The Not-so-Great Writ: Reevaluating Habeas Corpus in the Age of AEDPA

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Abstract

This Note examines the evolution and current application of the federal writ of habeas corpus in American legal history, particularly in light of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). It discusses the historical importance of the writ as a fundamental aspect of liberty and its pivotal role in protecting constitutional rights against arbitrary detentions. The Note's focus then shifts to how the enactment of AEDPA has significantly curtailed the effectiveness of habeas corpus, analyzing whether such restrictions are compatible with constitutional principles, especially regarding the powers of federal courts and state judiciaries. The Note posits that AEDPA, as interpreted by the U.S. Supreme Court, may infringe upon the Constitution's Non-Suspension Clause and weaken the federal judiciary's ability to oversee state criminal proceedings, ultimately advocating for a repeal or substantial modification of AEDPA to restore habeas corpus to its traditional Reconstruction-era role.

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Introduction: The Great Writ of Liberty

In Latin, the words "writ of habeas corpus" translates as "you shall have the body."[1] Legally, however, it describes a judicial order requiring a jailer to produce a prisoner before a judge, and to justify the prisoner's continued imprisonment, as within the bounds of law. Throughout England and America, the writ of habeas corpus was often called the "Great Writ" because it served as a bulwark against arbitrary executive and judicial detentions.[2] In America, many early statesmen regarded the writ "as a fundamental precept of liberty" and, during the Revolutionary War, George Washington's *Manifesto of America* condemned the fact that "arbitrary detention" had suddenly "received the sanction of British laws" through the "suspension of the Habeas Corpus Act."[3]

But besides its reverence among early statesmen, the writ would eventually take on a larger role in securing the Fourteenth Amendment's Due Process Clause against the States. Beginning in the mid-twentieth century, the writ had outsized importance for many Black Americans caught in the crosshairs of racially oppressive state prison systems. This writ's gradual expansion was an upshot of the distrust Congress had for former confederate states immediately after the Civil War.

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[1] *Habeas Corpus*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/habeas%20corpus [https://perma.cc/6JAA-DMHF].

[2] More recently, the Court has observed that the writ, "[a]t its historical core, … has served as a means of reviewing the legality of *Executive detention*, and it is in that context that its protections have been strongest." Rasul v. Bush, 542 U.S. 466, 474 (1977) (emphasis added) (quoting INS v. St. Cyr, 533 U.S. 289, 301 (2001)). But this is not entirely accurate. Bushell's Case, 124 Eng. Rep. 1006 (1670), is an early example of the writ's application to unlawful *judicial* detentions, as well. The prisoners in *Bushell's Case* were jailed for contempt after partaking in jury service and delivering a verdict the judge viewed as contrary to the evidence. They later successfully petitioned to Court of Common Pleas for habeas corpus relief, with Chief Justice Vaughan authoring opinion. Contrary to the Supreme Court's recent insinuations regarding executive detentions, it recognized long ago that *Bushell's Case* "is by no means isolated, and when habeas corpus practice was codified in the Habeas Corpus Act of 1679 . . . no distinction was made between executive and judicial detentions." Faye v. Noia, 372 U.S. 391, 403 (1963).

[3] Amanda L. Tyler, *Habeas Corpus and the American Revolution*, 103 CAL. L. REV. 635, 675 (2015).

During Reconstruction, Congress reconstituted the writ to help reinforce the new boundaries of federal and state power, and to protect formerly enslaved Blacks. In 1867, just one year after the Thirteenth Amendment's adoption, the Reconstruction Congress amended the Habeas Corpus Act and Judiciary Act to authorize habeas review for *all state prisoners*.[4] The amendments followed a House Resolution, issued just one day after the Thirteenth Amendment's effective date, instructing the House Judiciary Committee to consider and report on the legislation needed "to enable *the courts of the United States* to enforce … the constitutional amendment abolishing slavery."[5] Notably, in its report, the committee recommended a "bill *to secure the writ of Habeas Corpus* to persons held in slavery or involuntary servitude contrary to the Constitution[6] of the United States."[7] Clearly, the writ's common law origins, and its expected role in enforcing the ban against slavery, illustrate not merely the general esteem it enjoyed throughout history, but also its bedrock function in our scheme of constitutional governance.

Nonetheless, the writ's status as a bulwark of individual liberty withered away after the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Several legal scholars and judges have expressed the view that AEDPA was ill-considered: a gut reaction to the Oklahoma City bombing, where Republican lawmakers and a centrist President seized on an act

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[4] *See* Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385; Judiciary Act of 1867, ch. 28, § 2, 14 Stat. 385. Notably, this was not the first time Congress authorized federal habeas review of state criminal proceedings. The Habeas Corpus Act of 1833 authorized habeas review for federal officers held in state custody. *See* Force Act of March 2, 1833, c. 57, s 7, 4 Stat. 634-635 (1833). Similarly, the Habeas Corpus Act of 1842 authorized federal habeas review for state prisoners who were "subjects or citizens of a foreign state." The Act of August 29, 1842, c. 257, 5 Stat. 539-540 (1842).

[5] Cong. Globe, 39th Cong., 1st Sess. 87 (1865).

[6] Constitutional law historian Akhil Reed Amar and others have proposed that the term "duly convicted" is synonymous with the phrase "*by due process of law*." In *America's Constitution, a Biography*, Amar explains that the Thirteenth Amendment "promised a permanent end to America's slavery system: Neither states nor the federal government would be allowed to revive slave codes, import new slaves, or otherwise permit bondage to creep back onto American soil (save as a criminal punishment, *subject to due process*)." Amar, Akhil Reed. 2005. *America's Constitution: A Biography*. New York: Random House. Google Play Books, 350-351.

[7] *See* Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 34 (1965) (emphasis added).

of white-nationalist terrorism to slam the courthouse doors on untold numbers of—mostly Black—state prisoners. But this Note's purpose is not to rehash that history—many others have chartered those waters. Rather, this Note aims to interrogate whether AEDPA, as interpreted by the U.S. Supreme Court, violates Article III of the Constitution and, by extension, the Non-Suspension Clause, which declares that: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[8]

This Note is divided into five parts. Part I examines the writ's early history and its evolving scope throughout the twentieth century, while Part II considers AEDPA's blatant disregard of that history and its severe limitations on the writ. Part III explores how the Court has interpreted Article III of the Constitution, particularly as it relates to federal judges' "essential attributes," and what concerns, if any, that raises regarding AEDPA's constitutionality. Part IV analyzes Article III's substantive power and whether AEDPA contravenes the Supremacy Clause. And finally, Part V argues that AEDPA should be repealed or struck down, and the writ restored to its intended Reconstruction-era purpose.

I. The Writ's Historical Context and Early Evolution

Today, due to AEPDA, the federal writ of habeas corpus is a mostly dead letter, "reserved for only 'extreme malfunctions in the state criminal justice system.'" But this was not always the case.[9] Beginning in the 1950s, with the Supreme Court's seminal decision in *Brown v. Allen* (1953), the federal writ of habeas corpus evolved alongside selective incorporation's expansion of the Bill of Rights' guarantees to state criminal proceedings.[10] The Fourteenth Amendment, with

[8] U.S. CONST. art. 1, § 9, cl. 2.
[9] Brown v. Davenport, 596 U.S. 118, 133 (2022).
[10] "A writ of *habeas corpus*, also known as the Great Writ, ordered its addressee to produce in court the body of a person being physically confined so that the writ-issuing court could decide whether the confinement was legal."

its guarantee of birthright citizenship, equal protection, and due process, aimed to address the inequities that precipitated and immediately followed the Civil War, most notably the Supreme Court's *Dredd Scott* decision and the Southern Black Codes.[11] Naturally, more than fifty-years later, the pace with which the Supreme Court incorporated the Bill of Rights would also ebb and flow with the struggle for racial equality. Painstakingly clear from the Civil War, incorporation came at a high-cost—the sum of 620,000 lives. That sacrifice would have been in vain had the Federal Government been without any means for enforcing the Bill of Rights' guarantees against recalcitrant States, especially when the State has deprived a person of their liberty without due process of law. In that vein, federal habeas review, following incorporation, remained a vital and necessary tool for securing the Fourteenth Amendment's guarantee of due process against the States.

Before Reconstruction, the Bill of Rights did not apply to the States and, for the most part, only *federal* prisoners had access to the writ.[12] This resulted from the balance of federalism brokered during the Constitutional Convention of 1787, which left the States considerable power, despite creating a Federal Government far stronger than that which had previously existed under the Articles of Confederation.[13] This State-leaning balance, however, perished shortly after the Civil War. It is well-understood that the "constitutional Amendments adopted in the aftermath of

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AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760-1840, at 21-22 (2021).

[11] Following the Civil War, several former Confederate states passed laws or "codes" that were designed to obligate ex-slaves to their employers as indentured servants. Quitting work or absconding from their employers could result in *inter alia* corporal punishment. Section Five of the Fourteenth Amendment gave Congress the authority "to enforce" the amendment "by appropriate legislation"— U.S. CONST. amend. XIV, § 5— which it *did*, via the Civil Rights Act of 1866.

[12] McDonald v. City of Chicago, 561 U.S.742, 754 (2010) (noting that "[t]he Bill of Rights, including the Second Amendment, originally applied only to the Federal Government.").

[13] *See* Barron v. City of Baltimore, 32 U.S. 243, 248 (1833) (rejecting the assertion that the Constitution was originally" intended to secure the people of the several states against the undue exercise of power by their respective state governments," and explaining that, had that been so, Congress "would have declared this purpose in plain and intelligible language.").

the Civil War fundamentally altered our country's federal system" by *augmenting* federal power vis-à-vis the States.[14]

The Fourteenth Amendment's Due Process Clause provides that no State "shall … deprive any person of life, liberty, or property, without due process of law." As per that Clause, the States were obliged to apply the Bill of Rights' protections, as spelled out in the Constitution's first ten Amendments, in criminal proceedings. Nonetheless, it took considerable time, from the moment of the Fourteenth Amendment's adoption, for the writ to encompass most of the Bill of Rights protections. Selective incorporation entailed a case-by-case process by which the Court incorporated only those sections of the Bill of Rights it considered "fundamental to our scheme of ordered liberty" or "deeply rooted in th[e] Nation's history and tradition."[15] For example, the Court did not recognize the right to counsel as such a bedrock right until 1963,[16] although that guarantee was incorporated *sub silentio* against the States in 1868, upon the Fourteenth Amendment's adoption. Similarly, the rights to confrontation[17] and a speedy trial[18] were not formally recognized until 1965 and 1967, respectively.

The concept of incorporation can be traced to the Court's 1897 decision in *Chicago, Burlington & Quincy Railroad C. v. City of Chicago*, which compelled the States, as a matter of due process, to provide just compensation before seizing private property. But it was not until 1937, in *Palko v. Connecticut*, that the Supreme Court recognized that the Bill of Rights' procedural protections applied to *state criminal proceedings*. In the decades-long gap between the Fourteenth Amendment's adoption and *Palko*, only so-called "jurisdictional" challenges by state

[14] Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (quoting McDonald v. Chicago, 561 U.S. 742, 754 (2010)).
[15] McDonald v. Chicago, 561 U.S. at 767.
[16] *See* Gideon v. Wainwright, 372 U.S. 335 (1963).
[17] *See* Pointer v. Texas, 380 U.S. 400 (1965).
[18] *See* Klopfer v. North Carolina, 386 U.S. 213 (1967).

prisoners were reviewable in federal habeas proceedings—i.e., challenges to the constitutionality of a state penal statute or the trial court's subject-matter jurisdiction. In the wake of *Palko*, however, the Court broadened the writ's scope to remedy a wider array of claims, including violations of constitutional procedure. Simply put, "if a Bill of Rights protection [had been] incorporated," there was "no daylight between the federal and state conduct it prohibit[ed] or require[d]."[19]

Notably, although the sorts of arguments state prisoners could make on habeas review evolved throughout the nineteenth and twentieth centuries, the *nature of judicial review* did not. For more than two-hundred years, federal habeas review, especially regarding questions of federal law, was plenary.[20] In other words, federal courts had full and absolute authority, within the confines of the Constitution, to grant the writ if it determined that a person was unlawfully jailed or imprisoned. And notwithstanding Congress's ability, under the Non-suspension Clause, to suspend the writ, suspensions rarely occurred—and, in any case, as per the Constitution, such power exists only in times of rebellion or insurrection. Only during the Civil War was the writ suspended throughout the entire country. The remaining suspensions were short-lived and specific to designated regions or territories that were hotbeds for insurrection. During Reconstruction, for example, the writ was suspended in around a dozen South Carolina counties to stamp out antiblack terrorism by the Ku Klux Klan. The writ was again suspended in the Philippines in 1905, to stave off insurrection, and later in Hawaii following the attack on Pearl Harbor.

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[19] Timbs v. Indiana, 139 S. Ct. at 687.

[20] "Before the Reconstruction Amendments, federal habeas review of state convictions would have been outside the powers delegated to the central government by the Constitution. It would be erroneous, therefore, to conclude that the restriction against extending habeas to state prisoners in the 1789 Act means that the First Congress considered the power of the writ as less than plenary, within the constitutional boundaries of federal power at the time. The limitation to federal prisoners was, therefore, consistent with the original balance of federal and state sovereignty struck by the Framers. The writ simply reflected that constitutional background."
Evans Wohlforth, *Theories, A Meta-Theory, and Habeas Corpus*, 46 RUTGERS L. REV. 1395, 1418 (1994).

For the first time in our nation's history, however, with the passage of AEDPA in 1996, Congress suspended plenary habeas review. Although styled as an "antiterrorism" and pro-death-penalty bill, it is well known among jurists and academics that AEDPA has "very little to do with either terrorism or the death penalty."[21] All "the bill did," as one federal judge observed, "was make it extremely difficult … to grant habeas relief to a state prisoner whose constitutional rights had been violated."[22] For many tough-on-crime conservatives, AEDPA marked the counter-revolution's hallmark achievement: it served as the death knell for whatever remained of the Warren Court's legacy of enforcing the Bill of Rights in state criminal proceedings.[23] Under AEDPA, federal courts must deny the writ even in cases where there are serious doubts as to the prisoner's guilt, unless the state court judgment upholding the conviction is not fair-minded.[24] The "inevitable consequence" of AEDPA, the Court has recognized, "is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold."[25]

II. The Impact of AEDPA

The 1990s Democratic Party adopted a center-right approach to law-and-order and prisoner rights. Just two years before AEDPA, President Bill Clinton signed the 1994 Crime Bill into law. Besides adding hundreds of thousands of new cops to city streets, the Crime Bill supplied qualifying states with millions in grant money for new prison construction.[i] Under Clinton's leadership, the 1990s Democratic actively competed with Republicans to appear *tougher* on crime.

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[21] *See, e.g.*, Hon. Lynn Adelman, *Repeal the Antiterrorism and Effective Death Penalty Act to Restore Habeas Corpus*, 47 LITIGATION J. 6 (Fall 2020).
[22] *Id*.
[23] While many of the writ's detractors pointed to "delays associated with habeas practice" and the burden of entertaining "multiple [habeas] petitions by the same prisoner,"[23]scholars have noted that, "in the main," opposition was driven "not by relatively sterile concerns for federalism and congested federal dockets, but by an ideological resistance to the Warren Court's innovative interpretations of substantive federal rights." *See*, Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2332 (1993).
[24] Cavazos v. Smith, 564 U.S. 1, 2 (2011).
[25] *Id*.

Judicial review for state prisoners would eventually get caught in the crosshairs of that partisan struggle, especially after the 1994 Republican Revolution, a historic defeat that tipped the balance of power in favor of Republicans in both chambers of Congress.[26]

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is by far the most profound judicial reform measure since the American Civil War. AEDPA suspends the federal writ of habeas corpus by disengaging state criminal proceedings from plenary habeas review. Under the statute, federal judges must defer to state judges on questions of federal law, unless "there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with" Supreme Court precedent.[27] As the Court has observed, AEDPA stops *just* "short of imposing a complete bar on federal-court re-litigation of claims already rejected in state proceedings"—and, as the Court put it, "[i]f th[at] standard is difficult to meet, that is because it was meant to be."[28] AEDPA, as interpreted, effects a diminution of the federal judiciary's Article III power by outsourcing *federal* constitutional review to *state* judges. As Columbia Law Professors James S. Liberman and William F. Ryan wrote in "*Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, AEDPA's "approach … is conceptually no different from letting … state supreme courts hear 'appeals' of Article III court decisions and reverse them when, say, reasonable minds can … disagree."[29]

AEDPA's deferential standard is problematic because state judges, for the most part, lack constitutionally specified guarantees of judicial independence, and because the finality AEDPA extends to state court judgments effectively shuts the courthouse doors on an endless score of state

[26] The bill also *inter alia* eliminated federal Pell grants for incarcerated college students and encouraged longer sentences for violent crimes as well as mandatory life sentences for so-called repeat offenders.
[27] Harrington v. Richter, 562 U.S. 86, 102 (2011).
[28] *Id*.
[29] James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 874 (1998).

prisoners with bona fide federal claims. As it stands, the "beyond-any-possibility-of-fairminded-disagreement" standard ensures that even patently erroneous applications of federal law will not justify granting the writ.[30] Notwithstanding the Constitution's Non-suspension Clause, AEDPA presumes that the writ tolerates "fair-minded" violations of federal law. Federal habeas review, today, no longer tests the legality of one's confinement, but instead the "fair-mindedness" of the underlying state court judgment.

But what constitutes a "fair-minded" judgment can be limitless. After all, the Constitution's text is general, and, indeed, at moments in history, some of the Court's most dreaded decisions were considered fairminded. *Plessy v. Ferguson*, for example, remained settled law for 50 years, on the belief that "separate but equal" was fairminded, and all the Constitution demanded of the States. Similarly, although now thoroughly discredited by scholars, *Buck v. Bell*'s (1927) imprimatur for state-enforced sterilizations was also viewed as fairminded—and, as absurd as that sounds, *Buck has yet* to be expressly overruled. In other words, because the Constitution's text, for the most part, is imprecise, it is often the case that even radically different interpretations of a single text can be viewed as fair-minded, *all at once*.

As previously noted, constitutional protections for those tried in state court remained influx throughout much of the 20th century. Under the Warren Court, selective incorporation ushered in sweeping new procedural protections for individuals prosecuted in state court, many of which would not have provided grounds for habeas relief prior to the Fourteenth Amendment's adoption. What's more, habeas review for state prisoners *after* the Fourteenth Amendment's adoption, and

[30] Shinn v. Kayer, 592 U.S. 111, 118 (2020) (holding that, to satisfy AEDPA, "a prisoner must show far more than that the state court's decision was 'merely wrong' or 'even clear error'") (quoting Virginia v. LeBlanc, 137 S. Ct. 1726, 1728 (2017)).

before *Palko*, was at least arguably limited to so-called "jurisdictional" defects.[31] But regardless, even for that seemingly narrow category of cases, the writ always tested the *lawfulness*, not the "fairmindedness" of the judgment. Take, for example, the Supreme Court's pre-*Palko* decisions in *Ex parte Lange* (1873)[32] and *Ex parte Nielsen* (1889)[33]. In neither case did the Court shirk from its duty to grant habeas relief merely because the states courts had disposed of the prisoners' double jeopardy challenges—which the Court viewed as jurisdictional—in a fair-minded way; instead, the Court exerted plenary authority and granted the writ because the underlying state court decisions were *incorrect*.

More than a century later, however, AEDPA altered that baseline, with little regard for the writ's historical reach or the serious constitutional questions raised by such a shift. One such question is rooted in the constitutional requirement of an independent judiciary. State judges, with whom AEDPA insulates from the federal bench's plenary power, lack the attributes of Article III courts. Notwithstanding this juridical deficit, "fair-minded" state judges have the *final* say on whether a criminal proceeding has run afoul of the Constitution, save for the rare chance that the Supreme Court grants certiorari on direct review. This raises a crucial question: was the power to issue the writ reserved for tribunals possessing the attributes essential to Article III and, if so, does AEDPA unconstitutionally *suspend* the writ? A separate but related question involves Congress' authority, or lack thereof, to subordinate the federal bench to the judgment of state courts on matters of federal law? The former question concerns the attributes required of Article III courts,

[31] Brown v. Davenport, 596 U.S. 118, 129 (2022) (according to some members of the Court, at the time, a "habeas court could [only] grant relief if the court of conviction lacked jurisdiction over the defendant or his offense"). I use the term "arguably," however, because not everyone subscribed to this view. *See id*. at 150 (Kagan, dissenting) (rejecting the *Brown* majority's narrow historical formation of so-called "jurisdictional defects" and observing that, whatever is made of the term, habeas allowed for "expansive relief" for anyone "who on the way to conviction or sentence had suffered serious constitutional harms").
[32] 85 U.S. 163 (1874).
[33] 131 U.S. 176 (1889).

and the latter the imperative that Article III courts retain the authority to "say what the law is." Both questions, nonetheless, implicate the Constitution's Non-suspension Clause and the historic emendations that followed the Civil War.

III. Article III Requires an Independent Judiciary, Not Opportunities for State Courts To Make Unchecked Decisions

The Framers' anathema for tyranny is perhaps most apparent from their insistence on a three-branch government mutually restrained by checks and balances.[34] From the Constitution's text, the Federalist Papers, and the politics of the delegates who attended the 1787 Constitutional Convention, there can be little doubt of "the founding generation's deep conviction that 'checks and balances were the foundation of a structure of government that would protect liberty.'"[35] For its part, the Federal Judiciary was to operate independently of the Executive and the Legislature, and to act solely in accordance with the Constitution and the law.[36]

Textually, the requirement of an independent judiciary is rooted in Article III of the Constitution, which provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, sec. 1. The U.S. Supreme Court has held that "The judicial Power" cannot be exercised by tribunals lacking the attributes prescribed by Art. III, sec. 1. Under Art. III, sec. 1,

[34] "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 300 (James Madison) (H. Lodge ed., 1888).
[35] N.L.R.B. v. Noel Canning, 573 U.S. 513, 571 (2014) (quoting Bowsher v. Synar, 478 U.S. 714, 722 (1986)).
[36] "Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the courts'] necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws." THE FEDERALIST NO. 78, at 489 (Alexander Hamilton) (H. Lodge ed., 1888).

"The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[37] The "good behavior" Clause has been understood to provide Art. III judges with "life tenure, subject only to removal by impeachment," while the "Compensation Clause guarantees Art. III judges a fixed and irreducible compensation for their services."[38]

To be sure, in drawing the line between Congress's regulatory authority and Art. III judicial power, the Supreme Court has been guided by the distinction between "public" and "private" rights.[39] Public rights, the Court has explained, are "grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are 'inherently judicial.'"[40] Public rights, at the very least, involve disputes "between the government and others,"[41] whereas private rights concern "the liability of one individual to another under the law as defined."[42] According to the Supreme Court, "*only* controversies in the former category may be removed from Art. III courts" and delegated to courts lacking the essential attributes specified by Art. III.[43] But notwithstanding that distinction, the Court has further clarified that public rights involve claims that, "at the time the Constitution was adopted," were *not* "customarily cognizable in the courts," or "not traditionally" left for "judicial determination."[44]

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[37] U.S. CONST. art. III, § 1.
[38] N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59 (1982).
[39] *See, e.g.*, Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442 (1977); Crowell v. Benson, 285 U.S. 22 (1932).
[40] N. Pipeline Const. Co., 458 U.S. at 68 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 18 How., at 280–82).
[41] Ex parte Bakelite Corp., 279 U.S. 438, 451 (1929).
[42] Crowell, 285 U.S. at 51.
[43] N. Pipeline Const. Co., 458 U.S. at 70 (emphasis in original).
[44] *Id*. at 68.

Aided by this latter clarification, we can be certain that habeas controversies, despite technically involving claims between the "government and others," *may not* be removed from Art. III courts. After all, at the time the Constitution was ratified, the Great Writ was *exclusively* "cognizable in the courts." One of the writ's earliest functions, at least since being recognized in the royal charter of 1215,[45] was to protect against "*executive* excess at the expense of individual rights."[46] By the 17th century, the writ was further fortified by Parliament, through the Habeas Corpus Act of 1679. Notably, Parliament's strengthening of the writ was triggered by widespread protests denouncing the frequency with which it was denied by the royal courts or "suspended *by Parliament*."[47] It follows, then, that one's entitlement to the writ was *never* traditionally left to executive or legislative determination; on the contrary, the prerogative to issue the writ generally *rested with the courts*.[48]

IV. The Great Writ Is Irremovable From Article III's Guarantees

Forty-seven states allow for periodic reappointment or reelection of state supreme court justices,[49] and only three guarantee something comparable to the life tenure specified by Art. III's

[45] *See* SOURCES OF OUR LIBERTIES 17 (R. Perry & J. Cooper eds., 1959) (the royal charter of 1215–to wit, the Magna Carta–proclaimed that "[n]o man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, not will be go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land").

[46] Amanda L. Tyler, *A "Second Magna Carta": The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 NOTRE DAME L. REV. 1949, 1951 (2016).

[47] Boumediene v. Bush, 553 U.S. 723, 741-42 (2008).

[48] In *Boumediene v. Bush*, the Supreme Court observed that, at the time of the Founding, not only did Alexander Hamilton understand the writ to "provid[e] the detainee *a judicial forum* to challenge detention," but a "resolution passed by the New York ratifying convention made clear … that the [Suspension] Clause … guarantees an affirmative right to judicial inquiry into the causes of detention." *Id*. at 744.

[49] The Supreme Court, in *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. at 58, reiterated Alexander Hamilton's concern that "[p]eriodic appointments, however regulated, would, in some way or other, be fatal to [the courts'] necessary independence." Specifically, "[i]f the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to thee people, or to persons chosen by them for the special purpose, three would be too great a disposition to consult popularity, to justify reliance that nothing would be consulted by the Constitution and the laws." *Id.* (quoting THE FEDERALIST NO. 78, at 489 (Alexander Hamilton) (H. Lodge ed., 1888)).

"good Behavior" Clause.[50] Moreover, just twenty-nine state constitutions expressly prohibit the reduction of salaries for active general-jurisdiction or appellate court judges. Six state constitutions contain clauses *that allow for* reductions in judges' salaries, and a seventh, Wisconsin, permits salary reductions for active non-supreme court justices. Fifteen state constitutions contain no language addressing reductions in judges' salaries during their respective terms in office.[51]

The evidence is conclusive. State judges, for the most part, lack the attributes of judicial independence delineated by Art. III. That fact notwithstanding, AEDPA shrouds state judicial opinions with an imprimatur that severs Art. III's relationship to the Great Writ. Unless the state court adopts a view of federal law that is "contrary to" clearly established precedent, as determined by the Supreme Court, or otherwise declines to review the merits of a federal claim, AEDPA *requires* Art. III courts to defer to the state court's legal conclusions. This deference is absolute, provided that the state court's application federal law was "not so lacking in justification that there was an error well understood and comprehended in existing law *beyond any possibility* of fair-minded disagreement."[52] Under this framework, the writ's defining feature of plenary federal review is displaced from Art. III courts and conferred upon judges who lack the guarantees of independence to which Art. III is principally concerned.

The Supreme Court's 1982 decision in *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.* is instructive here. In *Northern Pipeline,* the Court declared the Bankruptcy Act of 1978 unconstitutional because Art. I bankruptcy judges–similar to the state judges layered with deference under AEDPA–did "not enjoy the protections constitutionally afforded to Art. III

[50] Length of Terms of State Supreme Court Justices, BALLOTPEDIA, https://ballotpedia.org/Length_of_terms_of_state_supreme_court_justices [https://perma.cc/D693-HBRT] (last visited Apr. 20, 2024).
[51] Salary reductions, NCSC, https://www.ncsc.org/salarytracker/special-reports/salary-reductions [https://perma.cc/EP7G-4JN6] (last visited Apr. 20, 2024).
[52] Harrington v. Richter*,* 562 U.S. 86, 103 (2011).

judges."[53] In particular, the bankruptcy judges, whose offices the Bankruptcy Act created, did "not serve for life subject to their continued 'good Behavior,'" and, instead, were "appointed for 14-year terms, and [could] be removed … on grounds of 'incompetency, misconduct, neglect of duty, or physical or mental disability."[54] In addition, the bankruptcy judges' salaries were "not immune from diminution by Congress."[55] As a result, Congress could not confer broad adjudicative powers upon these judges at the expense of Art. III courts.

In *Northern Pipeline*, the Supreme Court identified "three narrow" exceptions to the "constitutional command that the judicial power of the United States must be vested in Art. III courts.[56] The first such instance involves Congress's power to establish "territorial courts" in regions where "no State operate[s] as sovereign."[57] The Northwest Ordinance of 1787, which governed territories outside the original thirteen colonies, is perhaps the earliest example of a territorial court system.[58] But the power to establish territorial courts, the Court explained, derived from the general powers of government that Art. IV "bestowed upon Congress alone," specifically with respect to "territories not within the States."[59]

The second exception the Court recognized involves the Executive's "power to establish and administer courts-martial," which is traceable to "a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over

[53] N. Pipeline Const. Co., 458 U.S. at 61.
[54] *Id*.
[55] *Id*.
[56] *Id*. at 63-64.
[57] *Id*. at 64.
[58] It should be noted that, under the Ordinance, congressionally appointed judges, unlike state judges, served indefinitely "during good behavior." *Journals of the Continental Congress*, A CENTURY OF LAWMAKING FOR A NEW NATION: U.S. CONGRESSIONAL DOCUMENTS AND DEBATES, 1774-1875, at 335-337.
[59] N. Pipeline Const. Co., 458 U.S. at 64-65 (explaining that these non-Art. III courts were born of necessity, "created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States").

the precise subject matter at issue."[60] Textually, this is supported by Art. I, sec. 8, cls. 13, 14, which authorizes Congress "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces."[61] The text of Art. II, sec. 2, cl. 1, provides further support for the exceptional grant of non-Art. III executive and legislative control of courts-martial. That clause states "The President shall be the Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States."[62] These provisions, the Court explained, "provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States."[63]

The remaining exception to Art. III judicial power, acknowledged in *Northern Pipeline*, concerns the "public-rights" doctrine. As previously discussed *supra*, the Great Writ is not governed by the public-rights doctrine because, at common law, the power to dispense it was never entrusted to the executive or legislative branches; instead, that power rested solely with the judiciary. The Court in *Northern Pipeline* recognized that Congress may not "withdraw from judicial cognizance any matter which, *from its nature*, is the subject of a suit at the common law, or in equity, or admiralty."[64] Accordingly, because the writ, "from its nature," *was* "the subject of a suit at common law," it is irremovable from Art. III's guarantees.

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[60] *Id.* at 66.
[61] U.S. Const. art. I, § 8, cls. 13, 14. The *Northern Pipeline* Court found further textual support for the courts-martial exception in the Fifth Amendment's Grand Jury Clause, which requires, for capital or otherwise infamous crimes, "presentment or indictment of a grand jury" except in "cases arising in the land or naval forces." N. Pipeline Const. Co., 458 U.S. at 66.
[62] N. Pipeline Const. Co., 458 U.S. at 66.
[63] *Id*. at 66 (quoting Dynes v. Hoover, 20 How. 65, 79 (1857)).
[64] *Id*. (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.,* 18 How. 272 (1853)).

Through a diminution of habeas courts' Art. III power, AEDPA has deputized state courts as the primary arbiters of federal law. But, as none of Art. III's doctrinal exceptions could justify such an enactment, AEDPA violates the constitutional guarantee of an independent judiciary. That AEDPA restrains "the judicial Power" rather than directly conferring it on state courts is unimportant because its operative effect remains the same. Indeed, AEDPA's indirect grant of authority to state courts is *broader* than that which the 1978 Bankruptcy Act conferred on non-Art. III judges. While non-Art. III bankruptcy judges were conceivably "adjuncts" to the local district courts, no such relation exists with respect to state tribunals and federal district courts. Similarly, unlike parties on the losing side of non-Art. III bankruptcy proceedings, state prisoners have no "appeal as of right to an Article III court."[65] After the state courts deny a federal claim upon the merits, plenary federal review is foreclosed. Rather than a "direct appeal" to an Art. III court, an imprimatur attaches to the state court judgment that displaces Art. III review altogether. As such, AEDPA infringes upon the constitutional guarantee of an independent judiciary. In the words of Professor Akhil Amar, the notion that "the framers … committed 'ultimate' trusteeship of the Constitution to state judges *whose appointment, tenure and removal were nowhere even mentioned in, much less prescribed by, the* [Constitution]" is both "naively blind" and "unthinkable."[66]

V. Congress May Not Restrict the Federal Judiciary's Power To "Say What the Law Is"

Under Article III "the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends," and "[t]hey

[65] *Id*. at 62.
[66] Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 237-38 n.112, 250 (1985).

cannot abdicate their authority or duty in any case in favor of another jurisdiction."[67] Constitutional Art. III, Section 1 provides that "the judicial Power of the United States shall be vested in one supreme Court and such inferior Courts as the Congress from time to time ordain and establish."[68] While it is well-understood that the Exceptions Clause under Article III, sec. 2, confers power on Congress to limit the federal judiciary's jurisdiction, that power is confined to the judiciary's "quantitative powers," *not* the "qualitative" aspects of judicial decisionmaking. Federal judges, though wielding neither the power of the sword nor purse, have an inherent and unflagging duty to "say what the law is."[69]

United States v. Klein (1871) was an early decision to draw a line between Congress's authority under the Exceptions Clause and encroachments on "the judicial power." The *Klein* Court struck down a federal statute that would have compelled it to construe a presidential pardon as conclusive evidence that the pardoned party assisted the Confederacy during the Civil War and, consequently, forfeited the right to recover property seized by the Union. In declaring the statute unconstitutional, *Klein* held that Congress, by prescribing a "rule of decision," had "passed the limit which separates the legislative from the judicial power." *Klein* further observed that, while Congress retains the authority to regulate the federal judiciary's jurisdiction, it may "not prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred." In other words, Congress possessed the power to regulate the Court's subject-matter jurisdiction, but it could not "tinker with the qualitative aspects of the adjudicative process."[70]

Notably, two years after AEDPA's enactment, Constitutional Law Scholars James S. Liebman and William F. Ryan undertook an in-depth study of the records of the Constitutional

[67] New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 358 (1989).
[68] U.S CONST. Art. III, § 1.
[69] Marbury v. Madison, 1 Cranch 137, 177 (1803).
[70] Crater v. Galaza, 508 F.3d 1261, 1265 (9th Cir. 2007) (Reinhardt, J., dissenting).

Convention and the tradeoffs that gave rise to Article III's text. Liebman et al. concluded that, based on those records, it remained clear that the Framers' "principal mechanism for keeping federal law supreme over contrary state law" was *not* "an assured 'quantity' of federal 'arising' under jurisdiction but, instead, an assured 'quality' of federal judging in cases in which Congress confers jurisdiction."[71]

During the Constitutional Convention, Virginian James Madison pushed hard for a strong national government to avoid the flaws of the Articles of Confederation. Madison called for several reforms, including a national legislative veto over state laws, a system of national courts, and a Council of Revision composed of select federal judges and executive officials.[72] The Virginia Plan, proposed by Edmund Randolph but drafted in large part by Madison, called for an independent national judiciary, comprised of both supreme and inferior courts. The "more confederationist" Pinckney Plan, however, had proposed leaving Congress the ultimate authority to either establish or not establish even a *single* "federal judicial Court." The Pinckney Plan also did not propose a national judiciary with sweeping control over state laws.[73]

Due to opposition from those who favored a considerable degree of comity between federal and state courts, the Virginia Plan was forced to undergo significant changes. One such change, known as of the "Madisonian Compromise," included a revision giving Congress the authority to decide whether to create *any* inferior courts, and to choose whether to invest those courts "with original or appellate jurisdiction."[74]

As an alternative to the Virginia Plan's call for a robust national judiciary, William Paterson introduced a proposal—i.e., the New Jersey Plan—that included one supreme national

[71] James S. Liebman & William F. Ryan, *supra* note 29, at 696.
[72] *Id*. at 712.
[73] *Id*. at 714.
[74] *Id*. at 723.

tribunal with limited jurisdiction, but which left to state courts the principal duty of enforcing federal law. The New Jersey plan was handily defeated, however, with just 3 of 10 states voting in favor of it.[75]

Ultimately, save for Congress' power to create or *not* create inferior courts, Article III's text, and that of the Supremacy Clause, took on a Madisonian bend. Article III, section 1, vests "The judicial power … in one supreme court," and section 2 provides that "The judicial Power *shall* extend to *all* Cases, in Law and Equity, arising under th[e] Constitution." At minimum, this language makes clear that federal law was intended to be *supreme* over the States, and that at least one national and "supreme" tribunal would exist to enforce federal law against the States.

But importantly, the compromises that produced Article III's text, consistent with Liebman et al.'s historical analysis, clearly show that the Framers conferred a "*qualitatively*, not quantitatively, defined 'judicial Power' to decide 'Cases … [and] Controversies' independently, comprehensively, lawfully, finally, and effectually as a check on state judges."[76] This qualitatively defined judicial power, as Liebman et al.'s article aptly points out, forecloses any reading of AEDPA that would "oblige federal courts to give [deference] to state decisions found to violate federal law."[77]

Notably, when Liebman et al.'s article was published, the Supreme Court had yet to decide the precise level of deference that Article III judges owed to state courts under AEDPA, and the existing circuit court precedent on that question remained in flux. The Fifth, Seventh, and Eleventh Circuits had, at that time, adopted the broadest reading of AEDPA, insisting that federal courts may not grant the writ and must defer to state court decisions misapplying federal law, so long as

[75] *Id*. at 724-27.
[76] *Id*. at 703.
[77] *Id*. at 704.

the state court's misapplication of federal law is neither "more than clear" nor "grave."[78] Nonetheless, Liebman et al. maintained that such a broad reading of AEDPA contradicted the Framers' understanding of "[t]he judicial Power" because it granted deference "to state court interpretations of supreme law that in the Article III judges' independent estimation offend that law."[79]

In *Williams v. Taylor* (2000),[80] decided two years after Liebman et al.'s article, the Supreme Court, for the first time, attempted to discern how much deference, if any, federal courts owed to state courts under AEDPA. In her plurality opinion, Justice O'Connor stressed that AEDPA did not require federal judges to conclude, before granting habeas relief, that "all reasonable jurists would agree that the state court [judgment] was unreasonable."[81] O'Connor warned that such a "construction of AEDPA … would require the federal courts to cede th[eir] authority to the courts of the States" and, in that regard, "be inconsistent with the practice … federal judges have traditionally followed in discharging their duties under Article III of the Constitution."[82] If Congress truly "intended to require such an important change," O'Connor observed, "we believe it would have spoken with much greater clarity than is found in the text of AEDPA."[83]

On the question of deference, the *Williams* plurality adopted a middle-ground approach, one that required federal courts give state court "opinions a respectful reading" and encouraged them "to listen carefully to [state court] conclusions."[84] As the plurality noted, "[w]hatever

[78] Hennon v. Cooper, 109 F.3d 330, 334 (7th Cir. 1997); Neelley v. Nagle, 138 F.3d 917, 923-25 (11th Cir. 1998); Drinkard v. Johnson, 97 F.3d 751, 767-68 (5th Cir. 1996), *overruled on other grounds* United States v. Carter, 117 F.3d 262, 264 (5th Cir. 1997).
[79] James S. Liebman & William F. Ryan, *supra* note 29, at 873.
[80] 529 U.S. 362 (2000).
[81] *Id*. at 377.
[82] *Id*. at 379.
[83] *Id*.
[84] *Id*. at 387.

'deference' Congress had in mind with respect to [AEDPA], it surely is not a requirement that federal courts actually defer to a state-court application of the federal law that is, in the independent judgment of the federal court, in error."[85]

More than a decade after *Williams*, however, the Court would revisit the question of deference under AEDPA. In *Harrington v. Richter* (2011), the Court rejected the *Williams* plurality's narrow reading of AEDPA. *Harrington* held that, as a precondition to habeas relief, federal courts must find that the state court's application of federal law "was so lacking in justification that there was an error well understood and comprehended in existing law *beyond any possibility* of fairminded disagreement."[86] More recently, in *Brown v. Davenport* (2021), the Court reiterated that a federal judge's finding of a constitutional violation on habeas review "is only a necessary, not a sufficient, condition to relief."[87] The *Brown* Court claimed that Congress, by enacting AEDPA, had meant to "return the Great Writ closer to its historic office"—that is, as it was understood in 1789, when "a judgment of conviction after trial" was *in itself* "'conclusive of all the world.'"[88]

The writ's historic office, today, is an anachronism. As argued above *supra*, even in 1789 Congress lacked the power to make either "rules of decision" or to deprive the federal judiciary of plenary and independent review when deciding federal questions. Furthermore, the Non-suspension Clause, and the writ's attendant scope, must be informed by the balance of federalism achieved *in 1865*, when the Reconstruction Amendments were adopted. Again, the Civil War and Reconstruction fundamentally altered the power relations between the federal government and the States, with the Fourteenth Amendment increasing Article III courts' supervisory power over

[85] *Id*.
[86] 562 U.S. 86, 103 (2011).
[87] 596 U.S. 118, 127 (2022).
[88] *Id*. at 129.

states, particularly with respect to rights deemed "fundamental to our scheme of ordered liberty" or found to be "deeply rooted in th[e] Nation's history and tradition."[89]

Bottom line, AEDPA does *not* simply return the writ to its original 1789 scope because, even at that time, Congress did not—and *could not*—limit the federal judiciary's power to remedy constitutional harms in cases where it properly retained jurisdiction. Moreover, restricting the writ to its 1789 scope, when slavery was lawful and the Bill of Rights did not apply to the States, ignores the seismic shift in federal power occasioned by the Civil War and Reconstruction. But in any event, the Court's so-called "originalist" take on Congress's power to regulate the federal bench's habeas authority is incompatible with history, regardless of whether our starting point is 1789 or 1865.

Conclusion

The implications of the Court's current interpretation of AEDPA, as borne out in *Harrington* and *Brown*, are profound. The Great Writ is a constitutionally implied cause of action that "shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[90] Clearly, it was always expected that *federal* judges would entertain habeas corpus actions and serve as the primary expositors of federal law—not state judges who, for the most part, lack constitutionally specified guarantees of judicial independence. Nonetheless, AEDPA affords broad deference to state courts, giving their decisions near *res judicata* effect in federal habeas proceedings. Shutting the doors on federal habeas review for state prisoners is not just unconstitutional; even worse, it risks keeping innocent men and women behind bars by tolerating convictions that federal judges *know* resulted from fundamentally unfair proceedings.

[89] Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).
[90] U.S. CONST. art. 1, § 9, cl. 2.

Ultimately, the gloss the Supreme Court has attributed to AEDPA raises serious and significant constitutional questions. The historical evolution of habeas corpus, from its common law origins to its crucial role in protecting individual liberties after Reconstruction, underscores its fundamental importance in American legal tradition. AEDPA's enactment marked a significant shift, however, limiting the scope of federal habeas review and granting substantial deference to state courts, even in cases where federal judges find clear and obvious constitutional harms. AEDPA is an affront on the very essence of federal judicial oversight, and it raises daunting questions about the balance of power between federal and state courts, in addition to the judiciary's ability to safeguard individual rights against wrongful convictions and violations of constitutional procedure.

It is rather clear that there is an urgent need for legislative or judicial reforms, aimed at restoring the Great Writ to its traditional role as a guardian of constitutional rights. Only by reaffirming the writ's essential role in American law can we ensure that it remains a reliable bulwark against the arbitrary detention, reflecting our nation's continued commitment to due process and individual liberty.