 2254(d)(1) according to an “objective reasonableness” standard—which exists as a feudal form to undermine \textit{de novo} review—which through judicial creep was transformed into the “reasonable harmless error” standard which is also feudal and undermines \textit{de novo} review)). \textit{See} \textit{Harlow v. Fitzgerald}, 457 U.S. 800, 818 (1982) (setting forth the two prongs and an objective reasonableness standard as the common law of an absolute Presidential sovereign immunity—this seems to have been read into the AEDPA by Justice O’Connor). \textit{Cf.} \textit{Ashcroft v. al-Kidd}, 556 U.S. 731, 735, 743 (2011) (citing \textit{Harlow} as the origin of the two-pronged qualified immunity test of unreasonably applied clearly established law).
\bibitem{138} \textit{Ayala}, 135 S. Ct. at 2198–99 (citing \textit{Lockyer v. Andrade}, 538 U.S. 63, 75–76 (2003)).
\bibitem{139} \textit{Id.} at 2199, 2202 (undermining \textit{de novo} review) (citing \textit{Brecht} v. Abrahamson, 507 U.S. 619, 631 (1993) (interpreting the Harmless Error Statute by adopting the \textit{Kotteakos} standard)). \textit{See also} \textit{Brecht}, 507 U.S. at 640–41 (Stevens, J., concurring) (noting that \textit{Brecht}
violated the written terms of the AEDPA by following a perversion of equity jurisprudence instead of the written law. Therefore, the question of reasonable harmless error becomes “an additional layer of review” that is disjointed from both the facts and the law that form the basis for the Court’s jurisdiction in the first place.

Feudal immunity formalism by its nature entails inconsistency. The Court’s recent appeal to feudal form thus resulted in decisions rooted in sheer arbitrariness and willful obliviousness to the injustice of structural errors occurring in lower courts. These formalities contravene the very purpose for habeas corpus. They ignore the word and spirit of the U.S. Constitution and the law. They undermine the U.S. social compact. And finally these formalities cut against the very bedrock principles of U.S. society: that, unlike the King of England, the U.S. Government cannot arbitrarily put individuals in jail and throw

“requires a habeas court to review the entire record de novo”); Kotteakos v. United States, 328 U.S. 750, 762 (1946) (“each case must be influenced by conviction resulting from examination of the proceedings in their entirety”); Berger v. United States, 295 U.S. 78, 82, 88 (1935) (“The true inquiry” of the Harmless Error Statute requires de novo review of the facts to determine “whether there has been such a variance as to ‘affect the substantial rights’ of the accused” so that “justice shall be done.”); Chapman v. California, 386 U.S. 18, 22-24 (1967) (requiring a de novo review of the facts to determine whether substantial rights have been affected).


142 See, e.g., Tolan v. Cotton, 134 S. Ct. 1861, 1865 n.3, 1866 (2014) (per curiam) (a prime example of the confusion of lower courts over the “two-pronged inquiry”—the Court failed to even reach “Tolan’s additional argument” which was that “the reasonableness of Sergeant Cotton’s beliefs” should have been considered “under the second prong of the qualified-immunity analysis rather than the first”).


144 Coleman, 501 U.S. at 774 (Blackmun, J., dissenting) (“[F]undamental fairness is the central concern of the writ of habeas corpus.”) (quoting Strickland v. Washington, 466 U.S. 668, 697 (1984) (concluding, therefore, that “no special standards ought to apply to ineffectiveness claims made in habeas proceedings”)). See Wright v. West, 505 U.S. 277, 303 (1994) (O’Connor, J., concurring) (giving a long non-exhaustive list of habeas cases that “adhered to the general rule of de novo review of constitutional claims on habeas”).

145 U.S. CONST. art. I, § 9, cl. 2; Ex parte Bollman, 8 U.S. 75, 94–95 (1807) (properly comparing and construing the law and the constitution) (citing U.S. CONST. art. I, § 9, cl. 2; JUDICIARY ACT OF 1789, ch. 20, § 14, 1 Stat. 73).

146 See, e.g., Wheatley, Liberty & Peace, supra note 34 (the founding principles of the United States—Liberty and Peace—represent the spirit of the U.S. social compact).
away the key.147 Not one individual in American prisons is meant to be forgotten there.148

According to feudalism, the Barons were the only “free” people of England and all human rights were held incident to real property (i.e., the land), which the King ultimately and totally owned.149 All other human rights were held forfeit to the King in order to enter into English society.150 The people of Britannia, who were not granted titles and land, were owned incident to the land as trees and rocks are owned.151 Thus feudal slavery is inherent in the British form of government as literally the law of the land.152 William of Normandy began construction on the

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147 U.S. CONST. art. I, § 9, cl. 2 (habeas corpus “shall not be suspended”); 3 WILLIAM BLACKSTONE, COMMENTARIES *138 (Noting that “during temporary suspensions” of habeas corpus in England “persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.”). Cf. Jackson v. Virginia, 443 U.S. 307, 314 (1979) (noting that “the most elemental of due process rights” consists in a “freedom from a wholly arbitrary deprivation of liberty”) (citing Thompson v. City of Louisville, 362 U.S. 199, 202–03 (1960)).

148 STORY, CONSTITUTION, supra note 3, at § 1336. Cf. Jackson, 443 U.S. at 323–24 (“Under our system of criminal justice, even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar.”).

149 Quincy Adams, Independence Day, supra note 40 (“They received their freedom, as a donation from their sovereigns. They appealed for their privileges to a sign manual and a seal. They held their title to liberty, like their title to lands, from the bounty of a man, and in their moral and political chronology, the great charter of Runnimead was the beginning of the world.”). See THE FEDERALIST NO. 84 (Alexander Hamilton) (“It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was MAGNA CHARTA, obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the PETITION OF RIGHT assented to by Charles I., in the beginning of his reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations. ‘WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ORDAIN and ESTABLISH this Constitution for the United States of America.’ Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.”).

150 JOHN LOCKE, TWO TREATISES OF GOVERNMENT, Second Treatise § 95 (1690).

151 Quincy Adams, Independence Day, supra note 40.

152 Vane, Healing Question, supra note 37, at 4, 7–8, 13 (Vane described a hope that the English people would establish a government by written constitution by which “a great part of the outward exercise of anticchristian tyranny and bondage will be plucked up by the very roots” which Vane wrote came from “the root of a private and selfish interest” from which springs “the evil of that government which rose in and with the Norman conquest.” As a
prison known as the Tower of London to symbolize his feudal control over the people of London. In contrast the people of the United States established independent courts with the undoubted power to set anyone unjustly committed to prison free.

The U.S. Supreme Court wisely framed the law that is literally of the land in the United States when it ordered the missionary Samuel Worcester to be freed from Georgia state prison and expounded: “The abstract right of every section of the human race to a reasonable portion of the soil, by which to acquire the means of subsistence, cannot be controverted.” Thus the Court upheld the U.S. social compact by result, the people of England were “exposed” and “imposed upon, as if they had been enemies and conquered” by their own government.; Chisholm v. Georgia, 2 U.S. 419, 457–59, 462 (1793) (Opinion of Wilson, J.) (Speaking of English government: “It is a Government without a people. In that government, as so described, the sovereignty is possessed by the Parliament. In the Parliament, therefore, the supreme and absolute authority is vested. In the Parliament resides that incontrolable and despotic power which, in all governments, must reside somewhere. The constituent parts of the Parliament are the King’s Majesty, the Lord’s Spiritual, the Lord’s Temporal, and the Commons.”—The Crown appoints every position but those voted into the Commons. And even the Commons still needs improvement if it is to actually reflect the common people of England.); See John Adams, Letter LV on Locke, Milton and Hume, in 1 A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 371 (1778) (“The improvements to be made in the English constitution lie entirely in the house of commons. If county-members were abolished, and representatives proportionally and frequently chosen in small districts, and if no candidate could be chosen but an established long-settled inhabitant of that district, it would be impossible to corrupt the people of England, and the house of commons might be an immortal guardian of the national liberty.”). Cf. THE FEDERALIST NO. 84 (Alexander Hamilton) (In contrast to England where sovereign power rests in the Parliament: “Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations.”); Vane, Healing Question, supra note 37, at 11 (putting forward his view that by establishing “the rule and authority of their own supreme judicature” the people as a whole “do therein keep the sovereignty, as originally seated in themselves, and part with it only but as by deputation and representation of themselves, when it is brought into an orderly way of exercise, by being put into the hands of persons chosen and entrusted by themselves to that purpose.”).

Lord Ronald Sutherland Gower, 1 THE TOWER OF LONDON 1–5 (“William the First, not content with overawing the Londoners with his great tower in their city, built others”—but William’s Tower of London was the central symbol of the feudal establishment which arose from his conquest. In fact it was built upon the ruins of the Arx Palatina, which symbolized the Roman conquest of Britannia and provided grounds to claim legitimacy for William’s bloody usurpation.);

Ex parte Bollman, 8 U.S. 75, 95 (1807) (“if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted”). See also Ex parte Watkins, 28 U.S. 193, 209 (1830); Wise v. Withers, 7 U.S. 331, 337 (1806).

Worcester v. Georgia, 31 U.S. 515, 546, 579 (1832) (European charters “asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned. The power of war is given only for defence, not for conquest.”); John Adams, Minutes of the Argument, Surveyor General v. Loggs, Court of Vice Admiralty, Boston, March 8, 1773, in John Adams, 2 LEGAL PAPERS OF JOHN ADAMS 267, 269 (1773)
concluding that conquest and feudalism violate the law of nature and the rights that God gave to all human beings.156

Unlike English society, where all human rights and liberties are derived from government-granted titles and property, the people of the United States retain their natural liberties and rights.157 It is the ever present duty of the U.S. Supreme Court to uphold the natural liberty of human beings to differentiate the U.S. social compact from English feudalism.158 Thus, the establishment of public courts with the independent power to issue habeas corpus in order to release unjustly committed persons from prison is the undoubted symbol that the people of the United States chose to replace the tower-prisons of Europe.159
De Novo Habeas Review under AEDPA

A number of cases recently arose on direct review that mutilated both the distinction between objectivity and subjectivity and the distinction between law and fact. The fact that these former proxies for \textit{de novo} review are being systematically redefined \textit{sub silentio} to preclude \textit{de novo} review indicates that Justice Stevens was correct: A faithful \textit{de novo} review of the facts should be explicitly acknowledged as the proper quality of review on habeas no matter how the legal standard is worded. This is especially so because Justice O’Connor’s use of an “objective reasonableness” standard in Williams \textit{v. Taylor} is the unceasing subject of judicial creep that is creating havoc on collateral and direct review, as demonstrated by Heien \textit{v. North Carolina}.

As a result of judicial creep the objective reasonableness standard, first created in order to modestly limit or modify \textit{de novo} review, eventually became the foundation of Davis \textit{v. Ayala}’s total rejection of \textit{de novo} review in dictum. This is an inversion of the general rule of \textit{de novo} habeas review that has always existed before Ayala and that § 2254(d)(2) and other surrounding text of the AEDPA counsels in favor of, and that the availability of the writ under the Suspension Clause and the Judiciary Act explicitly requires.

Moreover, it is baffling why the Ayala Court refused to recognize that an alleged structural error is an “extreme malfunction” meriting full

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162 Williams \textit{v. Taylor}, 529 U.S. 362, 409 (2000); Heien, 135 S. Ct. at 539–40 (the objective reasonableness standard used to justify a subjective and incorrect reading of the law by the police—to undermine \textit{de novo} review). \textit{Cf.} Harlow \textit{v. Fitzgerald}, 457 U.S. 800, 818 (1982); Utah \textit{v. Strieff}, 136 S. Ct. 2056, 2059–60 (2016) (practically approving of writs of assistance, also known as general warrants, which were rejected by the American colonists in Paxton’s Case, and was a direct influence on the drafting of the Fourth Amendment).

163 Williams, 529 U.S. at 409.


de novo review. In fact Justice Stevens, who coined the phrase “extreme malfunction” in *Jackson v. Virginia*, would probably call *Ayala* an extreme malfunction. As Stevens stated in *Jackson* “the quality of justice administered by federal judges” is what matters “no matter what standard of appellate review is applied.”

In *Brecht v. Abrahamson*, Stevens repeated this point saying: “In the end, the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied.” Elsewhere Justice Stevens exposed the zeal the Court had over fashioning legal standards to be “wooden” and lacking in the human element of equity, especially if the quality of justice administered by the court is premised on a lie. Thus in *Jackson* and many other cases, Stevens contended for a full *de novo* review of the facts of the case that preserves the Court’s ability to detect the truth from lies in order to safeguard fundamental human rights and the Rule of Law.

Ultimately the feudal blindness at play in *Ayala* and similar cases undermines the paramount fundamental right of self-defense against slavery and death. The Court’s refusal to conduct *de novo* review of the facts in order to see structural error and to separate the truth from lies challenges the fundamental precepts of the common law and the very purposes of convening judicial process. Another way of expressing this crisis is that the Court is simultaneously violating the ancient and paramount maxim at equity “qui sentit commodum sentire debet et onus”

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167 *Jackson*, 443 U.S. at 332 n.5 (Stevens, J., concurring) (arguing for *de novo* review).

168 *Id.* at 327–28 (Stevens, J., concurring).


171 *Jackson*, 443 U.S. at 327–28 (Stevens, J., concurring). See *The Amistad*, 40 U.S. 518, 594–95 (1841); Reitz, *supra* note 63, at 466 (“Collateral inquiry into questions of fact” is “almost indispensable to establish the truth or falsity of claimed denials of due process or equal protection . . . .”).


173 *Williams v. Taylor*, 529 U.S. 362, 378 (2000) (Opinion of Stevens, J.); *Story, Constitution*, *supra* note 3, at § 1335 (“the common law was deemed by our ancestors a part of the law of the land, brought with them upon their emigration”). Cf. *Bator, supra* note 160, at 443, 446, 448, 457 (encouraging federal habeas courts not to review criminal cases for whether “the facts as found were ‘really’ true and the law ‘really’ correctly applied” without defining what the quality of that process should be applied instead).
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(‘those who get the benefit should also carry the burden’), and ignoring every person’s fundamental right to file a trespass *vi et armis* or similar action (such as § 1983 and *Bivens*) to be compensated for any such false imprisonment that occurs when this maxim is unconstitutionally violated. These rights of equity arise from the facts, are “[o]ne of the first duties of government” to secure, and comprise “[t]he very essence of civil liberty.”

The *Ayala* Court attempted to undermine the judicial power to conduct *de novo* review of the facts on habeas by expounding the procedural nicety of feudalism on habeas review. However, in *Ayala*’s sister case *Brumfield v. Cain* the Court explicitly repudiated *Ayala*’s dictum that “[t]he role of a federal habeas court is . . . not to apply *de novo* review of factual findings.” The *Brumfield* Court wisely remembered that it must take “evolving standards of decency” into account while interpreting the constitution. This requires, as a principle of the U.S. social compact, a *de novo* review of the facts incident to the fundamental human right for any person to approach the Court with an injury. Habeas corpus is thus not merely a citizen’s

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175 Wise v. Withers, 7 U.S. 331, 337 (1806) (The Court has long held the power upon *vi et armis* to declare: “The court and the officer are all trespassers.”); Freedman, supra note 114, at 600 nn.46–47. Cf. 3 WILLIAM BLACKSTONE, COMMENTARIES *138 (Noting that “during temporary suspensions” of habeas corpus in England “persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.”) In such cases, if habeas corpus was finally asserted: “The *satisfactory* remedy for this injury of false imprisonment, is by an action of trespass *vi et armis*, usually called an action of false imprisonment; which is generally, and almost unavoidably, accompanied with a charge of assault and battery also; and therein the party shall recover damages for the injury he has received; and also the defendant is, as for all other injuries committed with force, or *vi et armis*, liable to pay a fine to the king for the violation of the public peace.”); Dred Scott v. Sandford, 60 U.S. 393, 470 (1856) (Opinion of Daniels, J.) (this was an action for trespass *vi et armis*, i.e. a false imprisonment claim, and upon hearing his claim the Court should have granted Dred Scott his freedom and the freedom of his wife, and his two children and it should have ordered tort damages including just compensation for the work his slaveholder received from him and his family).


180 Marbury v. Madison, 5 U.S. 137, 163 (1803) (it is the “essence of civil liberty” that every individual can approach the court “whenever he receives an injury”); *Trop*, 356 U.S. at 101–02 (Opinion of Warren, C.J.); Ex parte *Wilson*, 114 U.S. 417, 424, 427–29 (1885)
privilege, but a guarantee to all individuals locked away by a U.S. government. Thus the Brumfield Court justified full de novo review of the facts upon § 2254(d)(2) instead of § 2254(d)(1). Then, the Court engaged in a full de novo review of the facts on habeas review. This signifies that the AEDPA should not be construed to disrupt “the general rule of de novo review of constitutional claims on habeas.” Instead, the Court recognized that § 2254(d)(1) is an equal alternative ground for habeas jurisdiction to § 2254(d)(2). Thus neither clause was enacted to undermine de novo review as the feudal formalities require.

The AEDPA does not even require that the holding in Teague v. Lane remain impervious to the Court’s liberal equity to recognize substantive rights as they arise from the facts in accordance with its overriding mandate to secure justice in the land. Limiting or

(181) Marbury v. Madison, 5 U.S. 137, 163 (1803); Ex parte Bollman 8 U.S. 75, 95 (1807); Boumediene v. Bush, 553 U.S. 723, 751–52 (2008); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (all are born equal and free); Letter from John Adams to Abigail Adams (April 27, 1777), available at http://founders.archives.gov/documents/Adams/04-02-02-0170 (“The Author of human Nature, who gave it its Rights, will not see it ruined, and suffer its destroyers to escape with Impunity.”).


(183) Id. at 2279–82.


(185) Brumfield, 135 S. Ct. at 2275–76.

(186) Id.; AEDPA 28 U.S.C. § 2254(d) (habeas corpus “shall not be granted . . . unless the adjudication of the claim—(1) 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; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”) (emphasis added).

(187) Williams v. Taylor, 529 U.S. 362, 380 (2000) (Opinion of Stevens, J.) (Justice Stevens was rightly unable to convince the Court “that AEDPA codifies Teague to the extent that Teague requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final” because he was wrong about this—AEDPA provides an avenue to review the facts and recognize all fundamental human rights in § 2254(d)(2) whether or not the Supreme Court ruled on them or not. Teague and
distinguishing Teague based on evolving standards is not enough. In fact the AEDPA ought to be construed under the liberal equity touted by Federal Rule of Civil Procedure 2 and Trespass on the Case to overrule Teague for a more liberal expansion of federal habeas review of unalienable human rights that necessarily arise from the facts.

Justice Sotomayor, speaking for the Court in Brumfield, threw open the Court’s windows and let in the light. Thus the Court began to expose the layers of contradiction started by Part II of Justice O’Connor’s opinion in Williams v. Taylor, as revealed through O’Connor’s contradictory opinion in Wiggins v. Smith. In Wiggins, the Court redefined the Lockyer objective reasonableness standard to require that “a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.”

188 Montgomery v. Louisiana, 136 S. Ct. 718, 728 –37 (2016) (limiting Teague v. Lane by relying on Ex parte Siebold that “[a]n unconstitutional law is void, and is as no law”) (citing Ex parte Siebold, 100 U.S. 371, 376 (1880)). But see Ex parte Parks, 93 U.S. 18, 23–24 (1876) (citing Ableman v. Booth, 62 U.S. 506 (1858)); Ex parte Siebold, 100 U.S. 371, 375 (1879) (citing Ableman, 62 U.S. at 408; Parks, 93 U.S. at 18).

189 AEDPA 28 U.S.C. § 2254(e)(2)(A)(i) (the Supreme Court can create “a new rule of constitutional law . . . retroactive to cases on collateral review . . . that was previously unavailable”); Fed. R. Civ. P. 2 (“There is one form of action—the civil action.”); J. H. Baker, An Introduction to English Legal History 80 (3d ed. 1990) (noting that in the 1700’s there was already one form of action—trespass on the case). See Berger v. United States, 295 U.S. 78, 82, 88 (1935) (interpreting the Harmless Error Statute’s “true inquiry” to be whether the accused’s “substantial rights” have been affected with an overarching court interest in producing justice); Davis v. Ayala, 135 S. Ct. 2187, 2198 (2015) (the Court’s interpretation of the Harmless Error Statute “subsumes the requirements that § 2254(d)” (citing Brecht v. Abrahamson, 507 U.S. 619 (1993) (interpreting the Harmless Error Statute to require de novo review of the facts to recognize substantive rights)).

190 Brumfield, 135 S. Ct. 2269, 2279–82; AEDPA 28 U.S.C. § 2254(d)(2) (requiring the Court to review “the facts in light of the evidence”).


192 Wiggins, 539 U.S. at 527, 531 (“We therefore must determine, de novo, whether counsel reached beyond the PSI and the DSS records in their investigation of petitioner’s background.”).

Even in *Williams* O’Connor contradicted her own reasoning by joining the \textit{de novo} review of the facts in Stevens’ opinion while writing obiter dictum in her own opinion that the AEDPA limited the power of the Court to engage in \textit{de novo} review.\footnote{195}{Id.} Thus from the very start, Justice O’Connor’s objective reasonableness requirement in *Williams* embodied two fundamentally contradictory positions set forth in *Wiggins* and *Lockyer*.\footnote{196}{Id.} In any case, if *Wiggins* overruled *Lockyer* as the final intended meaning of the objective reasonableness standard things may not have spun out of hand.\footnote{197}{Id.} But *Wiggins* was allowed to coexist with *Lockyer*, and ever since two distinct lines of precedent have been developed by the Court—one which required \textit{de novo} review of the facts and the other precluding it.\footnote{198}{Id.} Finally, *Davis v. Ayala* revealed the *Lockyer* line of precedent to be feudalistic, illegitimate, and fundamentally irreconcilable with *Williams/Wiggins*.\footnote{199}{Id.}

Thus *Brumfield* was forced to abrogate a progeny of cases epitomized by the ruling of *Lockyer v. Andrade* that were awkwardly derived from *Williams* as an impermissible requirement that all future habeas cases issue advisory opinions upon “hypothetical reasons state court[s] might have given for rejecting” habeas relief.\footnote{200}{Id.} Ironies abound as *Lockyer*’s objectivity requirement was solely created by a subjective inquiry of Congress’s intent that § 2254(d)(1) should implicitly be
gatekeeper to the de novo review called for in § 2254(d)(2). The Brumfield Court also rightly repudiated the Ayala Court for relying upon judicial creep oozing from Lockyer and epitomized by Harrington v. Richter in order to close its eyes on every law and fact other than Lockyer’s subjective interpretation of § 2254(d)(1) that strangely required so-called objectivity without looking at the facts de novo. This strategy is grounded solely in judicial creep stemming from Lockyer—a case repudiated by the author of Lockyer herself in Wiggins.

This is all vital information because the AEDPA’s gatekeeping provisions were originally held “constitutional” in Felker v. Turpin based on the idea that the AEDPA did not modify the Court’s fundamental jurisdiction under the Judiciary Act. As Justice Souter noted in Felker “if it should later turn out that statutory avenues other than certiorari for reviewing a [AEDPA § 2254] gatekeeping determination were closed, the question whether the statute exceeded Congress’s Exceptions Clause power would be open.” Thus if Ayala formally destroyed the foundation of Felker by interpreting the AEDPA to repeal previously recognized grounds for jurisdiction under the Judiciary Act by mere implication, then by the terms of Felker the AEDPA should be overturned whenever it violates the limits of Congress’s power described in the Suspension Clause of the U.S. Constitution.
This view was expressly affirmed again in \textit{INS v. St. Cyr}, and it flows from the Court’s prohibition of advisory statements in \textit{Ashwander}, which Justice Brandeis drew from Justice Marshall’s statutory construction in \textit{Ex parte Randolph}.\footnote{INS v. St. Cyr, 533 U.S. 289, 300–02 (2001) (citing Ashwander v. TVA, 297 U. S. 288, 341, 345–48 (1936) (Brandeis, J., concurring)); Ex parte Randolph, 20 F. Cas. 242, 256 (C.C.D. Va. 1833) (No. 11,558) (Marshall, C. J., on circuit). \textit{See Ex parte D’Olivera, 7 F. Cas. 853 (C.C.D. Mass. 1813) (No. 3,967) (Story, J., on circuit).}} This tradition of abstaining from advisory statements through constitutional avoidance actually inheres in habeas common law itself, and in \textit{St. Cyr} Justice Stevens traced it to an illustrious line of many other American and English habeas cases as well.\footnote{St. Cyr, 533 U.S. at 176–77 (1936) (The duty of declaring unconstitutional laws void inheres in the Court’s overruling and emphatic duty “to say what the law is.”).} It is also inherent in the Court’s equitable duty to say what the law is, first expounded by \textit{Marbury v. Madison} as the “very essence of judicial duty.”\footnote{Marbury v. Madison, 5 U.S. 137, 176–77 (1803) (The duty of declaring unconstitutional laws void inheres in the Court’s overruling and emphatic duty “to say what the law is.”).} This duty from \textit{Marbury} has always been adhered to during habeas review.\footnote{Ex parte Bollman, 8 U.S. 75, 100–01 (1807) (comporting with its duty to say what the law is in \textit{Marbury} by inquiring whether “the act of Congress . . . be compatible with the Constitution”). \textit{See Wright v. West, 505 U.S. 277, 305 (1994) (O’Connor, J., concurring)} (“We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.”).} And as in \textit{Marbury}, if the Court cannot manage to construe a statute so that it retains constitutional validity, then that statute must be vigorously overruled as against natural equity.\footnote{Marbury, 5 U.S. at 177–78, 180; Vanhorne’s Lessee v. Dorrance, 2 U.S. 304, 308, 316 (1795) (noting that the principle that laws repugnant to our written constitutions are void come from “natural equity”).} Overruling laws, however, ought to be avoided whenever possible by rigorously “say[ing] what the law is” under the constitution.\footnote{Marbury, 5 U.S. at 137. \textit{See Ex parte Randolph, 20 F. Cas. 242, 256 (C.C.D. Va. 1833) (No. 11,558) (Opinion of Marshall, C.J.).}}

Act. Instead, Ayala’s reasonable harmless error analysis is rooted solely upon Justice O’Connor’s objective reasonableness standard from \textit{Williams} as it was used in \textit{Lockyer} to undermine \textit{de novo} review and all clearly established substantive rights.\footnote{\textit{Ayala}, 135 S. Ct. at 2198 ("the \textit{Brecht} standard subsumes the requirements that § 2254(d) imposes") (citing Brecht v. Abrahamson, 507 U.S. 619 (1993) (interpreting the Harmless Error Statute to require \textit{de novo} review of the facts to recognize substantive rights according to \textit{Kotteakos}) (citing Kotteakos v. United States, 328 U.S. 750, 762 (1946) ("each case must be influenced by conviction resulting from examination of the proceeding in their entirety")).} In contrast, the \textit{Brecht} Court followed its long held duty of applying \textit{de novo} review under the AEDPA in order to vindicate substantial rights according to the overriding judicial command that "justice shall be done."\footnote{Id. at 2198–99 (quoting Fry v. Pliler, 551 U.S. 112, 119–20 (2007) (citing Lockyer v. Andrade, 538 U.S. 63, 75–76 (2003) ("clearly established law must be objectively unreasonable") (citing Williams v. Taylor, 529 U.S. 362, 409–10 (2000))).} This branch of jurisprudence which centered the Court’s interpretation of the Harmless Error Statute upon a \textit{de novo} review of facts began with \textit{Berger v. United States}.\footnote{\textit{Berger}, 295 U.S. at 79–81, 89.}

As \textit{Berger} expounded, the “true inquiry” under the Harmless Error Statute is whether the trial court’s error “affect the substantial rights’ of the accused.”\footnote{Id. at 82.} Thus the Court engaged in \textit{de novo} review of mixed questions of law and fact during habeas review because “fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.”\footnote{\textit{Crowell v. Benson}, 285 U.S. 22, 57, 65 (1932); \textit{Brown v. Allen}, 344 U.S. 443, 496–97 (1953) (Opinion of Frankfurter, J.) (noting that habeas corpus is “a field so vital . . . to vindicate constitutional rights” that the Supreme Court ought not throw it back upon the reasonableness of state court judges as if “they may do as they please”).} Under \textit{Felker}, the AEDPA’s constitutional viability depended on the Court’s continued \textit{de novo} review of the facts to “vindicate constitutional rights.”\footnote{\textit{Brown}, 344 U.S. at 496–97 (Opinion of Frankfurter, J.); \textit{Felker v. Turpin}, 518 U.S. 651, 663–64 (1996) (habeas exists to challenge “all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.”).} In fact “a liberal extension of the writ of . . . habeas corpus” was long considered an appropriate remedy against those who violate the
“constitutional rights of others.” Such a “liberal extension” of habeas to fashion final rules of federal law was always considered the picture of comity and grace toward state tribunals.

As recognized in Chapman v. California the Court traced substantial rights recognized in the Judiciary Act saying they are “rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the ‘independent’ federal courts would be the ‘guardians of those rights.’” The Brumfield Court ensured that the independent Supreme Court preserves habeas de novo review of the facts, safeguarding substantive rights as the third branch of government. Again, this Article III guardianship of substantive rights continues to inhere in the Court’s duty, as Marbury symbolizes, to say what the law is after a de novo review of the facts.

Justice O’Connor’s pivot away from this duty was allegedly because of Congress’s enactment of the AEDPA. Her apparent conviction that a mere law like the AEDPA could abrogate the federal judiciary’s “duty of examining the facts” de novo on habeas review seems to imply the adoption of Taney Court dicta in Barry v. Mercein that the Judiciary Act can be repealed by mere implication. O’Connor emphasized this idea in obiter dictum by saying that “§ 2254(d)(1)

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221 Martin v. Hunter’s Lessee, 14 U.S. 304, 381–82 (1816) (Opinion of Johnson, J.) (even Justice Johnson said this).
222 Id. See Younger v. Harris, 401 U.S. 37, 47–49 (1971) (even direct review of ongoing criminal cases may be upheld “to vindicate the constitutional rights” of the citizens of a state when “allegations, if true, clearly show irreparable injury” (quoting Dombrowski v. Pfister, 380 U.S. 479, 482, 485–86 (1965)).
223 Chapman v. California, 386 U.S. 18, 20–21 n.4 (1967) (quoting 1 ANNALS OF CONG. 439 (1789) (statement of James Madison)).
225 Ex parte Bollman, 8 U.S. 75, 100–01 (1807) (citing Marbury v. Madison, 5 U.S. 137 (1803)).
226 Williams v. Taylor, 529 U.S. 362, 400–02 (2000) (Opinion of O’Connor, J.) (sharply turning away from her previous stand for the general rule of de novo review on habeas corpus in Wright v. West and her alliance with Justice Stevens on this matter based solely on a change in the law). See Wright v. West, 503 U.S. 277, 303–05 (1994) (O’Connor, J., concurring) (according to “the general rule of de novo review of constitutional claims on habeas” Justice O’Connor declared: “We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.”). Cf. Williams, 529 U.S. at 378–79 (Opinion of Stevens, J.); Marbury v. Madison, 5 U.S. 137, 147, 176–77 (1803) (this duty to say what the law is inheres in Article III of the U.S. Constitution and cannot be changed by a mere law).
228 Barry v. Mercein, 46 U.S. 103, 119 (1847). See Felker v. Turpin, 518 U.S. 651, 661 (1996) (noting that Mercein is no longer good law); Bollman, 8 U.S. at 100–01 (under Marbury, it is apparent that Mercein was never good law because the Court even has the power to overrule the Judiciary Act where it is unconstitutional).
places a new constraint on the power of a federal habeas court.”229 However, this confuses the AEDPA with written constitutions.230 It also ignores the existence of the All Writs Act.231 Fortunately Felker repudiated the Taney Court’s most despicable case Ableman v. Booth, which applied the Fugitive Slaves Act of 1850 as if it could repeal § 14 of the Judiciary Act by mere implication.232

Even prior to the enactment of the AEDPA Justice O’Connor feigned constraints on the power of federal courts, resulting in obstructions of de novo review on grounds that were disjointed from the jurisdictional provisions of the law.233 However, constraints of this sort overlook the fact that Frank v. Mangum was overruled.234 Such constraints maintained by judges from time to time without any legal or constitutional support is reminiscent of Chief Justice Taney’s most horrendous opinions, which without fail degraded the fundamental human right to approach the court for freedom.235 Justice O’Connor’s

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230 James Wilson, 2 J. Elliot, Debates on the Federal Constitution 432 (2d ed. 1836) (“To control the power and conduct of the legislature, by an overruling constitution, was an improvement in the science and practice of government reserved to the American states.”).

231 See Ex parte Bollman, 8 U.S. 75, 100 (1807) (quoting JUDICIARY ACT OF 1789, ch. 20, §14, 1 Stat. 73) (aka, the All Writs Act).

232 Ableman v. Booth, 62 U.S. 506, 526 (1858) (rejecting habeas review for so-called fugitive slaves even though federal habeas had always been used to free African Americans under § 14 of the Judiciary Act); Habeas Corpus for Fugitive Slaves Cases, 1820–1843, microformed on Habeas Corpus Case Records of the U.S. Circuit Court for the District of Columbia, Microcopy No. 434, 1820–1863, roll no. 1–2 (Nat’l Archives Microfilm Publ’ns), available at http://www.ccharity.com/contents/petitions-writs-habeas-corpus-persons-alleged-be-fugitive-slaves/. See Felker v. Turpin, 518 U.S. 651, 660 (1996) (if a ground for habeas jurisdiction arising from the Judiciary Act were obstructed by the AEDPA, then the constitutionality of the AEDPA would be put in question) (citing Ex parte Yerger, 75 U.S. 85, 105 (1868) (“Repeals by implication are not favored.”)).


234 Fay v. Noia, 372 U.S. 391, 421 (1963) (“It was settled in Moore, restoring what evidently had been the assumption until Frank, that the state courts’ view of the merits was not entitled to conclusive weight. We have not deviated from that position.”).

235 Compare Dred Scott v. Sandford, 60 U.S. 393, 484–85, 487–90 (1857) (nullifying The Missouri Compromise (1820)), with Ableman v. Booth, 62 U.S. 506, 526 (1858) (showing clear favor to pro-slavery laws by declaring the Fugitive Slave Act of 1850 constitutional in
primary justification in aiding this endeavor was *Jackson v. Virginia*. \(^{236}\) Ultimately, any judicial decision that attempts to abrogate the *de novo* review of the facts ought to be overruled as against the superintending equity exercised in *Chisholm v. Georgia* incident to the U.S. social compact that overruled *The Bankers Case* in America.\(^ {237}\)

As Justice Stevens contended, O’Connor’s stated view of the AEDPA took § 2254(d)(1) completely out of the context of both the surrounding terms of the AEDPA and the Court’s prior jurisprudence regarding the Judiciary Act.\(^ {238}\) Furthermore, O’Connor’s tendency of deferring to “reasonable” state court determinations of the law without reviewing the facts *de novo* violates the fundamental requirement of the Rule of Law which requires federal uniformity and finality.\(^ {239}\) Finally, it violates the Court’s fundamental duty to uphold the Separation of Powers by saying what the law is as *Marbury* requires.\(^ {240}\) The resemblance of the Court’s “objective reasonableness” inquiry to the Taney Court is problematic because the word and spirit of the U.S. Constitution preempts and abrogates many of the Taney Court’s most

order to overrule the State of Wisconsin’s issuance of habeas corpus (impliedly nullifying the *Judiciary Act of 1789*, ch. 20, §14, 1 Stat. 73). But see *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”); *Ex parte Bollman*, 8 U.S. 75, 100 (1807) (under the Suspension Clause the power to issue habeas to secure the right to approach the court announced in *Marbury* is given through § 14 of the Judiciary Act—known as the All Writs Act) (quoting *Judiciary Act of 1789*, ch. 20, §14, 1 Stat. 73); (This right to approach the Court through § 14 explicitly included African Americans.); *Boumediene v. Bush*, 553 U.S. 723, 747–48 (2008) (citing Sommersett’s Case [1772] 20 How. St. Tr. 1, 80–82 (Eng.)); *Freedman*, *supra* note 114, at 600 n.44 (noting that common law habeas was used in the colonies to free Africans from slavery even before the Revolution).


\(^ {237}\) *Chisholm v. Georgia*, 2 U.S. 419, 437–45 (1793) (Iredell, J., dissenting) (quoting *The Bankers Case* [1696] 14 How. St. Tr. 1, 32–33 (Eng.) (Opinion of Lord Somers)), at 465 (Opinion of Wilson, J.), at 451 (Opinion of Blair, J.) (“no State in the Union should, by withholding justice, have it in its power to embroil the whole Confederacy in disputes of another nature”), at 468 (Opinion of Cushing, J.), and at 475–78 (Opinion of Jay, C.J.).


\(^ {239}\) *Id.* at 389 (Opinion of Stevens, J.) (As a result “the federal ‘law as determined by the Supreme Court of the United States’ might be applied by the federal courts one way in Virginia and another way in California.”).

\(^ {240}\) *Id.* at 378 (Opinion of Stevens, J.) (“When federal judges exercise their federal question jurisdiction under the ‘judicial Power’ of Article III of the Constitution, it is ‘emphatically the province and duty’ of those judges to ‘say what the law is.’”’) (quoting U.S. CONST. art. III; *Marbury v. Madison*, 5 U.S. 137, 176–77 (1803)).
despicable opinions (i.e., Ableman, Dred Scott & Luther v. Borden), and thus they are not good law.241

Habeas Common Law is the Law of the Land242

A petition for the writ of habeas corpus at common law “is a demand, however denominated, challenging the legal basis of a detention and calling upon the custodian to justify it.”243 Any judicial action, formal or otherwise, that facilitates the Court’s answer to such a demand by a de novo review of the facts is a part of habeas common law.244 Thus writs of trespass vi et armis, coram nobis, coram vobis, certiorari, supersedeas, prohibition, replevin, injunction, assumpsit, fraud, and any other formal writ may be issued upon the facts “even [on] pleadings that asked for no particular writ at all.”245 This is so because it

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242 Quincy Adams, The Amistad, supra note 27, at 43 (asking rhetorically in oral argument: “Is there a law of Habeas Corpus in the land?”).

243 Freedman, supra note 114, at 594 n.9 (citing Boumediene v. Bush, 533 U.S. 723, 783 (2008) (holding that statutory substitute for traditional habeas violated Suspension Clause because “[the habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive’s power to detain”)).


245 Freedman, supra note 114, at 593 (Habeas common law included “a variety of writs, including certiorari, supersedeas, prohibition, trespass, and replevin—[and was] even extended in pleadings that asked for no particular writ at all.”); Martin v. Hunter’s Lessee, 14 U.S. 304, 381–82 (1816) (Johnson, J., concurring) (acknowledging “a liberal extension of the writ of injunction and the habeas corpus ad subjiciendum” to correct constitutional error by “inflicting penalties on parties who shall contumaciously persist in infringing the constitutional rights of others”); The Amistad, 40 U.S. 518, 594–95 (1841) (prima facie evidence of slavery was “always open to be impugned for fraud”); Ex parte Watkins, 28 U.S. 193, 208–09 (1830) (citing Wise v. Withers, 7 U.S. 331 (1806) (trespass vi et armis)); Korematsu v. United States, 584 F. Supp. 1406, 1411–12 (N.D. Cal. 1984) (coram nobis); Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir. 1987) (coram nobis is available to attack criminal proceedings collaterally for “a defendant who has served his sentence and has
has always been the case that habeas corpus at common law “cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution.”

The common law of habeas corpus reveals the full equitable power of the Court because under the Suspension Clause, “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it.” Accordingly, under the open-door ruling in Ex parte Milligan, any legal limitation upon the Court’s exercise of habeas is void unless there is actual, present military violence shuttering the doors of the court. Despite Milligan’s undeniable congruence with the constitution, Milligan’s critics still try to limit it according to legislation because the Court’s appellate power is vested through Congress and according to the constitution Congress may make certain prudential “Exceptions” to the Court’s jurisdiction through the law.

This may be so, however, the judicial power is ultimately vested by the U.S. Constitution and the constitutional viability of Congressional regulation of, and exceptions to, federal jurisdiction are a paramount prudential concern of which the final adjudication lies in the Court alone. For Congress ultimately has the duty of vesting the whole judicial power in one Supreme Court, which according to the U.S. Constitution is an independent power to overrule any unconstitutional part of Congress’s laws. Perhaps in response to this reality, Milligan’s critics have been known to make a naked appeal to state sovereignty as a reason to limit federal habeas review as well. Nevertheless, despite the sovereignty of the states, prudence under the constitution and the laws necessitates that whenever a state fails to provide fair trials their courts


Falbo v. United States, 320 U.S. 549, 561 (1944) (Murphy, J., dissenting); Estep v. United States, 327 U.S. 114, 141 (1946) (Frankfurter, J., concurring) (“Habeas corpus ’comes in from the outside,’ after regular proceedings formally defined by law have ended, ’not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.’”) (quoting Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting)). Cf. Freedman, supra note 114, at 618.

U.S. CONST. art. I, § 9, cl. 2.

Ex parte Milligan, 71 U.S. 2, 124–25 (1866).

U.S. CONST. art. III, § 2, cl. 2.

Martin v. Hunter’s Lessee, 14 U.S. 304, 330 (1816); Marbury v. Madison, 5 U.S. 137, 173 (1803) (“The Constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as Congress shall, from time to time, ordain and establish.”). See STORY, CONSTITUTION, supra note 3, at §§ 1696, 1749–51, 1766.
lose their “high ground” and become like “a court martial” which “was considered as one of those inferior courts of limited jurisdiction, whose judgments may be questioned collaterally.”  

In the U.S. Courts the common law of habeas corpus traces back to *Chisholm v. Georgia*, which unseated English feudalism and extended the writ of assumpsit under § 14 of the Judiciary Act to common citizens in their suits against the states.  

Following the wisdom of *Chisholm*, Chief Justice Marshall spoke for the Court on habeas corpus and noted that § 14 (i.e., the All Writs Act) was drafted “under the immediate influence” of the Suspension Clause in order to recognize the Court’s power at common law to issue “all other writs not specially provided for by statute.” All the Justices in *Chisholm* agreed that the common law and natural equity reflected by § 14 should preside over the case.

Only Associate Justice Iredell erred by disregarding the U.S. social compact’s controlling force upon American common law. According to his opinion, Iredell looked to the feudal sovereign and qualified immunity in *The Bankers Case* for guidance instead. However, as the majority in *Chisholm* stated, the U.S. social compact uprooted feudal form in America. The states are not feudal sovereigns, they are free republics. The American common law was forever altered after the U.S. compact of 1776 made by the whole people of the United States for the good of the whole. Thus under the Suspension Clause § 14 preserves a pre-existing judicial function of hearing facts to determine whether injustice has occurred so that the court can remedy injustice with justice.

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251 Ex parte Watkins, 28 U.S. 193, 209 (1830); Wise v. Withers, 7 U.S. 331, 337 (1806) (declaring a state militia and military tribunal trespassers).

252 Chisholm v. Georgia, 2 U.S. 419, 433–34 (1793) (Iredell, J., dissenting), and at 451–52 (Opinion of Blair, J.).

253 Ex parte Bollman, 8 U.S. 75, 94–95 (1807).


255 Id. at 437–38 (Iredell, J., dissenting).

256 Id. at 437–45 (Iredell, J., dissenting) (quoting The Bankers Case [1696] 14 How. St. Tr. 1, 32–33 (Eng.) (Opinion of Lord Somers)).

257 Id. at 465 (Opinion of Wilson, J.), at 451 (Opinion of Blair, J.), at 468 (Opinion of Cushing, J.), and at 475–78 (Opinion of Jay, C.J.).

258 U.S. CONST. art. IV, § 4.

259 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); STORY, CONSTITUTION, supra note 3, at § 211.

260 FED. R. CIV. P. 2 (“There is one form of action—the civil action.”); BAKER, supra note 189, at 80 (noting that in the 1700’s there was already one form of action—trespass on the case: “For most purposes the new remedies were but subdivisions of one form of action.”) Rule
The natural equity that presides over common law habeas has therefore always operated like Trespass on the Case and Rule 2 of the Civil Rules, embodying function and not form.\textsuperscript{261} Civil Rule of Procedure 2 is a restatement of the natural equity inherent in the formal exercise of \textit{de novo} review of the facts under the writ of Trespass on the Case.\textsuperscript{262} By the formal \textit{de novo} review of the facts or merits, English and American courts participated in a liberal and flexible discovery and illumination of the common law.\textsuperscript{263} This matches the traditional habeas “court’s impulse . . . to deal with facts, not law” which was reflected by “speedily calling all interested parties into the courtroom and coming to a pragmatic resolution to secure [the petitioner’s] prompt liberation.”\textsuperscript{264} All contrary feudalistic attempts to revive “the restrictiveness and procedural nicety which beset \textit{praecipe} actions” in order to obstruct a \textit{de novo} review of the facts to delay a prisoner’s speedy release ought to be overruled as against natural equity.\textsuperscript{265}

The application of natural equity in U.S. Courts to void the process of illegitimate tribunals was inspired by Lord Coke’s opinion in \textit{Dr. Bonham’s Case} in which Dr. Bonham’s \textit{vi et armis} claim was not ignored.\textsuperscript{266} Instead, because “no person may be a judge in his own

\textsuperscript{2} was meant to make the U.S. court system \textit{more} liberal and \textit{more} flexible than the court was under the old writ of trespass on the case). See \textit{Fed. R. Civ. P. 8(e)} (“pleadings must be construed so as to do justice”); \textit{Conley v. Gibson, 355 U.S. 41, 47–48 (1957)} (“all pleadings shall be so construed as to do substantial justice”) (internal quotation marks omitted) (citations omitted). Cf. \textit{Kerry v. Din, 135 S. Ct. 2128, 2132–33 (2015)} (Opinion of Scalia, J.) (displaying sheer ignorance of the U.S. Court’s duty to vindicate federal rights in an apparent attempt to abrogate the U.S. social compact itself).

\textsuperscript{261} Freedman, supra note 114, at 593, 602–17 (“In researching the history of habeas corpus we need to get beyond the label ‘habeas corpus.’ The constitutional importance of the writ is in its function, not its name.”).

\textsuperscript{262} \textit{Fed. R. Civ. P. 2} (“There is one form of action—the civil action.”); \textit{Baker, supra} note 189, at 80 (“For most purposes the new remedies were but subdivisions of one form of action.”) This “one form of action” was Trespass on the Case which already “prevented any recurrence of the restrictiveness and procedural nicety which beset the \textit{praecipe} actions.”). See \textit{Fed. R. Civ. P. 8(e); Conley v. Gibson, 355 U.S. 41, 47–48 (1957)}. Cf. Arthur R. Miller, \textit{Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure}, 88 N.Y.U. L. REV. 286, 288 (2013); \textit{Fed. R. Civ. P. 1}.

\textsuperscript{263} \textit{Baker, supra} note 189, at 80.

\textsuperscript{264} Freedman, supra note 114, at 611–12.


cause” the act of Parliament, which justified Bonham’s trial and imprisonment was declared utterly void and against natural equity.\textsuperscript{267} Lord Coke’s stand against the King to strike down a gross structural error on behalf of Dr. Bonham cost him his seat on the bench.\textsuperscript{268} As a result of standing up to the King, Coke’s life and livelihood was also threatened by bills of attainder and bills of pains and penalties.\textsuperscript{269} Lord Coke’s bravery inspired the U.S. social compact, which is built upon the American Revolutionaries’ plan “to confer on the judiciary the power to declare unconstitutional statutes void.”\textsuperscript{270} Accordingly, the Revolutionary plan that Article III carries out established independent courts beyond the reach of political retribution.\textsuperscript{271}

Where English Courts were convened to administer the King’s Justice, the U.S. Courts were established to house Natural Justice, which does not fall silent amidst any clash of arms.\textsuperscript{272} As James Otis once proclaimed, “let the origin of government be placed where it may, the end of it is manifestly the good of the whole.”\textsuperscript{273} Otis based this claim on

\textsuperscript{267} Dr. Bonham’s Case [1610] 8 Co. Rep. 114a, 118a (Eng.). See Marbury, 5 U.S. at 177; Vanhorne’s Lessee v. Dorrance, 2 U.S. 304, 308 (1795) (noting that despite Dr. Bonham’s Case, “the general position” in England is “that the validity of an act of Parliament cannot be drawn into question by the judicial department” whereas in America it is the general position is to follow Dr. Bonham’s case so “that every act of the Legislature, repugnant to the Constitution, is absolutely void”).

\textsuperscript{268} JOHN LORD CAMPBELL, 1 THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 293–94 (1849). See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655, n.27 (1952) (Jackson, J., concurring) (noting that we follow Lord Coke’s example despite the fact he was removed from the bench for deciding Dr. Bonham’s Case).

\textsuperscript{269} CAMPBELL, supra note 268, at 290–91 (“Bacon next prepared a declaration which the King was to make to the Privy Council, touching Lord Coke, ‘that upon the three grounds of deceit, contempt, and slander of his government, his Majesty might very justly have proceeded not only to have put him from his place of Chief Justice, but to have brought him in question in the Star Chamber, which would have been his utter overthrow . . . .’”).

\textsuperscript{270} Tudor, Otis’s Speech, supra note 5, at 2–3 (“The remedy adopted by the Colonies was to . . . confer on the judiciary the power to declare unconstitutional statutes void.”). See Youngstown, 343 U.S. at 655, n.27 (Jackson, J., concurring).

\textsuperscript{271} John Adams, Thoughts on Government (1776); U.S. CONST. art. III.

\textsuperscript{272} Cicero, Pro Milone 4.10–11; Justinian, Pandects 1.1.4; THE DECLARATION OF INDEPENDENCE para. 1–2 (U.S. 1776). Cf. Quincy Adams, The Amistad, supra note 27, at 3–4 (The Amistad was a case about a group of enslaved black folk who rose up and violently took over their ship on the high seas and attempted to return to Sierra Leone, Africa but accidentally sailed to New York. Their violent act of self-defense did not change the Court’s preliminary decision to allow them into the Court, or their final decision to render the original enslavement of them a fraud.).

\textsuperscript{273} Otis, The Rights, supra note 26, at 11, 13–15 (Though Otis rightly prioritized the end of government above the origin of government, he did give an answer as to the origin as well: “Government is founded immediately on the necessities of human nature, and ultimately on
Ciceronian truth: “Salus populi suprema lex esto, is of the law of nature, and part of that grand charter given [to] the human race” by God.274 James Otis thus fashioned his writings to invite the English people to reject feudalism with the Americans.275 A year after Otis published these statements, Blackstone’s Commentaries were published to preserve the status quo of feudal form in England.276

Justice James Wilson recognized that Sir William Blackstone’s Commentaries are the foundation of feudal sovereign and qualified immunity “both on the other and this side of the Atlantic,” saying: “Of this plan, the author of the Commentaries was, if not the introducer, at least the great supporter.”277 In fact Blackstone’s Commentaries contain long vindications of the feudal immunity of both the King and his “wicked ministers.”278 Blackstone’s defense was grounded upon sheer fantasy: “The king, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing: in him is no folly or weakness.”279 The King was, in Blackstone’s eyes, a “superior being” that possessed “absolute perfection” and “absolute immortality.”280 In fact the King was so far above the law that in Blackstone’s words “there is no legal authority that can either delay or resist him.”281

Blackstone was reluctant to acknowledge that the two degrees of perversion to equity jurisprudence, known as feudal sovereign and qualified immunity as recorded in The Bankers Case, resulted in sheer oxymoron.282 As a result of making a god out of the King, Blackstone...
fundamentally lost track of the overriding reality that “in truth and nature, those who think and speak and act are men.”

When the Taney Court actually applied Blackstone’s feudal oxymorons in America, the due process of the law of the land was rendered completely weightless and arbitrary. As Blackstone suggested, feudalism requires courts to presume that wicked men are good. As the Lincoln Administration observed, however, courts cannot administer justice while equating wickedness with goodness.<ref>See [1817] 2 Dodson 210, 255 (Eng.) (Opinion of Sir William Scott) (presuming slavery according to the oxymoron of the free trade in human flesh).

Chisholm v. Georgia, 2 U.S. 419, 455–56 (1793) (Opinion of Wilson, J.) (responding directly to Blackstone); Hancock’s Case, supra note 60, at 199 (To borrow from John Adams, Blackstone’s thoughts on feudal immunity are “an immense distance from Fact and Truth and Nature” because they are “lost in the wild Regions of Imagination and Possibility, where arbitrary Power sits upon her brazen Throne and governs with an iron Scepter.”).

See, e.g., Luther v. Borden, 48 U.S. 1, 46 (1849) (allowing the residual “regal power” of Rhode Island to declare martial law according to its English charter, allowing the state to violate federal constitutional rights of Rhode Island citizens with impunity).

1 WILLIAM BLACKSTONE, COMMENTARIES **244, 246 (a wicked king is presumed good by English Courts and his ministers are imputed with his wickedness, but his wicked ministers are paradoxically also given a strong presumption that they are not “capable of intentionally disregarding his trust”).

Ex parte Merryman, 17 F. Cas. 144, 150 (C.C.D. Md. 1861) (No. 9,487) (Opinion of Chief Justice Taney riding circuit) (Taney literally presumed the wickedness of innocent black folk, and the goodness of white traitors and kidnappers. As a result, Chief Justice Taney exacerbated hostilities instead of securing peace on the eve of civil war while fervently asserting that it was good of him to do so. But let the record be made clear, as hostilities began to erupt in Maryland it was emphatically wicked and reckless of Taney to obstruct the peace by using his high seat on the federal bench to compare President Abraham Lincoln to the King of England, to call Lincoln a usurper, to misappropriate habeas corpus to waylay the Executive’s ability to arrest suspects for treason and hold them for trial, to look to English law as a superior bastion for habeas corpus than the United States according to his fundamentally incorrect analysis of English law, and ultimately to stoop to an appeal to the glory of English feudalism to challenge the very purposes and causes of the American Revolution and to undermine the U.S. social compact, especially its contention that all men are created equal, in order to release a white man suspected of violent insurrection while precluding habeas corpus by his opinion in Ableman from even the most kind and peaceful black folk, kidnapped and enslaved like Solomon Northup. Thus Taney attempted to destroy the sovereign power of free states to redress the evils of slavery for its free black citizens and even to obstruct their attempts to protect black folk from re-enslavement.) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *137). See Quincy Adams, The Amistad, supra note 27, 17 (absurdity abounds in reliance on feudal powers that are exercised gubernativamente: “First, they are demanded as persons, as the subjects of Spain, to be delivered up as criminals, to be tried for their lives, and liable to be executed on the gibbet. Then they are demanded as chattels, the same as so many bogs of coffee, or bales of cotton, belonging to owners, who have a right to be
To avoid this absurdity, which would have been a fatal blow to the administration of justice, the American Revolutionaries put forth a logical syllogism: Either the government will be of laws or of men. In other words, arbitrary government will prevail over due process of the laws, or due process will prevail over arbitrary government. As to this syllogism, the U.S. Supreme Court clearly stated: “there is no middle ground.”

On the other hand, Blackstone asserted sovereign and indemnified for any injury to their property.”), and at 111–12 (quoting Decree of William Johnson, Dec. 28, 1821, The Antelope, microformed on U.S. Supreme Court Appellate Case Files, Feb. 11–Aug. 5, 1822, roll no. 59 (Nat’l Archives Microfilm Publ’n’s)); The Antelope, 23 U.S. 66 (1825) (following the feudal English principle from Le Louis, which presumes slaves rightly enslaved without proof as a matter of the ultimate oxymoron of the free trade in human flesh), overruled by The Amistad, 40 U.S. 518 (1841).

287 Hancock’s Case, supra note 60, at 199 (arguing that arbitrary government is the violation of the consent of the governed). See WILLIAMS, BLOUDY supra note 52, at 114 (“the sovereign power of all civil authority is founded in the consent of the people”); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (governments “deriv[e] their just powers from the consent of the governed”); Chisholm v. Georgia, 2 U.S. 419, 457, 468 (1793) (Opinion of Wilson, J.) (disputing Blackstone’s violation of the “CONSENT of those whose obedience [the laws] require”); Marbury v. Madison, 5 U.S. 137, 176–77 (1803) (“That the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected.”); Nevada v. Hall, 440 U.S. 410, 426 (1979) (“In this Nation, each sovereign governs only with the consent of the governed.”).

288 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“Governments are instituted among men” to secure natural human rights “deriving their just powers from the consent of the governed.”); Gage, supra note 187, at 179 (“Governments derive their just powers from the consent of the governed. That is the axiom of our republic. From this axiom we understand that powers used by the government without consent of the governed, are not just powers, but that on the contrary, they are unjust powers, usurped powers, illegal powers.”).

289 Marbury v. Madison, 5 U.S. 137, 176–77 (1803) (“The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. . . . Between these alternatives there is no middle ground.”); Ex parte Milligan, 71 U.S. 2, 124–25 (1866) (“Civil liberty and this kind of martial law cannot endure together; the antagonism is irrecconcilable; and, in the conflict, one or the other must perish.”). See Charles Carroll, First Letter of First Citizen (1773), reprinted in ELIHU S. RILEY, CORRESPONDENCE OF “FIRST CITIZEN”—CHARLES CARROLL OF CARROLLTON, AND “ANTILON”—DANIEL DULANY, JR. 50 (1902) (rejecting feudalism as the pitiful and immoral “wish to be the first slave of a sultan, to lord it over all the rest,” Charles Carroll continued “power, Sir, power, is apt to pervert the best of natures; with too much of it, I would not trust the milkiest man on earth.”); Letter from Abigail Adams to John Adams (March 31, 1776) (“Remember all Men would be tyrants if they could.”). Cf. Susan B. Anthony, In Court Remarks after Directed Verdict (1872), in AN ACCOUNT OF THE PROCEEDINGS ON THE TRIAL OF SUSAN B. ANTHONY ON THE CHARGE OF ILLEGAL VOTING AT THE PRESIDENTIAL ELECTION IN NOV., 1872, at 82 (1874) [hereinafter Anthony, In Court] (“Yes, your honor, I have many things to say; for in your ordered verdict of guilty, you have trampled under foot every vital principle of our government. My natural rights, my civil rights, my political rights, my judicial rights, are all
qualified immunity while staunchly arguing that anarchy would destroy a system of government wholly placed under the Rule of Law. Blackstone’s fundamental principle in this gambit was that “all human law must be prescribed by a superior.” That is, though he rejected the American syllogism, Blackstone advocated a Rule of Men.

Like the Americans, the Roman Senator Cicero also preempted, however anciently, William Blackstone’s flamboyant claim that the King is the fountain of justice by asserting that “nature is... the foundation of justice.” Cicero argued that virtues like generosity, loyalty, and gratitude “originate in our natural inclination to care about others, and this is the foundation of justice.” Modern minds have since embraced this proposal.
The idea that the inclination of human beings toward goodness and justice arises from human nature is vital to the U.S. experiment. It is the origin of the natural right of self-defense that the founders announced in the years leading up to July 4, 1776, which faithfully controlled the first U.S. Supreme Court, and continues to inspire the Civil Rights movements on this and the other side of the Atlantic. In fact, the idea that nature is the foundation of justice inheres in the common law of habeas corpus, which Congress cannot suspend. In contrast, it is inherent in the character of martial law applied by secret military tribunals to indiscriminately violate the natural right of self-defense.

1, 18 (1950) (arguing that “we can [and should] allow free play to our natural humanitarian revulsion against cruelty”); Kastely, supra note 6, at 8, 14–15, 21.

296 Cicero, De Legibus 1.15.43; Cicero, Pro Milone 4.10–11; The Declaration of Independence para. 1–2 (U.S. 1776); The Federalist No. 51 (James Madison) (“Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.”). Cf. James Wilson, Lectures: On the Study of the Law (1790), in James Wilson, 1 The Works of James Wilson 119–22 (1804) (In Wilson’s third lecture he spoke: “I can only say, I feel that such is my duty. Here investigation must stop; reasoning can go no farther. . . . Such an intuitive truth is that, with which we just now closed our investigation. If a person was not possessed of the feeling before mentioned; it would not be in the power of arguments, to give him any conception of the distinction between right and wrong. . . . When an action is represented to us, flowing from love, humanity, gratitude, an ultimate desire of the good of others; though it happened in a country far and distant, or in an age long past, we admire the lovely exhibition, and praise its author. The contrary conduct, when represented to us, raises our abhorrence and aversion. . . . This sense or apprehension of right and wrong appears early, and exists in different degrees. The qualities of love, gratitude, sympathy unfold themselves, in the first stages of life, and the approbation of those qualities accompanies the first dawn of reflection. Young people, who think the least about the distant influences of actions, are, more than others, moved with moral forms. Hence that strong inclination in children to hear such stories as paint the characters and fortunes of men. Hence that joy in the prosperity of the kind and faithful, and that sorrow upon the success of the treacherous and cruel, with which we often see infant minds strongly agitated.”) (citing Cicero, De Natura Deorum 1.1.16.).

297 Chisholm v. Georgia, 2 U.S. 419, 458 (1793) (Opinion of Wilson, J.), at 468 (Opinion of Cushing, J.), at 471 (Opinion of Jay, C.J.), and at 450 (Opinion of Blair, J.).

298 See, e.g., Pankhurst, supra note 31 (Drawing from the example of the American Revolutionaries, Pankhurst showed how the natural human inclination to care about others was the way the Civil Rights movements forced change on society: “It means you refuse food until you are at death’s door, and then the authorities have to choose between letting you die, and letting you go; and then they let the women go.” And again: “Human life for us is sacred, but we say if any life is to be sacrificed it shall be ours; we won’t do it ourselves, but we will put the enemy in the position where they will have to choose between giving us freedom or giving us death.”).

299 Cicero, De Legibus 1.15.43; The Declaration of Independence para. 1–2 (U.S. 1776).

300 See Duncan v. Kahanamoku, 327 U.S. 304, 326 (1945) (the Court wisely followed the rule in Milligan to overturn a military tribunal that sentenced a person “to six months at hard
The practice of de novo review to discover and enforce natural rights was expressed in Cicero’s famed oration Pro Milo, and its existence justifies the U.S. social compact in order to vindicate fundamental human rights.\(^\text{301}\) Thus, Cicero argued that within a society when there is a clash of arms like a riot or an attempted murder, the positive laws fall silent and the intended victim is “not required to wait for their aid.”\(^\text{302}\) Upon recognizing that the positive laws fell silent in the facts of a case at bar, the U.S. Court’s natural equity will preside over the case so that the accused can assert the protection of self-defense in court according to the natural law.\(^\text{303}\)

Cicero’s argument in Pro Milo is the origin of the saying inter arma enim silent leges, and it does not remove the jurisdiction of the Court, but extends it to consider the natural law when the positive laws fall silent.\(^\text{304}\) Ex parte Quirin and all its progeny were built upon a misunderstanding of this Ciceronian rhetoric that has long persisted in American politics in order to destroy the Court’s recognition of the
natural law.\textsuperscript{305} That is, \textit{Quirin} used Cicero’s idea to do both the exact opposite of what Cicero intended in \textit{Pro Milo}, and to contravene the U.S. social compact’s vindication of the natural human right of self-defense.\textsuperscript{306} Therefore, \textit{Quirin} and its entire progeny should be summarily overruled because “[c]ivil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.”\textsuperscript{307}

Contrary to \textit{Quirin} the Court’s power is at its zenith when it is used to shut down illegitimate tribunals wherever they exist in the general jurisdiction of the United States.\textsuperscript{308} As in \textit{Dr. Bonham’s Case}, the power to declare unjust process void extends to state court tribunals when they commit “structural error” which “undermine[s] the fairness of a criminal proceeding as a whole.”\textsuperscript{309} In direct conflict with the common law of habeas corpus under the limitation of the Suspension Clause described in \textit{Milligan}, the \textit{Ex parte Quirin} Court ignored the common law of habeas corpus in favor of a “common law of war.”\textsuperscript{310} But as a matter of principle in America, war and martial law is ousted by natural and civil laws as \textit{coram non judice} according to the presumption of human freedom in \textit{Ex parte Watkins} and \textit{Ex parte Wilson}.\textsuperscript{311}

\textsuperscript{305} \textit{Ex parte Quirin}, 317 U.S. 1, 34 (1942). See \textit{Story, Constitution}, supra note 3, at § 217, §334 (applying a meaning other than Cicero’s meaning); \textit{Milligan}, 71 U.S. at 20 (lawyers for the government argued that during the civil war \textit{inter arma enim silent leges} and Cicero’s famed maxim \textit{salus populi suprema lex esto} justifies the executive’s application of martial law over an unpopular citizen because “all peace provisions of the Constitution, and, like all other conventional and legislative laws and enactments, are silent amidst arms, and when the safety of the people becomes the supreme law”—but this was a gross misunderstanding of Ciceronian thought). \textit{Cf. Walzer, Regicide}, supra note 46, at 74. \textit{But see Otis, The Rights}, supra note 26, at 13, 19 (“\textit{Salus populi suprema lex esto}, is the law of nature, and part of that grand charter given [to] the human race” by God.); Cicero, \textit{Pro Milone} 4.10–11 (arguing that the Court should rule upon the natural law in his client’s favor according to the circumstance that “silent enim leges inter arma”); Cicero, \textit{De Legibus} 3.3.8.

\textsuperscript{306} Cicero, \textit{Pro Milone} IV.10–11.

\textsuperscript{307} \textit{Ex parte Milligan}, 71 U.S. 2, 124–25 (1866); Cicero, \textit{Pro Milone} 4.10–11.

\textsuperscript{308} \textit{Glass v. The Sloop Betsey}, 3 U.S. 6, 16 (1794) (overruling the existence of illegitimate military courts on U.S. soil).


\textsuperscript{310} \textit{Ex parte Quirin}, 317 U.S. 1, 34 (1942).

\textsuperscript{311} \textit{Ex parte Wilson}, 114 U.S. 417, 421–27 (1885). \textit{Wilson} rooted itself in the founding principles and habeas cases exemplified by the Thirteenth Amendment rejection of slavery stretching back to \textit{Ex parte Watkins}, 28 U.S. 193, 209 (1830) (“a court martial had no jurisdiction over a person not belonging to the militia, and its sentence in such a case being
Nevertheless, the feudal presumption of slavery based on feudal warfare which eventually produced \emph{Ex parte Quirin} is a corruption that tends to keep rising from the dead.\footnote{Ex parte Quirin, 317 U.S. 1, 31 (1942) (turning a blind eye to the executive department when it changes U.S. citizens into “enemy combatants” with no rights). See \emph{The Antelope}, 23 U.S. 66, 118–20 (1825) (relying on the presumption of slavery in \emph{Le Louis} to decide that the Africans on board were property and had no rights) (citing \emph{Le Louis} [1817] 2 Dodson 210, 255 (Eng.) (Opinion of Sir William Scott) (presuming slavery according to the English oxymoron of the free trade in human flesh)); Quincy Adams, \emph{The Amistad}, supra note 27, at 88 (“The truth is, that property in man has existed in all ages of the world, and results from the natural state of man, which is war.”) (internal quotation marks omitted) (quoting \textit{Official Journal of the Executive}); \textit{Dred Scott v. Sandford}, 60 U.S. 393, 407 (1857) (arguing that African Americans are not “people”); \textit{Ableman v. Booth}, 62 U.S. 506, 526 (1858) (precluding African Americans from habeas corpus); \textit{Ex parte Parks}, 93 U.S. 18, 24 (1876) (refusing to overrule \textit{Ableman} and denying habeas); \textit{Ex parte Siebold}, 100 U.S. 371, 375 (1879) (citing \textit{Ableman}, 62 U.S. at 408; \textit{Parks}, 93 U.S. at 18); \textit{Downes v. Bidwell}, 182 U.S. 244, 250, 271–78 (1901) (Opinion of Brown, J.) (arguing that African Americans are not included as “people” in the U.S. Social Compact) (citing \textit{Dred Scott}, 60 U.S. at 436); \textit{The Slaughterhouse Cases}, 83 U.S. 36, 73 (1873) (celebrating \textit{Dred Scott}); \textit{Kerry v. Din}, 135 S. Ct. 2128, 2132–33 (2015) (Opinion of Scalia, J.) (arguing that only feudal rights from the Magna Carta exist); \textit{Tuaua v. United States}, 788 F.3d 300, 304 (D.C. Cir. 2015) (citing \textit{Dred Scott}, 60 U.S. at 404–05, cert. denied, 136 S. Ct. 2461 (2016); \textit{Montgomery v. Louisiana}, 136 S. Ct. 718, 728–37 (2016) (citing \textit{Ex parte Siebold}, 100 U.S. 371, 376 (1879)). \textit{See also} Hayne-Webster Debate, \textit{Haynes’ Reply} (1830), available at http://www.constitution.org/hwdebate/hayne2b.htm (quoting Edmund Burke, \textit{Speech on moving his resolutions for conciliation with the colonies} (March 22, 1775)).\footnote{The \textit{Antelope}, 23 U.S. at 118 (citing \textit{Le Louis} [1817] 2 Dodson 210, 255 (Eng.) (Opinion of Sir William Scott)), and at 126 (“no principle is settled”).}}

The presumption of slavery was nearly resurrected in \emph{The Antelope} by drawing inspiration from the despicable English admiralty case \emph{Le Louis}.\footnote{\textit{Le Louis} [1817] 2 Dodson 210, 255 (Eng.) (Opinion of Sir William Scott).\footnote{Id. at 243 (“I have to observe, that two principles of public law are generally recognized as fundamental. One is the perfect equality and entire independence of all distinct states... The second is, that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation.”). \textit{See} Hugo Grotius, \textit{Mare Liberum} ix–x (James Brown Scott ed., Ralph van Deman Magoffin trans. 1916) (1608) (the introductory note quotes \textit{Le Louis} to make this very point—that even in England Grotius’s idea that the sea is free defeated Selden’s idea that the sea should be proprietyed) (quoting \textit{Le Louis} [1817] 2 Dodson 210, 243 (Eng.) (Opinion of Sir William Scott)).} The \emph{Le Louis} case represents the feudal oxymoron of the free trade in human flesh.\footnote{Le Louis [1817] 2 Dodson 210, 255 (Eng.).} The free trade in human flesh was first established at the Treaty of Breda, 1667 where the English successfully corrupted Hugo Grotius’s idea that every sovereign nation is equal.\footnote{Id. at 243} Thus, based on the fundamental idea that all sovereigns are equal, \emph{The Antelope} Court erred by failing to recognize the natural equality of each person such that according to
habeas common law each person possesses the equal right to approach the Court for their freedom.316

The Antelope was overruled by The Amistad which allowed Cinque and other black citizens of Sierra Leone to approach the U.S. Court for their freedom.317 The Amistad Court found for Cinque and his fellow passengers by presuming all people free and looking behind prima facie evidence of their slavery for de novo evidentiary support on the merits.318 Finding no evidentiary support other than a flat claim of the Spanish Queen, the Court announced the enslavement of Cinque and his fellow passengers a fraud.319 Thus The Amistad engaged in de novo review of the facts, abrogating the oxymoron that controlled The Antelope and Le Louis, known as the free trade in human flesh.320

Then as though The Amistad never existed the Taney Court ignored Martin and Rachel Luther’s Third, Fourth, and Fifth Amendment rights in Luther v. Borden based upon a feudal appropriation of self-defense on behalf of a state corporation,321 ignored Dred Scott’s legitimate vi et armis claim in Scott v. Sandford based on equal sovereignty,322 and

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316 The Antelope, 23 U.S. at 122 (“No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights.” But this utterly misses the more important fact that each natural person has equal rights.).

317 The Amistad, 40 U.S. 518, 561, 595 (1841) (based upon the idea that “all men are presumed to be free” centering this presumption upon the idea that “it can never be presumed that either State intends to provide the means of perpetrating or protecting frauds”) (overruling The Antelope).

318 Id. at 594 (presuming the freedom of The Amistad Africans by “look[ing] behind” the documents that declared their enslavement by conducting a de novo review of the facts).

319 Id. at 520, 594–97 (“Fraud will vitiate any, even the most solemn, transactions, and any asserted title founded upon it is utterly void.” The Court concluded that the prima facie evidence provided in the name of Spain “have been obtained by the grossest frauds and impositions” and therefore “human life and human liberty are in issue, and constitute the very essence of the controversy.” The Court continued: “The treaty with Spain never could have intended to take away the equal rights of all foreigners who should contest their claims before any of our Courts, to equal justice; or to deprive such foreigners of the protection given them by other treaties, or by the general law of nations.” Finally “these negroes ought to be deemed free” and thus the Court concluded “the said negroes be declared free, and be dismissed from the custody of the Court, and go without day.”).

320 Id. at 518, 594 (overruling The Antelope by saying: “The principle . . . adopted in [The Antelope and Le Louis], has no application to the case of fugitives from slavery.”). See Le Louis [1817] 2 Dodson 210, 255 (Eng.) (Opinion of Sir William Scott) (presuming slavery according to the English oxymoron of the free trade in human flesh).

321 Luther v. Borden, 48 U.S. 1, 67 43–47 (1849), and at 67 (Woodbury, J., dissenting) (noting that the Third, Fourth, and Fifth Amendments were drafted to give form to the government under the U.S. social compact which ousted martial law to all who were not actually serving in the military).

322 Dred Scott v. Sandford, 60 U.S. 393, 406–07, 416–17 (1857), at 484–85 (Daniel, J., concurring), and at 527 (Catron, J., concurring) (“He secures his equality through the equality
precluded federal habeas corpus from all black people for the first time in *Ableman v. Booth* by importing the feudal injustice of Parliamentary omnipotence. These cases compose the origins of the political question doctrine. They also symbolize the Taney Court’s presumption of feudal slavery which paved the way to the Civil War. Chief Justice Taney’s treasonous celebration of feudalism was...
scandalously revealed in *Ex parte Merryman* on the very eve of Civil War.  

In fact Taney’s role of centralizing the Southern cause by declaring President Lincoln worse than King George III of 1776 is undeniable. Taney’s ironic *Merryman* opinion appealed to English feudalism in an attempt to use the judicial power to undermine the U.S. social compact. Accordingly Taney credited the English feudalists and not the American Revolutionaries for removing the dangerous prerogative power from the Crown in America. But Taney’s ridiculous revisionary history of England and America was already refuted by Joseph Story in his *Commentaries*. In fact Taney is demonstrably mistaken in his celebration of the English form of government because even in 2008 the

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327 *Merryman*, 17 F. Cas. at 151 (“If the president of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust the crown; a power which the queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First.”). But actually, the Queen could exercise that power in 1774, and did so in 2008: Bancoult v. Secretary of State for Foreign and Commonwealth Affairs [2008] UKHL 61 ([2007] EWCA Civ 798) (Eng.) (very recently reaffirming Campbell v. Hall [1774] 1 Cowp. 204 (Eng.)).

328 *Merryman*, 17 F. Cas. at 150 (Taney argued that the Fifth Amendment “is nothing more than a copy of a like provision in the English constitution” and arguing that as of the Petition of Right of King Charles I that the “people of England” had already removed the power of the privy council to cut through all protections of human liberty to imprison, impress, and put to death common English citizens according to martial law. This revision of English history, however, is patently un-American and demonstrably false on all levels, starting with the fact that the Petition of Right was merely a resolution of the House of Commons and was not made into law.). Cf. *The Declaration of Independence* para. 1–2 (U.S. 1776); *The Federalist* No. 84 (Alexander Hamilton); Vanhorne’s Lessee v. Dorrance, 2 U.S. 304, 308 (1795) (“Besides, in England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America the case is widely different: Every State in the Union has its constitution reduced to written exactitude and precision.”).

329 *Merryman*, 17 F. Cas. at 150–51 (arguing that “[t]he people of the United Colonies” already “lived under [the English constitution’s] protection, while they were British subjects”—but this is patently false, for (1) the birth of the Union was emphatically July 4, 1776 and no earlier, and (2) the rights of the Englishman were expressly precluded from all colonists in the 1774 decision *Campbell v. Hall*). Cf. *Story, Constitution*, supra note 3, at § 207; *The Declaration of Independence* para. 1–2 (U.S. 1776); Campbell v. Hall [1774] 1 Cowp. 204, 211–12 (Eng.).

330 *Story, Constitution*, supra note 3, at § 1334.
House of Lords endorsed the Queen’s unilateral power to conquest, banish, and imprison the Chagossians under the quintessentially anti-American 1774 precedent *Campbell v. Hall*.331

In *Merryman*, Taney riding circuit scandalously applied the English unwritten constitution according to Sir William Blackstone calling the Fifth Amendment “nothing more than a copy of a like provision in the English constitution.”332 But Blackstone’s *Commentaries* are not a valid source for the written provisions of the U.S. Constitution, the common law of habeas corpus, or the American ideal of the Separation of Powers.333 As Joseph Story reminds us “the right to pass bills of attainder in the British parliament still enables that body to exercise the summary and awful power of taking a man’s life, and confiscating his estate, without accusation or trial” and Blackstone, perhaps in his zeal to win the argument with Otis and Thacher for the Crown, “has slid over this subject with surprising delicacy.”334

It wasn’t until the enactment of the Fugitive Slave Law of 1850 that “mercy to [African Americans became] a crime” because the law “bribes the judge who tries them.”335 Chief Justice Taney blindly upheld the
constitutionality of this law upon habeas in *Ableman v. Booth*—nearly securing the nation’s destruction upon Civil War and undermining the very domestic “tranquillity” that it was expressly written to achieve.\footnote{Ableman v. Booth, 62 U.S. 506, 519–20, 526 (1858) (overruling the Wisconsin Supreme Court’s decision that the Fugitive Slave Law of 1850 is unconstitutional in order to secure “internal tranquillity” citing to the U.S. Constitution’s purposes in establishing the Court).} The oxymoron of *Ableman* is just that.\footnote{Compare Ableman, 62 U.S. at 519–20 (attempting to secure “internal tranquillity”), with President Abraham Lincoln, *A Proclamation of Blockade Against Southern Ports* (April 19, 1861) (“an insurrection against the Government of the United States has broken out”).} Ensuring “domestic Tranquility,” which is an express purpose of the U.S. Constitution, cannot be achieved by legalizing the “domestic violence” of slavery or by turning a blind eye to the kidnapper and the thief.\footnote{Ableman, 62 U.S. at 519–20, 526 (overruling the Wisconsin Supreme Court’s decision that the Fugitive Slave Law of 1850 is unconstitutional in order to secure “internal tranquillity”).} Taney’s vigorous assertion of § 14 of the Judiciary Act in *Merryman* revealed *Ableman* as patently arbitrary and an unconstitutional violation of the Rule of Law by repealing § 14 by mere implication and enforcing a legal presumption that all black habeas petitioners are fugitive slaves.\footnote{Ableman, 62 U.S. at 526; Douglass, supra note 15; NORTHUP, supra note 335, at 315–16 (even when no longer suspected of being a fugitive slave, free black people were apparently not allowed to testify in open court of their injuries).} The oxymoron is completed by *Ableman*’s declaration of supreme finality upon the federal law on habeas corpus by constitutionalizing the Fugitive Slave Law that utterly violated the power of every Court in the Union to make a final determination upon the facts.\footnote{Ableman, 62 U.S. at 519–20, 526 (allowing the Fugitive Slave Law to abrogate § 14 jurisdiction in regards to black people, while *Merryman* released a violent insurrectionist wanted for treason who was white); Ex parte Merryman, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9,487).}

After the Civil War the feudal presumptions in *Luther, Dred Scott,* and *Ableman* was preserved by *The Slaughterhouse Cases* that “celebrated Dred Scott.”\footnote{The Slaughterhouse Cases, 83 U.S. 36, 73 (1873).} Thus *Slaughterhouse* declared that “a man of respect the rights of African Americans as human beings in court); Letter from John Adams to Jeremy Belknap (Mar. 21, 1795), http://founders.archives.gov/documents/Adams/99-02-02-1659 (“I never knew a Jury by a Verdict to determine a Negro to be a Slave—They always found them free.”).
African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States” according to the U.S. social compact. But this was untrue. The federal writ of habeas corpus was always extended to free African Americans unjustly imprisoned—to respect their civil right to approach the court. The U.S. social compact presumes all people naturally and equally free.

The opinions of Justices White and Brown in *Downes v. Bidwell* extended *Slaughterhouse’s* treasonous sentiment about *Dred Scott* dictum in an attempt to revise the social compact as if Phillis Wheatley, federal habeas corpus for fugitive slaves before 1850, and *The Amistad* never existed. Justice Brown specifically contended that “the African race was not intended to be included, and formed no part of the people who framed and adopted the Declaration of Independence.” Again, this is not true. But even today, when all of the Justices symbolically express disgust over *Dred Scott* the U.S. Supreme Court still has not expressly overruled *Dred Scott* or explained why its approach fails constitutional muster.

In fact in 2015 the D.C. Circuit Court relied upon *Dred Scott* instead of *Boumediene* in *Tuaua v. United States* and the U.S. Supreme Court pitifully denied cert and allowed the D.C. Court’s violation of the

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342 *Slaughterhouse*, 83 U.S. at 73; Baker v. Carr, 369 U.S. 186, 285–86 (1962) (failing to overrule and totally void this assertion from *Dred Scott* that was scandalously repeated after the Civil War in *Slaughterhouse* as simply untrue). *Cf.* Calder v. Bull, 3 U.S. 386, 388 (1798) (Opinion of Chase, J.) (“An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority.” Thus when a law is declared void it is as if it never was a law, as if it never existed.).

343 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (it is “self-evident” truth that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights”).


345 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).


347 *Downes*, 182 U.S. at 272 (Opinion of Brown, J.).

348 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

law of the land to stand. There is no good reason for this. The
Tuaua Court should be counted out of bounds. It should be vigorously
overruled. The perversions of the U.S. social compact arising from the
Taney Court that treat only white, propertied men as “persons” remain
on the books, they are unchallenged, and they are still being used.
Accordingly Justice Scalia’s dissent in Boumediene championed Downes
in order to erect arbitrary territorial limits that amount to something less
than the general jurisdiction of the Court upon habeas corpus. Here
and elsewhere Scalia’s contributions to the Court’s jurisprudence have
an uncanny resemblance with Chief Justice Taney’s.

350 Tuaua, 788 F.3d at 304–05 (decided as if the dissents in Boumediene were the law)
(citing Dred Scott, 60 U.S. at 404–05), cert. denied, 136 S. Ct. 2461 (2016).
and the President the power to acquire, dispose of, and govern territory, not the power to
decide when and where its terms apply.”).
352 Id.; Ex parte Randolph 20 F. Cas. 242, 251 (C.C.D. Va. 1833) (No. 11,558) (Opinion
Murray v. The Charming Betsey 6 U.S. 64, 118 (1804) (“an act of Congress ought never to be
construed to violate the law of nations if any other possible construction remains”).
353 See, e.g., Tuaua, 788 F.3d at 304–05 (decided as if the dissents in Boumediene were
the law) (citing Dred Scott, 60 U.S. at 404–05), cert. denied, 136 S. Ct. 2461 (2016).
Downes based on a functional reading of the Insular Cases in general—but the analysis in
Downes itself should be vigorously overruled as it was based on infidelity to the U.S. social
compact). See Boumediene, 553 U.S. at 839 (Scalia, J., dissenting) (“None of the Insular
Cases stands for the proposition that aliens located outside U.S. sovereign territory have
constitutional rights . . . .”), and at 801–02 (Roberts, C.J., dissenting) (“I nonetheless agree
with Justice Scalia’s analysis of our precedents and the pertinent history of the writ, and
accordingly join his dissent.”). But see Boumediene, 553 U.S. at 751 (“The prudential barriers
that may have prevented the English courts from issuing the writ to Scotland and Hanover are
not relevant here. We have no reason to believe an order from a federal court would be
disobeyed at Guantanamo.”). Cf. Tuaua, 788 F.3d at 304–05 (decided as if the dissent in
Boumediene prevailed) (citing Dred Scott v. Sandford, 60 U.S. 393, 404–05 (1857)), cert.
denied, 136 S. Ct. 2461 (2016); Daimler v. Bauman, No. 11–965, slip op. at 15–16 (2014)
(applying corporate law “alter ego” test for piercing the corporate veil in an attempt to limit
general jurisdiction, which the Court cannot do because corporate law has nothing to do with
the Court’s general jurisdiction—the general jurisdiction of the Court exists independently
and above the Court, the Court emphatically does not create the U.S. general jurisdiction out
of its power, but actually the Court’s power is limited by the U.S. general jurisdiction).
Court to balance the right of the petitioner to freedom and the so-called “State’s right” to
deprive the petitioner of his freedom, but there is no such State’s right! Upon habeas corpus
the State is supposed to justify its power to imprison despite the natural rights of the prisoner.
The U.S. Constitution affirms this point in the Ninth and Tenth Amendments, which reserve
to states only powers, and to people both rights and powers); Kerry v. Din, 135 S. Ct. 2128,
2132–33 (2015) (Opinion of Scalia, J.); Ex parte Merryman, 17 F. Cas. 144, 150–51 (C.C.D.
Md. 1861) (No. 9,487) (Opinion of Taney, C.J. riding circuit). Cf. Letter from Thomas
The consequences of following Downes and the other Insular Cases in matters of habeas would be total. 357 Justice Brown (author of Plessy v. Ferguson) 358 spoke for a plurality in Downes to conclude that “alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought” could not possibly shoulder “the administration of government and justice according to Anglo-Saxon principles.” 359 But our nation is not built upon Anglo-Saxon principles. 360 In the 1774 case Campbell v. Hall the House of Lords expressly precluded the Americans from all the rights and privileges of Englishmen according to the King’s power to tax the entire world. 361 In response, America embraced an alternative and sweeping identity: “The land of freedom’s heaven-defended race!” 362

The revival of Taney’s infidelity on the Court after the Spanish-American War seems to emanate from Theodore Roosevelt’s “rough rider” involvement in Cuba around the turn of the twentieth century. 363 Like Taney, the elitist Theodore Roosevelt attempted to revise the history of the Louisiana Purchase during his Presidency in order to justify U.S. imperialism by emulating Europe. 364 In fact he made no secret of his wish to replace the ideals of the Declaration of

Paine to the Inhabitants of Louisiana (Sept. 22, 1804), available at http://thomas-paine-friends.org/paine-thomas_to-the-inhabitants-of-louisiana.htm (denouncing the inhabitants of Louisiana for claiming the power to import African Slaves in the name of rights); U.S. CONST. amends. IX & X.

357 Compare Boumediene, 553 U.S. at 839 (Scalia, J., dissenting), with Campbell v. Hall [1774] 1 Cowp. 204, 206–07, 210–11 (Eng.).
358 See generally Plessy v. Ferguson, 163 U.S. 537 (1896).
360 THE DECLARATION OF INDEPENDENCE para. 1–2 (U.S. 1776).
361 Campbell v. Hall [1774] 1 Cowp. 204, 206–07, 210–11 (Eng.).
364 President Theodore Roosevelt, Address of President Roosevelt upon the Occasion of the Opening of the Louisiana Purchase Exposition St. Louis 1–5, 13 (April 30, 1903), http://www.theodorerooseveltcenter.org/Research/Digital-Library/Record.aspx?libID=a294540 (falsey saying that the Americans “conquered the forest and the prairie” and paying homage to France and Spain for doing the same); President Theodore Roosevelt, Proclamation 480 – Louisiana Purchase Exposition (July 1, 1902); Pamela Newkirk, The Man who was Caged in a Zoo, THE GUARDIAN, June 3, 2015, http://www.theguardian.com/world/2015/jun/03/the-man-who-was-caged-in-a-zoo (remembering that the Roosevelt Administration facilitated the capture and jailing of Ota Benga first in the Louisiana Purchase Exposition, and then in the Bronx Zoo). See NANCY J. PAREZO & DON D. FOWLER, ANTHROPOLOGY GOES TO THE FAIR: THE 1904 LOUISIANA PURCHASE EXPOSITION 241 (2007); YARBROUGH, supra note 363, at 60.
Independence with German Ideals. Nor did he succeed in hiding his obvious racism at the World’s Fair in St. Louis. But Roosevelt’s apparent understanding of the German Ideals was an ironic iteration of Sir William Blackstone’s stated feudalism: “What we call purchase . . . the feudists called conquests . . . the Norman jurists . . . styled the first purchaser . . . the conqueror or conquereur.”

Roosevelt’s infidelity and ignorance of American history was embarrassing because from before the Revolution the Americans rejected conquest and refined a vision for purchases based on the God-given right of the Natives to the soil that did not condone acquisition by violence or fraud. The American position was always that peopled U.S. territories must either become independent nations or U.S. states. Furthermore, treaties with the nations of Europe are no good as to the inhabitants of U.S. territories. Thus in order to keep fidelity with the American view that God made all people sovereign, The Treaty of Paris of 1898 which forms the basis for the U.S. presence in Guantanamo Bay ought to be “considered as blank paper” in order to respect the rights of the people of Cuba, Guam, and Puerto Rico. The Insular Cases relying on Roosevelt and Taney’s revisionist history and all other attempts to normalize feudalism must be overruled.

For example Shelby County v. Holder was decided as if The Amistad never overruled The Antelope. Just as the Antelope Court did

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366 See generally PAREZO & FOWLER, supra note 364, at 241.
367 2 WILLIAM BLACKSTONE, COMMENTARIES **94, 103, 242–43.
368 The Case of the White Pines, supra note 155 (“Indian Natives had under God a Right to the Soil. That no good Title could be acquired by sovereign or subject, without obtaining it from the Natives.”).
369 Downes v. Bidwell, 182 U.S. 244, 247 (1901) (Opinion of Brown, J.) (“If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government.”). Cf. Letter from Thomas Paine to the Inhabitants of Louisiana (Sept. 22, 1804), available at http://thomas-paine-friends.org/paine-thomas_to-the-inhabitants-of-louisiana.htm (explaining that a temporary government may be needed—especially so the federal government can stop the inhabitants of territories from exercising the powers of statehood in the name of rights to import African people as slaves).
371 Id.
372 Downes, 182 U.S. at 264 (Opinion of Brown, J.) (adopting a feudal stance from Justice Johnson, a slaveholder, that the U.S. could acquire property by “purchase or conquest”); 2 WILLIAM BLACKSTONE, COMMENTARIES **94, 103, 242–43; Quincy Adams, The Amistad, supra note 27, at 97 (“William Davis and William Johnson, both long since deceased, truth and justice require the remark, with all the respect due to their memories as upright judges and honorable men, that they were both holders of slaves . . . .”).
to anti-slavery legislation, the *Shelby County* Court used “the fundamental principle of equal sovereignty” to nullify legislation that protected each person’s fundamental right to an equal vote.\(^{374}\) *Shelby County* thus fell into the European oxymoron of an equal sovereignty of state corporations that abrogates the equal share each natural person holds in the sovereignty of the nation.\(^{375}\) It was recognized since 1776 that laws should be enacted that protect the fidelity of the vote.\(^{376}\)

Instead of emphasizing the right of each person to the vote and the propriety of Congress’s efforts to secure this citizen’s right, *Shelby County* recognized a state “right to enact and execute [voting laws] on their own.”\(^{377}\) According to this so-called “right” the Court overruled a federal voter protection law in order to deny the due process of the laws to *Shelby County* petitioners and undermine their substantive right of one person, one vote.\(^{378}\) The substantive right of each person to have one vote of equal weight to every other person’s was apparently overruled or

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374 *Id.* at 2622; The Antelope, 23 U.S. 66, 122–23 (1825) (drawing a presumption of slavery from “the equality of nations” to nullify the anti-slavery laws of the United States despite Congress’s express power to define and punish offenses against the Law of Nations). *See* U.S. CONST. art. I, § 8, cl. 10; Slave Trade Act of 1794, 1 Stat. 347 (making the trade in human flesh a crime); 1819 Piracy Law, Pub. L. No. 15–77, 3 Stat. 510 (1819) (making the slave trade a piracy punishable by death); 1820 Piracy Law, Pub. L. No. 16–13, 3 Stat. 600 (1820) (extended and expanded the 1819 law).

375 Tudor, *Otis’s Speech*, supra note 5, at 11–12 n.*. *See* Chisholm v. Georgia, 2 U.S. 419, 477 (1793) (Opinion of Jay, C.J.) (“It would be strange indeed that the joint and equal sovereigns of this country should, in the very Constitution by which they professed to establish justice, so far deviate from the plain path of equality and impartiality as to give the collective citizens of one State a right of suing individual citizens of another State, and yet deny those citizens a right of suing them.”), and at 455–56 (Wilson, J., concurring) (“By a State I mean a complete body of free persons united together for their common benefit to enjoy peaceably what is their own and to do justice to others. It is an artificial person. . . . In all our contemplations, however, concerning this feigned and artificial person, we should never forget that, in truth and nature, those who think and speak and act are men.”). *Cf.* Osborn v. Nicholson, 80 U.S. 654, 660 (1871) (state sovereignty was used to invalidate marriages between African Americans even after the Civil War—destroying the freedoms of individuals through the freedom of the state), abrogated by *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–98 (2015).

376 John Adams, *Thoughts on Government* (1776) (Noting that formal legal protections for voters would be required: “Great care should be taken to effect this, and to prevent unfair, partial, and corrupt elections.” But also noting that “[s]uch regulations, however, may be better made in times of greater tranquility than at present.”).

377 *Shelby County* v. *Holder*, 133 S. Ct. 2612, 2624–26, 2631 (2013). *But see* U.S. CONST. amends. IX & X (the U.S. Constitution reserves to the states no rights, but only powers).

378 *Shelby County*, 133 S. Ct. at 2631 (striking down a law of the land that expressly existed to protect the equal vote of each person). *See* U.S. CONST. art. VI, cl. 2 (the laws of Congress are the law of the land).
forgotten.\textsuperscript{379} It bears repeating that the \textit{Shelby County} Court presumptively upheld substantive state rights and overruled fundamental human rights in the same style as \textit{The Antelope} and \textit{Dred Scott}.\textsuperscript{380} It thus represents an abandonment of the presumption of freedom for a feudal oxymoron like the free trade in human flesh.\textsuperscript{381} \textit{Shelby County} accomplished this by undermining the superintending and overarching “one person, one vote” ideal.\textsuperscript{382}

The “one person, one vote” ideal predates the Voting Rights Act of 1965 as a fundamental due process ideal that emanates from the U.S. social compact and the spirit of the Constitution.\textsuperscript{383} The ability for the Warren Court to defend equal protection of the laws throughout the states (which is the essence of the Rule of Law) depended on the Court’s repudiation of Justice Taney’s concept of non-justiciable political questions first expounded in \textit{Luther v. Borden}.\textsuperscript{384} The Warren Court replaced \textit{Luther}’s blanket deference to state sovereignty even when a

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\item \textsuperscript{379} \textit{Id.} at 2618, 2622–23 (discussing equal sovereignty without adhering to the equal share in state and federal sovereignty that each natural person has).
\item \textsuperscript{380} \textit{Id.} at 2618, 2622, 2631 (expressly overruling § 4(b) of the Voting Rights Act based on “the principle that all States enjoy equal sovereignty”) (nullifying Voting Rights Act of 1965, 79 Stat. 438, § 5). See \textit{The Antelope}, 23 U.S. 66, 122–23 (1825) (basing its decision to ignore federal laws based on “the equality of nations”) (nullifying Slave Trade Act of 1794, 1 Stat. 348; 1820 Piracy Law, Pub. L. No. 16–13, 3 Stat. 600 (1820); Dred Scott v. Sandford, 60 U.S. 393, 484–85, 487–90 (1857) (nullifying The Missouri Compromise unconstitutional based on the equal sovereignty of nations) (nullifying The Missouri Compromise (1820))).
\item \textsuperscript{381} United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 317–18 n.1 (1936) (citing \textit{STORY, CONSTITUTION}, supra note 3, at §§ 198–217). See \textit{Gage}, supra note 187, at 192 (“\textit{National} rights are the fundamental basis of \textit{State} rights. If this is not true, we are then no nation, but merely a confederacy, held together by our own separate wills, and the South was right in its war of secession. Every sovereign right of the United States exists solely from its existence as a nation.”).
\item \textsuperscript{382} \textit{Shelby County}, 133 S. Ct. at 2631.
\item \textsuperscript{383} Reynolds v. Sims, 377 U.S. 533, 558 (1964) (“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote.”) (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963)).
\end{itemize}
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state declares martial law (which the Court in *Shelby County* disturbingly resurrected) with a six factor test.385

But now looking back, the Warren Court ought to have declared all cases based upon the political question doctrine as “void process” which “is the same thing as if there were none at all.”386 *Baker*’s new test for the political question doctrine was doomed to failure because the doctrine itself is based on imagining hypothetical facts to solve a hypothetical evil.387 It fundamentally creates impermissible advisory statements.388 Thus the political question doctrine itself should be wholly overruled as a violation of the Equal Protection Clause because it requires an arbitrary second layer of review regarding whether an Equal Protection claim is “a justiciable constitutional cause of action.”389 Instead of determining justiciability the Court should simply determine its jurisdiction according to the traditional jurisdictional standards of standing, ripeness, mootness, and the choice of laws.390

A dangerous challenge to the traditional jurisdictional standards materialized in *Zivotofsky v. Clinton* [*Zivotofsky I*], which interpreted *Baker*’s factors as sufficient for the Court to justify its exercise of jurisdiction without considering traditional jurisdictional requirements.391 Then based on *Zivotofsky I* the Court issued a procession of impermissible advisory statements, some of which

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386 Ex parte Randolph, 20 F. Cas. 242, 251 (C.C.D. Va. 1833) (No. 11,558) (Opinion of Barbour, Dist. J.), and at 254 (Opinion of Marshall, C.J.) (The political question doctrine ought to be considered “absolutely void” because “it is necessary to discard every idea of its conferring judicial power.”).

387 Luther v. Borden, 48 U.S. 1, 43–44 (1849) (To take one example of many in this case: “After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? . . . It is true that, in this case, the militia were not called out by the President.”).

388 See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393, 447, 452–54 (1856) (deciding the U.S. Court has “no jurisdiction” because whether or not slavery extends to a state “is a question for the political department”—but then declaring the Missouri Compromise unconstitutional and void).


undermined the “one person, one vote” ideal, others of which resurrected cases that *Baker* expressly abrogated. All of the advisory cases ignored the word and spirit of the U.S. Constitution. For example *NLRB v. Noel Canning* seemed to rely upon and overrule the leading separation of powers precedent *Youngstown Sheet & Tube, Co. v. Sawyer*. In another case *Alabama Legislative Black Caucus v. Alabama* the Court based its jurisdiction over a matter not argued at trial because it was “a legal unicorn, an animal that exists only in the legal imagination,” assuring us that its reasoning was not “a slip of the pen” even though it “might seem” to be.

Another leading advisory opinion *Zivotofsky v. Kerry* [*Zivotofsky II*] frivolously hedged against the underlying principle of peace in both *United States v. Curtiss-Wright Export Corp.* and *Little v. Barreme* offering lengthy commentary on the constitution without even changing the outcome of the facts. Failing to see that the common thread in

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393 *See supra* note 392, and accompanying text.

394 *Noel Canning*, 134 S. Ct. at 2560, 2573 (2014) (citing *Youngstown Sheet & Tube, Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)). *But see Youngstown*, 343 U.S. at 610, 614 (Frankfurter, J., concurring) (noting that the Court should not speak when “the gloss which life has written” upon the Constitution is sufficient to decide the matter—only the dissent in Youngstown proceeded to actually dictate a gloss upon the Constitution—instead Frankfurter quoted Chief Justice Jay’s letter to President Washington refusing to issue an impermissible advisory statement) (citing Letter from the Supreme Court Justices to George Washington (Aug. 8, 1793), available at http://founders.archives.gov/documents/Washington/05-13-02-0263).


396 *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015) (misreading *Curtiss-Wright* by asserting that “Curtiss-Wright did not hold that the President is free from Congress’ lawmaking power” when in fact it did under the circumstance that the President was acting according to his inherent power to secure peace in international affairs); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 329 (1936) (refusing to overrule the Joint Resolution because it was not “an unlawful delegation of legislative power.” In fact it was no delegation of power at all because “there is sufficient warrant for the broad discretion vested in the President” to follow the advice of the Joint Resolution or not based on whether “the statute will have a beneficial effect upon the reestablishment of peace in the affected countries”); *Little v. Barreme*, 6 U.S. 170, 176–79 (1804) (the law of Congress can justify a President’s order to violently seize the vessels of foreign nations, or otherwise take actions that may tend not to secure peace, but these exceptions to the President’s duty to secure peace
Little and Curtiss-Wright is the scope of the President’s peace powers, the Zivotofsky II Court mistakenly accepted a false dichotomy between Curtiss-Wright and Little v. Barreme that was entirely created by law professors. Another case Arizona State Legislature v. Arizona Independent Redistricting Commission all but hailed itself as an oracle of democracy while it implicitly resurrected the anti-democratic opinion Taylor & Marshall v. Beckham. By doing so it departed from the express word of the U.S. Constitution even though its opinion had “absolutely no bearing on the outcome.”

Instead of applying the political question doctrine, the Judiciary Act is sufficient to dismiss a case but is by no means final as to the Court’s underlying power. It constitutes a mask of prudence that the Court ought to hide behind most of the time. The Court’s true face of are limited to the Congress’s laws which only have effect upon the high seas according to U.S. CONST. art. I, § 8, cl. 10).


398 Compare Arizona Independent, 135 S. Ct. at 2659–60 n.3 (using popular sovereignty and the political question doctrine to justify a departure from the express words of the U.S. Constitution requiring a “Republican Form of Government”) (citing Pacific States Telephone and Telegraph Company v. Oregon, 223 U.S. 118 (1912)), with Taylor & Marshall v. Beckham, 178 U.S. 548, 578–81 (1900) (doing the same). See Pacific States, 223 U.S. at 143, 148–51 (citing Beckham, 178 U.S. at 578; Luther v. Borden, 48 U.S. 1 (1849)). Cf. THE DECLARATION OF INDEPENDENCE para. 8 (U.S. 1776) (Without constitutions to give form to our governments “the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the meantime exposed to all the danger of invasion from without, and convulsions within.”); U.S. CONST. art. IV, § 4.

399 Jackson v. Virginia, 443 U.S. 307, 328 (1979) (Stevens, J., concurring). See Arizona Independent, 135 S. Ct. at 2659–60 n.3 (the court simply could have dismissed the case without commenting on the complications of popular sovereignty or the Elections Clause and it would have resulted in the same outcome).


401 Cohens v. Virginia, 19 U.S. 246, 404, 429–30 (1821) (“It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. . . . In such cases the Constitution and the [Judiciary Act] must be compared and construed. This is the exercise of jurisdiction. . . . The whole merits of this case, then, consist in the construction of the constitution and the act of Congress [i.e., the Judiciary Act]. The jurisdiction of the Court, if acknowledged, goes no farther. This we are required to do without the exercise of jurisdiction.”).
independent Article III judicial power ought to remain hidden when it is prudent to do so, except in cases where the Judiciary Act itself is unconstitutional.\textsuperscript{402} The Court is supposed to do this on a case by case basis by comparing and construing the Judiciary Act with the U.S. Constitution.\textsuperscript{403} Such a Court excels in modesty and prudence by exercising a jurisdiction approved by Congress as long as that jurisdiction is constitutional.\textsuperscript{404} On the other hand, the Taney Court’s feudalism and invention of the political question doctrine represents a judicial decision to wholly ignore prudence and the Judiciary Act in order to derive jurisdiction solely and directly from the constitutional power of the Court.\textsuperscript{405} Such a Court invariably turns its back on the U.S. social compact and the very purposes for which the U.S. Supreme Court was first ordained.\textsuperscript{406}

\textit{The Prohibition of Impermissible Advisory Statements}

In response to the many habeas cases that have formalized feudal qualified and sovereign immunity to issue advisory statements the Court should stop misquoting Stevens’ footnote 5 in \textit{Jackson} and actually apply the substance of his opinion.\textsuperscript{407} Justice Stevens’ primary contention in \textit{Jackson} was that the majority opinion was an embarrassingly issued impermissible advisory statement.\textsuperscript{408} The Court’s

\textsuperscript{402} \textit{Marbury} v. Madison, 5 U.S. 137, 168–74, 180 (1803) (overruling the writ of mandamus in § 13 of the Judiciary Act of 1789 as a violation of the Separation of Powers).

\textsuperscript{403} \textit{Cohens}, 19 U.S. at 404, 429–30.

\textsuperscript{404} \textit{Marbury}, 5 U.S. at 168–74, 180 (overturning the Judiciary Act according to facts and circumstances of the case).

\textsuperscript{405} Luther v. Borden, 48 U.S. 1, 46–47 (1849) (misusing the natural law of self-defense to justify the unconstitutional declaration of martial law without considering the Court’s jurisdiction under the Judiciary Act); Baker v. Carr, 396 U.S. 186, 208 (1962); Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427–28 (2012) (using the political question doctrine to justify impermissible advisory statements).


\textsuperscript{408} \textit{Jackson}, 443 U.S. at 327–28 (Stevens, J., concurring).
opinion is an impermissible advisory statement if (1) the opinion does not settle a case or controversy by imagining hypothetical facts, or (2) it has imprudently endeavored through procedural nicety to solve a hypothetical evil without “powerful reasons” in favor of doing so.\footnote{Id. (“Widespread concern that existing constitution doctrine is unjust . . . should not be the basis for dramatic—indeed, for any—constitutional lawmaking efforts unless (1) those efforts are necessary to the decision of the case at hand and (2) powerful reasons favor a change in the law.”) (citing \textit{Ashwander v. TVA}, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring) (federal courts have “no power to give advisory opinions”)); \textit{Youngstown Sheet \\& Tube Co. v. Sawyer}, 343 U.S. 579, 595, 610–11, 614 (1952) (Frankfurter, J., concurring) (the existence of “the gloss which life has written upon” the “words of the Constitution” is reason enough to withhold the Court’s opinion upon words which life has already rendered judgement and made the question unripe and forever moot) (citing \textit{Ashwander}, 297 U.S. at 346–48 (Brandeis, J., concurring)); \textit{Letter from Supreme Court Justices to George Washington} (August 8, 1793), available at http://founders.archives.gov/documents/Washington/05-13-02-0263 (even when faced with a matter of great importance, if there is no case or controversy, the Court must not issue a statement)); \textit{Glass v. The Sloop Betsey}, 3 U.S. 6, 16 (1794) (when a proper case or controversy arises on the same matter of great importance, the Court must act).} This test reflects traditional jurisdictional analysis which considers whether the Court is prudently exercising its powers in pursuit of justice.\footnote{United States v. Windsor, 133 S. Ct. 2675, 2685–87 (2013) (citing \textit{Ashwander v. TVA}, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)).} And it arises as a binding tradition started by the first U.S. Supreme Court,\footnote{Letter from Supreme Court Justices to George Washington (August 8, 1793), available at http://founders.archives.gov/documents/Washington/05-13-02-0263 (even when faced with a matter of great importance, if there is no case or controversy, the Court must not issue a statement)); \textit{Glass v. The Sloop Betsey}, 3 U.S. 6, 16 (1794) (when a proper case or controversy arises on the same matter of great importance, the Court must act). \textit{Cf. Youngstown Sheet \\& Tube Co. v. Sawyer}, 343 U.S. 579, 619 (1952) (Frankfurter, J., concurring) (quoting \textit{Letter from Supreme Court Justices to George Washington} (August 8, 1793)).} was solemnly confirmed by Chief Justice Marshall in \textit{Ex parte Randolph} on habeas according to the Separation of Powers,\footnote{Ex parte Randolph, 20 F. Cas. 242, 254, 256–57 (C.C.D. Va. 1833) (No. 11,558) (Opinion of Marshall, C.J.). \textit{See also Ex parte D’Olievera}, 7 F. Cas. 853 (C.C.D. Mass. 1813) (No. 3,967) (Story, J., on circuit). \textit{Cf. Ashwander v. TVA}, 297 U.S. 288, 346–47 n.5 (1936) (Brandeis, J., concurring) (citing \textit{Ex parte Randolph} as a prohibition on advisory statements and a vindication of the Separation of Powers).} and became supremely controlling upon the judicial construction of the AEDPA in \textit{INS v. St. Cyr}.\footnote{INS v. St. Cyr, 533 U.S. 289, 301, 304–05 (2001) (quoting Felker v. Turpin, 518 U.S. 651, 663–64 (1996)).}

These prongs should be applied as a traditional jurisdictional bar instead of feudal immunity prongs of (1) unreasonably applied (2)
clearly established law. \footnote{Ashcroft v. al-Kidd, 563 U.S. 731, 735, 743 (2011). Ashcroft and all cases that apply feudal form should be overruled with traditional jurisdictional analysis. \textit{Cf.} Luther v. Borden, 48 U.S. 1, 46–47 (1849) (the so-called political question doctrine created to turn a blind eye to what was \textit{literally} an application of unconstitutional feudal law by Rhode Island).} However, nothing would be gained if vindicating the traditional jurisdictional bar over feudal immunity was merely like switching out one wooden standard of review for another. \footnote{Jackson v. Virginia, 443 U.S. 307, 327–28 (1979) (Stevens, J., concurring); Brecht v. Abrahamson, 507 U.S. 619, 643 (1993) (Stevens, J., concurring).} In fact the fundamental purpose of the traditional jurisdictional requirements is to enforce the quality of justice administered by Article III Courts—that of \textit{de novo} review of the facts. \footnote{Crowell v. Benson, 285 U.S. 22, 58–59, 65 (1932) (citing \textit{In re Grimley}, 137 U.S. 147, 154–55 (1890)).} The vital difference in quality between traditional jurisdictional analysis and feudalism is that feudalism relieves the Court of its duty to uphold the Rule of Law upon \textit{de novo} review of the facts while the traditional standards require a \textit{de novo} review of the facts in order to uphold the Rule of Law. \footnote{See, e.g., \textit{Ex parte Randolph}, 20 F. Cas. 242, 254, 256–57 (C.C.D. Va. 1833) (No. 11,558) (Opinion of Marshall, C.J.) \textit{(though Chief Justice Marshall refused to overrule the law that was used to imprison Randolph, Marshall nonetheless construed the law in such a way as it could be found wholly constitutional and then applied it to Randolph’s circumstances and set him free upon a writ of habeas corpus). \textit{Cf.} United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 329 (1936) (refusing to overrule a joint resolution, but simply construing that it cannot invade the President’s pre-ordained power to pursue and secure international peace).} This duty was rightly characterized by Susan B. Anthony as the Court’s duty to apply “the full rigors of the law” to every person regardless of their sex, race, class or any other distinguishing factor. \footnote{Anthony, \textit{In Court}, supra note 289, at 84 (“I ask not leniency at your hands—but rather the full rigors of the law.”).} Thus where feudalism requires the Court to dismiss cases of all shapes and sizes in order to avoid applying “the full rigors of the law,” \footnote{Id.; \textit{Cohens v. Virginia}, 19 U.S. 264, 399–404, 429 (1821) (“It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should.” The Court decides this on a case by case basis by comparing and construing the constitution and the Judiciary Act according to the alleged facts. As \textit{Cohens} simply stated: “This is the exercise of jurisdiction.”).} traditional jurisdictional standards require the rigors of the law always be applied to the facts while prudently refusing to speak upon matters beyond the power of the Court. \footnote{Jackson, 443 U.S. at 336 (Stevens, J., concurring).} Accordingly \textit{Ayala} and all similar cases that impose an “additional layer of review” \footnote{Jackson, 443 U.S. at 336 (Stevens, J., concurring).} ... “under the guise of deference to anything within a conceivable spectrum of
reasonableness”422 should be overruled in order that the laws be rigorously and equally applied to everyone.423

The traditional jurisdictional inquiry was set forth upon habeas corpus review in *Ex parte Bollman*.424 In *Bollman*, Erick Bollman and Samuel Swartwout were held in military prison by the Jefferson Administration for allegedly conspiring with Aaron Burr to commit treason.425 The Supreme Court set the petitioners free on habeas because the crime of treason was expressly limited by the U.S. Constitution such that “no person should be convicted of it unless on the testimony of two witnesses to the same overt act or on confession in open court.”426 Thus the Court concluded “that the crime of treason should not be extended by construction to doubtful cases.”427

The *Bollman* Court issued the Great Writ in order to release the petitioners from military custody based on the Court’s *de novo* review of the facts to determine whether they satisfied the constitutional definition of treason.428 The facts did not.429 The Court justified its power to issue the writ of habeas corpus upon its construction of § 14 of the Judiciary Act (known today as the All Writs Act) under the Suspension Clause of the U.S. Constitution.430

In fact, from the beginning the All Writs Act ensured the Judiciary Act’s constitutionality because it “provide[d] efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.”431 Thus, the All Writs Act fulfilled an express constitutional “obligation” to liberally “give, to all the courts, the power of awarding writs of *habeas corpus*” even when it

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424 Ex parte Bollman, 8 U.S. 75, 106 (1807) (if a person is “deprived of his liberty” then “all clashing and interference of power ceases, and sufficient means of redress are still” available to a foreign citizen).
426 *Bollman*, 8 U.S. at 127 (paraphrasing U.S. CONST. art. III, § 3, cl. 1).
427 *Id.*
428 *Id.* at 126–35.
429 *Id.* at 135 (“Against [Bollman], therefore, there is no evidence to support a charge of treason.”).
430 *Bollman*, 8 U.S. at 94–95.
431 *Id.* (citing U.S. CONST. art. I, § 9, cl. 2; JUDICIARY ACT OF 1789, ch. 20, §14, 1 Stat. 73).
were “not specifically provided for by statute.” Thus the traditional bar holds that “[t]he ultimate nature and scope of the writ of habeas corpus are within the discretion of the judiciary unless validly circumscribed by Congress.” The All Writs Act remains good law and it is essential to the constitutional legitimacy of the AEDPA.

After Bollman, President Jefferson attempted to prosecute Aaron Burr for treason based on the same conspiracy theory in which Bollman was implicated. Burr and his comrades were accused of conspiring to commit treason by attacking then U.S. territory New Orleans and revolutionizing then Colonial Mexico. Aaron Burr’s indictment was strangely religious, saying that Burr “not having the fear of God before his eyes” was “being moved and seduced by the instigation of the devil.” This indictment for a conspiracy of “wickedly devising and intending . . . insurrection, rebellion and war” was reminiscent of accusations Robespierre laid against his political enemies. But unlike Robespierre’s Montagnards the Jefferson Administration had to submit to the U.S. Court, so it requested that the Court endorse President Jefferson’s executive determination to declare Aaron Burr an enemy of the state without applying a de novo review of the facts to the letter of the law. In order to uphold the Rule of Law, the Supreme Court wisely refused.

Looking past the dramatized religiosity of the indictment for treason Chief Justice John Marshall required Jefferson to produce evidence of an “overt act” of treason proved “in open court,” as

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432 Id. at 94–95, 105.
433 In re Yamashita, 327 U.S. 1, 30 (1946) (Murphy, J., dissenting).
435 Bollman, 8 U.S. at 128.
436 Id. (“An expedition against Mexico seems to have been the first and most matured part of [Burr’s] plan.”).
438 Id.; Maximilien Robespierre, Speeches at the Festival of the Supreme Being (June 8, 1794); WALZER, REGICIDE, supra note 46, at 72–74.
439 Letter from Thomas Jefferson to George Hay (June 2, 1807), available at http://founders.archives.gov/documents/Jefferson/99-01-02-5683 (The whole purpose of prosecuting “Burr’s case” was “to have the gratuitous opinion in Marbury v. Madison brought before the public & denounced as not law.”).
the U.S. Constitution requires. \(^{441}\) But Jefferson would not. \(^{442}\) Marshall subpoenaed President Jefferson’s papers for the evidence and Jefferson essentially cited to Presidential privilege to keep his papers secret. \(^{443}\) Giving Chief Justice John Marshall no choice, the Court cited to \textit{Ex parte Bollman} and set Aaron Burr free. \(^{444}\) According to \textit{Bollman} and \textit{Burr} the U.S. Court’s reverence for the Rule of Law affirmed the U.S. presumption of freedom, which requires the Court to apply a \textit{de novo} review of the facts to the letter of the law before committing anyone to punishment for a crime. \(^{445}\)

The role of the Rule of Law in the U.S. Court was once again put to the test when former President Nixon attempted to keep his papers secret even after he had been properly removed from office. \(^{446}\) In \textit{Nixon v. Administrator of General Services} the Court held that if a President is caught red handed and he resigns and takes a pardon he is “a legitimate class of one” and his papers may be properly seized. \(^{447}\) Thus the prohibition on Bills of Attainder does not work to violate the Rule of Law in America. \(^{448}\) As the Rule of Law requires, the President emphatically administers the law as an equal and \textit{not} as a superior. \(^{449}\)

\(^{441}\) U.S. CONST. art. III, § 3, cl. 1 (requiring an “overt Act” confirmed by “the Testimony of two Witnesses” to convict a person of treason); \textit{Burr}, 25 F. Cas. at 160–80 (firmly refusing to allow President Jefferson to behave like Robespierre) (citing \textit{Ex parte Bollman}, 8 U.S. 75 (1807)).


\(^{444}\) \textit{Burr}, 25 F. Cas. at 161–65 (citing \textit{Ex parte Bollman}, 8 U.S. 75 (1807)), and at 180–81 (The Court’s opinion was submitted to a jury, which found Burr “Not Guilty.” Jefferson’s attorney George Hay persisted in an attempt to quibble upon the procedural nicety of the jury’s acquittal and the Court responded by affirming the jury’s verdict of “not guilty” and setting Aaron Burr free.). \textit{Cf.} Hamdan v. Rumsfeld, 548 U.S. 557, 604–06 (2006) (Opinion of Stevens, J.) (apparently conforming to Justice Marshall’s opinion in \textit{Burr} that conspiracy must be accompanied with an “overt act” on a \textit{Quirin} review for “enemy combatant” reasonableness—but failing to require direct review by an Article III Court to ensure this result).

\(^{445}\) \textit{Burr}, 25 F. Cas. at 161–65; \textit{Bollman}, 8 U.S. at 126–35.


\(^{447}\) \textit{Id.} at 472 (majority opinion), and at 486 (Stevens, J., concurring).

\(^{448}\) \textit{Id.} at 485–86 n.1 (Stevens, J., concurring) (citing \textit{The Earl of Carnarvon’s remarkable Speech} (1678), in 4 \textit{THE PARLIAMENTARY HISTORY OF ENGLAND} 1073–74 (1808)). See also Chambers v. Florida, 309 U.S. 227, 235–37 (1940).

\(^{449}\) \textit{Burr}, 25 F. Cas. at 158–59, n.12 (Argument of Martin Luther) (noting that Jefferson could be in the same position as Burr after he left office and only the Rule of Law can safeguard all of us), and at 161–65 (Opinion of Marshall, C.J.); \textit{Nixon}, 433 U.S. at 472.
And as the constitution requires, the President cannot force the Court to convict another person of a crime while keeping material evidence on which the case depends secret.\textsuperscript{450} To do such a thing would transform a natural human being into a stateless traitor or an armed enemy at war in order to deprive him or her of a \textit{public} and \textit{speedy} trial.\textsuperscript{451}

\textit{Ex parte Bollman} and \textit{Burr} arose from the treacherous General Wilkinson’s military occupation of the newly purchased Louisiana Territory.\textsuperscript{452} During Wilkinson’s occupation Jefferson ordered a manhunt for Aaron Burr based on a conspiracy theory.\textsuperscript{453} Using cyphered messages to secret informants on the frontier, President Jefferson must have ordered that Wilkinson use any means necessary to find evidence to incriminate Burr.\textsuperscript{454} Thus Wilkinson ruled the city of New Orleans according to martial law and unjustly threw many individuals into military prison without due process.\textsuperscript{455} One New Orleans judge was even imprisoned by Wilkinson for issuing a writ of habeas corpus against Wilkinson’s martial rule in an attempt to free Wilkinson’s prisoners.\textsuperscript{456} However, Wilkinson’s evidentiary fishing expedition was unsuccessful and was overruled by the U.S. Supreme Court in \textit{Bollman} and \textit{Burr}.\textsuperscript{457}

Similarly to Wilkinson’s occupation of Louisiana, in the wake of the Japanese surrender after World War II, General MacArthur occupied Japan and the then U.S. Philippines Territory according to martial


\textsuperscript{451} \textit{Ex parte Quirin}, 317 U.S. 1, 31 (1942). \textit{See} U.S. CONST. art. III, § 3, cl. 1 (“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”). U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .”). \textit{Cf.} WALZER, \textit{REGICIDE}, supra note 46, at 74.

\textsuperscript{452} \textit{Weise}, supra note 425, at vi–vii, 325–26 (detailing how General Wilkinson betrayed his former friend Aaron Burr to President Jefferson).

\textsuperscript{453} \textit{Id.}

\textsuperscript{454} \textit{See} \textit{Ex parte Bollman}, 8 U.S. 75, 126–35 (1807); \textit{Burr}, 25 F. Cas. at 65–66.

\textsuperscript{455} \textit{Weise}, supra note 425, at 325–27.

\textsuperscript{456} \textit{Id.; Alcée Fortier}, 3 \textit{A HISTORY OF LOUISIANA} 48 (1904).

\textsuperscript{457} \textit{Burr}, 25 F. Cas. at 161–65; \textit{Bollman}, 8 U.S. at 126–35.
rule. \(^{458}\) Some reports of MacArthur’s occupation indicate an unhinged U.S. military raping and pillaging their conquered foes.\(^{459}\) However, not much is conclusively verified because MacArthur censored all speech in Japan and the Philippines suppressing speech critical of the United States.\(^{460}\) During MacArthur’s occupation a U.S. military tribunal ordered General Tomoyuki Yamashita to hang “for the crime of inefficiency in controlling [his] troops.”\(^{461}\) This so-called crime did not attribute an \textit{actus reus} or a \textit{mens rea} upon Yamashita.\(^{462}\) In fact, “[n]ot even knowledge of these crimes was attributed to him.”\(^{463}\)

Yamashita was charged “but three weeks after the petitioner surrendered” for a crime “without precedent in international law or in the annals of recorded military history.”\(^{464}\) And only two months later Yamashita was sentenced “without allowing the defense time to prepare an adequate case.”\(^{465}\) In fact MacArthur’s military tribunal sentenced Yamashita to die “without any thorough investigation and prosecution of those immediately responsible for the atrocities, out of which might have come some proof or indication of personal culpability on [Yamashita’s] part.”\(^{466}\) Thus “with needless and unseemly haste” Yamashita’s military “indictment, in effect, permitted the military commission to make the crime whatever it willed, dependent upon its biased view.”\(^{467}\) As dissenting Justice Murphy concluded “such a procedure is unworthy of

\(^{458}\) Calvin Sims, \textit{3 Dead Marines and a Secret of Wartime Okinawa}, N.Y. TIMES (June 1, 2000), http://www.nytimes.com/2000/06/01/world/3-dead-marines-and-a-secret-of-wartime-okinawa.html?pagewanted=all. In re Yamashita, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting) (“Unfortunately, such despicable acts have a dangerous tendency to call forth primitive impulses of vengeance and retaliation among the victimized peoples. The satisfaction of such impulses, in turn, breeds resentment and fresh tension. Thus does the spiral of cruelty and hatred grow.”). Cf. Joseph Bottum, \textit{A Twentieth Century Custer}, WASH. FREE BEACON (June 18, 2016), http://freebeacon.com/culture/twentieth-century-custer/.

\(^{459}\) Sims, supra note 458; YUKI TANAKA, \textit{JAPAN’S COMFORT WOMEN} 112, 116 (2003).


\(^{461}\) Yamashita, 327 U.S. at 35 (Murphy, J., dissenting), and at 52 n.17 (Rutledge, J., dissenting) (the indictment read that Yamashita “unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes”).

\(^{462}\) Id.

\(^{463}\) Id. at 28 (Murphy, J., dissenting).

\(^{464}\) Id. at 40 (Murphy, J., dissenting).

\(^{465}\) Yamashita, 327 U.S. at 40 (Murphy, J., dissenting).

\(^{466}\) Id.

\(^{467}\) Id. at 28 (Murphy, J., dissenting).
the traditions of our people or the immense sacrifices that they have made to advance the common ideals of mankind.\footnote{Id. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).}

Thus where Chief Justice Marshall ridiculed the Jefferson Administration’s loose indictment of Burr according to an in depth de novo review of the facts, Justice Stone speaking for the Court in Yamashita refused to engage in a de novo review of the facts in order to inquire about the validity of the indictment.\footnote{Yamashita 327 U.S. at 40 (Murphy, J., dissenting); United States v. Burr, 25 F. Cas. 55, 160–80 (C.C.D. Va. 1807) (No. 14,694).} As a result, the Supreme Court allowed General Yamashita to hang for a trumped up crime never before laid against a fallen military commander in known human history.\footnote{Yamashita 327 U.S. at 40 (Murphy, J., dissenting).} In following years criticism of General Yamashita’s trial circled the globe, resulting in the Third Geneva Convention of 1949 taking action that effectively “stripped [Yamashita] of its precedential value”; for as the world itself “respond[ed] to subsequent criticism of General Yamashita’s trial” the United States was forced to reciprocate by signing multilateral peace treaties that contained terms requiring the United States to codify express protections into binding law against kangaroo courts such as the one that presided over General Yamashita’s execution.\footnote{Hamdan v. Rumsfeld, 548 U.S. 557, 619–20 (2006).}

Nevertheless, even after the entire world’s disapproval of the events that occurred during MacArthur’s occupation of Japan, the U.S. Supreme Court still failed to overrule Ex parte Quirin and its legacy of unconstitutional impermissible advisory statements.\footnote{Id.} In fact Hamdan v. Rumsfeld watered down the Bollman and Burr test into a mere advisory statement directed toward military tribunals instead of requiring its application “in open court.”\footnote{Hamdan, 548 U.S. at 605–06.} And Hamdi v. Rumsfeld once again followed Ex parte Quirin to blindly disregard the express citizen’s right to approach the Court to contest a charge of treason even on habeas review.\footnote{Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004) (“There is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”) (citing Ex parte Quirin, 317 U.S. 1 (1942)).} These opinions all must be overruled as impermissible advisory statements; and the express constitutional rule vindicated in Bollman and Burr should once again be applied “in open court.”\footnote{See U.S. CONST. art. III, § 3, cl. 1; U.S. CONST. amend. VI; Ex parte Bollman, 8 U.S. 75, 127 (1807); United States v. Burr, 25 F. Cas. 55, 161–65 (C.C.D. Va. 1807) (No. 14,694).}
power of the Court to so rule was expressly vindicated in Rasul v. Bush, and should be used to vigorously overrule Ex parte Quirin and all its progeny.476

Hamdan embarrassingly failed to overrule Quirin for reliance upon “[t]he classic treatise penned by Colonel William Winthrop, whom we have called ‘the Blackstone of Military Law,’” and instead blessed Winthrop’s treatise with the gaudy title of “common law of war,” as if war was somehow civilized.477 In apparent ignorance of Ex parte Milligan and Ex parte Bollman, Winthrop’s treatise concluded that the military can identify and attack “enemy combatant[s]” even during a time of peace, on American soil, when there is no real, present, and actual violence shuttering the doors of the courts.478 In the age of predator drones and sting ray technology, Quirin should absolutely be overruled for following Winthrop.479 In fact this entire line of precedent fails to acknowledge that it is only Congress that can declare wars and that without a declaration of war that all of the U.S. government’s powers are exclusively peace powers.480

477 Hamdan, 548 U.S. at 595–98, 602–03 (citing Ex parte Quirin, 317 U.S. 1, 35–36 (1942); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831–46 (1920)).
478 Ex parte Quirin, 317 U.S. 1, 31 (1942) (inventing the concept of “enemy combatant” for the first time with inspiration from Winthrop’s Treatise in order to justify trying a U.S. citizen in a military tribunal on undisurbed American soil, and thus shifting the focus from individual rights to a determination of his status as an “enemy combatant”); WINTHROP, supra note 477, at 784 (Winthrop’s treatise perceived “uncivilized combatants,” a phrase Winthrop used synonymously with guerrillas, “as not being within the protection of the laws of war” and so they are to be “treated as criminal and outlaws, not entitled upon capture to be held as prisoners of war, but liable to be shot, imprisoned, or banished, either summarily where their guilt is clear or upon trial and conviction by military commission.”).
480 U.S. CONST. art. I, § 8, cl. 11; The Federalist No. 41 (James Madison) (“Is the power of declaring war necessary? No man will answer this question in the negative. It would be superfluous, therefore, to enter into a proof of the affirmative.”); N.Y. Times Co. v. United States, 403 U.S. 713, 715 (1971) (“[T]he war power stems from a declaration of war. The Constitution by Art. I, § 8, gives Congress, not the President, power ‘[t]o declare War.’ Nowhere are presidential wars authorized.”) (Douglas, J., concurring); Americanus No. I (Alexander Hamilton) (“It belongs to Congress to say—whether the Nation shall of choice dismiss the olive branch and unfurl the banners of War.”); Helvidius No. II (James Madison) (“it is the absolute duty of the executive in all cases to preserve peace till war is declared”) (emphasis in original); Helvidius No. IV (James Madison) (“the fundamental doctrine of the constitution, [is] that the power to declare war including the power of judging of the causes of
By following Winthrop, the Quirin Court did just as Blackstone
would have; it blessed military trials of any person for violations to “the
laws . . . of civilized war”—which smacks of sheer feudalistic
oxymoron.481 War is never civil.482 This fact is self-evident.483 Nevertheless, under the brute cowardice of Ex parte Quirin the Supreme
Court has ever since allowed methods of war to be used against U.S.
citizens with little dispute.484 Instead of contending for the “immutable
rights” of individuals as it ought, the Court has pitifully busied itself
with the so-called laws of war—as if war could be brought under and
executed faithfully according to man’s laws.485 But war is absolute,
unlimited, and primal.486 The very definition of war is to be without
law.487

In Jackson Justice Stevens referred to the traditional jurisdictional
analysis and candidly stated: “In this case, the Court’s analysis fails on

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481 Ex parte Quirin, 317 U.S. 1, 31 n.10 (1942) (internal quotation marks omitted). See also John Quincy Adams, State of the Nation, Speech in the House of Representatives (May 25, 1836), in SPEECH OF THE HON. JOHN QUINCY ADAMS 5 (H.R. Piercy ed., 1836) [hereinafter QUINCY ADAMS] (an example of how a Congressperson should debate the issue of war, and in his speech Quincy explains the differences between “the war power and the peace power”—explaining that the powers of war are “tremendous: it is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty, of property, and of life.”).

482 Ex parte Milligan, 71 U.S. 2, 124–25 (1866) (“Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.”); QUINCY ADAMS, supra note 480, at 5 (“The [war] power is tremendous: it is strictly constitutional, but breaks down every barrier so anxiously erected for the protection of liberty, of property, and of life.”).

483 Milligan, 71 U.S. at 124–25.


485 In re Yamashita, 327 U.S. 1, 26 (1946) (Murphy, J., dissenting).

486 Milligan, 71 U.S. at 124–25; QUINCY ADAMS, supra note 480, at 5; HELVIDIUS NO. IV (James Madison) (“War is in fact the true nurse of executive aggrandizement. In war, a physical force is to be created; and it is the executive will, which is to direct it. In war, the public treasures are to be unlocked; and it is the executive hand which is to dispense them. In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace.”).

487 Milligan, 71 U.S. at 124–25; Cicero, Pro Milone 4.10–11 (explaining that even in a case where the facts arise during a time of war and in a theater of war the court has jurisdiction to rule upon the natural law which presides over the case).
both counts.\textsuperscript{488} The Court’s “new constitutional principle” was formulated “under the most dangerous possible circumstances.”\textsuperscript{489} That is, \textit{Jackson} went beyond both the Court’s constitutional power and all prudential guidance.\textsuperscript{490} The \textit{Jackson} opinion thus strayed from both the facts and the “hypothetical evil” of “delays and costs associated with litigation” that it purported to address.\textsuperscript{491} Accordingly the \textit{Jackson} Court “announced its new constitutional edict in a case in which it has absolutely no bearing on the outcome.”\textsuperscript{492} Wherever an embarrassing and impermissible advisory statement such as \textit{Jackson} is identified (i.e., \textit{Ayala}), it should be declared utterly void and treated as if it never existed as in \textit{Ex parte Randolph}.\textsuperscript{493}

As an advisory opinion \textit{Ex parte Quirin} justified its jurisdiction under \textit{Ex parte Milligan}, but then totally undermined \textit{Milligan} with an “additional layer of review.”\textsuperscript{494} Thus, the \textit{Quirin} Court created the question of “enemy combatant” that the Supreme Court has since seized upon in order to needlessly undermine \textit{Milligan}’s overarching and superseding constitutional rule against martial law.\textsuperscript{495} \textit{Quirin} is thus an imprudent advisory statement beyond the Court’s power to make.\textsuperscript{496}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Jackson}, 443 U.S. at 328 (Stevens, J., concurring).
\item Id.
\item U.S. Const. art. III (power); \textit{Judiciary Act of 1789}, ch. 20, §14, 1 Stat. 73 (prudence).
\item \textit{Jackson}, 443 U.S. at 328 (Stevens, J., concurring).
\item Id.
\item \textit{Ex parte Quirin}, 317 U.S. 1, 24 (1942) (citing \textit{Ex parte Milligan}, 71 U.S. 2, 110–13 (1866) (describing traditional jurisdictional standards under the \textit{Judiciary Act})). \textit{But see Quirin}, 317 U.S. at 45–46 (unconstitutionally undermining \textit{Milligan}).
\end{enumerate}
\end{footnotesize}
Quirin’s blind approval of executive “enemy combatant” adjudications is both wholly outside the Court’s case or controversy jurisdiction and is an imprudent attempt to solve a mere hypothetical problem that is undemonstrable, and thus is not a matter in which “powerful reasons favor a change in the law.”

To be sure, Quirin departed from our nation’s founding tradition of extending fair and public trials even to our enemies.

In fact the Quirin Court deceptively represented that it did not make a change in the law when it actually did. It created, for the very first time, an arbitrary, secondary layer of review regarding whether the executive determination of “enemy combatant” was reasonable. Quirin wrongly presumed military tribunals were legitimate under Art. I, § 8, cl. 10 by disregarding that this grant of Article I power is expressly limited to “the high Seas.” On land, as Milligan presumed, there are

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497 Quirin, 317 U.S. at 31; Jackson, 443 U.S. at 327 (Stevens, J., concurring). See Milligan, 71 U.S. at 100–13. Cf. King v. Burwell, 135 S. Ct. 2480, 2485–86, 2492–94 (2015) (Chief Justice Roberts’ dramatization of “death spirals” that would occur if the Affordable Care Act was overruled is exactly the sort of hypothetical problem that is undemonstrable. The Court’s apparent fear of death spirals thus disconnected its discussion from the underlying inquiry of whether the Affordable Care Act is actually constitutional.).

498 John Adams, Diary (Mar. 5, 1773), in 2 THE WORKS OF JOHN ADAMS 317 (1850); Boumedine, 553 U.S. at 745 (“The [Suspension] Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.”); Braden v. 30th Judicial Cir. Ct. of Ky., 410 U.S. 484, 494–95 (1973). See In re Yamashita, 327 U.S. 1, 26–27 (1946) (Murphy, J., dissenting) (“The answer is plain. The Fifth Amendment guarantee of due process of law applies to ‘any person’ who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent.”); Ahrens v. Clark, 335 U.S. 188, 196–98 (Rutledge, J., dissenting) (quoting Ex parte Endo, 323 U.S. 283, 306 (1944)); Johnson v. Eisentrager, 339 U.S. 763, 798 (1950) (Black, J., dissenting) (“Our Constitution has led people everywhere to hope and believe that wherever our laws control, all people, whether our citizens or not, would have an equal chance before the bar of criminal justice.”).

499 Quirin, 317 U.S. at 27–28, 45–48 (unconstitutionally approving of the use of martial law against civilians as if the Court had always been approved of by the Court when it never had been positively approved of before Quirin); In re Yamashita, 327 U.S. 1, 7 (1946) (clarifying that Quirin allowed Congress to “create military commissions” according to art. I, § 8, cl. 10).

500 Quirin, 317 U.S. at 31; In re Yamashita, 327 U.S. 1, 15, 17–18 (1946) (using “any reasonable standard” and testing for “reasonable measures”).

501 U.S. CONST. art. I, § 8, cl. 10 (Congress’ power to define and punish violations to the law of nations has the limitation of “high seas”); Letter from Thomas Jefferson to James Monroe (Aug. 11, 1786), available at http://founders.archives.gov/documents/Jefferson/01-10-02-0150 (“Every national citizen must wish to see an effective instrument of coercion, and should fear to see it on any other element than the water. A naval force can never endanger our liberties, nor occasion bloodshed; a land force would do both.”). Compare Little v. Barreme, 6 U.S. 170, 176–79 (1804), with United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 329 (1936).
Article III Courts available to hear habeas corpus petitions in a speedy and public fashion.\footnote{Ex parte Milligan, 71 U.S. 2, 124–25 (1866); Curtiss-Wright, 299 U.S. at 318 (not considering U.S. CONST. art. I, § 8, cl. 10 regarding facts which do not include piracy and violations of the law of nations on the high seas).} Nothing is gained by legitimizing secret military tribunals when public Article III Courts are available.\footnote{Ebenezer Richardson’s Case, supra note 43, at 409 n.79 (“No tyranny so secure, none so intolerable, none so dangerous, none so remediless, as that of Executive Courts.”) (quoting Boston Gazette, 10 Feb. 1772, p. 2, cols. 1, 2); THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) (“He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”). See Milligan, 71 U.S. at 124–25.} Therefore, in Justice Stevens’ words from *Jackson* the Quirin “Court’s analysis fails on both [jurisdictional] counts.”\footnote{Jackson, 443 U.S. at 328 (Stevens, J., concurring).} Finally, because Quirin fails these fundamental jurisdictional requirements, *Quirin* issued a double advisory statement that undermines the Court’s power to review the facts *de novo* when it ought.\footnote{Quirin, 317 U.S. at 27–28, 45–48. See Moore v. Dempsey, 261 U.S. 86, 92 (1923).} Thus *Ex parte Quirin* ought to be treated as “void process”—as if it never existed.\footnote{Jackson, 443 U.S. at 327 (Stevens, J., concurring). See Ex parte Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558) (Opinion of Marshall, C.J.) (Those whose “offices are held at the pleasure of the president of the United States” are not Article III judges and “are, consequently, incapable of exercising any portion of the judicial power, and the act which attempts to confer it, is absolutely void.”).} As *Boumediene* found, there is an outward territorial limit on which the Court’s jurisdiction stops and habeas corpus can no longer be raised.\footnote{Boumediene v. Bush, 553 U.S. 723, 762–63 (2008) (citing Eisentrager, 339 U.S. at 779).} That outward limit is the Court’s general jurisdiction as defined by natural equity.\footnote{Id. at 745 (“The [Suspension] Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.”) (quoting In re Jackson, 15 Mich. 417, 439–40 (1867) (Cooley, J., concurring)); Braden v. 30th Judicial Cir. Ct. of Ky., 410 U.S. 484, 494–95 (1973); Ahrens v. Clark, 335 U.S. 188, 196–98 (1948) (Rutledge, J., dissenting) (quoting Ex parte Endo, 323 U.S. 283, 306 (1944)). STORY, CONFLICT OF LAWS, supra note 180, at §§ 7–8, 556 (the whole idea of general jurisdiction “is, that no nation can rightfully claim to exercise it, except as to persons and property within its own domains”).} Also, for jurisdictional purposes, it does not matter where the petitioner is imprisoned because habeas “is directed to, and served upon, not the person confined, but his jailer.”\footnote{Boumediene, 553 U.S. at 745 (quoting In re Jackson, 15 Mich. 417, 439–40 (1867) (Cooley, J., concurring)); Braden, 410 U.S. at 494–95 (quoting Jackson, 15 Mich. at 439–40 (Cooley, J., concurring)); Endo, 323 U.S. at 306 (quoting Jackson, 15 Mich. at 439–40 (Cooley, J., concurring)). See also Ahrens, 335 U.S. at 196–98 (Rutledge, J., dissenting) (quoting Jackson, 15 Mich. at 439–40 (Cooley, J., concurring)).} This means, as was the case in *Bollman*, that “when the liberty of any person is restrained by reason of the authority of the United States, the writ of
habeas corpus is available to test the legality of that restraint, even though direct court review of the restraint is prohibited.”

The presumption on habeas is always liberty. Boumediene should not have focused on Eisentrager, because the Eisentrager Court was derelict in its duty to consider the general jurisdiction of the United States. In fact Eisentrager erred twice: first by seizing upon the status of the petitioner according to Quirin, Yamashita, and Hirota—a practice that the entire world has squarely repudiated after Yamashita and that Padilla v. Kentucky overruled as to non-U.S. citizens generally. And second, Eisentrager erred by relying upon the Quirin-inspired territorial nicety from Ahrens v. Clarke, which Rasul and Boumediene repudiated, and which Braden v. 30th Judicial District of Ky. overruled entirely. The Ahrens Court erred by focusing jurisdiction on the location of imprisonment—which is superfluous because habeas “does not unbar the prison doors,” instead it compels “the oppressor to release his constraint.”

Thus as Justice Black rightly concluded in his Eisentrager dissent: “Our Constitution has led people everywhere to hope and believe that wherever our laws control, all people, whether our citizens or not, would have an equal chance before the bar of criminal justice.” And as Justice Murphy concluded in his dissent in Yamashita: “The answer is plain. The Fifth Amendment guarantee of due process of law applies to ‘any person’ who is accused of a crime by the Federal Government or

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510 In re Yamashita, 327 U.S. 1, 30 (1946) (Murphy, J., dissenting).
511 Id. (“The conclusive presumption must be made, in this country at least, that illegal restraints are unauthorized and unjustified by any foreign policy of the Government and that commonly accepted juridical standards are to be recognized and enforced.”).
512 Boumediene, 553 U.S. at 764.
513 Johnson v. Eisentrager, 339 U.S. 763, 781 (1950) (“This is the same preliminary hearing as to sufficiency of application that was extended in Quirin, Yamashita, and Hirota v. MacArthur.”). See Hamdan v. Rumsfeld, 548 U.S. 557, 619 (2006); Padilla v. Kentucky, 559 U.S. 356, 360 (2010) (“Whether he is entitled to relief depends on whether he has been prejudiced . . . .”).
516 Eisentrager, 339 U.S. at 798 (Black, J., dissenting).
any of its agencies.” Finally this issue was re-settled in Padilla and Braden as it was in Ex parte Endo and Bollman. Since the issue is settled, the Court should adopt the principles of the U.S. social compact that inspired the ringing dissents that Justice Murphy leveled against all the progeny of Quirin.

In Yamashita Justice Murphy dissented: “No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent.” The reason why is because “such an exception would be contrary to the whole philosophy of human rights, which makes the Constitution the great living document that it is.” Thus, channeling the ideals of the U.S. Declaration of Independence Justice Murphy wisely exclaimed:

The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.

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517 In re Yamashita, 327 U.S. 1, 26 (1946) (Murphy, J., dissenting) (quoting U.S. CONST. amend. V).
519 Ex parte Quirin, 317 U.S. 1, 48 (1942) (“Mr. Justice MURPHY took no part in the consideration or decision of these cases.”); In re Yamashita, 327 U.S. 1, 26 (1946) (Murphy, J., dissenting); Korematsu v. United States, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting).
520 In re Yamashita, 327 U.S. 1, 26 (1946) (Murphy, J., dissenting).
521 Id. at 26–27. See Gage, supra note 187, at 189–90 (“I have a natural right to as much fresh air as I can breathe; if you shut me in a close room with door and windows barred, that does not invalidate my right to breathe pure, fresh air. I have a natural right to obey the dictates of my own conscience, and to worship God as I choose. If you are physically stronger
Hence, because the Supreme Court allowed the U.S. military to abandon “our devotion to justice in dealing with a fallen enemy commander,” it embarrassingly “admit[ted] that the enemy has lost the battle but has destroyed our ideals.” Murphy contended that in order “to develop an orderly international community based upon a recognition of human dignity, . . . Justice must be tempered by compassion rather than by vengeance.” If it is not, “stark retribution will be free to masquerade in a cloak of false legalism.” And finally “the hatred and cynicism engendered by that retribution will supplant the great ideals to which this nation is dedicated.”

Similarly, Eisentrager failed to recognize that unlike ancient Rome where a territory must positively be declared free before citizens’ rights extend to the people of that territory, the U.S. government is composed by a written constitution that presumes that all people everywhere are free. The right to approach the Court with one’s injuries does not turn on U.S. citizenship, but arises from human dignity itself. Just the same, U.S. property law arises from equity jurisprudence grounded upon

523 Yamashita, 327 U.S. at 29 (Murphy, J., dissenting).
524 Id.
525 Id. at 30.
526 Id.
527 Johnson v. Eisentrager, 339 U.S. 763, 769 (1950) (“Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar.”), and at 798 (Black, J., dissenting) (correctly distinguishing the United States from Rome regarding the constitutional protection of the natural rights of all human beings) (citing Acts 25:16); The Amistad, 40 U.S. 518, 594 (1841); Douglass, supra note 15 (“[I]nterpreted, as it ought to be interpreted, the Constitution is a glorious liberty document.”). Cf. Yamashita, 327 U.S. at 41 (Murphy, J., dissenting) (“While peoples in other lands may not share our beliefs as to due process and the dignity of the individual, we are not free to give effect to our emotions in reckless disregard of the rights of others. We live under the Constitution, which is the embodiment of all the high hopes and aspirations of the new world.”).
528 Marbury v. Madison, 5 U.S. 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”) (emphasis added); The Amistad, 40 U.S. 518, 596 (1841) (“The treaty with Spain never could have intended to take away the equal rights of all foreigners, who should contest their claims before any of our Courts to equal justice, or to deprive such foreigners of the protection given them by other treaties or by the general law of nations.”) (emphasis added). See Quincy Adams, The Amistad, supra note 27, at 3–4 (Justice is: “The constant and perpetual will to secure to every one HIS OWN right.”)—including foreigners) (quoting Justinian, Pandects 1.1.10).
every person’s existence as *imago dei*. In terms of habeas review this issue was settled in *Padilla v. Kentucky* which decided that habeas “relief depends on whether [the petitioner] has been prejudiced,” and not whether the petitioner is a U.S. citizen.

In fact *Eisentrager* fell dangerously short of *Ex parte Bollman*. In *Bollman* it was Erick Bollman’s imprisonment as a human being that was legally binding upon the Court’s duty to issue the writ of habeas corpus on his behalf. It did not matter to the Court that the President accused Bollman of being an enemy of the state for conspiring outside the borders of the United States with Aaron Burr to revolutionize Mexico. It did not matter whether Erick Bollman was a German or U.S. citizen. Instead, the *Bollman* Court applied the U.S. presumption of human liberty—for the U.S. Constitution declares that all human beings are born free. And it is an ancient precept explained by Marcus

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529 Calder v. Bull, 3 U.S. 386, 394 (1798) (Opinion of Chase, J.) (“It seems to me that the right of property, in its origin, could only arise from compact express or implied . . . .”); Vanhorne’s Lessee v. Dorrance, 2 U.S. 304, 310 (1795) (“The preservation of property then is a primary object of the social compact . . . .”); James Wilson, *On the History of Property*, in *JAMES WILSON, 3 THE WORKS OF JAMES WILSON* 182 (1804) (tracing the origin of property law to the idea that “God created man in his own image”) (internal quotation marks omitted); Vane, *A Needful Corrective*, supra note 6, at 3–4 (“the spirit of right reason” is equity made “common” to all human beings equally as they are “made in the image of God”); *THE DECLARATION OF INDEPENDENCE* para. 1–2 (U.S. 1776) (asserting that God created human beings with certain unalienable rights of which it is the primary duty of governments to secure); *Genesis* 1:26–27 (“Then God said, ‘Let us make mankind in our image, in our likeness . . . .’”); Chisholm v. Georgia, 2 U.S. 419, 455 (1819) (Opinion of Wilson, J.) (“Man, fearfully and wonderfully made, is the workmanship of his all perfect Creator. A state, useful and valuable as the contrivance is, is the inferior contrivance of man, and from his native dignity derives all its acquired importance.”)


531 *Eisentrager*, 339 U.S. at 779 (limiting habeas corpus as to non-American persons being held extraterritorially); Ex parte Bollman, 8 U.S. 75, 131 (1807) (extending habeas corpus to Dr. Bollman, a German individual imprisoned by American forces on the frontier in the territory of New Orleans).

532 *Bollman*, 8 U.S. at 131.


535 *U.S. CONST.* pmbl; *THE DECLARATION OF INDEPENDENCE*, para. 2 (U.S. 1776); Adams, *A Defence*, supra note 16; The Quock Walker Case (Mass., 1781) (Cushing, J.) (“all men are born free & equal”); *The Amistad*, 40 U.S. 518, 554 (1841); Douglass, *supra* note 15 (“[I]nterpreted, as it ought to be interpreted, the Constitution is a glorious liberty document”). Cf. *Padilla*, 559 U.S. at 360 (“The Nation’s first 100 years was ‘a period of unimpeded immigration.’ An early effort to empower the President to order the deportation of those
Tullius Cicero and demonstrated by Paul of Tarsus that whenever someone is born free they possess all the rights and privileges of citizenship—especially the right to approach the court in order to face one’s accusers.536

As in other cases that overturned military tribunals Ex parte Endo extended Milligan to the civilian agencies wielded to intern loyal U.S. citizens of Japanese descent.537 However, Endo did not overturn its sister case Korematsu v. United States: a case by which the Court took advantage of a wartime emergency to rationalize the internment of U.S. citizens by their race.538 The Supreme Court’s failure in Korematsu was that it looked “to mere matters of form” instead of “the substance of what is required” by pretending there was a formal difference between civilian agencies and military agencies that justified substantially the same unconstitutional treatment of U.S. citizens of Japanese descent.539

Under the Suspension Clause Ex parte Endo should have cut through all forms and overruled Korematsu and Hirabayashi v. United States then and there.540 The petitioners Fred Korematsu and Gordon Hirabayashi who were loyal U.S. citizens all along should not have had to wait decades to eventually overrule their unjust convictions by writs of coram nobis.541

Ultimately the unconstitutional advisory statements that followed Ex parte Quirin’s inquiry of the reasonableness of the executive’s
determination of enemy combatant status falls into the feudal tradition of “prescribing limits, and declaring that those limits may be passed at pleasure.” With Quirin a number of cases on direct review succumbed to the same feudal oxymoron by wielding Baker’s political question doctrine to establish “practical and real omnipotence with the same breath which professes to restrict their powers.” The origin of the political question doctrine is in the Taney Court’s corruption of state sovereignty with feudalism and slavery. It is also demonstrably connected with the government oppression of Native Americans, inhabitants of U.S. territories, and women suffragists. Thus cases that are rooted in the Taney Court’s doctrine of political questions should be undoubtedly revealed as a tool for hiding the resurgence of feudal forms in penumbra and declared “void process” for violating the most fundamental and ancient principle of equity that: “Omnipotence in Legislation is despotism.”

PART II: OUT OF THE SHADOWS AND INTO THE LIGHT

As Brumfield demonstrated, in order to enforce fundamental human rights the Court must conduct a de novo review of the facts. It does not matter if the right in question is enumerated in the U.S. Constitution

543 Id. See Arizona Independent, 135 S. Ct. at 2665 n.13 (citing Baker v. Carr, 396 U.S. 186, 208 (1962)).
544 Luther v. Borden, 48 U.S. 1, 46–47 (1849); Dred Scott v. Sandford, 60 U.S. 393, 447 (1856) (“It is a question for the political department of the Government, and not the judicial . . . .”).
546 Ex parte Randolph, 20 F. Cas. 242, 251 (C.C.D. Va. 1833) (No. 11,558) (Opinion of Barbour, Dist. J.), and at 254 (Opinion of Marshall, C.J.); Vanhorne’s Lessee v. Dorrance, 2 U.S. 304, 308, 316 (1795) (noting that the principle that laws repugnant to our written constitutions are void comes from “natural equity”); Cicero, De Officiis I.10.33 (“Summum ius summa iniuria” meaning “More law, less justice”).
or not. It also does not matter if Supreme Court precedent has “clearly established” the right or not. It does not even matter if the right is technically substantive or procedural. In any case, de novo review of the facts is required in order to secure the rights of the individual because de novo review is the only way to verify the truth of facts and circumstances. Thus de novo review of the facts upon habeas is the norm because habeas corpus exists to vindicate due process of the laws in order to secure fundamental human rights. Furthermore, federal direct review and state habeas courts both tend to follow the trends set forth on federal habeas, and the constitutional legitimacy of administrative adjudication expressly depends on the overarching Article III power to conduct “de novo [review] upon habeas corpus.”

Thus undermining fundamental de novo review on habeas will put even the per se constitutionality of administrative adjudications in question. According to the U.S. Supreme Court’s ultimate power on habeas it is the federal courts that are empowered to rule “upon the finality of the determinations of fact.” Furthermore, Congress cannot vest this power of ruling “with finality” upon the facts “in its own instrumentalities or in the executive department.” An attempt to do so “would be to sap the judicial power as it exists under the federal

548 Id. at 2275–76. See U.S. Const. amend. IX; Gage, supra note 187, at 180 (“Governments never created a single right; rights did not come new-born into the world with our revolutionary fathers.”).

549 Brumfield, 135 S. Ct. at 2275–76.

550 Id. at 2275, 2282–83.

551 Chisholm v. Georgia, 2 U.S. 419, 468 (1793) (Opinion of Wilson, J.); Cicero, Pro Milone 4.10–11. See The Amistad, 40 U.S. 518, 561, 594, 596 (1841) (“Upon the merits of the case, then, there does not seem to us to be any ground for doubt that these negroes ought to be deemed free, and that the Spanish treaty interposes no obstacle to the just assertion of their rights.”).


555 Id. at 56–57.

556 Id. at 47.

557 Id. at 56–57.
Constitution, and to establish a government of a bureaucratic character alien to our system.”\footnote{Crowell, 285 U.S. at 56–57.} Such an alien bureaucratic system cannot stand because “fundamental rights depend . . . upon the facts, and finality as to facts become in effect finality in law.”\footnote{Id.} Accordingly the Court wisely “train[ed] its attention” to a de novo review of facts as revealed by the so-called “light of the evidence.”\footnote{Brumfield v. Cain, 135 S. Ct. 2269, 2276, 2281 (2015).}

In contrast the Griswold v. Connecticut Court suggested “that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”\footnote{Griswold v. Connecticut, 381 U.S. 479, 484 (1965).} However, Griswold was incorrect because it is nature that gives substance to human rights.\footnote{Cicero, \textit{Pro Milone} 4.10–11; \textit{THE DECLARATION OF INDEPENDENCE} para. 2 (U.S. 1776).} This was true according to Cicero during his defense of Milo in ancient Roman Court.\footnote{Cicero, \textit{Pro Milone} 4.10–11.} It was also true in America since the founding.\footnote{Henry, \textit{Give Me Liberty}, supra note 28 (Choosing the light of truth Henry stated: “I have but one lamp by which my feet are guided, and that is the lamp of experience.”); Wheatley, \textit{Liberty & Peace}, supra note 34 (talking of how “Heavenly Freedom spread her golden Ray”).} In fact with direct reference to the “great residuum of rights” reserved by the Ninth Amendment, James Madison expressly stated: “We must not shut our eyes to the nature of man, nor to the light of experience.”\footnote{James Madison, \textit{Note to His Speech on the Right of Popular Suffrage} (Aug. 7, 1787), in \textit{5 J. Elliot, Debates on the Federal Constitution} 580–83 (1845). See G.K. Chesterton, \textit{Heretics} 23–24 (1905) (because we have rejected the inquiry of “what is the philosophy of Light” and “pulled the lamp-post down” for multifarious and contradicting reasons it remains that “what we might have discussed under the gas-lamp, we now must discuss in the dark”); Reitz, supra note 63, at 461 (“Of all the many dark corners of the law, few are so dimly lit as is the federal habeas corpus jurisdiction under which federal courts pass upon the constitutional validity of state criminal prosecutions. Here many important developments are occurring, with all the hazards of walking in the dark.”).} Even more compelling is the Declaration of Independence which explicitly proclaimed the natural rights of all human beings as a principle of U.S. statecraft.\footnote{THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); Gage, supra note 187, at 180 (“Governments never created a single right; rights did not come new-born into the world with our revolutionary fathers. They were men of middle age when they severed their connexion with Great Britain, but that severance did not endow them with a single new right. It was at that time they first entered into the exercise of their natural, individual rights. Neither our Declaration, nor our Constitution created a single right; they merely recognized certain rights as in existence. They recognized those rights as human rights,—as inalienable rights,—as rights existing by virtue of common humanity.”).} Thus the Court is
required upon Revolutionary principle to return to “Fact and Truth and Nature.” It must therefore comport with “the light” according to a de novo review of the facts as it reveals “evolving standards of decency,” as “public opinion becomes enlightened by a humane justice.” This requirement ensures the Court’s fidelity to equity, which is the human element in the law.

As James Madison explained, “independent tribunals of justice” were meant to be “the guardians” of constitutional rights. In fact the independent court’s consideration of the facts de novo is essential so that the U.S. Courts can be, as Madison envisioned, “an impenetrable bulwark against every assumption of power in the Legislative or Executive.” The American colonists were in agreement in 1776 that for a court to be a guardian of constitutional rights it must be made independent of political interests and not subjugated to political bodies. Each federal judge should thus hold their tenure and salary on the bench for life. Furthermore the Court ought to be composed of persons with “Experience in the Laws, of exemplary Morals, invincible Patience, unruffled Calmness, and indefatigable Application.” And they ought to hold that state immunity emanates from the individuals

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567 Hancock’s Case, supra note 60, at 199; Chisholm v. Georgia, 2 U.S. 419, 455–56 (1793) (Opinion of Wilson, J.) (also relying upon “truth and nature” to justify de novo review of the facts).


569 Weems v. United States, 217 U.S. 349, 378 (1910) (citing Ex parte Wilson, 114 U.S. 417, 427 (1885)).

570 Brumfield v. Cain, 135 S. Ct. 2269, 2275 (2015) (“in light of the evidence”) (quoting AEDPA 28 U.S.C. § 2254(d)(2)); U.S. CONST. art. III (the court sits in law and equity). See THE FEDERALIST NO. 80 (Alexander Hamilton) (one reason for federal jurisdiction is to preserve the “distinction between LAW and EQUITY” when equity “is not maintained” at the state level); STORY, EQUITY, supra note 2, at vol. 1, ch. 1 § 1.

571 1 ANNALS OF CONG. 439 (1789) (statement of James Madison).

572 Id.

573 Tudor, Otis’s Speech, supra note 5, at 9; Ebenezer Richardson’s Case, supra note 43, at 409 n.79 (“No tyranny so secure, none so intolerable, none so dangerous, none so remediless, as that of Executive Courts.”) (quoting Boston Gazette, 10 Feb. 1772, p. 2, cols. 1, 2); The Sheffield Declaration para. 9 (1773); THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) (“He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”); John Adams, Thoughts on Government (1776).

574 U.S. CONST., art. III.

575 John Adams, Thoughts on Government (1776).
that compose the state and not the corporation that they spoke into existence. 576

Far from the “invincible Patience” and “unruffled Calmness” that is required of the Supreme Court by the U.S. social compact and constitution, the Roberts Court of 2015 charted a turbulent and stormy course. 577 Justice Scalia in particular showcased his own brand of impatience and bluster to challenge “the Court’s claimed power to create ‘liberties’ that the Constitution and its Amendments neglect to mention.” 578 Scalia contended that relying on liberties not expressly captured by the constitution “robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.” 579 However, “the freedom [for the people of the United States] to govern themselves” is also a freedom that “the Constitution . . . neglect[s] to mention.” 580

Therefore Justice Scalia’s attempt to use the people’s sovereignty (i.e., the freedom opposite of slavery) 581 to unravel other substantive liberties and rights not mentioned in the U.S. Constitution was a groundless contradiction in terms. 582 The crux of this argument seems to be the feigned idea that state and federal legislatures have original sovereignty as if they were the people. 583 But the legislatures are not the

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576 U.S. CONST. pmbl; Chisholm v. Georgia, 2 U.S. 419, 462–63 (1793) (Opinion of Wilson, J.) (The state “presents only the artificial person, instead of the natural persons, who spoke it into existence. A state I cheerfully fully admit, is the noblest work of Man. But, Man himself, free and honest, is, I speak as to this world, the noblest work of God.”); Nevada v. Hall, 440 U.S. 410, 426–27 (1979).
577 Compare John Adams, Thoughts on Government (1776), with Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1672–73 (2015) (not citing to Adams at all, and committing the oxymoron of characterizing Jefferson’s ideas for federal judicial dependence to represent a kind of judicial independence—this is utterly illogical and fallacious and confusing). Cf. Letter from Thomas Jefferson to William Giles (April 20, 1807) (Jefferson advocating an amendment to Article III to make federal courts political, biased, and dependent).
579 Id.
580 Id.
581 See Aristotle, Politics I.6, I.8, I.12.
582 The Declaration of Independence para. 2 (U.S. 1776); U.S. CONST. amends. IX & X; Gage, supra note 187, at 180. Cf. Charles Carroll, Fourth Letter of First Citizen (1773), reprinted in Riley, supra note 289, at 196 (“Groundless opinions are destroyed, but rational judgments, or the judgments of nature, are confirmed by time.”) (quoting Cicero, De Natura Deorum 2.2).
583 Arizona State Legislature v. Arizona Independent Redistricting Commission, 135 S. Ct. 2652, 2660 n.3, 2674–76 (2015) (equivocating the people’s sovereign power with the state legislature to effectively nullify the terms of the Elections Clause and to effectively throw off our written constitutions and return to the state of nature—a failure of government and one of the reasons the founders declared independence); Schuette v. BAMN, 134 S. Ct. 1623, 1646–
people. In fact this strategy of pretending the legislatures are the people resulted in the obstruction of the express terms of the U.S. Constitution, the debasement of state legislatures, and the erosion of the Article III power of federal courts. Such an opposition to the substantive rights of due process in federal courts was roundly considered by the founding fathers to be a “political heresy.”

The people’s sovereignty can be traced all the way back to Rome where Cicero recognized that each person had two citizenships “one fatherland which was the place of his birth and one by law.” Cicero continued that the citizenship by law which stands “first in our affections” must exist to reify natural citizenship by birth because legal

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47 (2014) (Scalia, J., concurring) (describing the “near-limitless sovereignty of each state” as if this sovereignty can be easily determined by a majority vote and as if the federal sovereignty is nothing). See THE DECLARATION OF INDEPENDENCE para. 8 (U.S. 1776) (even without constitutions to give form to our governments “the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the meantime exposed to all the danger of invasion from without, and convulsions from within’’); U.S. CONST. art. IV, § 4 (the state governments are required to remedy the dangers of a direct democracy noted in The Declaration by forming republican legislatures).

585 Chisholm v. Georgia, 2 U.S. 419, 462 (1793) (Opinion of Wilson, J.) (“The Parliament form the great body politic of England! What, then, or where, are the People? Nothing! No where! They are not so much as even the ‘baseless fabric of a vision!’ From legal contemplation they totally disappear!”).

586 Arizona Independent, 135 S. Ct. at 2660 n.3, 2674–76; BAMN, 134 S. Ct. at 1646–47 (Scalia, J., concurring); Kerry v. Din, 135 S. Ct. 2128, 2132–33 (2015) (Opinion of Scalia, J.) (Arguing that despite the Declaration of Independence and the U.S. Constitution to the contrary that only “the terminology associated with the guarantee of due process changed dramatically between 1215 and 1791,” and that “the general scope of the underlying rights protected stayed roughly constant.” Under this rationale, that America’s written constitution recognized no new rights since the year 1215, Scalia obstructed a married couple’s right to move and live together—but physical movement is the most fundamental liberty and was in fact the impetus for both the American Revolution and the War of 1812.). See THE DECLARATION OF INDEPENDENCE para. 10 (U.S. 1776); President Thomas Jefferson, Proclamation in Response to Chesapeake Affair (July 2, 1807); President James Madison, War Message to Congress (June 1, 1812).

587 Calder v. Bull, 3 U.S. 386, 388–89 (1798) (Opinion of Chase, J.) (the idea that federal or state legislatures possessed unlimited or absolute powers is “a political heresy; altogether inadmissible in our free republican governments”); STORY, CONSTITUTION, supra note 3, at § 212 (the idea that the states are separate and independent from the Union was “a species of political heresy, which can never benefit us, but may bring on us the most serious distresses”) (quoting Charles Pinckney, Debates in South Carolina, 1788, printed by A.E. Miller, Charleston, 1831, p. 43, 44), and at § 353 (“it was deemed a political heresy to maintain” that the United States was “a mere confederation” after the Declaration of Independence (1776)); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 317, n.1 (1936) (quoting Rufus King, 5 J. Elliot, Debates on the Federal Constitution 212 (1845)) (citing STORY, CONSTITUTION, supra note 3, at §§ 198–217).

588 Cicero, De Legibus 2.2.5.
citizenship is in “the name of republic [which] signifies the common citizenship of all of us.” Thus legal citizenship exists to reify the common, natural citizenship of each person based upon the place of their birth. John Adams and other key founders ensured that the Roman concept of two citizenships was combined in the United States.

Writing in defense of constitutions Adams stated that the “right of sovereignty, in Rome, resided in the people, but the government was not a democracy.” Adams continued: “In America, the right of sovereignty resides indisputably in the body of the people, and they have the whole property of land. There are no nobles or patricians—all are equal by law and by birth. . . . Governments more democratical never existed.” The idea that “all are equal by law and by birth,” or the idea that God gave each natural person a share of sovereignty somewhere, gave rise to a presumption of freedom on behalf of each human being incident to their birth.

This concept was used in The Amistad Court, which based its decision on the idea that “all men are presumed to be free.” By this presumption of freedom The Amistad Court refused to condemn The Amistad Africans to slavery without legal proof. Thus The Amistad set forth the most basic and vital difference between the U.S. social compact and European feudalism as none other than a presumption of freedom.

[588] Id.
[589] Id. See Kastely, supra note 6, at 15.
[590] Adams, A Defence, supra note 16 (as a matter of sovereignty “all are equal by law and by birth”).
[591] Id.
[592] Id. See ARENDT, REVOLUTION, supra note 35, at 93 (our “majesty reside[s] in [our] very plurality”).
[593] The Sheffield Declaration para. 5 (1773) (“That mankind in a state of nature are equal, free, and independent of each other, and have a right to the undisturbed enjoyment of their lives, their liberty and property.”); Adams, A Defence, supra note 16; The Quock Walker Case (Mass., 1781) (Cushing, J.) (“all men are born free & equal”); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. amend. XIV. See STORY, CONFLICT OF LAWS, supra note 180, at § 540; STORY, CONSTITUTION, supra note 3, at § 1473. See President Thomas Jefferson, Proclamation in Response to Chesapeake Affair (July 2, 1807); President James Madison, War Message to Congress (June 1, 1812) (the English kept trying to reclaim its subjects by jus sanguinis through violent impression upon the sea). See generally Worcester v. Georgia, 31 U.S. 515 (1832) (redefining the rights of the soil according to the natural rights of human beings rather than by conquest).
[595] Id.
[596] Id. (overruling The Antelope, 23 U.S. 66, 188 (1825) (relying on the presumption of slavery in Le Louis)). See Le Louis [1817] 2 Dodson 210, 255 (Eng.) (Opinion of Sir William
The Court will therefore exercise its “right to look behind . . .
documents” because “they are always open to be impugned for fraud.”597 The Court applied a de novo review of the facts and thus found that there was no legal proof at all.598 The enslavement of Cinque and his fellow Africans was declared a fraud.599 Or to be more straightforward: The truth set the Africans of The Amistad free.600

The presumption of freedom, arising from the social compact, found its way with the help of Hannah Arendt and habeas corpus review into Supreme Court precedent once more in Trop v. Dulles.601 This time the Trop Court emphasized the difference between the U.S. social compact and European totalitarianism by declaring the punishment of statelessness unconstitutional.602 As Arendt contended, it was the statelessness of the Jews and other minority populations in Europe that drove Germany to the “final solution”—the holocaust.603 Thus, according to Trop, the fundamental human right to belong or the “the right to have rights” that was vindicated by The Amistad as the presumption of freedom cannot be subverted in U.S. Courts.604

In Trop the Court emphasized that a proper de novo review allowed the U.S. Constitution to “draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”605 The use of “evolving standards of decency” to define the word and spirit of the U.S. Constitution through de novo review of the facts of specific cases and controversies was originally set forth during habeas review in a particular and beautiful line of cases that traces back to the U.S. social compact itself and the very purposes of the American Revolution.606 In

Scott) (presuming slavery according to the English oxymoron of the free trade in human flesh).

597 The Amistad, 40 U.S. at 594.
598 Id. at 594–97.
599 Id. at 595 (“the proprietors were seeking, by fraud, to cover their own illegal acts under the flag of Spain”).
600 Id.
602 Trop, 356 U.S. at 100–02 (Opinion of Warren, C.J.).
603 ARENDT, THE ORIGINS, supra note 35, at 74, 434–35, 479 (the goal was to remove the Jewish people as if they “never existed at all”).
604 The Amistad, 40 U.S. at 561, 594; Trop, 356 U.S. at 100–02 (Opinion of Warren, C.J.); ARENDT, THE ORIGINS, supra note 35, at 479.
605 Trop, 356 U.S. at 100–01 (Opinion of Warren, C.J.).
resplendent succession, Brumfield followed this fundamental line of precedent in U.S. law. Through de novo review, the ideals expressed in Phillis Wheatley’s poem Liberty and Peace can continue to raise the U.S. social compact as a bulwark against martial law and presumptive slavery. The U.S. social compact is destined to become relevant time and again to refute the old English presumption of absolute war and property.

If, as the Declaration of Independence states, governments are instituted among men to protect God-given, natural rights; then God-given, natural rights should be expounded by the Supreme Court as a presumption that can only be rebutted by the due process of the laws. Instead of penumbral rights emanating from the shadows of the words of the constitution—the Supreme Court should open its windows and let the light of the evidence pour in. Only then will the great residuum of

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607 Ex parte Wilson, 114 U.S. 417, 421–27 (1885) (this habeas petition ruled that hard labor was a cruel and unusual punishment based on the Thirteenth Amendment’s reestablishment of the founding compact’s stand against slavery and death) (quoting 1 ANNALS OF CONG. 435, 760 (1789) (statement of James Madison)). See THE DECLARATION OF INDEPENDENCE para. 10–11, 20 (U.S. 1776).

608 Wheatley, Liberty & Peace, supra note 34.

609 Id. See Shields, supra note 32, at 240.

610 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. art. VI, cl. 2, amend. V (Establishing first that: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” And second that: “No person shall ... be deprived of life, liberty, or property, without due process of law”). See In re Winship, 397 U.S. 358, 379–80 (1970) (Black, J., dissenting) (“it is thus unmistakably clear that ‘due process of law’ means according to ‘the law of the land’”) (citing Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276 (1856)). Cf. The Amistad, 40 U.S. 518, 561, 594 (1841).

human rights “not be . . . den[ied] or disparage[d].” 612 Only then will the Rule of Law be satisfied. 613 In order “to secure and support the rights of individuals” and to equally apply the laws to each individual as a threshold matter of due process, the Court must conduct a de novo review of the facts. 614 It must return to “Fact and Truth and Nature.” 615 “[O]r else,” as Justice Cushing declared from the bench, “vain is Government.” 616

By the time Davis v. Ayala was released in 2015 it was clear to any who reads Supreme Court opinions that each of the Justices were struggling with these fundamentals. 617 The corrupting force of Justice

612 U.S. CONST. amend. IX. See Letter from Richard Henry Lee to Edmund Randolph (Oct. 16, 1787) (suggesting a Bill of Rights to better secure “that residuum of human rights which is not intended to be given up to society, and which, indeed, is not necessary to be given for any social purpose.”); James Madison, Speech Introducing Bill of Rights (June 8, 1789) (“It has been said, that in the Federal Government [declarations of rights] are unnecessary, because the powers are enumerated, and it follows that all that are not granted by the Constitution are retained: that the Constitution is a bill of powers, the great residuum being the rights of the people; and therefore a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the government.”).

613 Anthony, Address, supra note 16, at 178 (the Rule of Law is the notion that all people are “equals before the law” so that no one can be above the law); Douglass, supra note 15 (The Fugitive Slave Law violated the Rule of Law and the Constitution: “[T]his Fugitive Slave Law stands alone in the annals of tyrannical legislation. I doubt if there be another nation on the globe, having the brass and the baseness to put such a law on the statute-book. If any man in this assembly thinks differently from me in this matter, and feels able to disprove my statements, I will gladly confront him at any suitable time and place he may select. . . . Now, take the Constitution according to its plain reading, and I defy the presentation of a single pro-slavery clause in it. On the other hand it will be found to contain principles and purposes, entirely hostile to the existence of slavery.”). See U.S. CONST. amend. XIV; Nixon v. Administrator of General Services, 433 U.S. 425, 485–86, n.1 (1977) (Stevens, J., concurring); United States v. Burr, 25 F. Cas. 55, 161–65 (C.C.D. Va. 1807) (No. 14,694).

614 Chisholm v. Georgia, 2 U.S. 419, 468 (1793) (Opinion of Cushing, J.); U.S. CONST. art. VI, cl. 2, amend. V, IX, & XIV.


616 Chisholm, 2 U.S. at 468 (Opinion of Cushing, J.).

Jackson’s tautological assurance from his concurrence in Brown v. Allen that “[w]e are not final because we are infallible, but we are infallible only because we are final” is too often found upon their lips. This intractable quip is as groundless as the illegitimate feudal maxim that the king can do no wrong. Meanwhile the brilliant words of founder Justice James Wilson are all but forgotten:

> When I deliver my sentiments from this chair, they shall be my honest sentiments: when I deliver them from the bench, they shall be nothing more. In both places I shall make—because I mean to support—the claim to integrity: in neither shall I make—because, in neither, can I support—the claim to infallibility.

And as Wilson knew, claims of infallibility contradict and demean any attempt to support the more basic judicial “claim to integrity.” And it is unfortunate that Wilson’s words are not more celebrated among the Justices because the honorable pursuit of integrity among those seated on the bench of the Supreme Court might have guided the Court to defend fundamental structural safeguards that are coeval with the American definition of due process, which it is the “historic office” of the Great Writ of habeas corpus to vindicate. In contrast the old dogmatic and feudal assertion of institutional infallibility has caused such blatant contradiction in the Court’s recent determinations that it may not succeed if it falls under the political attacks of flamboyant and unprincipled individuals like Citizen Genêt.

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619 Id.
621 Id.
623 Nevada v. Hall, 440 U.S. 410, 415–16 nn.8–9 (1979); STORY, EQUITY, supra note 2, at § 19 (explaining Selden’s criticism as an accusation of arbitrariness upon the English Court). Cf. Glass v. The Sloop Betsy, 3 U.S. 6, 16 (1794) (The Supreme Court had to assert its legitimacy vociferously against Citizen Genêt who established French Courts (i.e., non-article III courts) on American soil saying: “Decreed and adjudged that the admiralty jurisdiction which has been exercised in the United States by the consuls of France, not being so warranted, is not of right.”).
The Prudential Interests: Finality, Efficiency and Federal-State Comity

The founders and framers sought to establish “one Supreme Court” as an independent third branch of government.\textsuperscript{624} As Alexander Hamilton expounded, “the national and State systems are to be regarded as ONE WHOLE.”\textsuperscript{625} Hamilton continued that though state courts are “natural auxiliaries to the execution of the laws of the Union” that “an appeal from them will as naturally lie to that tribunal [i.e., the U.S. Supreme Court] which is destined to unite and assimilate the principles of national justice, and the rules of national decisions.”\textsuperscript{626} Thus federal law, according to the U.S. Constitution, should “receive their original or final determination in the courts of the Union.”\textsuperscript{627} On the matter of finality “[t]he mere necessity of uniformity” should “decide the question” in favor of federal review.\textsuperscript{628}

The countervailing, unconstitutional idea that federal finality is a problem because of a fatalistic belief that human courts cannot establish truth and justice must be vigorously overruled.\textsuperscript{629} The sheer impossibility of perfectly carrying out the ideals of truth and justice should not fluster U.S. judges to the point of turning their backs on them entirely.\textsuperscript{630} Judicial perfectionists and purists ought not to unravel the Court’s Article III power to rule “with finality” upon the facts on habeas review with nonsensical quips such as that “there can be no escape from a literally endless relitigation of the merits because the possibility of mistakes always exists.”\textsuperscript{631} There is always one sure escape: \textit{Putting less people in prison}.\textsuperscript{632} Overrule mandatory minimums and three strikes

\begin{thebibliography}{99}
\bibitem{624} U.S. CONST. art. III; Cohens v. Virginia, 19 U.S. 264, 415–16 (1821) (noting that if the federal courts relinquished “final jurisdiction” to each of the state courts “over the same causes, arising upon the same laws” then the result would be “a hydra in government, from which nothing but contradiction and confusion can proceed.”) (quoting \textsc{The Federalist No. 80 (Alexander Hamilton)}). \textit{See also Story, Constitution, supra note 3, at § 389.}
\bibitem{625} \textsc{The Federalist No. 82 (Alexander Hamilton)}; \textsc{The Federalist No. 80 (Alexander Hamilton)} (And again “the peace of the WHOLE ought not to be left at the disposal of a PART.”).
\bibitem{626} \textsc{The Federalist No. 82 (Alexander Hamilton)}.
\bibitem{627} \textit{Id.}
\bibitem{628} \textsc{The Federalist No. 80 (Alexander Hamilton)}.
\bibitem{629} Bator, \textit{supra} note 160, at 448, 455–56.
\bibitem{630} \textit{Id.} at 451, 453.
\bibitem{631} \textit{Compare} Bator, \textit{supra} note 160, at 441. 447 (idealizing “finality” in order to undo the federal court capacity to decide cases with finality as to state court practices), \textit{with} Crowell v. Benson, 285 U.S. 22, 57 (1932) (preserving the federal judiciary’s power to decide cases and controversies “with finality”).
\bibitem{632} Make it \textit{more} difficult to put people in prison—and there will literally be \textit{less} habeas petitions to review: \textit{Too Many Laws, Too Many Prisoners}, \textsc{The Economist} (July, 22, 2010),
\end{thebibliography}
laws. Decriminalize penumbral crimes. Decriminalize the possession crimes that lack a mens rea or actus reus requirement. Decriminalize intellectual property infringement. Many of these “crimes” have so wholly departed from the traditional common law concepts of crime that they should be found unconstitutional.


633 Johnson v. United States, 135 U.S. 2551, 2555, 2562 (2015) (overruling the residual clause of the Armed Career Criminal Act for being unconstitutionally vague which included a mandatory minimum sentence of 15 years in prison for a person with “three or more previous convictions for a ‘violent felony’”); Lockyer v. Andrade, 538 U.S. 63, 77 (2003) (Souter, J., dissenting) (“The application of the Eighth Amendment prohibition against cruel and unusual punishment to terms of years is articulated in the ‘clearly established’ principle acknowledged by the Court: a sentence grossly disproportionate to the offense for which it is imposed is unconstitutional.”).


635 Stephen F. Smith, Overcoming Overcriminalization 102 J. CRIM L. CRIMINOLOGY 537, 540, 569 n.116, 570 (2013) [hereinafter Smith, Overcoming] (“Despite the critical importance of mens rea to the effectiveness and legitimacy of federal criminal law, federal crimes often lack sufficient mens rea elements” and “the actus reus often is innocuous conduct”—Smith gives examples of using the mails, interstate or international travel, but there are many examples of this including in Mellouli v. Lynch the actus reus was possession of a sock and in McFadden v. United States it was selling bath salts—as Smith stated “[t]he blameworthiness of such crimes comes entirely from mens rea”). See also Raymond, supra note 634, at 1416–17; German Lopez, America can end its war on drugs. Here’s how., VOX, Apr. 25, 2016, http://www.vox.com/2016/4/25/11445454/end-war-on-drugs.

636 Lydia Pallas Loren, Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement 77 WASH. U. L. Q. 835, 858–59 (1999) (one cannot take and carry away intangible property, nor can an infringer intend to deprive the copyright holder of his copyright because infringement does not deprive anyone of their copy of the infringed work—thus copyright infringement does not fit as a theft crime).

637 Id. at 880 (“As criminal offenses moved from the common law of generally recognized wrongs to regulatory statutory offenses, act that were ‘crimes’ no longer necessarily reflected generally acknowledged wrongs.”); Smith, Overcoming, supra note 635, at 540. See McFadden v. United States, 135 S. Ct. 2298, 2303 (2015) (McFadden was convicted for selling bath salts with the intent that they be used as a drug); Mellouli v. Lynch, 135 S. Ct. 1980, 1983 (2015) (“Mellouli was charged with possessing . . . a sock”); Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014) (holding that deciding whether a state criminal law was unconstitutional and void is justiciable).
Another sure way for courts to reduce the amount of imprisoned individuals applying for habeas review is to require a more rigorous adjudication at the trial level through habeas review. Prescribing no rigor will only spin the justice system toward over-criminalization and recidivism while violating the Separation of Powers itself. Doing so is thus candidly impractical. As Realists tend to do, attempting to limit federal de novo review upon habeas leaves them with nothing much to discuss except efficiencies and cost/benefit analyses. But this does not make Realist and Positivist views efficient or cost effective because they have lost sight of truth and justice. For example, allowing states like Louisiana to continue over-criminalizing its population while defunding its public defenders in violation of Gideon v. Wainwright will justifiably open the floodgates of habeas petitions.

In fact legal Realism and Positivism tend to indicate a defect in character—a species of fatalism and nihilism—which renders these

638 F. CHEESMAN ET AL., PRISONER LITIGATION IN RELATION TO PRISONER POPULATION, 4 CASELOAD HIGHLIGHTS NO. 2 (1998) (“The current analysis supports the ‘more prisoners, more litigation’ observation made by other researchers and practitioners. Results show that yearly increases in state prison populations translate into both short-term and long-term increases in state prisoner litigation.”).


642 Bator, supra note 160, at 447, 451, 506.

643 Jackson v. Virginia, 443 U.S. 307, 337 n.12 (1979) (Stevens, J., concurring) (ironically the “rational factfinder” test from Jackson which comes straight out of Bator’s playbook, creates inefficiencies and does not resolve them) (quoting a lengthy passage from Bator, supra note 160, at 450–51). See Jackson, 443 U.S. at 314, 317, 321–24 (creating its “rational factfinder” rule in the interest of “finality and federal-state comity” in order to ensure meaningful and rational review); Bator, supra note 160, at 450–51 (habeas corpus “should exist to test the question whether the processes furnished by the previous tribunal were meaningful and rational”).

views most inefficient and costly of all. By denying that human beings can access truth and justice they attempt to undermine the very purpose of convening courts of justice in the first place. They have rejected the inquiry of “what is the philosophy of Light” and want to “pull[] the lamp-post down” hoping that “what we might have discussed under the gas-lamp, we now must discuss in the dark.” But the de novo review of the facts to determine the truth and to rule in justice and equity is still binding. And the light of experience shines on in America.

Post-AEDPA comity and federalism is often expressed as a matter of loose statutory construction because the “AEDPA’s requirements reflect a ‘presumption that state courts know and follow the law.’” However, this presumption is neither statutory nor is it new. In fact there has long been a presumption “that trial judges and juries will act rationally and honestly . . . at least so long as the trial is free of procedural error and the record contains evidence tending to prove each of the elements of the offense.” This presumption should not bear upon the “quality of justice” administered by federal courts. In fact, in Moore v. Dempsey this presumption was held not “sufficient to allow a

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645 Jackson, 443 U.S. at 337 n.12 (Stevens, J., concurring).
646 Compare Bator, supra note 160, at 443, 446, 448, 457 (encouraging judges to doubt their ability to ascertain truth and administer justice), with FED. R. EVID. 102 (“every proceeding” should be administered “to the end of ascertaining the truth and securing a just determination”). Cf. Cicero, De Officiis 1.4.13 (“Above all, the search after truth and its eager pursuit are peculiar to man. And so, when we have leisure from the demands of business cares, we are eager to see, to hear, to learn something new, and we esteem a desire to know the secrets and wonders of creation as indispensable to a happy life. Thus we come to understand that what is true, simple and genuine appeals most strongly to a man’ s nature.” Thus human beings are “unwilling to be, subject to anybody save one . . . who is a teacher of truth or who, for the general good, rules according to justice and law.”).
647 G.K. CHESTERTON, HERETICS 23–24 (1905).
652 Id.
Judge of the United States to escape the duty of examining the facts for himself [de novo] when if true as alleged they make the trial absolutely void."654

Before Moore, in Frank v. Mangum the Court noted its de novo "obligation . . . to look through the form and into the very heart and substance of the matter."655 The Frank Court violated this obligation by presuming the facts alleged were untrue without reviewing them de novo in order to deny the writ.656 In Moore, the Court overruled Frank’s error by setting this obligation forth as a duty to conduct de novo review by presuming facts “true as alleged” when deciding whether or not to issue the writ to review a state court determination.657 Then in Brown v. Allen the Court conducted de novo review but hedged against its duty to do so in dictum saying that “a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus” because “the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights.”658 Thus in short, Brown suggested in dictum that “[a]lthough they have the power, it is not necessary for federal courts” to conduct de novo review of the facts on habeas.659 The Brown Court nevertheless engaged in de novo review of the facts as Moore required.660

In Brown, Justice Jackson issued an oft quoted concurrence in which he expressly questioned “the latitude” that “federal courts should exercise in retrying de novo state court criminal issues” through habeas corpus.661 Jackson then proposed a new “doctrine of federal self-restraint” in dictum based on “the irritation that is developing over ill-considered federal use of the writ to slap down state courts” and the apparent flaws in final federal determinations.662 Though Justice Jackson did not fully or even adequately explain his new doctrine, his intention was to inspire future courts to limit de novo habeas review in federal

656 Id. at 338, 344–45.
657 Moore v. Dempsey, 261 U.S. 86, 92 (1923). See Fay v. Noia, 372 U.S. 391, 421 (1963) (“It was settled in Moore, restoring what evidently had been the assumption until Frank, that the state courts’ view of the merits was not entitled to conclusive weight. We have not deviated from that position.”).
659 Id. at 464.
660 Id. at 466–86.
661 Brown, 344 U.S. at 546 (Jackson, J., concurring).
662 Id.
courts by redefining long held judicial precedent on federal-state comity and finality.663

Professor Paul M. Bator answered Justice Jackson’s clarion call in Brown.664 According to Jackson’s prodding, Bator cast Brown as a radical expansion of federal review of state habeas cases.665 He also mislabeled Frank v. Mangum as an expansion of habeas review even though it violated its “obligation” to conduct de novo review.666 Bator further contended that instead of abrogating Frank, Moore merely applied Frank’s ruling and thus Frank should continue to apply as the rule without considering Moore.667 This strategy of downplaying the role of Moore seemed to be employed by Bator solely to throw the Supreme Court off the scent of Moore’s bold requirement of lower federal courts to apply de novo review to the facts decided in state courts as a duty.668 Unfortunately, in subsequent habeas review, Bator’s critique successfully convinced the U.S. Supreme Court to apply Frank and Brown as if Moore never existed.669

According to Bator’s deceptive reading of Moore as a mere application of Frank, and Brown as a liberal expansion of habeas review when Brown is anything but, the Stone v. Powell Court characterized Brown as an expansive ruling, cited Frank as unchecked law, and expressed actual confusion about whether Moore was relevant at all.670 In actuality, Frank violated and Brown hedged against the power of the federal courts to review state court determinations de novo,671 while Moore boldly cited a duty to assert de novo review in order to abrogate Frank’s ruling.672 Thus, at the behest of Professor Bator and in the

663 Id. at 544–46 (Jackson, J., concurring).
665 Id. at 462–64.
666 Id. at 486–87 (writing with bombastic flair Bator used wartime analogies to characterize Frank as “a crucial weapon” added “[f]or the first time . . . to the arsenal of the habeas corpus court”).
667 Id. at 489–91.
670 Id.
671 Frank v. Mangum, 237 U.S. 309, 335 (1915) (setting forth a standard to limit de novo review to determine whether the state trial court supplied a sufficient “corrective process” and actually refusing to question a state court determination of the truth, clearly withholding de novo review); Brown v. Allen, 344 U.S. 443, 464–65 (1953) (cutting back on Moore’s duty to conduct a de novo review in dictum saying “a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus”).
672 Moore, 261 U.S. at 90–92 (abrogating Frank v. Mangum, 237 U.S. 309 (1915)).
footsteps of Justice Jackson’s concurrence in Brown, the Stone Court furthered Brown’s hedge against Moore’s stated duty to review the facts de novo without understanding either Brown or Moore.673 Fortunately, Stone also remained a mere hedge against de novo review like Brown and still reserved de novo review for when state courts fail to provide an adequate “corrective process.”674

The Court crossed the line to overrule potentially all de novo review in Jackson v. Virginia.675 That line was rightly described by Justice Stevens as the Court’s fundamental prohibition on issuing impermissible advisory statements.676 Long ago, as Chief Justice Jay wisely concluded, this prohibition was jurisdictional and inhered in the Supreme Court’s place as “a court of last resort.”677 In order to overcome the prohibited status of a mere advisory statement both the Court’s prudence and power must converge over the complaint at bar in the pursuit of justice.678 Justice Stevens’ concurrence in Jackson adequately provided two steps to verify whether the Court has done so.679 Namely the Court’s decisions must (1) comport with the traditional jurisdictional requirements of standing, ripeness, mootness, and the choice of laws, and (2) the Court must prudently justify its jurisdiction by the terms of the Judiciary Act under the constitution.680

Finally, Brown’s dictum that hedged against the duty of federal judges to conduct de novo review was given new life in Wright v. West

674 Stone, 428 U.S. 475–76 (applying Frank’s “corrective process” standard).
675 Jackson v. Virginia, 443 U.S. 307, 327, 337 (1979) (Stevens, J., concurring) (The majority set forth a strange “new brainchild” with “the stated purpose of the additional layer of review is to determine whether the State’s factfinder is ‘rational.’”).
676 Id. at 327–28 (Stevens, J., concurring).
678 See, e.g., Glass v. The Sloop Betsey, 3 U.S. 6, 16 (1794).
679 Jackson, 443 U.S. at 327–28 (Stevens, J., concurring) (In constitutional cases the Court should not make a change to constitutional precedent unless (1) those efforts are necessary to the decision of the case at hand and (2) powerful reasons favor a change in the law.).
in Justice O’Connor’s disagreement with Justice Thomas.\textsuperscript{681} Then after Wright the AEDPA was enacted and Justice O’Connor led the Court by creating an “objective reasonableness” standard to govern the availability of federal habeas corpus review of state run criminal trials through § 2254(d)(1).\textsuperscript{682} Through judicial creep the “objective reasonableness” standard was revealed in Ayala to be another version of Jackson’s “rational factfinder” test.\textsuperscript{683} Therefore, Ayala engaged in “an additional layer of review” that should render the entire standard impermissible.\textsuperscript{684} By way of embarrassing advisory statements the interests of finality, efficiency, and federal-state comity were gradually redefined according to Bator’s urging to cut back on federal de novo review.

According to dictum in Jackson and similar cases “finality” now requires the federal courts not to set forth a final determination on the facts.\textsuperscript{685} And the version of “federal-state comity” set forth by Jackson and similar cases absurdly require that federal courts reject a presumption “that trial judges and juries will act rationally and honestly.”\textsuperscript{686} Efficiency itself, for which this entire movement was inspired, is totally undermined by replacing the de novo review of facts under the law with tangential questions wholly arbitrary to the case at bar.\textsuperscript{687} In Ayala the Court even suggested in dictum that due to federal-state comity and finality the Supreme Court no longer even possesses the


\textsuperscript{684} Bator, 443 U.S. at 336 (Stevens, J., concurring).

\textsuperscript{685} Bator, supra note 160, at 506 (quoting Brown v. Allen, 344 U.S. 443, 536–37 (1953) (Jackson, J., concurring)).

\textsuperscript{686} Jackson, 443 U.S. at 321–22 (articulating a “societal interest in the finality of state criminal proceedings” just as wanted, and losing sight of the overarching reality that all benefit from a uniform pronouncement of the federal law).

\textsuperscript{687} Id. at 322 (majority opinion), and at 335 (Stevens, J., concurring).

\textsuperscript{688} Id. at 313, 324–25.
power to review cases *de novo*. But this suggestion was a boldfaced hoax and it was ultimately refuted in *Ayala’s* sister case *Brumfield*.

In order to mount a greater restoration of habeas review based upon *Brumfield*, a deeper understanding of Justice Stevens’ oft cited concurrence in *Jackson* should be awakened. As Stevens recognized, even feudal Courts are required to read the entire record so feudal forms create no extra efficiency during review. In fact they create inefficiencies by presumptively allowing some unjust and inequitable punishments to stand, which as controlling precedent will create more unjust imprisonments and punishments. This inefficiency and injustice comes from the only change brought by feudalism, which is an “additional layer of review” put forth by a “rational factfinder” test or equivalent.

Justice Stevens rightly characterized this test as a “new brainchild” and “a meaningless shibboleth” that runs aground on traditional jurisdictional standards and thus results in advisory statements that are disjointed from the facts of the case and the purposes of the law. In turn the unchallenged state court determinations of federal law, whether just or unjust, will create more inefficiency simply because of their non-uniformity. As Alexander Hamilton expounded regarding the matter of finality: “The mere necessity of uniformity” should “decide the question” in favor of federal review. Great inefficiencies and costly legal uncertainties arise when federal laws are allowed to have different

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692 *Jackson*, 443 U.S. at 328, 334–35 (Stevens, J., concurring).
695 *Id.* at 327–28.
696 *THE FEDERALIST NOS. 80, 82* (Alexander Hamilton).
697 *THE FEDERALIST NO. 82* (Alexander Hamilton) (As Alexander Hamilton expounded “the national and State systems are to be regarded as ONE WHOLE.” Hamilton continued that though state courts are “natural auxiliaries to the execution of the laws of the Union” that “an appeal from them will naturally lie to that tribunal [i.e., the U.S. Supreme Court] which is destined to unite and assimilate the principles of national justice and the rules of national decisions.” Thus federal law, according to the U.S. Constitution, should “receive their original or final determination in the courts of the Union.”).
meanings in every state. In fact the idea that the states should be “independent courts of final jurisdiction” was roundly rejected by the framers as “a hydra in government from which nothing but contradiction and confusion can proceed.”

The only justification for limiting de novo review based upon the ideals of finality, efficiency and federalism is prudence. But making state trials unreviewable by federal courts is not prudent. In fact it turns the whole federal system upside down. And it does not even solve the “hypothetical evil” it aims to remedy which is “delays and costs associated with litigation.” It is both oblivious to the fundamental human rights that the Court is entrusted to uphold and it also takes defense lawyers’ time and efforts for granted. There is no reason to blindly affirm unjust convictions to save the court time and

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699 Cohens v. Virginia, 19 U.S. 264, 415–16 (1821) (quoting THE FEDERALIST NO. 80 (Alexander Hamilton)).

700 Pennsylvania v. Union Gas Co., 491 U.S. 1, 27 (1989) (Stevens, J., concurring); Younger v. Harris, 401 U.S. 37, 43–45 (1971) (applying prudential analysis from the Judiciary Act of 1793 to deny jurisdiction while acknowledging its inherent power to engage in jurisdiction in order to protect constitutional rights) (citing Ex parte Young, 209 U.S. 123 (1900)).

701 See Martin v. Hunter’s Lessee, 14 U.S. 304, 347, 374 (1816) (Recognizing that federal jurisdiction was granted by the U.S. Constitution to ameliorate the “State attachments, State prejudices, State jealousies, and State interests might some times obstruct . . . the regular administration of justice.” Article III of the U.S. Constitution was created “to remove all ground for jealousy and complaint” for the States “relinquish[ed] the privilege of being any longer the exclusive arbiters of their own justice where the rights of others come into question or the great interests of the whole may be affected by those feelings, partialities, or prejudices, which they meant to put down forever.”). See Ex parte Young, 209 U.S. 123, 162 (1908); Pennhurst State Sch. v. Halderman, 465 U.S. 89, 158–59 (1984) (Stevens, J., dissenting) (“Ex parte Young concluded in as explicit a fashion as possible that unconstitutional action by state officials is not action by the State even if it purports to be authorized by state law, because the federal Constitution strikes down the state law shield. . . . Young is as clear as a bell: the Eleventh Amendment does not apply where there is no state-law shield.”).

702 Cohens v. Virginia, 19 U.S. 264, 415–16 (1821) (noting that if the federal courts relinquished “final jurisdiction” to each of the state courts “over the same causes, arising upon the same laws” then the result would be “a hydra in government from which nothing but contradiction and confusion can proceed”) (quoting THE FEDERALIST NO. 80 (Alexander Hamilton)). See also STORY, CONSTITUTION, supra note 3, at § 389.


704 See, e.g., Hohn v. United States, 524 U.S. 236, 257 (1998) (Scalia, J., dissenting) (“The whole point of that provision is to diverge from the ordinary course of the judicial process and to keep petitioner’s case against respondent out of the Court of Appeals unless petitioner obtains a COA. The certificate is a screening device, helping to conserve judicial (and prosecutorial) resources.”) (emphasis in original) (internal quotation marks omitted).
resources because unjustly procured convictions are an *ultimate* waste of everybody’s time and resources. Most importantly, unjust convictions are an arbitrary waste of the lives, liberty and property of natural human beings.

The application of comity and grace to undermine the court’s power to conduct *de novo* review of facts originates in English feudalism. It flows once again from Blackstone who said that the Crown is only beholden to his people as “a matter of grace.” Justice Iredell failed to reestablish this principle in U.S. common law, and it ought not to be revived. Blackstone regarded the people of England as though they were a separate country from their ruler. The English people were literally a nation of slaves conquered by their King. Thus sovereign

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705 Dart Cherokee Basin Operating Co., LLC v. Owens, 135 S. Ct. 547, 562 (2014) (Thomas, J., dissenting) (One of the ways the Court arbitrarily preserves unjust convictions is through the Certificate of Appealability requirement enacted by the AEDPA, which requires a statutorily mandated intermediate trial before the appellate trial. In *Dart* Justice Thomas expressed his opinion that this requirement should be carried over from the AEDPA into federal Class Action suits and that his dissenting interpretation of the AEDPA regarding the Certificate of Appealability of a remand order in the case of *Dart* should not be reviewable by the Court on appeal. Thomas either wanted to disregard or overrule *Hohn* which already determined in a classic habeas context that the Certificate of Appealability hearing counts as a “case” and may be reviewed by the Court on appeal.).

706 U.S. CONST. amends. V & XIV.


708 Chisholm, 2 U.S. at 444 (Iredell, J., dissenting).

709 *Id.* (“The remedy, in the language of Blackstone, being a matter of grace, and not on compulsion.”).

710 1 WILLIAM BLACKSTONE, COMMENTARIES *243 (federal habeas corpus is being administered “as a matter of grace, though not upon compulsion” applying Blackstone’s feudalism). See Nevada v. Hall, 440 U.S. 410, 416 (1979) (sovereign immunity is not based on “any conception or obsolete theory” like feudalism but is merely based on prudence which is “logical and practical ground”) (quoting Kawananokoa v. Polyblank, 205 U.S. 349, 353 (1907)).

711 Quincy Adams, *Independence Day*, *supra* note 40 (“They received their freedom, as a donation from their sovereigns. They appealed for their privileges to a sign manual and a seal. They held their title to liberty, like their title to lands, from the bounty of a man, and in their moral and political chronology, the great charter of Runnimead was the beginning of the world.”).
and qualified immunity was raised to dismiss the legal claims of individuals against the Crown as if English people were foreigners in their own courts.\footnote{1 WILLIAM BLACKSTONE, COMMENTARIES 241–43.} The people’s perpetual slavery under their foreign conqueror that paradoxically resulted in “the enjoyment of true liberty,” according to Blackstone, is the oxymoron at the bottom of English government.\footnote{1 WILLIAM BLACKSTONE, COMMENTARIES 94, 103 (“Thus were this brave people gradually conquered into the enjoyment of true liberty; being insensibly put upon the same footing, and made fellow-citizens with their conquerors.”), and at 242–43 (“What we call purchase . . . the feudists called conquests . . . the Norman jurists . . . styled the first purchaser . . . the conqueror or conqueror.”).} It continues to choke out the vitality of the tree of liberty in England.\footnote{Vane, Healing Question, supra note 37, at 4–5.} In fact it was the life killing weed that the American Revolution vigorously uprooted.\footnote{Samuel Adams, A Letter of Correspondence to the Other Towns (Nov. 20, 1772), reprinted in SAMUEL ADAMS, 2 THE WRITINGS OF SAMUEL ADAMS 1770–1773, at 372–73 (Harry Alonzo Cushing ed., 1906).} The dogmatic application of the Crown’s immunity from suit is required for English government to function at all, but it flies in the face of everything the United States represents.\footnote{1 WILLIAM BLACKSTONE, COMMENTARIES 241.}

Feudalism was rejected by the founders of the United States and it is an affront to the U.S. social compact and the constitution.\footnote{See Otis, The Rights, supra note 26, at 58–59 (rejecting the fiction that the King can do no wrong).} As Justice Stevens remarked, speaking for the Court in Nevada v. Hall: “The King’s immunity rested primarily on the structure of the feudal system, and secondarily on a fiction that the King could do no wrong.”\footnote{Nevada v. Hall, 440 U.S. 410, 415 (1979).} There is no feudal structure in the United States.\footnote{THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (basing the “just powers” of the government on “the consent of the governed”).} Titles of nobility have been abolished.\footnote{U.S. CONST. art. I, § 9, cl. 8.} Seats in government are held in trust and not as a form of property.\footnote{Id. See Chisholm v. Georgia, 2 U.S. 419, 446 (1793) (Opinion of Iredell, J.) (“A Governor of a State is a mere Executive officer, his general authority very narrowly limited by the Constitution of the States, with no undefined or disputable prerogatives; without power to effect one shilling of the public money, but as he is authorized under the Constitution, or by a particular law; having no colour to represent the sovereignty of the States, so as to bind it in any manner to its prejudice, unless specifically authorised thereto.”); Taylor and Marshall v. Beckham, 178 U.S. 548, 576–77 (1900) (“The view that public office is not property has been generally entertained in this country . . . . The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such.”).}
government office. 722 There are no bills of attainder, bills of pains and penalties, or ex post facto laws. 723 And martial law itself was meant to be a virtual impossibility except in “Cases of Rebellion or Invasion,” and only when actual, present violence shutters the doors of the court. 724 These principled changes were derived from the U.S. social compact. 725

As Justice Stevens continued in *Hall*, the people’s sovereignty which is their right to govern “necessarily encompass[es] the right to determine what suits may be brought in the sovereign’s own courts.” 726 This right that inheres in sovereignty can be exercised in both directions in order to assert jurisdiction over a fellow sovereign or to abstain prudent. 727 This sovereign right was established nationally in 1776 according to the Declaration of Independence and each state’s sovereignty was established on the foundation of the whole nation’s birth as *e pluribus unum*. 728 Then after the first U.S. constitutions were ordained, Chief Justice Jay’s analysis in *Chisholm v. Georgia* affirmed in binding precedent that “what suits may be brought” are prescribed by the people through their written constitutions. 729 This reality was expressly recognized by the Tenth Amendment. 730

With no feudal structure existing in the United States since the U.S. social compact was struck in 1776, the only possible source of feudalism in America is a naked appeal to the fiction that “the King could do no wrong.” 731 In response to one such attempt by Nevada, Justice Stevens

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722 U.S. CONST. art. VI, cl. 3.
725 U.S. CONST. pmbl.
727 Id.
729 Hall, 440 U.S. at 415 (citing Chisholm v. Georgia, 2 U.S. 419, 472 (1793) (Opinion of Jay, C.J.) (“Sovereignty is the right to govern; a nation or State sovereign is the person or persons in whom that resides.”)); Martin v. Hunter’s Lessee, 14 U.S. 304, 324 (1816) (“The Constitution of the United States was ordained and established not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by ‘the people of the United States.’”).
730 U.S. CONST. amend. X.
wisely remarked: “We must, of course, reject the fiction.” Stevens continued: “It was rejected by the colonists when they declared their independence from the Crown.” In the place of feudal sovereignty the Court must, as Justice Stevens argued, find a way to reaffirm the age old sovereignty that emanates from “the consent of the governed.” Accordingly the American Revolutionaries courageously announced that “the King . . . erred in his kind intentions towards the Colonies, and taken away our fish, and given us a stone.” Doing so established the legacies of the American colonists Roger Williams, Anne Hutchinson, and Sir Henry Vane the Younger as exemplars of what eventually became the principles of statecraft in America—the undoubted law of the land.

_Habeas Corpus and the Supremacy of Federal Law_

In 1908 the U.S. Supreme Court engaged in habeas review and struck a decisive blow against European-style feudalism in _Ex parte Young._ The question in _Young_ was whether the States have the sovereign power to immunize their officers from the consequences of violating federal laws. The question arose after Attorney General of Minnesota Edward T. Young was jailed by the federal government for violating federal laws. Young petitioned the federal courts with a writ of habeas corpus asserting the sovereignty of the State of Minnesota and the state laws, which violated the federal laws. The Supreme Court utterly rejected Young’s habeas petition saying: “The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.” Young’s holding had an immediate

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732 Id. at 415.
733 Id. See Otis, The Rights, supra note 26, at 58–59; Tudor, Otis’s Speech, supra note 5, at 28 (As a matter of the principles which “breathed into this nation the breath of life” the Supreme Court must always reject this fiction.).
734 Hall, 440 U.S. at 426. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); WILLIAMS, BLOUDY supra note 52, at 114 (“the sovereign power of all civil authority is founded in the consent of the people”).
736 WILLIAMS, BLOUDY supra note 52, at 114.
737 Ex parte Young, 209 U.S. 123, 160 (1908) (“The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.”).
738 Id. at 144–46.
739 Id. at 149.
740 Id. at 150.
741 Young, 209 U.S. at 150–51, 159–60, 168 (“In some of the cases, the writ has been refused as matter of discretion, but, in others, it has been granted, while the power has been
effect on direct review and even its critics admitted that “Ex parte Young gives life to the Supremacy Clause.”

The reason “Ex parte Young gives life to the Supremacy Clause” is because it limited the effects of Hans v. Louisiana, which read feudal sovereignty concessions into the Eleventh Amendment. Young thus stands as an example of the overriding nature of the fundamental privilege of habeas corpus. Before Young, it seemed that Hans might preclude any direct federal review of conflicts between state and federal law. Thus, even though the federal law was “the supreme law of the land” the federal courts may not be able to overrule conflicting state laws under Hans’ reading of the Eleventh Amendment. Ex parte Young reopened the U.S. Courts to plaintiffs harmed by the state governments in violation of federal law by allowing officers of the state to be sued.

Before Young the federal government ran into a serious problem with Hans when it endeavored to create a working inter-state railway system. Hans’ resuscitation of feudal sovereignty as a judge-made constitutional principle facilitated the defiance of the states to the federal government. Minnesota for example enacted freight and passenger rates that were different than the uniform, national standard enacted by Congress. Perhaps expecting that a direct challenge under the supremacy clause would be dismissed according to the unwritten feudal principles affirmed in Hans, the federal government took action and put a number of Minnesota state officers in prison including Attorney General of Minnesota Edward T. Young.

fully recognized in all.”) (abrogating In re Ayers, 123 U.S. 443, 507 (1887); Hans v. Louisiana, 134 U.S. 1 (1890)).

743 Id. See Ex parte Young, 209 U.S. 123, 150–51 (1908) (abrogating In re Ayers, 123 U.S. 443, 507 (1887); Hans v. Louisiana, 134 U.S. 1 (1890)).
744 Id. at 168 (the federal courts always have the undoubted power to issue the writ).
746 Id., U.S. CONST. art. VI, cl. 2.
747 Ex parte Young, 209 U.S. 123, 167 (1908).
748 In re Ayers, 123 U.S. 443, 507–08 (1887); Hagood v. Southern, 117 U.S. 52, 70–71 (1886).
749 Union Gas, 491 U.S. at 23–24 (Stevens, J., concurring) (distinguishing judge-made sovereign immunity from Hans and the plain word of the Eleventh Amendment saying: “It is important to emphasize the distinction between our two Eleventh Amendments.”).
750 Young, 209 U.S. at 127.
751 Id. at 129.
Attorney General Young filed for a writ of habeas corpus to issue from the U.S. Supreme Court to set him free.\(^{752}\) In response the Court denied Young’s petition for freedom, concluded that the feudal sovereign immunity of the states was irrelevant, and therefore found that it does not matter whether or not a state minister has perpetrated “personal trespasses and wrongs” or has failed to carry out a “merely ministerial duty.”\(^{753}\) Hence, because of Young, each state’s “wicked ministers” can still be sued in federal court whenever they violate federal law.\(^{754}\) Accordingly the Supreme Court overruled Minnesota’s law under the supremacy of federal law.\(^{755}\) This determination finalized dicta from *In re Ayers*, which was issued three years before *Hans*.\(^{756}\) *Ex parte Young* departed from Blackstone’s feudalism and ensured that feudal concessions granted to the states were not extended to state officers.\(^{757}\)

Even though habeas corpus review exists independently of all prudential considerations, including federalism, the *Ex parte Young* Court still failed to overrule *In re Ayers*, which had no good reason to deny review because of the prudential federalism concerns it imputed into the Eleventh Amendment.\(^{758}\) The Eleventh Amendment is, to be sure, a limitation of the Court’s power to hear cases brought against a state by citizens of another state.\(^{759}\) But Attorney General of Virginia Rufus A. Ayers was a citizen of the state of Virginia.\(^{760}\) The Eleventh Amendment expressly does not preclude federal courts from hearing valid federal suits brought against the state by citizens of that state.\(^{761}\)

Thus, as Justice Stevens wisely contended in many later cases, state sovereignty should be treated as a prudential federalism concern like *Younger v. Harris* abstentions.\(^{762}\) Furthermore, because prudential

\(^{752}\) *Id.* at 126.

\(^{753}\) *Id.* at 158–59; *Ayers*, 123 U.S. at 506. *See* Wise v. Withers, 7 U.S. 331, 337 (1806) (“The court and the officer are all trespassers.”).

\(^{754}\) *Young*, 209 U.S. at 159–60; 1 *WILLIAM BLACKSTONE, COMMENTARIES* *#244*.

\(^{755}\) *Young*, 209 U.S. at 159–60.

\(^{756}\) *Id.* at 167 (citing *Ayers*, 123 U.S. at 507).

\(^{757}\) *Id.*; 1 *WILLIAM BLACKSTONE, COMMENTARIES* *#244*.

\(^{758}\) *See* *Ayers*, 123 U.S. at 507 (citing U.S. CONST. amend. XI).

\(^{759}\) U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

\(^{760}\) *Ayers*, 123 U.S. at 445–46.


\(^{762}\) *Martin v. Hunter’s Lessee*, 14 U.S. 304, 324 (1816) (“The Constitution of the United States was ordained and established not by the States in their sovereign capacities, but
concerns are virtually irrelevant during habeas corpus review, the state sovereignty recognized in *Hans* should be entirely disregarded during habeas review and *In re Ayers* should be vigorously overruled. Finally, *Hans* and all its progeny should be overruled in light of the Court’s actual power as it is revealed without prudential limitation during habeas review.

*Hans* and *In re Ayers* were decided based solely upon the idea that the Eleventh Amendment established state sovereignty as a constitutional limitation upon federal power. The Eleventh Amendment, however, says nothing about sovereign immunity. As Chief Justice Marshall found in *Cohens v. Virginia*, the motive of the states and Congress for ratifying the Eleventh Amendment “was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance” before a federal court because “it does not comprehend controversies between two or more States, or between a State and a foreign State. . . . [I]n these a State may still be sued.” Nor was this intention made clear during the drafting of the U.S. Constitution as *Hans* contended.

emphatically, as the preamble of the Constitution declares, by ‘the people of the United States.’”)


764 *Young*, 209 U.S. at 150–51 (abrogating *Ayers*, 123 U.S. at 507; *Hans v. Louisiana*, 134 U.S. 1 (1890)).

765 *Union Gas*, 491 U.S. at 25–26 (Stevens, J., concurring).

766 *Hans v. Louisiana*, 134 U.S. 1, 10–13 (1890); *Ayers*, 123 U.S. at 505 (stating that the Eleventh Amendment created a “residuum of sovereignty” in the states in dictum). Cf. The Federalist No. 80 (Alexander Hamilton) (As Alexander Hamilton wrote in The Federalist, the terms of the Eleventh Amendment were not intended on the outset because “the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled” indicated that “the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens.”); *Union Gas*, 491 U.S. at 23 (Stevens, J., concurring).


768 *Cohens*, 19 U.S. at 406 (the text of the Eleventh Amendment also does not mention suits brought by citizens of a state against their own state).

769 The Federalist No. 80 (Alexander Hamilton) (“the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens”); Chisholm v. Georgia, 2 U.S. 419, 472 (1793) (Opinion of Cushing, J.) (“As controversies between State and State, and between a State and citizens of another State, might tend gradually to involve States in war and bloodshed, a disinterested civil tribunal was intended to be instituted to decide such controversies and preserve peace and friendship.”). See generally Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) (Brennan, J., dissenting) (giving what Justice Stevens later called “the correct and literal interpretation of the plain language of the Eleventh Amendment” in *Union Gas*).
The purpose of the Eleventh Amendment must therefore be “some other cause than the dignity of a State.”\(^{770}\) Not to worry. Chief Justice Marshall easily concluded that “[t]here is no difficulty in finding this cause.”\(^{771}\) The purpose accomplished by ratifying the Eleventh Amendment was to block federal review of the credit defaults of certain states that refused to pay debts incurred to wage the American Revolution.\(^{772}\) The Eleventh Amendment should be limited by this purpose according to the equitable maxim “cessante ratione legis, cessat et ipsa lex,” which means “the reason for a law ceasing, the law itself ceases.”\(^{773}\) Joseph Story held this maxim as a “universal principle of interpretation” that expressly applies to the U.S. Constitution through its preamble.\(^{774}\)

Justice Stevens’ courageous stand against Hans’ concept of feudal sovereignty in Nevada v. Hall, in which he managed to retain a majority of the Court, came from a long experience of witnessing the betrayal that Hans’s feudalism represents.\(^{775}\) Once allying himself with the Hans progeny as a matter of **stare decisis** to respect the institution, Stevens’ view radically changed when he observed the Court repudiate “at least 28 cases, spanning well over a century of this Court’s jurisprudence” all at once according to feudal principles.\(^{776}\) With a heavy heart, realizing that he had been deceived,\(^{777}\) Stevens ended one of his most daring

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\(^{770}\) *Cohens*, 19 U.S. at 406.

\(^{771}\) Id.

\(^{772}\) Id.

\(^{773}\) Funk v. United States, 290 U.S. 371, 385 (1933) (The maxim that *cessante ratione legis, cessat et ipsa lex* “means that no law can survive the reasons on which it was founded. It needs no statute; it abrogates itself.”) (internal quotation marks omitted) (quoting Beardsley v. City of Hartford, 50 Conn. 529, 542 (1883)); Fox v. Snow, 6 N.J. 12, 22 (1950) (per curiam) (Vanderbilt, C.J., dissenting) (“[c]essante ratione legis, cessat et ipsa lex (the reason for a law ceasing, the law itself ceases”) (citing Beardsley, 50 Conn. at 542); Milborn’s Case [1609] 7 Coke 7a (Eng.) (Opinion of Lord Coke) (“ratio legis est anima legis, et mutata legis ratione, mutatur ex lex”) (the reason for a law is the soul of the law, and if the reason for a law has change, the law is changed).

\(^{774}\) STORY, CONSTITUTION, supra note 3, at § 459 (“[T]he preamble of a statute is a key to open the mind of the makers, as to the mischief, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute.”), and at §§ 459–60 n.1 (“cessante legis prœmio, cessat et ipsa lex”) (citing Chisholm, 2 U.S. at 457 (Opinion of Jay, C.J.).


\(^{776}\) Id. at 127, 165–67.

\(^{777}\) Florida DHRS v. Florida Nursing Home Assn., 450 U.S. 147, 155 (1981) (Stevens, J., concurring) (“For me, the adverse consequences of adhering to an arguably erroneous precedent in this case are far less serious than the consequences of further unravelling the doctrine of *stare decisis*.”); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 304 (1985)
dissents as it began by saying: “This case has illuminated the character of an institution.”

This gradual realization, which took place over many years on the bench, resulted in a valiant struggle by Justice Stevens to reverse the direction of the Court. Through this struggle, Justice Stevens undoubtedly revealed that the Supreme Court was having an identity crisis. And despite Stevens’ efforts, this crisis has not yet resolved. In the end, the Supreme Court will either abandon arbitrary rulings inspired by feudalism or it will abandon the prudence and self-discipline required by the U.S. social compact of the Supreme Court and all Article III judges. The Court must either choose fidelity or infidelity to its principles. And the people of the United States await the Court’s

(Stevens, J., dissenting) (Stevens explained that even though he believed Edelman “was incorrectly decided, I then concluded that the doctrine of stare decisis required that Edelman be followed. Since then, however, the Court has not felt constrained by stare decisis in its expansion of the protective mantle of sovereign immunity—having repudiated at least 28 cases in its decision in Pennhurst State School and Hospital v. Halderman—and additional study has made it abundantly clear that not only Edelman, but Hans v. Louisiana, 134 U.S. 1 (1890), as well, can properly be characterized as ‘egregiously incorrect.’ I am now persuaded that a fresh examination of the Court’s Eleventh Amendment jurisprudence will produce benefits that far outweigh ‘the consequences of further unraveling the doctrine of stare decisis’ in this area of law.”) (citations omitted).

Pennhurst, 465 U.S. at 126, 167 (Stevens, J., dissenting) (Stevens was previously convinced by his fellow jurists to affirm Hans for the purpose of safeguarding stare decisis and the integrity of the Court, but in Pennhurst the Court repudiated a number of cases based on Hans. The oxymoron of Hans was that it was preserved by way of stare decisis in order to overrule a whole swath of case law that also once held the position of stare decisis. In order to protect the integrity of his position, and to justify his change of opinion that Hans should no longer be preserved by principles of stare decisis, Stevens was forced to shed light on how Hans was disingenuously being used by the Court to subvert the principles of stare decisis. Stevens suggested this ongoing lack of integrity regarding Hans a defect in the Court’s institutional character.).


Hall, 440 U.S. at 415. See Union Gas, 491 U.S. at 27 (Stevens, J., concurring) (State sovereignty “cases are better understood as simply invoking the comity and federalism concerns discussed in our abstention cases . . . although admittedly in a slightly different voice.”).


Union Gas, 491 U.S. at 23–27 (Stevens, J., concurring).

Compare Armstrong, 135 S. Ct. at 1385–86 (based on English feudalism), with Hall, 440 U.S. at 415 (based on the U.S. principles of statecraft).
decision for the administration of Justice in the United States hangs in the balance.  

The crisis on the Court is exemplified by its use of *Hans* to cannibalize *ex parte Young*. The most recent example of this backwards trajectory was *Armstrong v. Exceptional Child Centers*—a decision inspired by sheer feudalism. The *Armstrong* Court extended a concession of feudal immunity to officers of the State of Idaho when they purposely violate federal law. In *Armstrong* the Court used equitable power in an attempt to restrict its equitable power to obstruct the Court’s duty to “enjoin unconstitutional government action.” Instead of properly expounding equity against the laws the Court stated that: “We have no warrant to revise Congress’s scheme simply because it did not ‘affirmatively’ preclude the availability of a judge-made action at equity.” The *Armstrong* Court went on to find that “the sheer complexity” of a law reveals “Congress’s intent to foreclose equitable

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784 Martin v. Hunter’s Lessee, 14 U.S. 304, 347, 374 (1816) (The Court is not meant to allow free play to “State jealousies” which “obstruct . . . the administration of justice.” The Court should recognize that the States “relinquish[ed] the privilege of being any longer the exclusive arbiters of their own justice where the rights of others come in question or the great interests of the whole may be affected by those feelings, partialities, or prejudices, which they meant to put down forever.”). See Jackson v. Virginia, 443 U.S. 307, 327 (1979) (Stevens, J., concurring) (rightly concerned over “the quality of justice administered by federal judges”).

785 Seminole Tribe, 517 U.S. at 74; *Armstrong*, 135 S. Ct. at 1385–86.

786 *Armstrong*, 135 S. Ct. at 1385–86 (using *Hans*, which read sheer feudalism into the Eleventh Amendment extending its application far beyond its text, to ironically abrogate *Ex parte Young* which breathed life back into the Supremacy Clause through habeas corpus review) (citing *Seminole Tribe*, 517 U.S. at 73–74 (citing to *Hans* v. Louisiana, 134 U.S. 1 (1880))) (abrogating *Ex parte Young*, 209 U.S. 123, 155–56 (1908)).


788 *Armstrong*, 135 S. Ct. at 1390–91 (Sotomayor, J., dissenting), and in the majority opinion at 1384 (expressly refusing to “enjoin unlawful executive action” and refusing to “enjoin unconstitutional actions by state and federal officers” and refusing to “enjoin the enforcement of state laws that are alleged to violate federal law” and it refused to “enjoin[] preempted state action”). *Cf.* Martin v. Hunter’s Lessee, 14 U.S. 304, 340–41, 360 (1816) (“The treaty of peace was not necessary to have been stated, for it was the supreme law of the land, of which all Courts must take notice.”) Accordingly the Court had appellate revising power over all state court interpretations of the treaty as Article VI of the Constitution in conjunction with Article III declares.) (citing U.S. Const. art. VI, cl. 2 (stating that as to the law of the land “the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”)); Calder v. Bull, 3 U.S. 386, 387 (1798) (Opinion of Chase, J.) (“any law of the Federal government, or of the State governments, contrary to the constitution of the United States, is void; and that this court possesses the power to declare such law void”).

789 *Armstrong*, 135 S. Ct at 1385–86.
relief.” This judicially divined intention of Congress was then used to overrule the preemption of state laws that are repugnant to valid federal laws. This is to say that a federal law is no longer “the supreme Law of the Land” as the U.S. Constitution requires whenever the Court arbitrarily decides that the law is too complex.

Due process of the laws is explicitly defined as by the law of the land. Thus the Court abandoned the due process of the law merely because of the “sheer complexity” of the law. The Court is ignoring the law of the land by claiming, rather ridiculously, that Congress’s implied intent is that the laws they enact should be nullified. This is not statutory construction, it is divination. It is the very same utter

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790 Armstrong, 135 S. Ct at 1385, 1387 (Justice Scalia said he had two reasons for precluding federal jurisdiction which were the existence of an administrative remedy and the sheer complexity of the law. But the only available administrative remedy was for the Secretary of Health to cut off all Medicaid funding to the State of Idaho. Earlier in Sebelius Roberts called this kind of remedy “a gun to the head.” However in Armstrong, Scalia treated this remedy as another complexity of the law and refused to pierce that complexity in order to determine whether such a remedy is illusory because it is “too massive to be a realistic source of relief.”). Cf. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604 (2012) (Opinion of Roberts, C.J.) (Chief Justice Roberts easily cut the law’s complexity to the quick in Sebelius saying: “In this case, the financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head.”). Cf. B&B Hardware, Inc. v. Hargis Industries, Inc., 135 S. Ct. 1293, 1310 (2015) (“Congress’ creation of this elaborate registration scheme, with so many important rights attached and backed up by plenary review, confirms that [Article I agency] registration decisions can be weighty enough to ground issue preclusion.”).

791 Compare Armstrong, 135 S. Ct. at 1384–86, with U.S. Const. art. VI, cl. 2. Cf. Martin v. Hunter’s Lessee, 14 U.S. at 340–41, 360 (1816) (noting that the Supreme Court has the supreme appellate revising power over state cases that interpret “the law of the land”).

792 U.S. Const. art. VI, cl. 2; U.S. Const, amends. V & XIV; In re Winship, 397 U.S. 358, 382–84 (1970) (Black, J., dissenting) (“it is thus unmistakably clear that ‘due process of law’ means according to ‘the law of the land,’” and the law of the land itself refers to “the fundamental principle of the rule of law” which is not limited to the application of the due process provisions of the constitution” (citing Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276 (1856)). My reading is that due process itself is swept up in the higher principles of equal rights, equal liberties, and equal application of the law that inheres in the Rule of Law and that the terms “due process” and “law of the land” are not limited by the specific places it is written in the constitution, but arises as an overarching and superseding principle like the independent equitable power of the U.S. Supreme Court itself.

793 Compare U.S. Const. art. VI, cl. 2, U.S. Const, amends. V & XIV, with Armstrong, 135 S. Ct. at 1384–86.

794 But see Armstrong, 135 S. Ct. at 1385 (The Secretary of Health could still defund Medicaid in Idaho, which according to Scalia is the only weight the law has—the power to self-destruct and withdraw itself from the states).

795 Quincy Adams, The Amistad, supra note 27, at 111–12 (“Yet shall we refuse to act because not gifted with the power of divination? We can only do the best in our power. The lot must decide their fate, and the Almighty will direct the hand that acts in the selection.”) To
groundlessness whence medieval feudalism sprouts. In *Armstrong* the Court actively confounded federalism and the separation of powers to nullify express text passed into law by Congress according to the Court’s perception of Congress’s intent evinced solely by the complexity of the text being nullified. This undermines the very concept of a legislature.

As in *Armstrong*, the *Integrity Staffing Solutions, Inc. v. Busk* Court wielded equitable power to reach an inequitable result. *Busk* construed

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797 Cicero, *De Divinatione* 2.17 (“I say ‘rashly,’ for it is evident that divination has been destroyed and yet we must hold on to the gods.”); Charles Carroll, *Fourth Letter of First Citizen* (1773), reprinted in *RILEY*, *supra* note 289, at 196 (“Groundless opinions are destroyed, but rational judgments of nature, are confirmed by time.”) (quoting Cicero, *De Natura Deorum* 2.2 (“And, in truth, we see that other opinions, being false and groundless, have already fallen into oblivion by lapse of time. . . . For time destroys the fictions of error and opinion, while it confirms the determinations of nature and of truth.”)).

798 *Armstrong*, 135 S. Ct. at 1384–85 (using *Hans*, which read shear feudalism into the Eleventh Amendment extending its application far beyond its text) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (citing to *Hans v. Louisiana*, 134 U.S. 1 (1890))) (abrogating *Ex parte Young*, 209 U.S. 123, 155–56 (1908)). *Cf.* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (Souter, J., dissenting) (recognizing that “we have two Eleventh Amendments, the one ratified in 1795, the other (so-called) invented by the Court nearly a century later in *Hans v. Louisiana*, 134 U.S. 1 (1890)”).


800 *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 517–19 (2014) (nullifying the original purpose of the FLSA to make work compensable according to the Ninth and Thirteenth Amendments); *Lochner v. New York*, 198 U.S. 45, 57–58, 64 (1905) (declaring void laws that limited the work hours of employees in order to preserve their health and wellbeing, which should have been safeguarded from judicial scrutiny by the Ninth and Thirteenth Amendments).
the laws according to Congress’s intent to paradoxically render the entire concept of compensable “work” superfluous.\textsuperscript{801} It has thus run afoul of the Ninth and Thirteenth Amendment prohibitions of slavery and indentured servitude by making the definition of “work” in the Fair Labor Standards Act [FLSA] totally superfluous.\textsuperscript{802} All that matters now is the definition of “principle activity.”\textsuperscript{803} The Court also ran afoul of the U.S. social compact, which is grounded in the natural human right to defend oneself from enslavement.\textsuperscript{804} The very purpose of the Thirteenth Amendment was to give new birth to the natural right of self-defense for all.\textsuperscript{805}

The \textit{Busk} Court turned its back on its paramount duty of securing this right through the due process of the laws to every person in its jurisdiction.\textsuperscript{806} Presumptive slavery is now apparently the rule in American employment law.\textsuperscript{807} In fact if an employee fails to “properly present[] to the employer at the bargaining table” his arguments for a task to be a compensable “principal activity” then their work is rendered

\begin{footnotesize}
\textsuperscript{801} \textit{Busk}, 135 S. Ct. at 517–19 (overruling Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690–691 (1946)).
\textsuperscript{802} \textit{Id.}; U.S. CONST. amends. IX & XIII.
\textsuperscript{803} \textit{Busk}, 135 S. Ct. at 517–19 (focusing exclusively on “principle activities” or “principle work” instead of just “work”).
\textsuperscript{804} The \textbf{Declaration of Independence} para. 1–2 (U.S. 1776). See Letter from Richard Henry Lee to Edmund Randolph (Oct. 16, 1787) (noting the great residuum of rights); James Madison, \textit{Speech Introducing Bill of Rights} (June 8, 1789) (noting the great residuum of rights); Samuel Adams, \textit{The Rights of the Colonists} (1772) (expressly noting that the great residuum of rights recognized by the Ninth Amendment explicitly included an unalienable right against being a slave); Otis, \textit{The Rights}, supra note 26, at 12 (connecting this right against being a slave (i.e., liberty) with his concept of sovereignty which the people cannot alienate). \textit{Cf.} Declaration of Self-Defense, supra note 22.
\textsuperscript{805} U.S. CONST. amend. XIII; President Abraham Lincoln, \textit{The Emancipation Proclamation} (Sept. 2, 1862) (in force on Jan. 1, 1863) (“I hereby enjoin upon the people so declared to be free to abstain from all violence, unless in necessary self-defence.”). See \textbf{The Declaration of Independence} para. 2 (U.S. 1776); Wheatley, \textit{General Washington}, supra note 362 (calling the soon to be united American colonies: “The land of freedom’s heaven-defended race!”). See Declaration of Self-Defense, supra note 22; Otis, \textit{The Rights}, supra note 26, at 9, 43–44; Letter from Benjamin Banneker to Thomas Jefferson (Aug. 19, 1791); Corbit’s Case, supra note 43. See also Preston’s Case, supra note 43, at 1. \textit{Cf.} Wheatley, \textit{On the Death}, supra note 43; Ebenezer Richardson’s Case, supra note 43, at 405–07 n.67 (citing \textit{Bushell’s Case} [1670] 124 Eng. Rep. 1006 (Eng.)).
\textsuperscript{806} \textit{Busk}, 135 S. Ct. at 517–19. See U.S. CONST. amends. IX & XIII; Zinermon v. Burch, 494 U.S. 113, 125 (1990) (“[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions ‘regardless of the fairness of the procedures used to implement them.’”) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).
\textsuperscript{807} \textit{Busk}, 135 S. Ct. at 517–19.
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presumptively non-compensable.\textsuperscript{808} Non-payment is the rule and specifically contracted “principal activities” are now required for compensation.\textsuperscript{809} Like the infamous \textit{Lochner v. New York}, the \textit{Busk} decision will rise up with preemptive force to both state and federal laws.\textsuperscript{810}

Not one Justice disputed this unjust, unconstitutional, and legally absurd result.\textsuperscript{811} No Justice consulted the U.S. Constitution or the social compact to justify its holding.\textsuperscript{812} And most disturbingly, no Justice considered the writs of habeas corpus that were once issued to release slaves from Southern slave-masters before the Civil War under § 14 of the Judiciary Act of 1789 known as the All Writs Act,\textsuperscript{813} and after to enforce the Thirteenth Amendment under the Habeas Corpus Act of 1867.\textsuperscript{814} Nevertheless, the \textit{Busk} ruling seemed to read a right to falsely imprison employees into the FLSA on behalf of employers.\textsuperscript{815} The \textit{Busk} holding is a judge created feudal sovereign immunity from federal law

\textsuperscript{808} Id.
\textsuperscript{809} Id. at 516.
\textsuperscript{810} Id. at 519 ("These arguments are properly presented to the employer at the bargaining table, not to a court in an FLSA claim."); \textit{Lochner v. New York}, 198 U.S. 45, 58–61 (1905) (using the “liberty of contract” to overrule state employment law).
\textsuperscript{811} \textit{Busk}, 135 S. Ct. at 519–20 (Sotomayor, J., concurring).
\textsuperscript{812} Id. See Declaration of Self-Defense, \textit{supra} note 22. See also Samuel Adams, \textit{The Rights of the Colonists} (1772) ("the right to freedom being the gift of God Almighty, it is not in the power of Man to alienate this gift, and voluntarily become a slave"); The Quock Walker Case (Mass., 1781) (Cushing, J.) ("But whatever sentiments have formerly prevailed in this particular or slid in upon us by the example of others, a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty, with which Heaven (without regard to color, complexion, or shape of noses-features) has inspired all the human race. And upon this ground our Constitution of Government, by which the people of this Commonwealth have solemnly bound themselves, sets out with declaring that all men are born free and equal—and that every subject is entitled to liberty, and to have it guarded by the laws, as well as life and property—and in short is totally repugnant to the idea of being born slaves.").
\textsuperscript{813} Habeas Corpus for Fugitive Slaves Cases, \textit{supra} note 232, at roll no. 1–2 (using habeas corpus under § 14 of the Judiciary Act of 1789 to release escaped slaves as free people) (exercising jurisdiction under the \textit{JUDICIARY ACT OF 1789}, ch. 20, § 14, 1 Stat. 73).
\textsuperscript{814} Ex parte Yerger, 75 U.S. 85, 106 (1868) (upholding § 14 of the Judiciary Act of 1789 and the expansions under the Habeas Corpus Act of 1867 as unaffected by “the act of 1868” so that federal jurisdiction extended to all people imprisoned in violation of the U.S. Constitution). \textit{See} Fay v. Noia, 372 U.S. 391, 416–17 (1963) (citing Judiciary Act Amendment of Feb. 5, 1867). \textit{See also Boumediene v. Bush}, 553 U.S. 723, 747–48 (2008) (citing Sommerset’s Case [1772] 20 How. St. Tr. 1, 80–82 (Eng.)). \textit{Cf.} Ex parte Young, 209 U.S. 123, 168 (1908) (“In some of the cases, the writ has been refused as matter of discretion, but, in others, it has been granted, while the power has been fully recognized in all.”); \textit{STORY, EQUITY, supra} note 2, at § 1341a, n.1.
\textsuperscript{815} \textit{Busk}, 135 S. Ct. at 518–19.
for private employers for holding illegal policies of false imprisonment and indentured servitude over their employees.\textsuperscript{816}

Less than a year before \textit{Busk} was released, the Court gave the State of Alabama sovereign/qualified immunity from the First Amendment when firing an employee for testifying truthfully in Court against the State in \textit{Lane v. Franks}.\textsuperscript{817} This holding is apparently the same as the puritanical religious freedom of a strong person to take away the liberty of the weak and vulnerable exemplified by the Puritan English dictator Oliver Cromwell, which violates the First Amendment idea of religious freedom.\textsuperscript{818} This Puritanical version of religious liberty was resurrected in the private corporate context of \textit{Burwell v. Hobby Lobby} and \textit{Wheaton College v. Burwell}.\textsuperscript{819} Through these cases the Court might combine

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\item \textsuperscript{817} \textit{Lane}, 134 S. Ct. at 2381. \textit{But see In re Quarles and Butler}, 158 U.S. 532, 535–36 (1895) ("It is the duty and the right not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States.").

\item \textsuperscript{818} See EDMUND LUDLOW, MEMOIRS OF EDMUND LUDLOW 11–12, 193 (1771) (Oliver Cromwell screamed: ‘O Sir Henry Vane, Sir Henry Vane; the Lord deliver me from Sir Henry Vane!’); Letter from Oliver Cromwell to John Bradshaw (Sept. 17, 1649); Letter from Oliver Cromwell to William Lenthall (Sept. 17, 1649); John Mason, \textit{A Brief History of the Pequot War} 8–9 (Paul Royster ed., 2007) (1736). See ARENDT, THE ORIGINS, \textit{supra} note 35, at 127 n.9 (noting that Cromwell’s massacres of the Irish people ensured that they are still not united to the English Empire); Vane, \textit{Healing Question}, \textit{supra} note 37, at 16 (Vane attempted to create a Union of the three nations by establishing a Supreme Court, but was betrayed and imprisoned by Cromwell and beheaded by King Charles II for trying.).

\end{itemize}
church and state and nullify the First Amendment itself and the very idea of *qui tam* suits. Such a trajectory exemplifies the Court’s recent departure from the U.S. social compact and the historical fact that the Union won the Civil War expressly to rebirth the founding compact anew.

**The Objects of the U.S. Social Compact**

As already mentioned, *Brumfield v. Cain* is rooted in a beautiful line of precedent that traces back to the U.S. social compact. From this line of precedent the U.S. Supreme Court read the U.S. Constitution as a living document saying: “The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation.” This idea traces back to *Ex parte Wilson*, which decided that the original intent of adding the phrase “infamous crime[s]” to the Fifth Amendment was that it “may be affected by the changes of public opinion from one age to another.” The idea that the founders infused the U.S. Constitution with words and phrases that change and adapt as living creatures do is one way the U.S. social compact continues to shape constitutional construction and the judicial practice in general.

In *Curtiss-Wright Export Corp. v. United States* the Supreme Court rested its opinion upon the social compact as expounded in Joseph Story’s *Commentaries on the Constitution*. The *Curtiss-Wright* Court

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822 See supra note 606, and accompanying text.


825 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. pmbl; U.S. CONST. amend. IX; *James Madison, Speech Introducing Bill of Rights* (June 8, 1789) (noting the great residuum of rights recognized by the Ninth Amendment).

was faced with deciding whether the President had the power to block the sale of machine guns to a war zone in South America according to a joint resolution enacted by Congress. The Court decided that the President has a “very delicate, plenary and exclusive power” to block the sale of arms to a war zone according to the ideals of the U.S. social compact. Thus the resolution that Congress made to allow the President to embargo the sale of arms was irrelevant.

Instead the President’s freestanding duty to preserve and perpetuate peace that President George Washington first exercised was justified by Curtiss-Wright as a matter of national sovereignty. Justice Sutherland speaking for the Court held close to the wisdom expressed by the first U.S. Supreme Court during the Citizen Genêt Affair. That Supreme Court, under Chief Justice Jay, wisely withheld its judgment by presenting a signed letter to President Washington saying that “your Judgment will discern what is Right, and your usual Prudence, Decision and Firmness will surmount every obstacle to the Preservation of Rights, Peace, and Dignity of the united States.”

Just as Curtiss-Wright interpreted the Presidential power according to the duty of peace, Chisholm v. Georgia extended the Supreme Court’s “superintending judicial authority” over the states based upon the court’s duty to preserve peace. Justice James Wilson cited back to

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827 Curtiss-Wright, 299 U.S. at 311–12.
828 Id. at 319–20.
829 Id. at 327–29 (nearly overturning the authorizing act as unconstitutional, but being satisfied with just noting that the act was superfluous because it purported to extend power to President that the constitution already vested in the President).
830 Id. See President George Washington, The Proclamation of Neutrality (April 22, 1793); Alexander Hamilton, Defense of the President’s Neutrality Proclamation (May, 1793); PACIFICUS NO. I (Alexander Hamilton) (Hamilton argued that the President has the right and duty “to proclaim the neutrality of the Nation” without consulting Congress in order to “exhort all persons to observe it, and to warn them of the penalties which would attend its non observance.”); President Thomas Jefferson, Proclamation in Response to Chesapeake Affair (July 2, 1807) (also exercising the Presidential power to declare neutrality and peace in a similar proclamation).
833 Curtiss-Wright, 299 U.S. at 329.
834 Chisholm v. Georgia, 2 U.S. 419, 465 (1793) (Opinion of Wilson, J.), at 451 (Opinion of Blair, J.) (“no State in the Union should, by withholding justice, have it in its power to
the preamble of the constitution to justify federal review because “tranquility is most likely to be disturbed by controversies between the states.”835 Chief Justice Jay agreed saying that “domestic tranquillity requires that the contentions of States should be peaceably terminated by a common judicatory.”836 Or as Justice Cushing recounted, “a disinterested civil tribunal was intended to be instituted to decide such controversies and preserve peace and friendship.”837 Otherwise “controversies between State and State, and between a State and citizens of another State, might tend gradually to involve States in war and bloodshed.”838 A “desire and duty of peace” arises from the U.S. social compact and the national sovereignty born in 1776.839 The social compact’s overriding force is the very foundation of the state sovereignties, which depend upon the sovereignty of the whole Nation for their principle.840

For example, in Calder v. Bull the Court held that state laws that violate the U.S. Constitution are void according to the U.S. social compact.841 As Justice Chase set forth: “The purposes for which men enter into the society will determine the nature and terms of the social compact; and as they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it.”842 Citing directly to the rule from Dr. Bonham’s Case, Justice Chase contended that “[t]he genius, the nature, and the spirit, of our State Governments” prevent them from creating laws “contrary to the great first principles of the social compact.”843 Thus Chase proclaimed the Rule of Law saying “that no man should be compelled to do what the

835 Chisholm, 2 U.S. at 465 (Opinion of Wilson, J.).
836 Id. at 475 (Opinion of Jay, C.J.).
837 Id. at 468 (Opinion of Cushing, J.).
838 Id.
839 HELVIDIUS NO. IV (James Madison); THE DECLARATION OF INDEPENDENCE para. 30–32 (U.S. 1776) (referring to the original, peaceful appeal the American colonists made to the unwritten English constitution).
840 See Martin v. Hunter’s Lessee, 14 U.S. 304, 324–25 (1816); Gage, supra note 187, at 192.
842 Id. at 388.
843 Id. (a law cannot make “a man a Judge in his own cause”); Dr. Bonham’s Case 8 Co. Rep. 114a, 118a (Eng.) (“quia aliquis non debet esse Judex in propria causa, imo iniquum est aliquem sui rei esse judicem” meaning “no person may be a judge in his own cause”). Cf. Tudor, Otis’s Speech, supra note 5, at 28.
laws do not require; nor to refrain from acts which the laws permit." 

Chase called this a “fundamental principle” which “flows from the very nature of our free Republican governments.”

The Supreme Court wisely held the same in Martin v. Hunter’s Lessee that the states are not feudal sovereigns but free republics. Thus based on the U.S. social compact of 1776 the states “meant to put down forever” all of their “feelings, partialities, or prejudices” whenever “[t]he security and happiness of the whole” was put in question. From 1776 going forward, the whole people of the United States “surrendered those powers which might make [the States] dangerous to each other” in order to “prevent dissention and collision.” The Martin Court revealed once again the vital connection between the preamble of the U.S. Constitution and the U.S. social compact. Thus Martin observed that according to “the great interests of the whole” the people of each State “relinquish[ed] the privilege of being the exclusive arbiters of their own justice.” For the purposes of uniformity “[a]nd to remove all ground for jealousy and complaint” the state sovereignty must give way and

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844 Calder, 3 U.S. at 388 (Opinion of Chase, J.).
845 Id.
846 Martin v. Hunter’s Lessee, 14 U.S. 304, 373–74 (1816) (“The security and happiness of the whole was the object, and, to prevent dissention and collision, each surrendered those powers which might make them dangerous to each other. Well aware of the sensitive irritability of sovereign States, where their wills or interests clash, they placed themselves, with regard to each other, on the footing of sovereigns upon the ocean, where power is mutually conceded to act upon the individual, but the national vessel must remain unviolated. And to remove all ground for jealousy and complaint, they relinquish the privilege of being any longer the exclusive arbiters of their own justice where the rights of others come in question or the great interests of the whole may be affected by those feelings, partialities, or prejudices, which they meant to put down forever.”). See also Vanhorn’s Lessee v. Dorrance, 2 U.S. 304, 314–16 (1795).
847 Id. at 373–74. THE DECLARATION OF INDEPENDENCE para. 1, 30–32 (U.S. 1776) (at this moment “the united states of America” was born—the Union was struck for the purposes of liberty and peace in the service of the absolute rejection of the British ultimatum of servitude or death, by declaring independence the compact which was developed over many years prior (John Adams claimed that the seeds were first sown with James Otis’ argument in Paxton’s Case) was finally made complete); Tudor, Otis’s Speech, supra note 5, at 14 (citing Matthew 13:1–9; Mark 4:1–9; Luke 8:4–8).
848 Martin, 14 U.S. at 373–74.
849 Id. at 324–25 (quoting U.S. Const. pmbl). See STORY, CONSTITUTION, supra note 3, at § 459 (“[T]he preamble of a statute is a key to open the mind of the makers, as to the mischief, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute.”), and at §§ 459–60 n.1 (“cessante legis præmio, cessat et ipsa lex”) (citing Chisholm, 2 U.S. at 457 (Opinion of Jay, C.J.)).
850 Martin, 14 U.S. at 374.
“the national vessel must remain unviolated.” This is the essence of the dormant commerce clause.

Decades before Martin was decided Vanhorne’s Lessee v. Dorrance was set forth by Justice Patterson riding circuit in Pennsylvania. Patterson concluded that “security was one of the objects, that induced [the founding Pennsylvanians] to unite in society.” As Justice Patterson stated: “Some of the judges in England have had the boldness to assert, that an act of Parliament, made against natural equity, is void” such as Lord Coke’s decision in Dr. Bonham’s Case. However, “this opinion contravenes the general position” in England which is “that the validity of an act of Parliament cannot be drawn into question by the judicial department: It cannot be disputed, and must be obeyed.” Patterson went further: “The power of Parliament is absolute and transcendant; it is omnipotent in the scale of political existence.” This is demonstrable because “in England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested.”

To this Patterson exclaimed: “In America the case is widely different: Every state in the Union has its constitution reduced to written exactitude and precision.” Finally Patterson concluded: “Whatever may be the case in other countries, yet in this [country] there can be no doubt, that every act of the Legislature, repugnant to the Constitution, is absolutely void.” Thus while Dr. Bonham’s Case is the exception in England, it is the “general position” in America. The judiciary can void an act of a legislature in the United States as “against natural equity.” In fact this judicial power and duty of our independent

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851 Id.
853 Vanhorne’s Lessee v. Dorrance, 2 U.S. 304, 304–05 (1795).
854 Id. at 310.
855 Id. at 308; Dr. Bonham’s Case [1610] 8 Co. Rep. 114a, 118a (Eng.). Cf. Tudor, Otis’s Speech, supra note 5, at 5 (“An act against the Constitution is void.”).
856 Vanhorne’s Lessee, 2 U.S. at 308.
857 Id.
858 Id.
859 Id.
860 Id.; Youngstown Sheet & Tube, Co. v. Sawyer, 343 U.S. 579, 655 n.27 (1952) (Jackson, J., concurring) (referring to Dr. Bonham’s Case [1610] 8 Co. Rep. 114a, 118a (Eng.)).
861 Id.; Tudor, Otis’s Speech, supra note 5, at 5.
jUDICIARY ArISES AS A FUNDAMENTAL REQUIREMENT OF THE SEPARATION OF POWERS IN ORDER TO SECURE THE RULE OF LAW. 863

Therefore Patterson continued that “[t]he preservation of property then is a primary object of the social compact, and, by the late Constitution of Pennsylvania, was made a fundamental law.” 864 Instead of copiously citing to the words of the constitution like shibboleth incantations, Vanhorne’s Lessee was decided upon “the nature of the social compact” and “the spirit of the Constitution.” 865 Thus the Court found that no “taking [of] private property” can be made without “just compensation,” without referring to the Fifth Amendment Takings Clause. 866 Instead Justice Patterson relied upon the republican form of our governments saying “we have republican governments, and written Constitutions, by which the protection and enjoyment of property are rendered inviolable.” 867 Ultimately when the Court’s jurisdiction achieves “reasons of a higher and more extensive nature touching the safety, peace, and sovereignty of the nation” such a case should be disposed of according to “the objects of the general compact.” 868 This idea traces back to James Otis and Oxenbridge Thacher’s arguments in Paxton’s Case in 1760–61. 869

Nearly five years before Blackstone published his Commentaries, Otis and Thacher declared that “an Act against the Constitution is void: an Act against natural Equity is void: and if an Act of Parliament should

863 Youngstown, 343 U.S. at 655 n.27 (Jackson, J., concurring) (“We follow the judicial tradition instituted on a memorable Sunday in 1612 when King James took offense at the independence of his judges and, in rage, declared: ‘Then I am to be under the law—which it is treason to affirm.’ Chief Justice Coke replied to his King: ‘Thus, wrote Bracton, The King ought not to be under any man, but he is under God and the Law.’


865 Vanhorne’s Lessee, 2 U.S. at 310–11, 314.

866 Id. at 310–11 (“The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation.”).

867 Id. at 314.

868 Martin v. Hunter’s Lessee, 14 U.S. 304, 325, 347, 373–74 (1816) (“the security and happiness of the whole was the object”). See Chisholm v. Georgia, 2 U.S. 419, 462 (Opinion of Wilson, J.) (arguing that the “People of the United States” are “the first great object in the Union”), and at 468 (Opinion of Cushing, J.) (“the great end and object” of U.S. governments is to “secure and support the rights of individuals”); Vanhorne’s Lessee, 2 U.S. at 310 (the “security [of property] was one of the objects, that induced [the Pennsylvanians of 1776] to unite in society” and thus “[t]he preservation of property then is a primary object of the social compact”); Calder, 3 U.S. at 388 (Opinion of Chase, J.) (expounding many of “the proper objects” of the U.S. social compact).

869 Tudor, Otis’s Speech, supra note 5, at 19.
be made, in the very Words of this Petition, it would be void." Thus the Americans’ plan to remedy English tyranny was “to confer on the judiciary the power to declare unconstitutional statutes void.” Such an independent judiciary would be required to recognize the equal, natural rights of all human beings born in British colonies both “white or black,” male or female, protestant or otherwise. The call for such a supreme judiciary as a necessary component to achieve Union through a respect for equal rights traces back to the political writings of former Massachusetts Bay Governor Sir Henry Vane the Younger.

Then “Lieutenant Governor Hutchinson, who [also] presided as Chief Justice” in Massachusetts Bay Colony dismissed Otis and Thacher’s arguments. This result was taken as proof positive of the colonists’ suspicions that the title of Lieutenant Governor was “quite incompatible with the place of Chief Justice, unless seconding the designs of government in all cases was to be the excuse and the return for such extraordinary favors.” Thus the direct experience of the American colonists that natural human rights regardless of race, gender or religious belief were being violated by executive English Courts inspired the American project of establishing the judiciary department as an independent third branch of government. The Americans maintained that natural Equity must uphold the Rule of Law in order to treat all British subjects equally.

As Sir Henry Vane the Younger once suggested, the Supreme Court must be a mirror of the people. It should not matter whether those before the court were born in England or in one of England’s territories, whether they are black or white, whether they are man or woman, or whether they were in England’s church or not. Vane’s conviction arose from his belief that sovereignty resides in “the whole body of the

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870 *Id.* at 5.
871 *Id.* at 2.
873 Vane, *Healing Question*, supra note 37, at 11, 16.
875 *Id.* at 9.
877 Tudor, *Otis’s Speech*, supra note 5, at 5; Paine, *Common*, supra note 52, at 99.
878 Vane, *Healing Question*, supra note 37, at 16 (the Supreme Court is “the representative of the whole” so that there may be “an orderly union of many understandings together”).
The birth of such an idea traced back to Anne Hutchinson and Henry Vane’s alliance with Roger Williams who strongly contended that any sovereignty in civil government came from “the consent of the people.” To this point “[t]axation without representation is tyranny,” was the maxim. In fact this revolutionary slogan “was the guide and watchword of all the friends of liberty.” But it wasn’t until 1776 that Roger Williams’ wisdom inspired the Declaration of Independence and ever since it has been a principle of statecraft in the United States that the “just powers” of any government are derived from “the consent of the governed.”

In 1764, still one year before Blackstone published his Commentaries, Otis published a pamphlet in England advocating for the rights of the English colonists. On behalf of all British colonists, Otis rose up once more in bold humility to declare that: “[T]he King . . . erred in his kind intentions towards the Colonies, and taken away our fish, and given us a stone.” This was so because “infallibility belongs not to mortals,” and therefore the English people “have been misinformed and deceived.” Thus the American colonists bravely confronted reality. By wielding reality instead of fantasy the American Revolutionaries successfully managed to trigger a revolution “in the Minds and Hearts of the People.” Then the people replaced England’s feudal and grandiose fictions of royal “infallibility” and parliamentary “omnipotence” with the sovereignty of the people. Natural liberty and peace were established as the cornerstone of the Republic.

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880 Vane, Healing Question, supra note 37, at 4–7; Otis, The Rights, supra note 26, at 17 (also arguing that sovereignty lies with the “whole body of the people”).
881 WILLIAMS, BLOODY, supra note 52, at 137 (“the sovereign, original, and foundation of civil power, lies with the people”), and at 114 (“the sovereign power of all civil authority is founded in the consent of the people”); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (basing the “just powers” of any government upon “the consent of the governed”).
882 Tudor, Otis’s Speech, supra note 5, at 30.
883 Id.
884 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). See WILLIAMS, BLOODY, supra note 52, at 114.
887 Id. at 59.
888 Id.; Campbell v. Hall [1774] 1 Cowp. 204, 211 (Eng.).
890 WILLIAMS, BLOODY, supra note 52, at 114, 137; Vane, Healing Question, supra note 37, at 5–7; Otis, The Rights, supra note 26, at 17; THE DECLARATION OF INDEPENDENCE para.
Partly in response to Otis’s 1764 pamphlet, Sir William Blackstone published his *Commentaries* in 1765, which defended the King based on sheer fantasy. As already discussed, Blackstone vilified Otis’s arguments as tantamount to advocating anarchy. On top of that Blackstone declared that the King was a “superior being” like God, possessing absolute immortality and perfection. The Americans knew first hand that the King’s “personal perfection” as described by Blackstone was solely derived from the King’s barbarism and frequent resort to military justice symbolized by the Tower of London—a prison of national prestige.

Upon the dogma of the English god-King, Blackstone put forward his most cunning lie—that England’s Courts were already independent from the Crown in its decisions because its judges only served during good behavior. But as the Americans already knew first hand from watching Otis & Thacher’s arguments in *Paxton’s Case*, the British Courts were not independent. Finally, Blackstone defended the King’s power to enforce stamp taxes and the Parliament passed the Stamp Act that same year of 1765 aggravating the Americans even further.

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2 (U.S. 1776) (basing the “just powers” of any government upon “the consent of the governed”); U.S. CONST. pmbl (recognizing the sovereign power of the people to write and rewrite constitutions). See James Wilson, 2 J. Elliot, Debates on the Federal Constitution 432 (2d ed. 1836); Vanhorne’s Lessee v. Dorrance, 2 U.S. 304, 308 (1795) (commenting on Parliament’s omnipotence); 1 WILLIAM BLACKSTONE, COMMENTARIES *162 (“So long therefore as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.”). Cf. Martin v. Hunter’s Lessee, 14 U.S. 304, 324–25 (1816).  

891 Wheatley, *Liberty & Peace*, supra note 34. See Quincy Adams, *Independence Day*, supra note 40. Cf. Montesquieu, supra note 26, at 5–6 (in the state of nature humans are at liberty and peace—this is the opposite of Locke’s claims).  

892 1 WILLIAM BLACKSTONE, COMMENTARIES **241, 246, 249.**  

893 *Id.* at **251.**  

894 *Id.* at **241, 246, 249 (deifying the King as a “superior being” with “absolute perfection” and “absolute immortality”).**  

895 1 WILLIAM BLACKSTONE, COMMENTARIES *246–47 (even the nobles were subject to imprisonment in the tower if they object without “the utmost respect and deference”).  

896 *Id.* at **267–68.**  

897 Tudor, *Otis’s Speech*, supra note 5, at 9, 13; Otis, *The Rights*, supra note 26, at 58–59 (In fact before Blackstone could issue his defense of the Crown the Otis already declared that “the King . . . erred” because he had “taken away our fish, and given us a stone.”).  

Oxenbridge Thacher also passed away in 1765.899 Before he passed, Thacher bequeathed much of his legal business to John Adams.900 The young Phillis Wheatley who lamented Thacher’s passing penned her first poem to his family.901 A year later in 1766, England repealed the Stamp Act.902 Phillis Wheatley, who commanded the souls of many on this and the other side of the Atlantic, cordially congratulated the King on his wise repeal.903 Shortly thereafter Wheatley published her book of poetry in England in 1773, and was granted a special audience with the King during her visit to England.904

Then, despite Wheatley’s winsome advocacy in England for the natural citizenship of all mankind,905 in 1774 she and the Americans lost their appeal.906 The House of Lords reprimanded America with a unanimous opinion known as Campbell v. Hall, which proclaimed that

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899 Tudor, Otis’s Speech, supra note 5, at 11–12 (“Mr. Thacher, the colleague of Mr. Otis in this great cause, was at that time one of the heads of the bar in Boston, . . . The opposition of Thacher gave the government great uneasiness: his disposition and habits secured public confidence, and while his moderation preserved him from the imputation of ambition, his learning and ability gave weight to his opinions, and prevented him from being considered as under the influence of others. . . . Mr. Adams says, ‘they hated him worse than they did James Otis or Samuel Adams, and they feared him more, because they had no revenge for a father’s disappointment of a seat on the Superior bench to impute to him, as they did to Otis.’ . . . He died of a pulmonary complaint, aggravated by his excessive anxiety respecting public affairs in 1765, after having been two years in the legislature from the town of Boston.”).

900 Tudor, Otis’s Speech, supra note 5, at 12 n.* (“‘Not long before his death’ says President Adams, ‘he sent for me, to commit to my care some of his business at the bar.’”).

901 Jeremy Belknap Diary (1773) (on the inside back cover Rev. Belknap transcribed Wheatley’s (perhaps) earliest writing, created when she was about eleven years old saying: “Mr[s] Thacher’s Son is gone / Unto Salvation / Her daughter too, so I conclude / They are both gone to be renewed”), available at http://www.masshist.org/object-of-the-month/objects/phillis-wheatley-s-earliest-poem-2011-12-01.


903 Phillis Wheatley, To the King’s Most Excellent Majesty (1768), reprinted in Wheatley, supra note 32, at 17 [hereinafter Wheatley, To the King’s].

904 Gates, supra note 25, at 34 (an audience which she was unable to attend). See generally Phillis Wheatley, Poems on Various Subjects, Religious and Moral (1773), reprinted in Wheatley, supra note 32.

905 Letter from Phillis Wheatley to Obour Tanner (Oct. 30, 1773), in Wheatley, supra note 32, at 171–72 (“What you observe of Esau is true of all mankind, who, (left to themselves) would sell their heavenly birth rights for a few moments of sensual pleasure, whose wages at last (dreadful wages!) is eternal condemnation. Dear Obour, let us not sell our birthright for a thousand worlds, which indeed would be as dust upon the balance.”).

906 Campbell v. Hall, [1774] 1 Cowp. 204, 214 (Eng.).
all the Americans had “no privilege distinct from the natives.”

It explicitly upheld the King’s most fundamental power to tax all the conquered peoples of the Earth based on “the conquest of New York” in 1667.

Thus the unwritten English constitution was formally revealed as something inherently poisoned by feudal slavery and conquest. The puritanical imperialism of the treacherous Sir George Downing and the king-slaying dictator Oliver Cromwell were the Lords’ chosen champions in Campbell. As a result King George III clamped down even harder on American trade—ironically defending Cromwell’s tyrannical Navigation Acts. In response, the Americans stood by the

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908 Campbell v. Hall [1774] 1 Cowp. 204, 211 (Eng.).

909 Id.; Treaty of Breda (1667) (compromising the English Mare Clausum with the Dutch Mare Liberum to create the oxymoron of the free trade in human flesh for the first time—releasing the monopoly on the slave trade actually created a flood of slavery); African Company Act 1750, 24 Geo. II, c. 49 (Eng.). See Le Louis [1817] 2 Dodson 210, 255 (Eng.) (Opinion of Sir William Scott) (presuming slavery according to the English oxymoron of the free trade in human flesh). Cf. The Amistad, 40 U.S. 518, 594 (1841) (presuming the freedom of The Amistad Africans by “look[ing] behind” the documents that declared their enslavement by conducting a de novo review of the facts) (overruling The Antelope, 23 U.S. 66, 188 (1825) (relying on the presumption of slavery in Le Louis)).

910 Campbell v. Hall [1774] 1 Cowp. 204, 211 (Eng.). See The Navigation Act of 1651 (Oliver Cromwell, Rump Parliament); The Navigation Act of 1660 (Charles II, reestablished Cromwell’s Navigation Acts which created a bottleneck of trade in London for the Americans); Tudor, Otis’s Speech, supra note 5, at 22–23 (“George Downing, a native of New England, educated at Harvard College, whose name, office, and title appear in their catalogue, went to England in the time of lord Clarendon’s civil wars, and became such a favourite of Cromwell and the ruling powers, that he was sent ambassador to Holland. He was not only not received, but ill treated, which he resented on his return to England, by proposing an act of navigation, which was adopted, and has ruined Holland, and would have ruined America, if she had not resisted. To borrow the language of the great Dr. Johnson, this ‘Dog’ Downing must have had a head and brains, or in other words, genius and address: but if we may believe history, he was a scoundrel. To ingratiating himself with Charles II he probably not only pleaded his merit in inventing the navigation act, but he betrayed to the block some of his old republican and revolutionary friends. But where is Downing’s statute? British policy has suppressed all the laws of England, from 1648 to 1660. The statute book contains not one line. Such are records and such is history.”). Cf. GEORGE LOUIS BEER, 1 CROMWELL’S POLICY IN ITS ECONOMIC ASPECTS 9–10, 45, 50–55 (1902).

911 Campbell v. Hall [1774] 1 Cowp. 204, 206–07, 210–11 (Eng.) (affirming the King’s power to tax the colonies incident to his power to write and rewrite the constitutions of the colonies); Hancock’s Case, supra note 60, at 195–96 (quoting The American Act of 1764, 4 Geo. 3, c. 15, § 37 (Eng.) (another iteration of The Navigation Acts which was used to make John Hancock a criminal, and against which John Adams defended Hancock in Court—The Navigation Acts were also a precursor to the unjust Civil Forfeiture laws today)). Cf. Sarah
principles of Roger Williams, Anne Hutchinson and Sir Henry Vane the Younger—that the just powers of government are derived from the consent of the governed and that a “supreme judicature” ought to be formed to establish Unity and the Rule of Law.912 Thus, in 1775 colonists like Patrick Henry, John Dickinson, and Thomas Jefferson declared a fundamental human right of self-defense against slavery and death.913

Finally, in 1776 the American colonists asserted their undoubted political significance.914 The people of the Thirteen Colonies “took their last stand upon the adamantine rock of human rights,” politically separated themselves from England, and endeavored to build a “good government from reflection and choice.”915 The American Revolutionaries responded to Blackstone’s royal fantasies with all the reality of the Earth.916 They strongly declared themselves e pluribus


912 Hancock’s Case, supra note 60, at 198 (Arguing that the Navigation Acts were “made without our Consent. My Clyent Mr. Hancock never consented to it. He never voted for it himself, and he never voted for any Man to make such a Law for him. In this Respect therefore the greatest Consolation of an Englishman, suffering under any Law, is torn from him, I mean the Reflection, that it is a Law of his own Making, a Law that he sees the Necessity of for the Public. Indeed the Consent of the subject to all Laws, is so clearly necessary that no Man has yet been found hardy enough to deny it. And The Patrons of these Acts allow that Consent is necessary, they only contend for a Consent by Construction, by Interpretation, a virtual Consent. But this is only deluding Men with Shadows instead of Substances. Construction has made Treasons where the Law has made none. Constructions, in short and arbitrary Distinctions, made in short only for so many Words, so many Cries to deceive a Mob have always been the Instruments of arbitrary Power, the means of lulling and ensnaring Men into their own Servitude.”); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (requiring “the consent of the governed”); Vane, Healing Question, supra note 37, at 3–5.

913 Henry, Give Me Liberty, supra note 28; Declaration of Self-Defense, supra note 22.

914 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

915 Id. (beginning and ending with the phrase “united States of America”—not politically united until July 4, 1776 and also not sovereign “States” until this moment—statehood was born incident to the Union and not before); Quincy Adams, Independence Day, supra note 40; The Federalist No. 1 (Alexander Hamilton).

916 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (calling upon “the powers of the earth” to recognize the reality of a “separate and equal station to which the Laws of Nature and of Nature’s God entitle them”); Wheatley, On Imagination, supra note 889, (Imagination is the human mind’s “imperial queen” and “the leader of the mental train” but reality confronts each imagining person like “northern tempests” that “damp the rising fire”—thus, while the human imagination is to be celebrated and encouraged, it must also be continually chastened with reality); Hancock’s Case, supra note 60, at 199 (Adams argued that the patrons of the Navigation Acts were an “immense distance from Fact and Truth and Nature, lost in the wild Regions of Imagination and Possibility, where arbitrary Power sitts [sic] upon her brazen Throne and governs with an iron Scepter.”); Luke 1:51 (“He hath shown
unum, rejected the Rule of Law, and began the American practice of ordaining written constitutions. Thus in John Adams’ words “Thirteen Clocks were made to Strike together” and miraculously, we are told, the men of the Revolution moved together “in the Same Principles in Theory and the Same System of Action.” However, with no shortage of straight, white men to claim credit for the work of Heaven, the project of keeping the promises of the U.S. social compact was left dangerously incomplete.

In response to slaveholders then declaring a natural right of self-defense against slavery, Wheatley stated: “I desire not for their Hurt, but to convince them of the strange Absurdity of their Conduct whose strength with his arm; he hath scattered the proud in the imagination of their hearts”). See Gage, supra note 187, at 189–90 (“I have a natural right to as much fresh air as I can breathe; if you shut me in a close room with door and windows barred, that does not invalidate my right to breathe pure, fresh air. I have a natural right to obey the dictates of my own conscience, and to worship God as I choose. If you are physically stronger than I am, or if you are legally stronger than I am and use your strength to prevent the exercise of these natural rights, you by no means destroy them. Though I do not use these rights, I still possess them. The framers of this government, the men and the women who voted at that early day had never until then, exercised their natural rights of self-government; when they chose, they took them up.”); HANNAH ARENDT, CRISIS OF THE REPUBLIC 5 (1972) (“In order to make room for one’s own action, something that was there before must be removed or destroyed, and things as they were before are changed. Such change would be impossible if we could not mentally remove ourselves from where we physically are located and imagine that things might as well be different from what they actually are. In other words, the deliberate denial of factual truth—the ability to lie—and the capacity to change facts—the ability to act—are interconnected; they owe their existence to the same source: imagination.”).

917 Phillis Wheatley, An Hymn to Humanity (1773), reprinted in WHEATLEY, supra note 32, at 95–97; Benjamin Franklin, Great Seal Design (1776); HANNAH ARENDT, THE LIFE OF THE MIND 19 (1978) (“Not Man but men inhabit this planet. Plurality is the law of the earth.”).

918 Paine, Common, supra note 52, at 99 (“in America the law is king”); Chisholm v. Georgia, 2 U.S. 419, 458 (1793) (Opinion of Wilson, J.) (the Rule of Law is based on the concept of the consent of the governed, while the Rule of Men is based upon Blackstone’s principle “that all human law must be prescribed by a superior”); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (all the government’s just powers are derived from the consent of the governed).

919 Otis, The Rights, supra note 26, at 14, 59. See 1 WILLIAM BLACKSTONE, COMMENTARIES *241 (the King is a “superior being”).


Words and Actions are so diametrically opposite. “Then she continued: “How well the Cry for Liberty, and the reverse Disposition for the Exercise of oppressive Power over others agree,—I humbly think it does not require the Penetration of a Philosopher to determine.” Many followed in the tradition of Phillis Wheatley as an exemplar of the U.S. social compact, peacefully denouncing American slaveholders for their hypocrisy and infidelity to the compact struck in 1776.

One person who followed in the tradition of Phillis Wheatley was James Bayard who spoke on the floor of Congress, saying that when “men who can count in their train a hundred slaves, whose large domains, like feudal baronies, are peopled with the humblest vessels, are stiled Democrats, I am astonished.” Bayard continued, “when I see the High Priests of Liberty so zealously proclaiming freedom with one hand, while they are riveting the chains of slavery with the other, I cannot forbear tearing aside the veil which conceals the truth from the world.” Another of Wheatley’s heirs was the free African American and inventor Benjamin Bannekar, who addressed a letter directly to Thomas Jefferson to quote the Declaration of Independence to him that “all men are created equal,” and to remind him “that the present freedom and tranquility which you enjoy you have mercifully received, and that it is the peculiar blessing of Heaven.” Frederick Douglass, Matilda Gage, and Susan B. Anthony also followed in Wheatley’s stead, making similar statements and pronouncements based upon the natural liberty and equality of mankind.

In some states the principles of the U.S. social compact had immediate effect. For example, Chief Justice Cushing of Wheatley’s home state of Massachusetts decided to free all persons born into slavery saying: “I think the Idea of Slavery is inconsistent with our own conduct

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922 Letter from Phillis Wheatley to Samson Occom (Feb. 11, 1774), reprinted in WHEATLEY, supra note 32, at 176–77.
923 Id.
924 Id. (calling the English “our Modern Egyptians”); Benjamin Franklin, Great Seal Design (1776) (depicting the Israelites escaping Egyptian slavery).
925 James Bayard, Speech on the Foreign Intercourse Bill 13 (March 3, 1798).
926 Id.
928 Douglass, supra note 15 (noting the “saving principles” of the Declaration); Anthony, In Court, supra note 289, at 82 (“Your denial of my citizen’s right to vote, is the denial of my right of consent as one of the governed.”); Gage, supra note 187, at 189–90. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
929 See Gage, supra note 187, at 191.
& Constitution.” As Phillis Wheatley expounded, the U.S. social compact is based on the idea that “in every human Breast, God has implanted a Principle, which we call Love of Freedom; it is impatient of Oppression, and pants for Deliverance; and by the Leave of our Modern Egyptians I will assert, that the same Principle lives in us.” Phillis Wheatley continued: “God grant Deliverance in his own way and Time, and get him honor upon all those whose Avarice impels them to countenance and help forward the Calamities of their Fellow Creatures.”

The Court’s power to review the facts and circumstances de novo that justify deportment, imprisonment, torture, or death of any person upon a writ of habeas corpus arises from the U.S. social compact. Looking back to the social compact, the U.S. Courts are required to be a “superintending judicial authority” to guard against “domestic violence” and secure “domestic tranquility.” This includes wielding natural equity to enforce the fundamental maxim *qui sentit commodum sentire debet et onus* (‘those who get the benefit should also carry the burden’), and also to secure every person’s fundamental right to file a trespass *vi et armis* or similar action to be compensated for any such false imprisonment that occurs because of unconstitutional government imprisonment. Eventually, fidelity to these principles resulted in the

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930 The Quock Walker Case (Mass., 1781) (Cushing, J.). See The Sheffield Declaration (1773) (saying that every person in the human race in a state of nature is equal and free).

931 Letter from Phillis Wheatley to Samson Occom (Feb. 11, 1774), reprinted in WHEATLEY, supra note 32, at 176–77.

932 Id.


935 Otis, The Rights, supra note 26, at 53. See Busk, 135 S. Ct. at 519 (exactly the opinion that should be overruled according to this equitable maxim).

936 Wise v. Withers, 7 U.S. 331, 337 (1806); Freedman, supra note 114, at 600 nn.46–47. Cf. 3 WILLIAM BLACKSTONE, COMMENTARIES *138 (Noting that “during temporary suspensions” of habeas corpus in England “persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.” In such cases, if habeas corpus was finally asserted: “The *satisfactory* remedy for this injury of false imprisonment, is by an action of trespass, *vi et armis*, usually called an action of false imprisonment; which is generally, and almost unavoidably, accompanied with a charge of assault and battery also: and therein the party shall recovery damages for the injury he has received; and also the defendant is, as for all other injuries committed with force, or *vi et armis*, liable to pay a fine to the king for the violation of the public peace.”); Dred Scott v. Sandford, 60 U.S. 393, 470 (1856) (Opinion of Daniels, J.) (this was an action for trespass *vi et armis*, i.e. false imprisonment, which should have freed Dred Scott, his wife and his two children from slavery and an order tort damages including just compensation for the work his slaveholder received from him and his family should have been granted).
Court’s enforcement of “one person, one vote” as a pillar of the U.S. social compact revived by the Fourteenth Amendment. 937 For it is today as it was during the American Revolution: “all are equal by law and by birth.” 938

CONCLUSION: PRODUCING THE BODY

Though the moderns thought of history as a line in which progress is made, “the Greeks venerated the polis and the circle” and “were unaware of progress.” 939 Time itself is kept by counting the revolutions of our planet around the sun. 940 Revolution is thus “an explosion of reality: a return and a communion, an upsetting of old institutions, a releasing of many ferocious, tender and noble feelings that had been hidden by our fear of being.” 941 The American Revolutionaries were heirs of this wisdom. 942 Therefore, they vindicated the idea that “no cause is left but the most ancient of all, the one, in fact, that from the beginning of our history has determined the very existence of politics, the cause of freedom versus tyranny.” 943

Thus in politics the very term revolution means “to revolve back to old times when things had been as they ought to be.” 944 The U.S. experiment is therefore by principle a return to a more innocent time

937 Gray v. Sanders, 372 U.S. 368, 381 (1963) (“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”).

938 Adams, A Defence, supra note 16; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); James Wilson, Considerations on the Nature and Extent of the Legislative Authority of the British Parliament (1774) (“All men are, by nature, equal and free”).


940 Id. (giving examples of time as “the eternal return” in order to conclude: “In the realm of eternity there is no succession because everything is. Being triumphs over becoming.”).


942 ARENDT, REVOLUTION, supra note 35, at 42–43 (“In the seventeenth century, where we find the word [revolution] for the first time as a political term, the metaphoric content was even closer to the original meaning of the word, for it was used for a movement of revolving back to some pre-established point and, by implication, of swinging back into a preordained order.”).

943 Id. at 11.

944 Id. at 44–45 (Explaining how the intent of the American Revolution was “to revolve back to an ‘early period’ when [people] had been in the possession of rights and liberties of which tyranny and conquest had dispossessed them.”); Letter from Phillis Wheatley to Obour Tanner (Oct. 30, 1773), in WHEATLEY, supra note 32, at 171–72.
when people were “in the possession of rights and liberties of which tyranny and conquest had dispossessed them.” The counter-movement to re-adopt the procedural nicety of the feudal forms of England in U.S. Courts is a “counter-revolution,” that is an unnatural attempt to dispossess the people of the United States of the rights and liberties that our forbearers fought to secure for us. It is literally a failure to return to liberty and peace in order to place the chains of feudalism and conquest back upon our wrists and ankles in order to degrade our humanity.

The judges of the United States must resist this failure to return to liberty and peace by taking into account the human element in the law (aequitatis et iustitia). America’s judges must engage with their own shared humanity as a duty arising from the equity that inheres in revolution. U.S. Courts are explicitly convened to hear all the appeals

945 ARENDT, REVOLUTION, supra note 35, at 45 (“And his [Thomas Paine’s] ‘early period’ is by no means the hypothetical prehistorical state of nature, as the seventeenth century understood it, but a definite, though undefined, period in history.”).
946 Id. at 45 (“Paine . . . used the term ‘counter-revolution’ in reply to Burke’s forceful defence of the rights of an Englishman.”). Paine and the Americans were correct and Burke and the English were dreadfully wrong. Not only were the Americans and all British colonists expressly precluded from the rights of an Englishman according to the House of Lords in Campbell v. Hall, but Burke’s dreadful ideas about slavery and liberty eventually galvanized the American South to Civil War: Hayne-Webster Debate, Haynes’ Reply (1830), available at http://www.constitution.org/hwdebate/hayne2b.htm (“In such a people, the haughtiness of domination, combined with the spirit of freedom, fortifies it and renders it invincible.”) (quoting Edmund Burke, Speech on moving his resolutions for conciliation with the colonies (March 22, 1775)).
947 U.S. CONST. pmbl (the U.S. Constitution was ordained and established “in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity”); Letter from John Adams to Abigail Adams (April 26, 1777), available at http://founders.archives.gov/documents/Adams/04-02-02-0169 (“Posterity! You will never know how much it cost the present generation to preserve your freedom! I hope you will make good use of it. If you do not, I shall repent in Heaven that I ever took half the pains to preserve it.”).
948 See, e.g., Luther v. Borden, 48 U.S. 1, 46–47 (1849) (invoking “the regal power of England” to justify “the declaration of martial law by the legislative authority of the state, made for purposes of self-defence” in order to degrade the human rights of U.S. citizens expressly captured in the U.S. Constitution).
949 See, e.g., Brown v. Board of Education, 347 U.S. 483, n.13 (1954) (noting the duty to decide the shape of the Court’s “equitable power” in order to chart a course to alleviate the injustice—but failing to entirely overrule Plessy v. Ferguson as void and not law it ought to have done); Ex parte Randolph, 20 F. Cas. 242, 251 (C.C.D. Va. 1833) (No. 11,558) (Opinion of Barbour, Dist. J.), and at 254 (Opinion of Marshall, C.J.).
to heaven, which may arise from individuals unjustly treated. There is no legitimate excuse for failing to hear appeals to heaven for natural justice because the U.S. judges are wholly independent from political consequences. Their salaries and positions are secure as a matter of fundamental law. The “good Behaviour” that they are duty bound to uphold consists of placing the impetus of judgment upon a pursuit of natural justice. The felt practicalities of government considered by feudal form that both spare unjust government officials and cause the unjust punishment of others are wholly abandoned as a matter of fundamental law.

In 1776 the United States revolved back to a time before when the root of conquest and martial law choked the roots of the tree of liberty. We, the people, made a thinking decision to begin again. We made our start by refusing to “sell [our] heavenly birthrights” even “for a thousand worlds, which indeed would be as dust upon the

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951 Quincy Adams, *The Amistad*, supra note 27, at 135 (issuing a “fervent petition to heaven” before the U.S. Supreme Court).

952 U.S. Const. art. III, § 1.

953 *Id.* See *The Declaration of Independence* para. 11 (U.S. 1776) (one of the reasons the United States was born was because the King’s judges were “dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”); Tudor, *Oti’s Speech*, supra note 5, at 2–3 (“The remedy adopted by the Colonies was to . . . confer on the judiciary the power to declare unconstitutional statutes void.”); John Adams, *Thoughts on Government* (1776).

954 U.S. Const. art. III, § 1. See Tudor, *Oti’s Speech*, supra note 5, at 5 (“an Act against the Constitution is void: an Act against natural equity is void”) (citing to Dr. Bonham’s Case [1610] 8 Co. Rep. 114a (Eng.)); Cf. *Vanhorne’s Lessee v. Dorrance* 2 U.S. 304, 308 (1795) (laws “made against natural equity” are void); *Story, Equity*, supra note 2, at § 7.

955 See, e.g., 1 William Blackstone, *Commentaries** **245–46 (“if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies” and therefore if a King unreasonably violated a clearly established rule or legal provision “the law . . . declares that the king was deceived in his grant.”), and at *241 (Blackstone admitted that these regal formalities had no actual purpose except to allay an irrational fear that the common people were “apt to grow insolent and refractory” without them.).

956 *The Declaration of Independence* para. 1–2 (U.S. 1776). See Vane, *Healing Question*, supra note 37, at 4–5 (in England “there be never so many fair branches of liberty planted on the root of a private and selfish interest” and thus “they will not long prosper, but must within a little time wither and degenerate into the nature of that whereunto they are planted: and hence indeed sprung the evil of that Government which rose in and with the Norman conquest. The root and bottom upon which it stood, was not public interest, but the private lust and will of the Conqueror, who by force of armies did at first detain the right and freedom which was, and is, due to the whole body of the people: for whose safety and good, government itself is ordained by God, not for the particular benefit of the rulers, as a distinct and private interest of their own.”).

957 U.S. Const. pmbl; *The Declaration of Independence* para. 1–2 (U.S. 1776).
balance.” The undoubted power of the U.S. Courts to issue writs of habeas corpus has been carried over from British tradition as “the great bulwark of personal liberty” but is now unhindered by the whims of royal politics.

Our great return, the American Revolution, means that the U.S. Courts can now safely apply the common law as it ought to be—the way it was before the “rude and degrading league between the bar and feudal barbarism” ever existed. While losing every pretense to a right of racial superiority, the Americans boldly declared independence based on the equal rights of all human beings. Thus in the United States feudal concepts are as dangerous and oxymoronic as the living dead. The Supreme Court therefore ought to vindicate a duty to review the facts de novo upon habeas review according to every person’s fundamental right to approach the Court with their injuries.

Doing this justice to the U.S. social compact is to answer a solemn writ of habeas corpus issued on behalf of the people of the United States. It tells the Court to finally produce the whole body of the people in their majesty. For the majesty of the people of the United States should never be forgotten by the very Supreme Court that the

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958 Letter from Phillis Wheatley to Obour Tanner (Oct. 30, 1773), in WHEATLEY, supra note 32, at 171–72 (“What you observe of Esau is true of all mankind, who, (left to themselves) would sell their heavenly birth rights for a few moments of sensual pleasure, whose wages at last (dreadful wages!) is eternal condemnation. Dear Obour, let us not sell our birthright for a thousand worlds, which indeed would be as dust upon the balance.”).

959 STORY, CONSTITUTION, supra note 3, at § 1333–34. Like the Jacquetta Rivers witch trial, for example: The White Queen: The Bad Queen (Starz/BBC television broadcast Sept. 1, 2013).


961 Campbell v. Hall [1774] 1 Cowp. 204, 211–12 (Eng.).


964 Marbury v. Madison, 5 U.S. 137, 163 (1803).

965 Chisholm v. Georgia, 2 U.S. 419, 462–63 (1793) (Opinion of Wilson, J.) (“A state I cheerfully admit, is the noblest work of Man. But, Man himself, free and honest, is, I speak as to this world, the noblest work of God.”).

966 ARENDT, REVOLUTION, supra note 35, at 93.
people spoke into existence. The U.S. social compact should never be rewritten sub silentio by judges the sovereign people entrusted with independence according to the social compact. The prerogative of the people “to enjoy peaceably what is their own and to do justice to others,” should be vindicated time and again. The hope of the people of the United States to become e pluribus unum—a symbol of unified individuals—should be revered and extolled. And the people’s heeding of Sir Henry Vane the Younger’s call to form a “supreme judicature” to administer justice, secure peace, and win the orderly union of the states should be studied and remembered.

To achieve all these things the U.S. Supreme Court must be prudent and courageous enough to be what it was created to be—a house of Natural Justice. The role of de novo review upon federal habeas corpus of declaring void and nonexistent all unjust and illegitimate process is paramount, overarching, and superintending upon all the courts in our nation. For only upon de novo review of the facts may the Court finally complete its fundamental duty to ensure that the ministers of government “are reminded whose creatures they are” so that the “first maxims of jurisprudence are ever kept in view—that all power is derived from the people—that their happiness is the end of government.”

967 Chisholm, 2 U.S. at 462–63 (Opinion of Wilson, J.) (the people of the United States are “the first great object in the Union” as they are “the natural persons who spoke it [the United States] into existence”).

968 Tudor, Otis’s Speech, supra note 5, at 2–3 (the judiciary was given “the power to declare unconstitutional statutes void”).

969 Chisholm, 2 U.S. at 455 (Opinion of Wilson, J.).

970 Benjamin Franklin, Great Seal Design (1776).

971 Vane, Healing Question, supra note 37, at 16; U.S. CONST. art. III, § 1.


973 U.S. CONST. pmbl; Chisholm, 2 U.S. at 465 (Opinion of Wilson, J.) (The U.S. Constitution accomplished its express purposes “by the establishment and by the exercise of a superintending judicial authority.”).

974 James Wilson, Considerations on the Nature and Extent of the Legislative Authority of the British Parliament (1774) (“All men are, by nature, equal and free: no one has a right to any authority over another without his consent: all lawful government is founded on the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature. The consequence is, that the happiness of the society is the first law of every government. . . . The people have a right to insist that this rule be observed; and are entitled to demand a moral security that the legislature will observe it.”).
This duty not only arises under the Separation of Powers but also according to the requirements of natural justice, for all natural rights arise from the facts.\textsuperscript{975} By vindicating a \textit{de novo} review of the facts the Court may, in the tradition of the revolutionary James Otis, conceive in reality the preemptive and controlling maxim that by nature the good of all the people is the supreme law.\textsuperscript{976} Such an act of judicial wisdom would ensure the Court’s fidelity to the U.S. social compact by faithfully and finally vindicating the intentions of those who set forth the founding principles of the Republic. In a time of demagoguery and political corruption, as fears and uncertainty abound, and even while a ninth justice is yet to be confirmed by the Senate, a Court that stands by the principles of the Declaration and is “true to them on all occasions, in all places, against all foes, and at whatever cost” is a Court that, when everything is said and done, stands to save everything.\textsuperscript{977}

\begin{footnotes}
\textsuperscript{976} STORY, EQUITY, supra note 2, at §§ 1–2; Otis, The Rights, supra note 26, at 13, 19; Cicero, \textit{De Legibus} 3.3.8.
\textsuperscript{977} Douglass, supra note 15; ARENDT, REVOLUTION, supra note 35, at 213.
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