



6-1-1999

Historical Origins of Broad Federal Habeas Review Reconsidered

Clarke D. Forsythe

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Clarke D. Forsythe, *Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 Notre Dame L. Rev. 1079 (1995).

Available at: <http://scholarship.law.nd.edu/ndlr/vol70/iss5/2>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

ARTICLES

The Historical Origins of Broad Federal Habeas Review Reconsidered

Clarke D. Forsythe*

[A] proper determination of the Great Writ's future requires an accurate understanding of its past.¹

I. INTRODUCTION

History continues to be a defining factor in the Supreme Court's habeas corpus jurisprudence. Although the modern doctrine of federal habeas as a post-conviction remedy bears little likeness to its common law function, Supreme Court Justices repeatedly extol the history of the writ in applying it.² However, a growing criticism of expansive habeas jurisdiction among some Justices has fostered a continuing examination of the history of habeas corpus and of the 190 years of Supreme Court habeas jurisprudence. Justices Brennan and Harlan debated the common law background and legislative purpose of the 1867 Act in *Fay v. Noia*.³ Justice Powell reviewed the historical function of habeas in

* B.A., Allegheny College, 1980; J.D., Valparaiso University, 1983. I am grateful to Richard and Imogene Forsythe for a gift that allowed me to complete this article; to Gerry Bradley, Mary Ann Glendon, Michael Paulsen, and Kent Scheidegger for comments on an earlier draft; to Miranda Perry (J.D., University of Chicago, 1996) for her helpful research assistance; to Virginia Reuter for word processing assistance; to Michael Brown and the D'Angelo Law Library at the University of Chicago for providing quiet space to research and write; and to my wife, Karen, for her patience throughout the research and writing of this article.

1 James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 1999 (1992).

2 See, e.g., *Smith v. Murray*, 477 U.S. 527, 541 (1986); *Engle v. Isaac*, 456 U.S. 107, 126 (1982); *Francis v. Henderson*, 425 U.S. 536, 544 (1976); *Fay v. Noia*, 372 U.S. 391, 401-02 (1963); *Sunal v. Large*, 332 U.S. 174, 188 (1947) (Rutledge, J., dissenting) ("the writ's historic purpose"); see also *Coleman v. McCormick*, 874 F.2d 1280, 1294 & n.6 (9th Cir.) (en banc) (Reinhardt, J., concurring) (invoking the history of the writ), *cert. denied*, 493 U.S. 944 (1989).

3 372 U.S. 391 (1963).

Schneckloth v. Bustamonte,⁴ *Rose v. Mitchell*,⁵ and *Kuhlmann v. Wilson*.⁶ Justice Scalia surveyed the history of Supreme Court habeas doctrine in *Withrow v. Williams*.⁷ Justice Kennedy summarized the evolution of federal habeas for state prisoners in *McCleskey v. Zant*.⁸ Justices Thomas and O'Connor sparred over the history of the federal court's standard of review for mixed questions of fact and law in *Wright v. West*.⁹ Last Term, in *Heck v. Humphrey*,¹⁰ the intersection between section 1983 and the federal habeas statutes was revisited. In the 1994-95 Term, the Court will hear at least three habeas cases, and historical analyses are sure to influence the Court's consideration.¹¹ Clearly, history continues to shape the Court's habeas jurisprudence.

Unfortunately, the writ's arcane Latin phraseology obscures its historic purpose.¹² A writ of habeas corpus is a civil procedure, directed to a law enforcement authority, to contest "the legality of the detention of one in the custody of another."¹³ The writ is deeply based in the English common law, dating back at least to the thirteenth century. It was first referred to as the "great writ" by Chief Justice Marshall in *Ex parte Bollman*,¹⁴ because of its function in preserving freedom against illegal custody of the innocent. Its essential purpose was to liberate those "imprisoned without sufficient cause."¹⁵ Although the United States Constitution

4 412 U.S. 218, 254 (1973) (Powell, J., concurring).

5 443 U.S. 545, 580-82 (1979) (Powell, J., concurring).

6 477 U.S. 436, 445-48 (1986).

7 113 S. Ct. 1745 (1993).

8 499 U.S. 467 (1991).

9 112 S. Ct. 2482 (1992). For one perspective on this debate, see Liebman, *supra* note 1.

10 114 S. Ct. 2364, 2374 (1994) (Thomas, J., concurring).

11 *Schlup v. Delo*, 115 S. Ct. 851 (1995) (holding that actual innocence exception for a successive or abusive petition is governed by colorable showing of innocence standard and not by more stringent clear and convincing evidence standard); *O'Neal v. McAninch*, 115 S. Ct. 992 (1995) (holding that federal habeas court which finds constitutional error in state court criminal judgment, and is in "grave doubt" about whether the error was "harmless," should treat error as if it affected the verdict); *Kyles v. Whitley*, 5 F.3d 806 (5th Cir. 1993), *cert. granted*, 114 S. Ct. 1610 (1994) (No. 93-7927).

12 Habeas corpus is a latin phrase meaning "[y]ou have the body." BLACK'S LAW DICTIONARY 709 (6th ed. 1990).

13 *McNally v. Hill*, 293 U.S. 131, 136 (1934), *overruled on other grounds*, *Peyton v. Rowe*, 391 U.S. 54 (1968); *see also Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) ("It is clear . . . from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody.").

14 8 U.S. (4 Cranch) 75, 96 (1807).

15 *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830); *see also* BARBARA J. SHAPIRO,

restricts the ability of Congress to suspend the availability of the writ,¹⁶ habeas corpus has never been held to be a constitutional right.¹⁷ It is essentially a matter of federal statutory law in its practical implementation. In the original Judiciary Act of 1789, Congress made habeas corpus in federal court available to federal prisoners only.¹⁸ Not until 1867 did Congress allow state prisoners to seek habeas corpus in federal court. The Act of 1867 has been amended only occasionally, most notably in 1948¹⁹ and in 1966.²⁰

"BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE": HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 131, 133 (1991) (citing WILLIAM LAMBARDE, EIRENARCHA, OR OF THE OFFICE OF THE JUSTICE OF THE PEACE 93 (1614 ed.) and WILLIAM SHEPPARD, AN EPITOME OF ALL THE COMMON AND STATUTE LAW (1659) on the function of habeas corpus).

16 "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." U.S. CONST. art. I, § 9, cl. 2.

17 See *Habeas Corpus Reform, Hearings on S. 88, S. 1757 and S. 1760 Before the Senate Comm. on the Judiciary*, 101st Cong., 1st & 2d Sess. 11 n.2 (1989 & 1990) [hereinafter 1989-90 *Senate Habeas Hearings*] (Testimony of Lewis F. Powell).

This is also implied by the Court's holding in *Herrera v. Collins*, 113 S. Ct. 853 (1993), that there is no constitutional right to a *judicial* determination of "actual innocence" via habeas corpus.

18

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

Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82; see *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807); *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 448-49 (1806); *United States v. Hamilton*, 3 U.S. (3 Dall.) 17 (1795).

19 Ch. 646, 62 Stat. 964 (1948). In 1948, Congress codified the exhaustion of state remedies requirement from *Ex parte Royall*, 117 U.S. 241 (1886), and *Ex parte Hawk*, 321 U.S. 114 (1944), in 28 U.S.C. § 2254(b) (1988); see *Rose v. Lundy*, 455 U.S. 509, 515-16 (1982).

20 Pub. L. No. 89-590, 80 Stat. 811 (1966); Pub. L. No. 89-711, 80 Stat. 1105 (1966).

The current principal statutes—28 U.S.C. §§ 2241, 2244 and 2254—authorize the grant of the writ by federal courts for state prisoners within broad and ambiguous limits. Consolidating three sections of the earlier code, 28 U.S.C. § 2241 authorizes the grant of the writ when the prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241 (c)(3) (1988). Likewise, 28 U.S.C. § 2254(a), descending from the 1867 Habeas Corpus Act, grants broad habeas jurisdiction for a

At least two contrasting views of the proper function of federal habeas corpus have predominated in Supreme Court opinions and scholarly commentary over the past forty years. One view is that the proper function of the writ is limited to testing the lawfulness of a prisoner's confinement where state procedural remedies are either unavailable or violate basic notions of due process. In this view, state interests in finality, in the criminal justice process, and in federalism must be weighed against interests in affording state prisoners federal oversight of state proceedings. A second view is based on an expansive reading of common law history, of the Habeas Corpus Act of 1867, and of Supreme Court precedent. Habeas corpus is viewed as a federal safeguard supplementing both state appeal and collateral relief. As such, it can be used by any prisoner to fully relitigate any constitutional right that may have been violated at any stage of the state criminal justice process—investigation, arrest, indictment, conviction, or sentencing—regardless of whether any violations relate to guilt determination or whether the prisoner has had a full and fair opportunity to litigate these claims in state court.²¹

state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254(b)-(c) (1988).

21 See *Stone v. Powell*, 428 U.S. 465, 518 (1976) (Brennan, J., dissenting) ("settled principle that federal habeas relief is available to redress any denial of asserted constitutional rights, whether or not denial of the right affected the truth or fairness of the factfinding process.") (emphasis in original); Liebman, *supra* note 1, at 2012 (habeas should "function as a substitute for the review the petitioner would have received had the Supreme Court the resources to review the case."); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 690-91 (1982) (federal habeas corpus should be available "for all constitutional claims regardless of the extent of prior state court litigation."); Curtis R. Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1316 (1961) ("It is a fundamental purpose of the habeas corpus jurisdiction to secure the federal rights of state prisoners through an independent proceeding in a federal forum. Even when the highest state court has ruled on the merits of the federal questions, principles of *res judicata* do not bar this further litigation.").

Supreme Court Justices have articulated variations on these two themes. Justice Harlan would have limited habeas to cases where a state prisoner had been denied a "full and fair opportunity" in the state court to raise his constitutional claims.²² Justice Powell considered the modern expansion of federal habeas jurisdiction to be unjustified, but would have made it available for "redressing an unjust incarceration."²³ Justice O'Connor considers "finality, federalism and fairness" to be the touchstones of habeas jurisprudence.²⁴ Like Justice Harlan, Justices Scalia and Thomas would limit all federal habeas review for state prisoners to federal constitutional claims according to the rule of *Stone v. Powell*²⁵ and dismiss federal habeas claims where there had been a "full and fair adjudication" of the prisoner's claims in the state courts.²⁶ Justice Brennan, author of the Court's opinion in *Fay v. Noia*, espoused a full relitigation position.

Although this continuing turmoil is due to several factors, one key factor is a continuing debate over the writ's history—in particular, the historical scope of habeas corpus at common law, the historical purposes of the Reconstruction Congress in enacting the 1867 Habeas Corpus Act, and the historical boundaries of the Court's habeas jurisprudence which has evolved over the last century. Professor Paul Bator's landmark 1963 article largely determined the boundaries of the modern debate over the appropriate role of federal habeas corpus by directly challenging the Court's decisions in *Brown v. Allen* and *Fay v. Noia* and the modern expansion of federal habeas.²⁷ Since then, Bator's work has been supported or challenged by important historical studies by Professors Gary Peller, William Duker, James Liebman, and Ann Woolhandler, but these have not yet brought definitive resolution to the debate.²⁸ This is evident from the conflicting opinions of

22 *Mackey v. United States*, 401 U.S. 667 (1971) (Harlan, J., dissenting); *Desist v. United States*, 394 U.S. 244 (1969) (Harlan, J., dissenting); *Fay v. Noia*, 372 U.S. 391 (1963) (Harlan, J., dissenting).

23 *Schneckloth v. Bustamonte*, 412 U.S. 218, 257-58 (1973).

24 *Withrow v. Williams*, 113 S. Ct. 1745, 1756 (1993) ("finality, federalism, and fairness" are "the principles that inform our habeas jurisprudence"); *Strickland v. Washington*, 466 U.S. 668, 697 (1984) ("fundamental fairness is the central concern of the writ of habeas corpus"); *Engle v. Isaac*, 456 U.S. 107, 126 (1982).

25 428 U.S. 465 (1976).

26 *Withrow*, 113 S. Ct. at 1765-69 (Scalia, J., concurring in part, dissenting in part).

27 Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

28 WILLIAM DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980); Liebman,

the Justices in *Wright v. West*.²⁹

This Article reassesses the common law history, the interpretation of the text of the 1867 Act, the historical circumstances that gave rise to the 1867 Act, and the evolution of the Court's interpretation of the 1867 Act until 1953 when the Court issued its landmark decision in *Brown v. Allen*, significantly expanding the availability of federal habeas for state prisoners.³⁰ With the assistance of new evidence of the purposes of Congress in enacting both the 1867 Act and the Habeas Corpus Jurisdiction Act of 1885, and closer examination of the contemporary analyses of the Court's habeas jurisdiction doctrine, this Article endeavors to synthesize the historical studies and resolve points of disagreement to provide a firmer basis for continuing legal analysis as the Court's habeas jurisprudence evolves and Congress addresses habeas corpus reform.

II. THE SCOPE AND FUNCTION OF HABEAS CORPUS IN ENGLISH LAW

In construing and applying statutes, judges must necessarily resort to history because the legislature's purpose is set in history. Determining and applying that purpose is the ultimate end of judicial decisionmaking because the legislature as a body is constitutionally endowed with the political authority to make law.³¹ The

supra note 1; Peller, *supra* note 21; Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993).

²⁹ 112 S. Ct. 2482 (1992).

³⁰ 344 U.S. 443 (1953).

³¹ See, e.g., *Ngiraingas v. Sanchez*, 495 U.S. 182, 192 (1990) ("Just as 'we are not at liberty to seek ingenious analytical instruments' to avoid giving a congressional enactment the broad scope its language and origins may require, . . . so too are we not at liberty to recast this statute to expand its application beyond the limited reach Congress gave it.") (quoting *Columbia v. Carter*, 409 U.S. 418, 432 (1973)); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989) ("[R]ewriting . . . is a job for Congress, if it is so inclined, and not for this Court."); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508 (1989) ("Our task in deciding this case, however, is not to fashion the rule we deem desirable but to identify the rule that Congress fashioned."); *Commissioner v. Engle*, 464 U.S. 206, 217 (1984) ("Our duty then is 'to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.") (quoting *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957)); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute."); *Braden v. 39th Judicial Circuit Court*, 410 U.S. 484, 509-10 (1973) (Rehnquist, J., dissenting) ("The result reached today may be desirable from the point of view of sound judicial administration It is the function of this Court,

member's, sponsor's, or committee's purpose is relevant only insofar as each accurately reflects the legislature's purpose.³²

This does not mean that defining the legislative purpose is simple, and the Supreme Court's historical analysis and conclusions, in both constitutional and statutory construction, have been often subject to withering criticism.³³ The Court has been on weakest ground when it has resorted to general history to construe the Constitution or Congressional legislation.³⁴ The Court has sometimes failed to determine if, or explain why, the general history accurately and authoritatively reflects the legislature's purpose.

Nevertheless, the rules for accurately and authoritatively determining the legislature's purpose are neither odd nor novel, but have been worked out through 300 years of Anglo-American jurisprudence, with the ultimate purpose of faithfully respecting the legitimate law-making authority in a constitutional democracy. Judges, whose duty it is to serve justice, have a surpassing obligation to accurately interpret and apply the law. Some would disparage the notion that judges have an obligation to accurately discern history.³⁵ But insofar as judges purport to derive their authority from the law, and a democratic people expect them to do so, they have an obligation to respect the legislative purpose and to apply it faithfully.³⁶ That necessarily involves an accurate interpretation

however, to ascertain the intent of Congress Having completed that task . . . it is the function of Congress to amend the statute if this Court misinterpreted congressional intent or if subsequent developments suggest the desirability, from a policy viewpoint, of alterations in the statute."); *United States v. Alpers*, 338 U.S. 680, 681-82 (1950) ("The most important thing to be determined is the intent of Congress").

32 *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 30 (1989) (Scalia, J., concurring in part and dissenting in part) ("It is our task . . . not to enter the minds of the Members of Congress . . . but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times."); *United States v. Fausto*, 484 U.S. 439, 444 (1988) (Scalia, J.) (examining "leading purpose").

33 See, e.g., MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS* (1965); CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1969); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119; Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965); Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451, 463-64 (1966).

34 See, e.g., Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947) ("I should say that the troublesome phase of construction is the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink discernible to the judicial eye.").

35 See, e.g., John P. Reid, *Law and History*, 27 LOYOLA L.A. L. REV. 193 (1992).

36 *Blanchard v. Bergeron*, 489 U.S. 87, 100 (1989) (O'Connor, J., concurring in part

of history, because there can be no faithful interpretation of legislative purpose without an accurate interpretation of history. Good judges must be good historians.

A. *Common Law Origins*

The common law history of habeas corpus is important because general principles of statutory construction dictate that Congress knows the common law and incorporates it into federal legislation when it legislates in that area of law, unless there is express legislative intent to the contrary.³⁷ In Justice Frankfurter's colorful aphorism, "[I]f a word is obviously transplanted from another legal source, whether the common law or other legisla-

and concurring in the judgment) ("an interpretation of the statute that is reasonable, consistent and faithful to its apparent purpose"); Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1125 (1983) ("The conscientious judge searches for the 'true' meaning of a statute, because the constitutional separation of powers assigns to the legislative branch the central responsibility for the statutory management of social policy in the substantive areas allocated to it under the applicable constitution . . .").

37 See, e.g., *Evans v. United States*, 112 S. Ct. 1881, 1885 (1992) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.") (quoting *Morissette v. United States*, 342 U.S. 246, 264 (1952)); *Astoria Federal Sav. & Loan v. Solimino*, 111 S. Ct. 2166, 2169 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles"); *Taylor v. United States*, 495 U.S. 575, 592 (1990) ("maxim that a statutory term is generally presumed to have its common-law meaning."); *United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980) ("Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law . . ."); *United States v. Turley*, 352 U.S. 407, 411 (1957) ("We recognize that where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning"); *Shaw v. North Pennsylvania R. Co.*, 101 U.S. 557, 565 (1879) ("No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."); *Ross v. Jones*, 89 U.S. 576, 592 (1874) ("Where the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature, for statutes are not presumed to make any alteration in the common law, beyond what is expressed in the statute."); *Ex parte Wells*, 59 U.S. (18 How.) 307, 311 (1855) ("We must then give the word ["pardon" in Art. II, Sec. 2] the same meaning as prevailed here and in England at the time it found a place in the constitution."); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 545 (1837) (adopting rules for construction from English common law); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1812) ("The common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.").

tion, it brings the old soil with it."³⁸ When Congress extended federal habeas jurisdiction to state prisoners for the first time in 1867, it enacted that jurisdiction against the background of the common law. Indeed, the Court has specifically held that federal statutes authorizing the writ must be read against the background of the common law, which gave the Great Writ its heritage and provides an important perspective for the development of modern habeas law. The Court emphasized the importance of historical guidelines in *Ex parte Parks*³⁹ when it applied the federal habeas statute to federal prisoners:

The general principles upon which the writ of *habeas corpus* is issued in England were well settled by usage and statutes long before the period of our national independence, and must have been in the mind of Congress when the power to issue the writ was given to the courts and judges of the United States. These principles, subject to the limitations imposed by the Federal Constitution and laws, are to be referred to for our guidance on the subject.⁴⁰

The Great Writ is great precisely because of its traditional, common law function of requiring sufficient legal cause for detaining or jailing someone. The Great Writ is great because the common

38 Frankfurter, *supra* note 34, at 537.

39 93 U.S. 18 (1876).

40 *Id.* at 21; *see also* Frank v. Mangum, 237 U.S. 309, 330 (1915) ("The rule at the common law, and under the act 31 Car. II, chap. 2 [the English Habeas Corpus Act of 1679], and other acts . . ."); *Ex parte Siebold*, 100 U.S. 371, 375 (1879) ("There are other limitations of the jurisdiction, however, arising from the nature and objects of the writ itself, as defined by the common law, from which its name and incidents are derived."); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807).

This same point was made on the eve of the 1885 Jurisdiction Act by a prominent critic of the expansive view of the 1867 statute given by some lower federal courts. In one of the papers that made up the Report of the Sixth Annual Meeting of the American Bar Association in 1883, Seymour Thompson criticized lower federal court habeas decisions issued after the 1867 Act was enacted and before the Court's appellate jurisdiction over the 1867 Act was reinstated in 1885:

It is a well settled principle of statutory construction that statutes relating to a subject founded upon the common law are to be construed with reference to the rules and principles of the common law, and are not to be extended beyond the plain import of their terms, when in derogation of that law. This principle forbids that the act of 1867, should be extended to the overthrowing, in collateral proceedings by the summary process of *habeas corpus* used by the inferior federal judges, of the judgments and decrees of the courts of the several states.

Seymour Thompson, *Abuses of the Writ of Habeas Corpus*, 6 Ann. Rep. Amer. Bar. Assoc. 243, 263 (1883), *reprinted in* 18 AM. L. REV. 1 (1884).

law made it so.

Early on, the Marshall Court held in *Ex parte Bollman*⁴¹ that the federal courts had no inherent power to issue a writ of habeas corpus and that such authority must be conferred by Congress through statute.⁴² The Court appealed to the common law to construe the federal statute applicable to federal prisoners in *Ex parte Watkins*.⁴³ Even sixty-seven years after the Habeas Corpus Act of 1867, the Court resorted to the common law to determine the meaning and scope of habeas corpus. In *McNally v. Hill*,⁴⁴ the Court said:

To ascertain its meaning and the appropriate use of the writ in the federal courts, recourse must be had to the common law, from which the term was drawn, and to the decisions of this Court interpreting and applying the common law principles which define its use when authorized by statute.⁴⁵

41 8 U.S. (4 Cranch) 75 (1807).

42 Otherwise, the Court held, "for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." *Id.* at 93-94.

43

No law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the Court over the party brought up by it. The term is used in the [C]onstitution, as one which was well understood; and the judicial act authorizes this [C]ourt, and all the courts of the United States, and the judges thereof, to issue the writ "for the purpose of inquiring into the cause of commitment." This general reference to a power which we are required to exercise, without any precise definition of that power, imposes on us the necessity of making some inquiries into its use, according to that law which is in a considerable degree incorporated into our own.

28 U.S. (3 Pet.) 193, 201-02 (1830). Marshall then proceeded to examine the common law and the English Habeas Corpus Act of 1679 which "enforces the common law." *Id.* at 202. As Justice Frankfurter acknowledged in his dissent in *Sunal v. Large*, 332 U.S. 174, 184 (1947), in reference to the 1789 Act, "[S]ince the scope of the writ was not defined by Congress, it carried its common law implications."

44 293 U.S. 131, 136 (1934), *overruled on other grounds*, *Peyton v. Rowe*, 391 U.S. 54 (1968).

45 *McNally*, 293 U.S. at 136.

Originating as a writ by which the superior courts of the common law and the chancellor sought to extend their jurisdiction at the expense of inferior or rival courts, it ultimately took form and survived as the writ of *habeas corpus ad subjiciendum*, by which the legality of the detention of one in the custody of another could be tested judicially.

Id. (citing 9 WILLIAM HOLDSWORTH, A HISTORY OF THE ENGLISH LAW 108-25).

Its use was defined and regulated by the Habeas Corpus Act of 1679. This legislation and the decisions of the English courts interpreting it have been accepted by this Court as authoritative guides in defining the principles which control the use of the writ in the federal courts.

Although the study of the English common law is a continuing discipline with new records continually coming to light, much already has been written on the history of the writ of habeas corpus.⁴⁶ Habeas corpus arose out of the social and legal process of Magna Carta—the effort to constrain the rule of men by the rule of law.⁴⁷ In the earliest years of English law, citizens could be restrained or imprisoned by both public and private authorities for crimes or debts.⁴⁸ Over several centuries, habeas corpus developed to require that such detention be justified by law, rather than mere personal whim. Because its function was limited to determining whether there was “sufficient cause” in law for detention, habeas corpus was not directly related to guilt determination. However, by requiring “sufficient cause” for detention, habeas corpus addressed the factual basis for the legal violation that permitted detention.⁴⁹

Id. (citations omitted).

46 See, e.g., WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS (2d ed. 1893); DUKER, *supra* note 28; ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS (Albany, W.C. Little & Co. 1858); JAMES A. SCOTT, THE LAW OF HABEAS CORPUS (1923); ROBERT J. SHARPE, THE LAW OF HABEAS CORPUS (2d ed. 1989); RONALD P. SOKOL, A HANDBOOK OF FEDERAL HABEAS CORPUS (1965); ROBERT S. WALKER, THE AMERICAN RECEPTION OF THE WRIT OF LIBERTY (1961); ROBERT S. WALKER, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY (1960); HORACE WOOD, A TREATISE ON THE LEGAL REMEDIES OF MANDAMUS, PROHIBITION, HABEAS CORPUS, CERTIORARI, AND QUO WARRANTO (3d ed. 1896); Maxwell Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ—I*, 18 CAN. B. REV. 10 (1940); Maxwell Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ—II*, 18 CAN. B. REV. 172 (1940); Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335 (1952); Edward Jenks, *The Story of the Habeas Corpus*, 18 LAW Q. REV. 64 (1902).

47

Whether or not the famous clause [sec. 39] of Magna Carta [1215], which enacted that “no free man shall be taken or imprisoned or disseised or exiled or in any way destroyed except by the lawful judgment of his peers or by the law of the land,” was intended to safeguard the principle that no man should be imprisoned without due process of law, it soon came to be interpreted as safeguarding it.

9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 104 (3d ed. 1944, reprinted 1966). Section 39 of Magna Carta provided:

No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anyways destroyed; nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land.

THOMAS P. TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 130 (1886). Four hundred years later, the Commons held that the writ of habeas corpus was directly derived from the Magna Carta. DUKER, *supra* note 28, at 45.

48 See generally SHAPIRO, *supra* note 14, at 127-40.

49 Cf. *Schneekloth v. Bustamonte*, 412 U.S. 218, 257 (1973) (Powell, J., concurring)

Although habeas corpus as a protection of the liberty of the person against the state did not culminate until the seventeenth century, several types of writs of habeas corpus developed at least by the end of the reign of Edward I (1307). Today's term, habeas corpus, is short for *habeas corpus ad subjiciendum*. An early reference to habeas corpus can be traced back to Henry II's *Assize of Clarendon* in 1166, which "made great changes in the administration of the criminal law" and, in part, ordered sheriffs to bring certain prisoners before the justices.⁵⁰ Professor William Duker writes that by the fourteenth century, there were instances of habeas corpus similar to *habeas corpus ad respondendum* instituted on the petition of the prisoner for the purpose of examining the cause of the imprisonment.⁵¹ By the middle of the fourteenth century, two existing writs—habeas corpus and a writ which inquired into the cause of detention—were aggregated to form *habeas corpus cum causa* or *corpus cum causa*. These were used in cases throughout the last half of the fourteenth century during what one commentator calls the "emergence of the modern writ."⁵² Thus, habeas corpus at this stage was a mechanism used by courts in both civil and criminal proceedings to bring prisoners or parties before them.

By the end of the fourteenth century, the use of habeas corpus as a way to compel sheriffs to bring persons before the courts embroiled contending English courts in jurisdictional disputes.⁵³ Initially, these disputes were solely between the courts, not between the courts and the King. Chancery was able to defeat the jurisdiction of inferior courts, and Parliament responded with legislation in an attempt to correct the situation in the fifteenth century. The justices of the King's Bench and of the Common Pleas also began to use habeas corpus to bring cases and prisoners before them throughout the fifteenth and sixteenth centuries.

The Constitution speaks of the "Privilege of the Writ of Habeas Corpus." Although Professor Duker does not specifically say, it

(stating that "history reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt.")

50 1 SIR FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 137 (2d ed. 1968).

51 DUKER, *supra* note 28, at 24.

52 *Id.* at 25; Maxwell Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ-I*, 18 CAN. B. REV. 10, 13 (1940); Maxwell Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ-II*, 18 CAN. B. REV. 172 (1940).

53 DUKER, *supra* note 28, at 27; *see also* 9 HOLDSWORTH, *supra* note 47, at 109-13.

seems that this language may originate from the combination of the writ of privilege and the writ of habeas corpus. Writs of privilege were granted to certain classes of persons—including members of Parliament, the King's ministers, and officers of the Crown courts—to be tried for violations of law in special courts, out of the jurisdiction of the ordinary courts. Duker writes that habeas corpus was used to "enforce the notion of privilege."⁵⁴

The combined use of the writs of privilege and *corpus cum causa* provided the ideal deterrent to encroachments on the jurisdiction of the superior courts. Inevitably this mechanism of defense was used by some as an offensive weapon to disrupt the just operation of the lower courts. Determined to enjoin this abuse, the superior courts would refuse to grant a writ of *corpus cum causa* based upon privilege if they perceived that the petition was an attempt by the applicant to evade his lawful obligations

In sum, the superior courts' efforts to maintain and extend their jurisdiction had the unintended effect of changing the nature of the prerogative writ of habeas corpus; for in so using the writ, the superior courts were questioning the validity of an imprisonment. This "liberalization" of the writ was accelerated when the jurisdictional contest shifted from the arena of the local courts to that of the superior courts.⁵⁵

This occurred between the fifteenth and seventeenth centuries with the common law courts (including the King's Bench) and the courts of equity.⁵⁶ When the King's Bench was held to be the superior court, the result, in effect, was that "the King's prerogative writ issued to defeat, technically that is, the King's own authority as embodied in the Chancery."⁵⁷ The common law courts also got involved in jurisdictional conflicts with the Court of High Commission, using writs of prohibition and habeas corpus. "The writ of prohibition was issued to enjoin the ecclesiastical judges from continuing the trial of a given case on the ground that it in-

54 DUKER, *supra* note 28, at 31 (citing *Vandevelde v. Lluellin*, 83 Eng. Rep. 910 (K.B. 1661); *Peter's Case*, 74 Eng. Rep. 628 (K.B. 1587); *Skrogges v. Coleshil*, 73 Eng. Rep. 386 (K.B. 1560); *Anon.*, 145 Eng. Rep. 113 (Ex. 1487)).

55 *Id.* at 32-33.

56 *Id.* at 33-35 (citing *Blackwell's Case*, 73 Eng. Rep. 1057 (K.B. 1626); *Apsley's Case*, 72 Eng. Rep. 940 (K.B. 1616); *Russwell's Case*, 81 Eng. Rep. 445 (K.B. 1616); *King v. Dr. Gouge*, 81 Eng. Rep. 98 (K.B. 1615); *Glanville v. Courtney*, 80 Eng. Rep. 1139 (K.B. 1615) (Coke, J.); *Addis' Case*, 79 Eng. Rep. 190 (K.B. 1610)); 1 HOLDSWORTH, *supra* note 47, at 461-63.

57 DUKER, *supra* note 28, at 35.

volved temporal matters. The writ of habeas corpus issued to free those imprisoned by the Commission.⁵⁸ Jurisdictional conflicts also erupted between the common law courts and the Court of Admiralty⁵⁹ and the Court of Requests.⁶⁰ The common law courts also conflicted with the Privy Council, an agency of the King.⁶¹ In most of these jurisdictional disputes, the Court of Common Pleas prevailed.

In 1627, a landmark developed in the *Case of the Five Knights or Darnel's Case*.⁶² Five knights, including Thomas Darnel, were imprisoned for refusing to grant King Charles what was in reality a "forced loan." While the court ruled for the King, not the knights, the losing arguments were ahead of their time according to Duker. Counsel for the knights, in losing, contended:

[T]he Writ of Habeas Corpus is the only means the subject has to obtain his liberty, and the end of this Writ is to return the cause of the imprisonment, that it may be examined in this court, whether the parties ought to be discharged or not: but that cannot be done upon this return: for the cause of the imprisonment of this gentleman at first is so far from appearing particularly by it, that there is no cause at all expressed in it.⁶³

Darnel's Case sparked intense debates in Parliament and something of a "political backlash." The House of Commons passed three resolutions supporting the writ of habeas corpus for those imprisoned without a showing of cause. Pamphlets containing the arguments by defense counsel were printed and distributed.

The historic Petition of Right of June 7, 1628 furthered the development of habeas corpus by limiting the ability of the King,

58 *Id.* at 36 (citing Anon, 79 Eng. Rep. 1097 (K.B. 1641); Torle's Case, 79 Eng. Rep. 1100 (K.B. 1641); Codd v. Turback, 81 Eng. Rep. 94 (K.B. 1616); Bradstone v. High-Commission Court, 80 Eng. Rep. 1138 (K.B. 1615); Chancey's Case, 77 Eng. Rep. 1360 (K.B. 1612); Lady Throgmorton's Case, 77 Eng. Rep. 1347 (K.B. 1611); Roper's Case, 77 Eng. Rep. 1326 (K.B. 1608); Fuller's Case, 77 Eng. Rep. 1322 (1607); 74 Eng. Rep. 1091 (K.B. 1607)); *see also* 1 HOLDSWORTH, *supra* note 47, at 605-11.

59 Hawkeridge's Case, 77 Eng. Rep. 1404 (1617); Thomlinson's Case, 77 Eng. Rep. 1379 (1605).

60 Humfrey's Case, 74 Eng. Rep. 513 (C.P. 1572); 1 HOLDSWORTH, *supra* note 47, at 414.

61 Case of the City of London, 77 Eng. Rep. 658 (K.B. 1610); Howel's Case, 74 Eng. Rep. 66 (C.P. 1588); Peter's Case, 74 Eng. Rep. 628 (C.P. 1587); Helyard's Case, 74 Eng. Rep. 455 (C.P. 1587); Hinde's Case, 74 Eng. Rep. 701 (C.P. 1577); 1 HOLDSWORTH, *supra* note 47, at 477-78, 492.

62 3 State Trials 1-59 (K.B. 1627).

63 DUKER, *supra* note 28, at 44 (quoting *Darnel's Case*, 3 State Trials at 6-7).

through the Privy Council, to imprison without a showing of cause.⁶⁴ Habeas corpus was only one part of the Petition of Right, which represented the culmination of several grievances against Charles I during a time of growing tension between Parliament and the King. The Petition also purported to limit the forced housing of soldiers, taxation without Parliament's consent, and the use of martial law against civilians. The incorporation of habeas corpus within the Petition demonstrated the essential function of habeas corpus as a measure of the rule of law versus rule by arbitrary will.

Two years later, in the landmark *Chamber's Case*,⁶⁵ counsel contended that the cause shown was not in accord with the Petition of Right. After being imprisoned for refusing to pay certain merchants' taxes, Chambers was granted a writ of habeas corpus by the King's Bench. The customary "return" that came back, describing the cause which justified Chambers' imprisonment, was held to be insufficient. Duker concludes:

Chamber's Case confirmed that the writ of habeas corpus had assumed a new role. No longer was it primarily an instrument employed by the common-law courts to protect their jurisdiction. The questioning of the validity of commitments, previously an incidental effect of the writ, now became the major object. It was at this point, then, that the writ of habeas corpus embarked upon its journey as 'the highest remedy in law, for any man that is imprisoned.'⁶⁶

The next stage in the development of habeas corpus came with the Habeas Corpus Act of 1641,⁶⁷ enacted after Parliament had been suspended from 1629 to 1640 during the reign of Oliver Cromwell. This Act purported to limit the privy council and the

64 The Petition stated in part:

V. Nevertheless, against the tenor of the said statutes, and other the good laws and statutes of your realm . . . divers of your subjects have of late been imprisoned, without any cause shewed; and when for their deliverance they were brought before your justices, by your majesty's Writs of Habeas Corpus, there to undergo and receive as the court should order, and their keepers commanded to certify the causes of their detainer; no cause was certified, but that they were detained by your majesty's special command, signified by the lords of your privy-council, and yet were returned back to several prisons, without being charged with any thing to which they might make answer according to the law.

Petition of Right, 1627, 3 Car. 1, ch. 1, reprinted in DUKER, *supra* note 28, at 86-87 n.362.

65 79 Eng. Rep. 717 (K.B. 1629).

66 DUKER, *supra* note 28, at 46-47.

67 Habeas Corpus Act, 1641, 16 Car. 1, ch. 10 (Engl.).

infamous Star Chamber. A person detained could apply for a writ of habeas corpus to the proper court. The Act required the sheriff (or other person with custody) to whom the writ was directed to file a "return," stating the factual and legal ground for the detention. At common law, the allegations in the "return" were deemed conclusive and could not be controverted by the prisoner.⁶⁸ When the court examined the return, it could bail, discharge, or remand the prisoner to custody. In this way, the Act of 1641 streamlined the process of habeas corpus that English courts had formulated.

The 1670 *Bushell's Case*,⁶⁹ although famous and frequently cited, hardly stands as precedent for broad federal habeas jurisdiction in criminal cases or for granting the writ after conviction. *Bushell* involved jurors imprisoned for contempt by an inferior court for delivering a verdict that allegedly ignored the evidence in a case involving trespass and disturbing the peace. They were brought before a superior common law court, Common Pleas, by habeas corpus and discharged *because of a defective return*.⁷⁰ *Bushell's Case* stands for the independence of juries,⁷¹ not the use of habeas as a post-conviction remedy.⁷²

68 39 C.J.S. *Habeas Corpus* § 98-99 (1976).

69 124 Eng. Rep. 1006 (C.P. 1670).

70

The Court hath no knowledge by this return [sic], whether the evidence given were full and manifest, or doubtful, lame, and dark, or indeed evidence at all material to the issue, because it is not return'd what evidence in particular, and as it was deliver'd, was given. For it is not possible to judge of that rightly, which is not expos'd to a mans [sic] judgment.

Id. at 1007; see ROBERT J. SHARPE, *THE LAW OF HABEAS CORPUS* 38-40 (1976).

71 See, e.g., Mark Cammack, *The Jurisprudence of Jury Trials: The No Impeachment Rule and the Conditions for Legitimate Legal Decisionmaking*, 64 U. COLO. L. REV. 57, 61 (1993); John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 206 (1988); Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 9 (1989).

72 Justice Brennan's reliance on *Bushell* in *Fay v. Noia*, 372 U.S. 391, 404 (1963) to refute the notion that "habeas corpus was available only to inquire into the jurisdiction, in a narrow sense, of the committing court," was thoroughly disparaged by Professors Oaks and Duker. DUKER, *supra* note 28, at 274 n.20; Oaks, *supra* note 33, at 463-64. Professor Duker found *Bushell* "completely consistent with the concept of jurisdiction." DUKER, *supra* note 28, at 227.

Professor James Liebman falls into a similar misconception of *Bushell*, stating that it shows that "the writ served in England to review post-trial, judicially sanctioned incarceration." Liebman, *supra* note 1, at 2042 n.241. This is the only English case he cites for this proposition. Liebman's language is misleading—the jurors were obviously not held after *their* trial; they were not tried. They were imprisoned for contempt after the

B. *The English Habeas Corpus Act of 1679*

The English Habeas Corpus Act of 1679 is the most significant part of the English law of habeas corpus for its impact on American law at the Founding.⁷³ When the Supreme Court first applied the Judiciary Act of 1787—granting the writ for federal prisoners only—the Court looked not only to the common law but also to the Act of 1679, which, as Chief Justice Marshall wrote, “enforces the common law.”⁷⁴ Blackstone called the Act of 1679 “the famous habeas corpus act . . . which is frequently considered as another magna carta of the kingdom.”⁷⁵ James Kent considered the Act of 1679 to be “the basis of all the American statutes on the subject.”⁷⁶ The Act of 1679 remained in force and unal-

trial of another.

73 The Act stated in pertinent part:

[W]hensoever any person . . . shall bring any habeas corpus directed unto any sheriff . . . for any person in his or their custody . . . that the said officer . . . shall within three days after the service thereof, as aforesaid (unless the commitment aforesaid were for treason or felony, plainly and especially expressed in the warrant of commitment), upon payment . . . of the charges of bringing the said prisoner . . . make return of such writ; and bring or cause to be brought the body of the party so committed or restrained, unto or before the lord chancellor or lord keeper of the great seal of England . . . , or the judges or barons of the said court . . . ; and shall then likewise certify the true causes of his detainer or imprisonment

. . . [A]nd if any person or persons shall be or stand committed or detained as aforesaid, for any crime, unless for felony or treason, plainly expressed in the warrant of commitment, in the vacation time and out of term, it shall and may be lawful to and for the person or persons so committed or detained (other than persons convict or in execution by legal process), or any one in his or their behalf, to appeal or complain to the lord chancellor or lord keeper

Habeas Corpus Act, 1679, 31 Car. II, ch. 2, § 58, *reprinted in* CHURCH, *supra* note 46, at 48-50.

74 *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (citing Habeas Corpus Act, 1679, 31 Car. II, ch. 2 (Engl.)). For Blackstone’s survey of the provisions of the law, see 3 WILLIAM BLACKSTONE, COMMENTARIES 136-37.

75 3 BLACKSTONE, *supra* note 74, at 135.

76 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 28 (2d ed. 1832); *see also* 2 THOMAS COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 718 (8th ed. 1927) (agreeing that the Act of 1679 is basis of American habeas corpus statutes).

Members of the Reconstruction Congress in 1866 were familiar with Kent’s explanation of English law and with the derivation of American habeas laws from the English Act of 1679. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2056-59 (1866) (“How is it in Virginia and North Carolina? Their *habeas corpus* act is a copy of the habeas corpus act of England, from which we have borrowed the common law and the writ of *habeas corpus*.”) (statement of Doolittle).

tered until 1816.⁷⁷ Thus, however complex and ambiguous the common law development of habeas corpus may seem, the 1679 Act provides clear and specific guidance for American courts on the law of habeas corpus at the time of the Judiciary Act of 1789—as the Supreme Court held in *Ex parte Watkins*.⁷⁸

The merit of the Act of 1679—also called Shaftesbury's Act after the principal sponsor, Lord Shaftesbury—was that it clarified the English law of habeas corpus, codified it, and compelled sheriffs and others who kept persons in custody to justify that custody by reference to law rather than personal will.⁷⁹ The Act also made habeas available during times of vacation by English courts. But the Act did not enlarge the scope of the writ in English law. Henry Hallam, in his *Constitutional History* provides:

It is a very common mistake, and that not only among foreigners, but many from whom some knowledge of our constitutional laws might be expected, to suppose that this statute of Charles II enlarged in a great degree our liberties, and forms a sort of epoch in their history; but though a very beneficent enactment, and eminently remedial in many cases of illegal imprisonment, it introduced no new principle, nor conferred any right upon the subject.⁸⁰

The Act also contained significant limitations.⁸¹ The Act did not apply

if it appear to the authority issuing the writ that the prisoner is detained by legal process, order, or warrant out of some court that hath *jurisdiction* in criminal matters, or by legal warrant for such matters or offenses for which, by the law, the prisoner is not bailable; or if he be committed for treason or felony, plainly expressed in the warrant of commitment, or if he be convict or in execution by legal process, or if he be charged with process in any civil suit.⁸²

Thus, the central concept of the jurisdiction of the committing

⁷⁷ SHARPE, *supra* note 46, at 20.

⁷⁸ 28 U.S. (3 Pet.) 193 (1830).

⁷⁹ PAUL M. BATOR ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1427 (2d ed. 1973).

⁸⁰ HENRY HALLAM, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 500 (London, 5th ed. 1847); *see also* Jenks, *supra* note 46, at 64 (“[T]he famous Habeas Corpus Act of 1679 created no new remedy, but merely strengthened and perfected an engine which had been used with effect in the great struggle between Crown and Parliament in the earlier years of the century.”).

⁸¹ *See generally* CHURCH, *supra* note 46, at 25-33, 48-58.

⁸² CHURCH, *supra* note 46, at 27 (emphasis added).

court, which figured so prominently in Supreme Court decisions from 1807 until the 1930s, goes back at least as far as this seminal act.⁸³

Moreover, the Act only applied to commitment in criminal cases. As one of the most prominent habeas treatise authors of the nineteenth century, Rollin Hurd, wrote, "The common law writ of habeas corpus . . . was not taken away by the act of 31 Car. II; but was left wholly untouched by it in all cases where the detainer was *not for criminal or supposed criminal matter*."⁸⁴ All *civil* instances excepted from the Act were required to rely on remedies that might otherwise be available by the common law.⁸⁵

Finally, the most significant limitation of the Act was that it applied only *before* conviction. As Professor Dallin Oaks accurately summarized:

At common law and under the famous Habeas Corpus Act of 1679 the use of the Great Writ against official restraints was simply to ensure that a person was not held without formal charges and that once charged he was either bailed or brought to trial within a specified time. If a prisoner was held by a valid warrant or pursuant to the execution or judgment of a proper court, he could not obtain release by habeas corpus.⁸⁶

As Chief Justice Marshall noted in *Ex parte Watkins*,⁸⁷ and Justice

83 Duker suggests that the courts of chancery, with their equity powers, used habeas corpus as a means of "correcting" the decisions and "defeating the jurisdiction" of inferior courts by the end of the 14th century. DUKER, *supra* note 28, at 27-29. In support of this proposition, he cites "three cases decided in the latter part of the fourteenth century" and several other cases. Some of the cases were civil, not criminal, and in one case, John Walpole's, the writ was directed to the sheriff and seems to have involved no "correction" of any court. In any case, Duker's use of the term "correction" does not mean that these courts overturned convictions or acted as appeals. Rather, the cases dealt with detention before any conviction and obviously go no farther than the Act of 1679.

84 HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS 199 (2d ed.) (emphasis added); see also ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 216-19 (9th ed. 1939); 9 HOLDSWORTH, *supra* note 47, at 110-25; Sir John Eardley Wilmot, *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 36, 85-86, 89, 105 (1758); Maxwell Cohen, *Habeas Corpus Cum Causa, The Emergence of the Modern Writ II*, 18 CAN. B. REV. 172, 186 (1940) ("the effect was to leave what may be termed *civil detentions* to the vagaries of the common law procedure.").

85 *But c.f.* Brief for Respondent at 30, *United States v. Hayman*, 342 U.S. 205 (1952) (No. 23) (stating without citation, "[T]he Act of 1679 . . . did not mark the full extent of the privilege of habeas corpus even at that time.").

86 Dallin H. Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 245 (1965).

87 28 U.S. (3 Pet.) 193 (1830).

Bradley noted in *Ex parte Parks*,⁸⁸ the 1679 Act “excepts from those who are entitled to its benefit, persons committed for felony or treason plainly expressed in the warrant, as well as persons convicted or in execution.”⁸⁹ (“In execution,” in this context, does not refer to capital punishment but means the carrying out of any sentence.) Thus, the rule under the common law provided that persons convicted were excluded from the privileges of the writ. This rule was part of the Act of 1679 and was incorporated into early American state statutes.⁹⁰

The Act of 1679 remained unamended and the essential statement of English habeas law until 1816, through the time of the American Founding and the Judiciary Act of 1789. Blackstone summarized the law in the 1760’s. He described habeas corpus as a remedy for the violation of personal liberty. In the context of his third volume on private wrongs, in a chapter on the remedies respecting the rights of private persons, Blackstone addressed “the violation of the right of personal liberty” by false imprisonment.⁹¹ The “injury” of false imprisonment, which Blackstone called “a heinous public crime,” was defined as the unlawful detention of a person. Unlawful was defined as “without sufficient authority.” The law provided punishment for the violator, private reparation for the injured party by removing the confinement, and a civil action for damages against the violator.⁹² According to Blackstone, there were four “means of removing the actual injury of false imprisonment,” all four being writs. One of those writs was habeas corpus (by which he referred to habeas corpus collectively), which Blackstone called “the most celebrated writ in the English law.”⁹³ After reviewing the various forms of habeas corpus, Blackstone

88 93 U.S. 18 (1876).

89 *Id.* at 21. Likewise, in *Ex parte Clarke*, 100 U.S. 399 (1879), Justice Bradley looked to the 1679 English Act in considering the propriety of the practice of one Supreme Court Justice postponing consideration of a writ filed with him and referring it to the whole Court. *Id.* at 403.

90 2 SIR EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 52 (1797); DICEY, *supra* note 84, at 217-18; COLLINGS, *supra* note 46, at 338; OAKS, *supra* note 86, at 254 (“The legislation in the twelve original states that followed the English Act was uniform in providing that the benefits of the act should not extend to persons properly charged with felony or treason or to ‘persons convict’ or in execution under civil or criminal process.”).

91 3 BLACKSTONE, *supra* note 74, at *127.

92 Chief Justice Marshall noted in *Ex parte Watkins* that if the judgment of a court in support of imprisonment “be a nullity, the officer who obeys it is guilty of false imprisonment.” 28 U.S. (3 Pet.) 193, 203 (1830).

93 3 BLACKSTONE, *supra* note 74, at *129.

emphasized habeas corpus *ad subjiciendum* (ad subjiciendum meaning to "submit to") as being "the great and efficacious writ in all manner of illegal confinement."⁹⁴ It is:

directed to the person detaining another, and commanding him to produce the body of the prisoner with the day and cause of his caption and detention . . . to do, submit to, and receive, whatsoever the judge or court awarding such writ shall consider in that behalf. This is a high prerogative writ, and therefore by the common law issuing out of the court of king's bench not only in term-time, but also during the vacation, by a fiat from the chief justice or any other of the judges, and running into all parts of the king's dominions: for the king is at all times intitled [sic] to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted.⁹⁵

Blackstone confirmed the function of habeas corpus as a protection against the deprivation of liberty by arbitrary will unsupported by law.

Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law . . . the laws of England have never abridged it without sufficient cause; and, that in this kingdom it cannot ever be abridged *at the mere discretion of the magistrate, without the explicit permission of the laws* By 16 Car. I. c. 10. [the Act of 1679] if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council; he shall, upon demand of his counsel, have a writ of *habeas corpus*, to bring his body before the court of king's bench or common pleas; who shall determine whether the cause of his commitment be just, and thereupon do as justice shall appertain

Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of

94 *Id.* at *131.

95 *Id.* A "prerogative writ" referred to "certain judicial writs issued by courts only upon proper cause shown, but never as a mere right," and included writs of certiorari, prohibition, and mandamus. DUKER, *supra* note 28, at 63 n.2; see also S.A. De Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40 (1951); Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523 (1923).

any, the highest, magistrate to *imprison arbitrarily whomever he or his officers thought proper* . . . there would soon be an end of all other rights and immunities.⁹⁶

As this survey demonstrates, the common law function of the writ was to require sufficient legal cause to prevent detention merely by the arbitrary will of a public official. The common law rule made habeas available before conviction; a convicted person was not entitled to the privilege of the writ because appeal was the remedy for a conviction contrary to law.⁹⁷ As one commentator concluded: "Certainly nothing in the historical background provides any indication that a prisoner convicted according to the course of the common law by a court of general criminal jurisdiction was ever entitled to the writ."⁹⁸

Accordingly, there is no basis under the common law or the English Act of 1679 for contemporary, sweeping declarations that habeas corpus "has been the judicial method of lifting undue restraints upon personal liberty"⁹⁹ or that habeas corpus "is a bulwark against convictions that violate fundamental fairness"¹⁰⁰ or that the historic function of the writ was "to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints"¹⁰¹ or that "the historic office of the Great Writ was the ultimate protection against 'fundamental unfairness'"¹⁰² or that the "ancient principles of the writ . . . embodied in the Federal Constitution" served as a "remedy for restraints contrary to the Constitution."¹⁰³

Similarly, the common law has been used to suggest that because habeas corpus was not intended to determine guilt or innocence, modern procedural rules respecting habeas corpus petitions should not be concerned with guilt or innocence. But this reasoning is misleading. It is true that habeas corpus at common law—as received by the Supreme Court in *Bollman* and *Watkins*—was not concerned with establishing guilt or innocence. However, this was because the function of habeas was *narrower*

96 1 BLACKSTONE, *supra* note 74, ¶130-31 (emphasis added).

97 See *supra* note 86 and accompanying text.

98 Collings, *supra* note 46, at 345.

99 Price v. Johnston, 334 U.S. 266, 269 (1948).

100 Engle v. Isaac, 456 U.S. 107, 126 (1982).

101 Fay v. Noia, 372 U.S. 391, 401-02 (1963).

102 Smith v. Murray, 477 U.S. 527, 541 (1986) (Stevens, J., dissenting).

103 Francis v. Henderson, 425 U.S. 536, 544 (1976) (Brennan, J., dissenting) (quoting *Fay*, 372 U.S. at 433-34, 438-39).

than this, not *broader*. Habeas was available only before conviction and for the purpose of establishing that sufficient legal cause existed for the prisoner's detention. It was for a court with competent jurisdiction to establish guilt or innocence, and habeas corpus was not intended to disturb that. The appellate process was the exclusive remedy for legal errors. The great writ was called "great" because of its more limited function: to protect against detention by the arbitrary will of a public official without sufficient legal cause. The real source of the expansive notion that "fundamental fairness" is the function of the writ is *Fay v. Noia*, decided only thirty years ago and since overruled. It is not surprising, therefore, that Professor Henry Hart confessed quite plainly in 1959:

It seems likely that the men who wrote the guarantee against suspension of the writ of habeas corpus into the Constitution . . . would have said that the writ does not lie at all to inquire into the validity of the detention of a person who is held pursuant to a judgment of conviction . . .¹⁰⁴

This was the writ of habeas corpus inherited by the Framers and the authors of the Judiciary Act of 1789. English law, as received by the American colonies at the time of the Founding, does not by itself provide historical precedent or legal authority for the much broader scope of habeas jurisprudence exercised today in our federal system. As one modern Canadian commentator has written, "The American use of the writ as a post-conviction remedy contrasts markedly with the English practice."¹⁰⁵

III. THE TEXT AND LEGISLATIVE HISTORY OF THE HABEAS CORPUS ACT OF 1867

A. *The Text*

Until Congress enacted the Habeas Corpus Act of 1867, no statute provided federal courts with jurisdiction to hear petitions for habeas corpus from state prisoners except in very narrow circumstances. The 1867 Act provided, in pertinent part:

[T]he several courts of the United States . . . within their respective jurisdictions, in addition to the authority already con-

104 Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 103 (1959).

105 SHARPE, *supra* note 70, at v.

ferred by law, shall have power to grant writs of habeas corpus in 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 States¹⁰⁶

Because the Court has held, since *Bollman*, that the term "habeas corpus" incorporated the common law rules, the language must be read against the backdrop of habeas law in 1867.

This backdrop provides several guidelines. First, the phrase "in addition to the authority already conferred by law" is also contained in the 1833 and 1842 Acts. The phrase cannot refer to the common law, or expand the common law, because, as the Court in *Bollman* held, the federal courts had no inherent power to grant writs of habeas, only that authority conferred by federal statute. Thus, the only "authority already conferred by law" was conferred by statute. Moreover, in *Cunningham v. Neagle*,¹⁰⁷ the Court construed the word "law" in the 1833 Act to refer to statutes.¹⁰⁸ Four federal habeas statutes were in effect in 1866: the original 1789 Act granting habeas jurisdiction for federal prisoners; the 1833 Act allowing habeas for federal officials imprisoned under state law;¹⁰⁹ the 1842 Act applicable to foreign nationals held in state custody;¹¹⁰ and the Act of March 3, 1863¹¹¹

106 The Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.

107 135 U.S. 1 (1890).

108 *Id.* at 8 (Lamar, J., dissenting) (citing *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 657-58 (1834)).

109 Force Act of March 2, 1833, ch. 57, §7, 4 Stat. 634-35, provided:

That either of the *justices* of the Supreme Court or a *judge* of any district court of the United States, *in addition to the authority already conferred by law*, shall have power to grant writs of habeas corpus in all cases of a prisoner or prisoners, in jail or confinement, where he or they shall be committed or confined on, or by authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof.

Id. (emphasis added).

110 Act of Aug. 29, 1842, ch. 257, 5 Stat. 539, provided:

That either of the justices of the Supreme Court of the United States, or judge of any district court of the United States, in which a prisoner is confined, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of any prisoner or prisoners in jail or confinement, where he, she, or they, being subjects or citizens of a foreign State, and domiciled therein, shall be committed or confined, or in custody, under or by any authority or law, or process founded thereon, of the United States, or of any one of them, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, or order, or sanction, of any foreign State or

ratifying the suspension of the writ by President Lincoln. The phrase must refer to authority "already conferred" by federal statute.

Second, as the Court held in *Bollman*, when Congress incorporated the term "habeas corpus" into the federal statute, the grant of power, by use of that term, was read to incorporate the common law writ of habeas corpus, which carried its own limitations. To the extent that the common law nature and procedure of habeas corpus was left unchanged by the 1867 Act, it was incorporated into the 1867 Act. The two most important limitations were the jurisdiction doctrine and pre-conviction availability.

Third, the 1867 Act uses the phrase "any person . . . restrained of his or her liberty in violation of the Constitution," rather than "prisoners in jail or confinement" as used in the 1789, 1833, and 1842 habeas corpus statutes. The Act does not refer to "convictions," and, despite the breadth of the "restrained" language at first blush, nothing in the "restrained" language suggests a desire to alter or overturn the "conviction" limitations in the 1679 English Act. Blackstone used the same term "restrained" in referring to the application of habeas corpus before conviction.¹¹² Other sources also used the "restrained" language in reference to habeas corpus when it was fully recognized that the writ

Sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof.

111 Ch. 81, 12 Stat. 755; see *Neagle*, 135 U.S. at 70-71 (reviewing purposes of the 1833 and 1842 acts); *Ex parte Jenkins*, 69 U.S. (2 Wall.) 521, 529 (1853) (on the purposes of the 1833 Act); George F. Longsdorf, *The Federal Habeas Corpus Acts Original and Amended*, 13 F.R.D. 407 (1953).

Professor Peller's attempt to derive support for expansive federal habeas jurisdiction for state prisoners from judicial interpretations of these statutes is futile. Peller, *supra* note 21, at 611, 616-17. By their terms, they were clearly limited in their scope in form and substance to a narrow class of cases. As the Court acknowledged in *Ex parte McCordle*, 73 U.S. (6 Wall.) 318 (1867), the 1842 Act applied to "a small class of cases arising from commitments for acts done . . . under alleged authority of foreign governments." *Id.* at 325.

The Reconstruction Construction also clearly understood this. For example, in March, 1866, Congressman Cook of Illinois called up H.R. 298 from the House Judiciary Committee, which purported to enlarge the protection for federal officers acting under authority of the United States or the President under the Force Bill and the Habeas Corpus Act of March 3, 1863. The limited scope of the 1842 Act was clearly recognized. CONG. GLOBE, 39th Cong., 1st Sess. 1387-90 (1866). Federal court review was provided for trial of the question whether the federal officers were acting under authority of federal law. *Id.* at 1423-26, 1523-30. (The bill passed the House on March 20. *Id.* at 1530. The Senate took up the bill on April 18.)

112 3 BLACKSTONE, *supra* note 74, * 131.

was not available after conviction.¹¹³ Thus, the "restrained in violation of the constitution" language must be read consistently with the limitations of the 1679 English Act to refer to "restraints" *prior to conviction* that violate the Constitution or federal statutes. As we will see, it was exactly this kind of restraint that posed a vivid problem in the Reconstruction context of the Act.¹¹⁴

Thus, a proper textual analysis confirms Justice Harlan's reading of the Act in his dissent in *Fay v. Noia*: "the change accomplished by the language of the Act related to the *classes* of prisoners (in particular, state as well as federal) for whom the writ would be available."¹¹⁵ The ostensible purpose of the 1867 Act was to encompass state prisoners, not to change the nature of the writ itself.

Finally, the change in habeas procedure made in the 1867 Act, enhancing the inquiry into the "cause of commitment," implies no change in the common law conviction limitation. Congress added a fact determination provision, presumably taken from an 1816 English statute which did not apply to criminal cases.¹¹⁶ This allowed the person in custody to "deny any of the material facts set forth in the return," allege facts under oath to show that "the detention is in contravention of the Constitution or laws of the United States," and ordered the court to "proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested."¹¹⁷ This provision applied, however, only after the court had examined the petition, determined that the petition itself did not show that the person was lawfully held, and issued the writ to the custodian. The procedural change only relates to the *inquiry* into the cause of restraint beyond the face of the return and says nothing about the cause or timing of the restraint; it implies nothing about any change in the

113 See, e.g., *In re Kaine*, 55 U.S. (14 How.) 103, 147 (1852) (Nelson, J., dissenting) ("This writ has always been justly regarded as the stable bulwark of civil liberty; and undoubtedly, in the hands of a firm and independent judiciary, no person, be he citizen or alien, can be subjected to illegal restraint, or be deprived of his liberty, except according to the law of the land.").

114 Cf. Frankfurter, *supra* note 34, at 531 ("[Holmes'] habit of mind . . . had a natural tendency to confine what seemed to him familiar language in a statute to its familiar scope.")

115 *Fay v. Noia*, 372 U.S. 391, 452 (1963) (Harlan, J., dissenting).

116 See DUKER, *supra* note 28, at 193.

117 The Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385, 385-86; DUKER, *supra* note 28, at 216 n.79.

common law conviction limitation.¹¹⁸ Thus, when the plain language is read against the backdrop of existing common law, habeas statutes, and case law, the language is incompatible with the full review model of habeas relitigation and post-conviction application explicitly adopted in *Brown v. Allen*.¹¹⁹

In *Fay*, Justice Brennan justified an expansive interpretation of the 1867 statute with the following reasoning:

Although the Act of 1867, like its English and American predecessors, nowhere defines habeas corpus, its expansive language and imperative tone, viewed against the background of post-Civil War efforts in Congress to deal severely with the States of the former Confederacy, would seem to make inescapable the conclusion that Congress was enlarging the habeas remedy as previously understood, not only in extending its coverage to state prisoners, but also in making its procedures more efficacious.¹²⁰

None of these factors justifies—in fact, they all weigh against—the conclusion that the 1867 Act applied post-conviction. That the Act “nowhere defines habeas” means that the common law procedures and limitations are incorporated unless specifically changed, as the Court held in *Bollman* and *Watkins*. The language of the 1867 Act is no more “expansive” than the 1789, 1833, or 1842 Acts, except in a few particulars, none of which relate to the common law post-conviction limitation. The changes relate to its application to *state* prisoners, its invocation of constitutional law, and its broader fact-finding provisions. In addition, the 1867 Act is no more “imperative” than the prior federal acts. The “backdrop” of the post-Civil War efforts suggests, if anything, a limitation of the class of prisoners to freedmen and loyal Unionists. Finally, the fact that the 1867 Act enlarged the class of prisoners and expanded the factual inquiry does not imply that it dropped the pre-existing limitation against post-conviction relief. Justice Brennan’s reasoning, therefore, fails.

Contemporary scholars have had to supply a rationale for the Court’s expansive decision in *Brown v. Allen* because little can be found in the Court’s decisions between *Moore v. Dempsey*¹²¹ and *Brown*.¹²² The Court never closely examined the language of the

118 Cf. *Frank v. Mangum*, 237 U.S. 309, 330-31 (1915).

119 344 U.S. 443 (1953).

120 *Fay*, 372 U.S. at 415.

121 261 U.S. 86 (1923).

122 See, e.g., *United States v. Hayman*, 342 U.S. 205 (1952) (federal case); *Jennings v.*

Illinois, 342 U.S. 104 (1951) ("Where the state does not afford a remedy, a state prisoner may apply for a writ of habeas corpus . . ."); *Dowd v. United States ex rel. Cook*, 340 U.S. 206 (1951); *Darr v. Burford*, 339 U.S. 200, 205 (1950) (state case; cursory examination of 1867 Act; "writ . . . commands general recognition as the essential remedy to safeguard a citizen against imprisonment by State or Nation in violation of his constitutional right" (citing *Hawk*, 326 U.S. at 274)); *Young v. Ragan*, 337 U.S. 235 (1949) (reviewing availability of state habeas corpus as remedy for due process violations); *Loftus v. Illinois*, 334 U.S. 804 (1948); *Wade v. Mayo*, 334 U.S. 672 (1948) (state right to counsel case; no consideration of language or history of 1867 Act); *Price v. Johnston*, 334 U.S. 266, 283 (1948) (5-4 decision) ("to afford a swift and imperative remedy in all cases of illegal restraint upon personal liberty"); *Von Moltke v. Gillies*, 332 U.S. 708 (1948); *Sunal v. Large*, 332 U.S. 174 (1947); *Eagles v. U.S. ex rel. Samuels*, 329 U.S. 304 (1946); *Carter v. Illinois*, 329 U.S. 173 (1946); *Woods v. Nierstheimer*, 328 U.S. 211, 217 (1946) ("[I]f the State of Illinois should at all times deny all remedies . . . the federal courts would be available to provide a remedy . . ."); *Hawk v. Olson*, 326 U.S. 271 (1945); *Rice v. Olson*, 324 U.S. 786 (1945) (state case; reversing denial of writ for review of right to counsel claim); *White v. Ragen*, 324 U.S. 760 (1945); *House v. Mayo*, 324 U.S. 42 (1945); *Tomkins v. Missouri*, 323 U.S. 485 (1945) (state case; reversing denial of writ to review claim of deprivation of counsel under *Powell v. Alabama*, 287 U.S. 45 (1932)); *Ex parte Hawk*, 321 U.S. 114 (1944) (per curiam) (state case; "where resort to state court remedies has failed to afford a full and fair adjudication . . . either because the state affords no remedy . . . or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate . . . a federal court should entertain his petition for habeas corpus, else he would be remediless." (citing *Moore*)); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 274 (1942) (federal prisoner; "the writ . . . should not do service for an appeal"); *Pyle v. Kansas*, 317 U.S. 213, 215 (1942) (state case; knowing use of perjured testimony (citing *Mooney*)); *Cochran v. Kansas*, 316 U.S. 255 (1942); *Waley v. Johnston*, 316 U.S. 101, 104-105 (1942) (per curiam) (federal prisoner, allegedly coerced by FBI agent to plead guilty; "In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." (citing *Moore*, *Mooney*, *Bowen*)); *Holiday v. Johnston*, 313 U.S. 342 (1941) (federal indictment; referring to hearing procedure from 1867 Act, remanded case for hearing of testimony); *Walker v. Johnston*, 312 U.S. 275 (1941) (federal prisoner, applying hearing procedure from 1867 Act; no voluntary waiver of counsel, allegedly coerced into pleading guilty); *Bowen v. Johnston*, 306 U.S. 19, 23 (1939) (federal prisoner; habeas corpus cannot be used as writ of error; scope of review limited to examination of jurisdiction, but "if it be found that the court had no jurisdiction . . . or that in its proceedings his constitutional rights have been denied, remedy of habeas corpus is available" (citing *Watkins*)); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (federal prisoner; ordered federal court on habeas corpus to determine on the merits whether the defendant had made an effectual waiver of 6th Amendment right to counsel, *id.* at 465; "Congress has expanded the rights of a petitioner for *habeas corpus*" (citing 28 U.S.C. § 451), *id.*; "Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence" *id.* at 468); *Escoe v. Zerbst*, 295 U.S. 490 (1935) (federal prisoner); *Mooney v. Holohan*, 294 U.S. 103, 113 (1935) (per curiam) (conviction obtained solely through knowing use of perjured testimony results in a deprivation of liberty without due process of law; Court not satisfied that state failed to provide corrective judicial process, no exhaustion of remedies); *McNally v. Hill*, 293 U.S. 131 (1934) (federal case); *Knewel v. Egan*, 268 U.S. 442, 445 (1925) ("habeas corpus calls in question only the jurisdiction of the court whose judgment is challenged" (citing *Frank*)); *Goto v. Lane*, 265 U.S. 393,

1867 Act until *Fay v. Noia*. Its first consideration of the Act, in *Ex parte McCardle* (*McCardle I*), was clearly dictum, given its later decision in *McCardle II* that the Court lacked jurisdiction.¹²³ In 1876, in *Ex parte Parks*,¹²⁴ Justice Bradley stated that the 1867 Act was "passed in consequence of the state of things that followed the late rebellion," but this idea was never further developed.¹²⁵ In *Ex parte Royall*,¹²⁶ the Court's first consideration of the statute after restoration of its appellate jurisdiction, a careful analysis might have been expected. Instead, Justice Harlan's meandering opinion in *Royall*—a state, pre-conviction case involving an attack on the constitutionality of a Virginia business law—implies almost befuddlement with the language and contains no close analysis.¹²⁷ Justice Black, in applying the habeas statute for federal prisoners in *Johnson v. Zerbst*,¹²⁸ suggested that Congress intended a broadening of habeas, but cited no authority for this notion. Likewise, Justice Frankfurter, in his opinion in *Brown v. Allen*,¹²⁹ contended that the 1867 Act compelled the result in *Brown*—that any constitutional questions could be relitigated on federal habeas. But

402 (1924) (conviction by territorial court, did not fall within exceptional cases of pressing need or where the process or judgment is wholly void (citing *Watkins*)); *Salinger v. Loisel*, 265 U.S. 224, 230 (1924) (federal case; prior refusal to grant habeas is not without bearing or weight when a later petition raising same issues is considered); *United States v. Valante*, 264 U.S. 563, 565 (1924) (federal case, habeas cannot be used as substitute for writ of error); *Rodman v. Pothier*, 264 U.S. 399, 402 (1924) (murder on military reservation; "consideration of many facts and seriously controverted questions of law . . . must be determined by the court where the indictment was found"); *Craig v. Hecht*, 263 U.S. 255, 277 (1923) (federal case; "habeas corpus cannot be utilized for the purpose of proceedings in error"); *Riddle v. Dyche*, 262 U.S. 333, 335 (1923) (habeas cannot be used as a substitute for writ of error (citing *Frank*)); *Moore v. Dempsey*, 261 U.S. 86 (1923) (state case; 1867 Act not cited, only habeas precedent cited is *Frank*).

123 *McCardle I*, 73 U.S. (6 Wall.) 318, 325-26 (1867). The Court simply denied a motion to dismiss, holding that it had jurisdiction of a case involving a prisoner in the custody of military authorities. However, in a later opinion, *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), the Court dismissed the appeal for lack of jurisdiction. The earlier opinion is cited thereafter in only a very few habeas cases and in no case applying the 1867 Act. *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1868), was a federal case.

124 93 U.S. 18 (1876).

125 *Id.* at 22.

126 117 U.S. 241 (1886).

127 *See, e.g., id.* at 251 ("We cannot suppose that Congress intended to compel those courts . . . to draw to themselves, in the first instance, the control of all criminal prosecutions . . ."); *id.* at 253 ("It was further observed, in the same case [*Ex parte Bridges*, 4 F. Cas. 98 (C.C.N.D. Ga. 1875) (No. 1,862)], that while it might appear unseemly that a prisoner, after conviction in a State court, should be set at liberty by a single judge on habeas corpus, there was no escape from the act of 1867 . . .").

128 304 U.S. 458 (1938).

129 344 U.S. 443 (1953).

Frankfurter's expansive reading in *Brown* was not supported by any analysis of the language of the Act, its legislative history, or by citation to any authority.¹³⁰ In his dissent in *Sunal v. Large*,¹³¹ Frankfurter apparently felt he could dispose of the 115 year old rule of *Ex Parte Watkins* that habeas could not be used as a writ of error (a rule repeatedly stated by the Court) by calling it a "well-worn formula."¹³² From *Moore* to *Brown*, the Court never considered the plain language or legislative history of the 1867 Act. Instead, it expanded the writ in *federal* prisoner cases and imported that expansion into state prisoner cases without analysis. The Court did not closely examine the language or legislative history until *Fay v. Noia*.¹³³

B. The Legislative History

Beyond its plain language, it is helpful to read the 1867 Act in the context of its legislative history. Although the use of legislative history in statutory construction has come under substantial criticism by Justice Scalia of late,¹³⁴ other Justices regularly consult legislative history. There are just reasons to be concerned with the use of legislative history, especially when it sweeps beyond official congressional documents into a general history of the "spirit" of the times. In the case of the 1867 Act, the thrust of the legislative history is more compelling in refuting any post-conviction application of the Act than in narrowing the class of persons seemingly encompassed by the plain language.

In what is apparently the only thorough review of the legisla-

130 Frankfurter's opinion in *Brown* was foreshadowed by his dissenting opinion in *Sunal v. Large*, 332 U.S. 174, 184 (1947), where he asserted that the "writ was greatly enlarged after the Civil War" by the 1867 Act. For this proposition, he cited only Holmes' dissent in *Frank v. Mangum*, 237 U.S. 309, 345 (1915), that habeas was "available to cut through forms and go 'to the very tissue of the structure.'" *Sunal*, 332 U.S. at 184 (quoting *Frank*, 237 U.S. at 346). But Frankfurter took Holmes out of context, for Holmes never referred to the 1867 Act in *Frank* or suggested that the 1867 Act enlarged habeas corpus.

131 332 U.S. 174 (1947).

132 *Id.* at 184; cf. Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1017 (1985) (referring to the *Watkins* doctrine as "traditional rhetoric"). There is reason to believe that Frankfurter's views on habeas were shaped more by his intense involvement in the Sacco-Vanzetti case than by the text of the 1867 Act or its history. See EDMUND WILSON, *PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR 777-78* (1962) (describing Holmes-Frankfurter interaction regarding case).

133 372 U.S. 391 (1963).

134 See generally Bradley C. Karkkainen, "Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 HARV. J.L. & PUB. POL'Y 401 (1994).

tive history, Professor Lewis Mayers described the Act as "a measure drafted in vague terms . . . reported only orally, explained in one way in the house in which it originated and in an entirely different way in the other house, and passed without debate and with only the most casual attention in either chamber."¹³⁵ The legislative history begins with a joint resolution signed by President Lincoln on March 3, 1865, designed to grant freedom to some former slaves serving in the Union forces and their wives and children.¹³⁶ On December 18, 1865, the Thirteenth Amendment was ratified and became effective. The next day, December 19, the House passed a new resolution, ordering the House Judiciary Committee to formulate legislation that would enforce the March 3 Joint Resolution:

Resolved, That the Committee on the Judiciary be directed to inquire and report to this House, as soon as practicable, by bill or otherwise, what legislation is necessary to enable the courts of the United States to enforce the freedom of the wives and children of soldiers of the United States under the joint resolution of Congress of March 3, 1865, and also to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery.¹³⁷

Three weeks later, on January 8, 1866, the chairman of the House Judiciary Committee, Representative James F. Wilson of Iowa, introduced a "bill to secure the writ of *habeas corpus* to persons held in slavery or involuntary servitude contrary to the Constitution of the United States," but the bill was never reported out of his committee.¹³⁸

A different bill, H.R. 605, was drafted and introduced in the House by Representative William Lawrence (R.-Ohio), a member of the House Judiciary Committee.¹³⁹ Lawrence called up the bill for discussion on July 25, 1866. The first and second sections of

135 Mayers, *supra* note 33, at 32.

136 J. Res. 29, 38th Cong., 2d Sess. (1865); see DUKER, *supra* note 28, at 189-99, 215 n.57; Mayers, *supra* note 33, at 33 & n.12.

137 CONG. GLOBE, 39th Cong., 1st Sess. 87 (1865).

138 CONG. GLOBE, 39th Cong., 1st Sess. 135 (1866); Mayers, *supra* note 33, at 33. Mayers reports that Wilson's bill was never printed, but that the original handwritten bill is in the National Archives. *Id.* at 34 n.16. The *Congressional Globe* headlines Wilson's bill as "Protection of Emancipated Slaves." CONG. GLOBE, 39th Cong., 1st Sess. 135 (1866).

139 Professor William Wiecek states that Wilson's bill was "replaced" by Lawrence's, but Wiecek does not give the reasons for this replacement. William M. Wiecek, *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, 36 J. SOUTH. HIST. 530, 538 (1970).

the bill were read. A Democratic opponent, Representative LeBlond, asked "whether in case a person who is not bound to perform service in the Army or Navy is taken possession of by the Government, he is 'cut off from the benefit of the writ of *habeas corpus*' under this bill."¹⁴⁰ LeBlond was concerned that the second section exempted those held by military authorities.¹⁴¹ Lawrence replied, "I think not . . . This has no relation to that subject at all," and then immediately explained "the object of the bill":

On the 19th of December last, my colleague [Mr. Shellabarger] introduced a *resolution* instructing the Judiciary Committee to inquire and report to the House as soon as practicable, by bill or otherwise, what legislation is necessary to enable the courts of the United States to enforce the freedom of the wife and children of soldiers of the United States, and also to enforce the liberty of all persons. Judge Ballard, of the district court of Kentucky, decided that there was no act of Congress giving courts of the United States jurisdiction to enforce the rights and liberties of such persons. In pursuance of *that resolution* of my colleague this bill has been introduced, the effect of which is to enlarge the privilege of the writ of *habeas* [sic] *corpus*, and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them. It is a bill of the largest liberty, and does not interfere with persons in military custody, or restrain the writ of *habeas corpus* at all.¹⁴²

Without further debate, the bill was passed.

Lawrence's stated purpose relates to a specific, limited class of people and not at all to state prisoners imprisoned for or convicted of crimes. His reference to "all persons" relates, in the context of the same sentence, to the persons encompassed by the December 19 Resolution (i.e., "all persons under the operation of the constitutional amendment abolishing slavery"),¹⁴³ because Lawrence said he introduced the bill "[i]n pursuance of that

140 CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866).

141 Mayers, *supra* note 33, at 38 & n.34 (citing Proclamation 51, 13 Stat. 774 (1865)). Mayers reports that, by a presidential proclamation of December 1, 1865, Lincoln's suspension of habeas corpus on September 15, 1863 was terminated "in all the loyal states except Kentucky," and that the Judiciary Act of 1789 provided for habeas corpus for persons in federal military custody where the writ was not suspended. *Id.* at 38 n.34.

142 CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866) (emphasis added).

143 CONG. GLOBE, 39th Cong., 1st Sess. 87 (1865).

resolution."¹⁴⁴ He did not need to quote the Resolution word for word because Congress was familiar with it. Justice Brennan, in *Fay v. Noia*, quoted only part of the very last sentence ("a bill of the largest liberty"), but one must read this phrase in the context of the entire statement, the Resolution, and the brief debate, to refer to the military custody question.¹⁴⁵ Although Wilson's and Lawrence's bills were separate, Lawrence makes a direct tie back to the December 19 Resolution. In the context of existing law and the status of habeas corpus in the loyal states except Kentucky, Mayers interpreted Lawrence's statement that it was "a bill of the largest liberty" as meaning that "it extended the federal habeas jurisdiction to freedmen yet in no way constricted the existing federal habeas protection of federal prisoners."¹⁴⁶

Lawrence's reference to "Judge Ballard"¹⁴⁷ has gone unexamined by every commentator on the Act of 1867 except William Duker.¹⁴⁸ Immediately after referring to "all persons," Lawrence refers to Judge Ballard and the enforcement of "the rights and

144 CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866).

145 Wiecek's reading is similarly superficial and incomplete. Wiecek, *supra* note 139, at 538.

146 Mayers, *supra* note 33, at 38; see also DUKER, *supra* note 28, at 190; William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333, 344 (1969). Professor Wiecek writes that "Wilson's bill was replaced by a new two-part bill and reported out," referring to Lawrence's bill. *Id.* He refers to Lawrence's statement, without quoting it in full, asserting that Lawrence:

who reported out the bill, stated that it was originally designed to protect the wives and children of freedmen who served in the Union army, but that, in its revised version, its 'effect is to enlarge the privilege of the Writ of habeas corpus, and to make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them.'["]

Id. at 344-45. Wiecek called this a "sweeping explanation of the jurisdiction conferred by the bill . . ." *Id.* at 345. Wiecek, however, reads into Lawrence's statement a contrast between the "originally designed" bill and its "revised version" that Lawrence never makes. *Id.* at 344. In fact, Lawrence said that "this bill" was introduced "in pursuance of that resolution" of December 19th. CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866). Moreover, Lawrence's reference to expansive jurisdiction is made in direct response to Rep. LeBlond's concern that the second section of the bill exempted those held by military authorities.

147 CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866).

148 According to Duker, the Ballard reference involves the case of *Corbin v. Marsh*, 63 Ky. (2 Duv.) 193 (1865) (combined with *Hughes v. Todd*, 63 Ky. (2 Duv.) 188 (1865)). See DUKER, *supra* note 28, at 190, 215 n.58. Judge Bland Ballard was a federal district judge in Kentucky between 1861-1879. BIOGRAPHICAL NOTES OF THE FEDERAL JUDGES, 30 F. Cas. 1361, 1362 (1897). However, he was not associated with the *Corbin* decision in the Kentucky Reports, unless the case also came to his court. If so, that decision has not been identified.

liberties of *such* persons."¹⁴⁹ The reference to Ballard is a specific and concrete example of the type of problem to which the bill was addressed. It is well known that Reconstruction involved a prolonged period during which violence was committed against the freedmen and their families, and their civil rights were denied. All of this was the subject of an 800 page Congressional report issued by the Committee on Reconstruction early in 1866.¹⁵⁰ Violence and civil rights violations also occurred in Kentucky.¹⁵¹ It is estimated that "65,000 men, women and children remained slaves in Kentucky after March, 1865," and white landowners continued to hold freedmen over concern about their labor supply.¹⁵² The Freedman's Bureau was established in March, 1865, and announced that it would begin operations in Kentucky in December, 1865. The Civil Rights Act was passed over President Johnson's veto on April 9, 1866. A new Freedman's Bill was passed in June, 1866, and the Fourteenth Amendment was proposed by Congress that month. Beginning in February, 1866, "[i]ntervention by the bureau into legal proceedings prevented Louisville officials from sending Afro-Americans to jail on several occasions."¹⁵³

Federal District Judge Ballard, who had a reputation for protecting the rights of freedmen, had communicated with the Freedman's Bureau about its work in Kentucky and had corresponded with Senator Trumbull in March, 1866, concerning the Civil Rights Bill and the need to protect the rights of freedmen.¹⁵⁴ With the passage of the Civil Rights Act in April, and the Kentucky state courts denying blacks the right to testify in court cases, the Bureau "consistently moved cases to the United States district court in Louisville under the jurisdiction of Judge

149 CONG. GLOBE, 39th Cong., 1st Sess 4151 (1866) (emphasis added).

150 REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REP. NO. 30, 39th Cong., 1st Sess. (1866).

151 GEORGE C. WRIGHT, RACIAL VIOLENCE IN KENTUCKY, 1865-1940, at 19 (1990); see also VICTOR B. HOWARD, BLACK LIBERATION IN KENTUCKY: EMANCIPATION AND FREEDOM, 1862-1884 (1983); DONALD G. NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-1868, at 140 (1979); HAMBLETON TAPP & JAMES C. KLOTTER, KENTUCKY: DECADES OF DISCORD, 1865-1900, at 50 (1977); ROSS A. WEBB, KENTUCKY IN THE RECONSTRUCTION ERA (1979).

152 WEBB, *supra* note 151, at 39-40.

153 WRIGHT, *supra* note 151, at 23.

154 HOWARD, *supra* note 151, at 133-34, 201 n.27. Ballard wrote to Trumbull, "I have a strong desire that Congress shall pass the Civil Rights Bill over the President's veto. If this bill cannot be passed then some other bill must be. It will not do to leave the civil rights of the Negroes unprotected." *Id.* at 134.

Bland Ballard.”¹⁵⁵ In light of the Ballard example, the “such persons” that Lawrence referred to were clearly freedmen.

There is no evidence to indicate, as some have argued, that the difference in language between Wilson’s bill and Lawrence’s meant that Congress consciously intended to drop all common law constraints and adopt a full relitigation model for federal habeas.¹⁵⁶ Lawrence’s “any person . . . restrained of his or her liberty . . . in violation of the Constitution” language is not significantly broader than Wilson’s “persons held in slavery or involuntary servitude contrary to the Constitution.” Congress was specifically concerned with freedmen, or their children, held under apprenticeship laws.¹⁵⁷ It is reasonable to conclude that Wilson’s narrower language might not encompass all the myriad ways in which freedmen might be “restrained,” and thus, it is reasonable to conclude, as Mayers suggested, that it was designed to make the law “more serviceable” to freedmen and their families. Although the different language in Lawrence’s bill may be taken as relevant to the breadth of the class affected, neither Wilson’s nor Lawrence’s language justifies any conclusion that Congress intended to drop common law pre-conviction limits on habeas.

Discussion in the Senate on July 27, 1866, two days after House passage, was abbreviated, but, at first blush, may suggest a different purpose.¹⁵⁸ Senator Lyman Trumbull of Illinois, the chairman of the Senate Judiciary Committee, called up the bill for consideration. There was a brief debate. The first and second sections of the bill were described, including the exemption for “any person who is or may be held in the custody of the military authorities.”¹⁵⁹ Senator Davis then objected to the diminution of state authority. Trumbull apologized that it was “a House bill; it

155 *Id.* at 134; WRIGHT, *supra* note 151, at 23.

156 *See* Wiecek, *supra* note 146, at 344-45. Professor Steiker, for example, contends that Mayer, *supra* note 33, has trouble “explaining why Congress chose to express its purportedly narrow purpose in such expansive language.” Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 885 (1994). The issue, however, is—expansive as to what? While the language may be expansive regarding the class affected (“any person”), the language does not suggest any expansion of the common law function except to allow habeas (with its pre-conviction limitation) to test such restraints against the Constitution.

157 *See, e.g.*, NIEMAN, *supra* note 151, at 76, 78-82, 92-95, 137-38; *see also In re Turner*, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247) (Chief Justice Chase, on circuit, granting habeas to ex-slave held by ex-master under Maryland apprenticeship act).

158 CONG. GLOBE, 39th Cong., 1st Sess. 4228 (1866).

159 *Id.* at 4229.

was not prepared in the Senate," and said that he was "sorry that the Senator from Maryland (Mr. Johnson) is not here; he examined it in committee, and is in favor of its passage."¹⁶⁰ He replied that the military exemption meant that military cases would not be taken away from the military authorities. He denied that the bill would "interfere at all with any existing condition of persons held in confinement in consequence of the rebellion" and would not object to such an express amendment.¹⁶¹ He then gave what Justice Brennan in *Fay* construed as a broader statement of the purpose of the bill:

I will state to the Senator from Kentucky, which he is probably aware of, that the *habeas corpus* act of 1789, to which this bill is an amendment, confines the jurisdiction of the United States courts in issuing writs of *habeas corpus* to persons who are held under United States laws. Now, a person might be held under a State law in violation of the Constitution and laws of the United States, and he ought to have in such a case the benefit of the writ, and we agree that he ought to have recourse to United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States.¹⁶²

Trumbull also noted that he had received "a note from one of the members of the Judiciary Committee of the House . . . requesting me to have the bill acted upon."¹⁶³ Trumbull made no mention of the December 19 resolution.¹⁶⁴

Contrary to the suggestion of some proponents of broad habeas that the Senate passed the bill based on Trumbull's statement, further debate was postponed and the bill was ultimately held over at the request of Kentucky Senator Davis and not taken up again until January 25, 1867, a full five months later.¹⁶⁵ On that day, a colloquy occurred between Senators Trumbull and

160 *Id.*

161 *Id.*

162 *Id.*

163 *Id.*

164 To the extent that Trumbull's explanation of the bill may appear to conflict with Lawrence's, Wiecek concludes that Trumbull "had obviously not done his homework . . ." Wiecek, *supra* note 139, at 539.

165 CONG. GLOBE, 39th Cong., 2d Sess. 729 (1867). Proponents of broad habeas review have a habit of hanging on Trumbull's statement to the exclusion of almost all else in the legislative history. See, e.g., Mark V. Tushnet, *Judicial Revision of the Habeas Corpus Statutes: A Note on Schneckloth v. Bustamonte*, 1975 WIS. L. REV. 484, 489-90; *Habeas Corpus Reform, Hearings on S. 238 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 137 (1985) (statement of Larry Yackle) ("the bill was passed in the Senate on the basis of the explanation offered by Trumbull.").

Johnson, in which Senator Johnson objected that the bill might be construed to allow any federal judge to grant habeas corpus for a prisoner located in another part of the country. Trumbull agreed that this would be objectionable and agreed to postpone consideration.¹⁶⁶ Debate was again taken up three days later on January 28, 1867.¹⁶⁷ The bill was amended to confine judicial authority to "respective jurisdictions" and then passed.¹⁶⁸ The House concurred on January 31.¹⁶⁹ It is true that the House passed the bill immediately after Lawrence's explanation, but the Senate passed the bill five months after Trumbull spoke.

One year later, Congress suspended the Supreme Court's appellate jurisdiction to review habeas cases under the 1867 Act because of the pending case of *Ex parte McCardle*.¹⁷⁰ This jurisdiction was not restored until 1885.¹⁷¹ During the March 25, 1868 debate that led to the suspension of the Court's appellate jurisdiction under the Act, Senator Trumbull's construction of the 1867 Act is exactly in line with Representative Lawrence's statements the year before:

The act of 1867 was not the first act which authorized writs of habeas corpus to be issued by the United States courts. The act of 1789 authorized the issuing of all such writs in cases where persons were deprived of their liberty under authority or color of authority of the United States. Why, then, was the act of 1867 passed? It was passed to authorize writs of *habeas corpus* to issue in cases where persons were deprived of their liberty under State laws or pretended State laws. It was the object of the act of 1867 to confer jurisdiction on the United States courts in cases not before provided for, and it was to meet a class of cases which was arising in the rebel States, where, under pretense of certain State laws, men made free by the Constitution of the United States were virtually being enslaved, and

166 CONG. GLOBE, 39th Cong., 2d Sess. 730 (1867).

167 *Id.* at 790.

168 *Id.*

169 *Id.* at 899. Another habeas corpus bill, H.R. 755, was also proceeding through Congress at this time. It amended a bill passed on May 11, 1866, H.R. 238, which amended the Habeas Corpus Act of March 3, 1863 (suspending the writ) (12 Stat. 755), and restored the writ in some areas. (There seems to be some confusion in the Globe Index between "H.R. 238" and "H.R. 298" and between "H.R. 755" and "H.R. 775.") H.R. 755 was passed by the Senate on January 25, 1867. CONG. GLOBE, 39th Cong., 2d Sess. 729 (1867).

170 Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44; see *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1867) (upholding the Court's jurisdiction and denying a motion to dismiss).

171 Act of March 3, 1885, ch. 353, 23 Stat. 437.

it was also applicable to cases in the State of Maryland where, under an apprentice law, freedmen were being subjected to a species of bondage. The object was to authorize a *habeas corpus* in those cases to issue from the United States courts, and to be taken by appeal to the Supreme Court.¹⁷²

Statements made by Senator Johnson during the 1868 debate on repealing the Court's jurisdiction have been taken out of context by some to suggest that the Act allowed full federal relitigation of any constitutional claim. When these statements are read in the context of the entire debate, however, it is clear that Johnson was arguing that the Act protected Union officers as well as freedmen, and no more.¹⁷³

Accordingly, there is a strong and consistent record that can be read to understand the 1867 Act as referring to the Thirteenth Amendment and the Reconstruction laws designed to enforce it. Indeed, the purpose of protecting the freedmen seems to dominate the entire course of the bill, and, as we will see, it was said to be the "well known origin" of the 1867 Act by the House Judiciary Committee when the Court's appellate jurisdiction was restored in 1884-85. And, aside from the class of persons protected, there is nothing in the legislative history that alters the conclusion from the text that the Act did not change the English limitations except in the mode of factual inquiry.

Charles Warren, in his history of the Supreme Court pub-

172 CONG. GLOBE, 40th Cong., 2d Sess. 2096 (1868); see also *id.* at 2095, 2115, 2127, 2165.

It should be noted that Trumbull was counsel for the Government in the Supreme Court in *McCordle*. *Id.* at 2096. He restated the same purpose of the 1867 Act in the Court:

What was the purpose of that act? We all know. It is a matter of legislative, nay, of public history. It was to relieve persons from a deprivation of their liberty under State laws; to protect loyal men in the rebel states from oppression under color of State laws administered by rebel officers; to protect especially those who had formerly been slaves, and who, under color of vagrant and apprentice laws in some of the States, were being reduced to a bondage more intolerable than that from which they had been recently delivered. It was to protect such persons and for such a purpose that the law of 1867 was passed

McCordle, 73 U.S. (6 Wall.) at 322.

Because Trumbull was counsel for the Government in the *McCordle* case, it may be argued that he was inclined to construe the 1867 Act narrowly. This might be persuasive if Trumbull's argument was novel, but it was exactly in line with Lawrence's argument of the year before.

173 Even here, Johnson retreated from his statement and seemed to confuse the habeas act and the indemnity act. See Weicek, *supra* note 139, at 540 (citing CONG. GLOBE, 40th Cong., 2d Sess. 2120 (1868)).

lished in 1926, supports Congressman Lawrence's construction of the 1867 Act. In his history of the *McCardle* case, Warren describes the Act as "enacted by Congress for the protection of Federal officials and other loyal persons against adverse action by the Courts and officials in the late Confederate States."¹⁷⁴ He noted the irony that, with the *McCardle* case, "this Act designed to enforce the Reconstruction measures was now seized upon as a weapon to test their validity."¹⁷⁵

The March 3, 1865 resolution, the December 19, 1865 resolution, the Ballard example and the historical conditions behind the Act, the statements of Lawrence in 1867, the statement of Trumbull in 1868 when Congress suspended the Court's jurisdiction, and, as we shall see, the 1884 report of the House Judiciary Committee that accompanied the 1885 restoration of the Court's jurisdiction, all support each other in demonstrating that the intent of the 1867 Act was to extend to the specific condition of the freedmen and loyal Unionists in the South.¹⁷⁶ Any broader construction sweeps beyond the purposes of Congress expressed in the public record.

C. *The 1885 Habeas Corpus Jurisdiction Act*

The purpose and legislative history of the 1885 Act that restored the Court's appellate jurisdiction over the 1867 Act is also revealing. Yet, that purpose has never been fully illuminated. Nevertheless, the purpose of the 1885 Act directly bears on Congress's understanding of the 1867 Act and on contemporary understanding of the Court's habeas jurisprudence.

The 1885 Act was developed against a backdrop of criticism of expansive interpretations of the 1867 Act by lower federal courts

174 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 464 (1926).

175 *Id.* at 465.

176 Cf. William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333 (1969). Wiecek baldly asserts that Congress "transformed the nature of the Great Writ itself" in the 1867 Act. *Id.* at 333. By this he means that "the writ became a means of reviewing *judicial* confinement." *Id.* at 342. While Wiecek acknowledges that the 1867 Act came to be broadly construed, he does not provide any evidence that it was intended to apply beyond the condition of the freedman and federal officials in the South. In fact, in his unique, backhanded way, he confirms that the 1867 Act may have evolved to encompass any constitutional claims of any state prisoner, notwithstanding that that was not the purpose of the 39th Congress ("Most congressmen and senators, however, did not foresee the ultimate consequences of that act. Possibly no federal statute of equivalent importance had such an inconspicuous beginning; probably none was enacted so inadvertently."). Wiecek, *supra* note 139, at 538.

which disregarded the jurisdiction of the state courts.¹⁷⁷ At the August, 1883 annual meeting of the American Bar Association (ABA), Judge Seymour D. Thompson presented a paper that was critical of the expansive interpretation of the 1867 Act applied by lower federal courts in trumping state court judgments.¹⁷⁸

It is a well settled principle of statutory construction that statutes relating to a subject founded upon the common law are to be construed with reference to the rules and principles of the common law, and are not to be extended beyond the plain import of their terms, when in derogation of that law. This principle forbids that the act of 1867 should be extended to the overthrowing, in collateral proceedings by the summary process of *habeas corpus* used by the inferior Federal judges, of the judgments and decrees of the courts of the several States.¹⁷⁹

Thompson proposed that the Court's appellate jurisdiction over the 1867 Act be restored for the specific purpose of curtailing expansive federal court applications of the Act.¹⁸⁰

Around the same time, Vermont Congressman Luke P. Poland, a member of the House Judiciary Committee, was studying the expansive application given to the 1867 Act by some lower federal courts.¹⁸¹ Poland was Vermont's U.S. Senator at the time

177 Between 1868 and 1883, the lower federal courts had continued to apply the 1867 Act, but the Supreme Court did not consider habeas cases under the 1867 Act because its appellate jurisdiction had been suspended.

178 Thompson, *supra* note 40, at 243. The paper was referred to the ABA's Committee on Jurisprudence and Law Reform for further analysis and became part of the Report of the Sixth Annual Meeting of the ABA.

Seymour D. Thompson (1842-1904), a veteran of the Civil War, was admitted to the bar in 1869 and became a master in chancery in St. Louis. He became the associate editor of the *Central Law Journal*, when it was founded in 1874, and served as editor from 1875-78. Between 1883 and his death in 1904, he was co-editor of the *American Law Review*. Between 1880 and 1892, he was a judge of the St. Louis Court of Appeals. Thompson published a number of treatises, perhaps the most distinguished being *COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS* (7 vols. 1895-99) (D. Malone ed., 1936).

179 Thompson, *supra* note 40, at 263.

180 His paper was published as the lead article in the January-February 1884 issue of the *American Law Review*, of which Thompson was a co-editor. Thompson had and would publish other articles involving or relating to habeas corpus. Seymour D. Thompson, *Habeas Corpus in Controversies Touching the Custody of Children*, 7 CRIM. L. MAG. & REP. 1 (Jan. 1886); Seymour D. Thompson, *Note on Habeas Corpus*, 18 F. 68 (1883) (after *In re Brosnahan*, 18 F. 62 (C.C.W.D. Mo. 1883) cited in *Sunal v. Large*, 332 U.S. 174, 184 (1947) (Frankfurter, J., dissenting); Seymour D. Thompson, *Void Sentences*, 4 CRIM. L. MAG. & REP. 797 (Nov. 1883).

181 Poland (1815-1887) was a justice of the Vermont Supreme Court between 1850-

of the passage of the 1867 Act and told the 1884 ABA annual meeting that he "had something to do with the passage of that act," though he did not elaborate.¹⁸² He was motivated to further examine the matter by an expansive federal habeas case in Vermont.¹⁸³ Significantly, Poland was also the chairman of the Executive Committee of the ABA.

In 1883-84, Poland, on behalf of the House Judiciary Committee, introduced various bills to curtail the 1867 Act.¹⁸⁴ One of Poland's bills was referred to a subcommittee of the Judiciary Committee, made up of Poland and Congressman James O. Broadhead of Missouri. On behalf of the House Judiciary Committee, Poland filed House Report Number 730 in March 1884 which criticized the expansive interpretation given the 1867 Act by certain federal courts.¹⁸⁵ Some of the bills would have specifically amended the 1867 Act and significantly limited habeas corpus for state prisoners, but the Report indicated that the Committee fa-

1865, when he resigned to serve as Vermont's U.S. Senator from November 1865 to March 1867. "At once assigned to the committee on judiciary, he quickly won respect by his able arguments on constitutional questions, his resistance to extreme partisan demands, and his proposals for constructive legislation—especially for a new bankruptcy law and the compilation and revision of all the statute laws of the United States." 15 *DICTIONARY OF AMERICAN BIOGRAPHY* 33 (Dumas Malone ed., 1935). In 1867, he exchanged seats with Vermont Congressman Justin Morrill and served in the House until 1875. In the 40th Congress, he would eventually serve as Chairman of the Committee on Revision of the Laws and as chairman of three select committees, including one in 1871 that investigated the Ku Klux Klan in the South and issued a report that influenced congressional legislation. *Id.* (citing H. REP. NO. 22, 42d Cong., 2d Sess. (1871)). Poland returned to the practice of law in 1875, except for service in the 48th Congress. *Id.* at 34.

182 7 *ANN. REP. AMER. BAR ASSOC.* 31 (1884) [hereinafter *ANNUAL REPORTS*].

183 This is presumably *Ex parte* Houghton, 7 F. 657 (C.C.D. Vt. 1881). This is one of the lower federal decisions criticized in the House Judiciary Committee's 1884 Report. H.R. REP. NO. 730, 48th Cong., 1st Sess. 4 (1884).

184 15 *CONG. REC.* 118 (1883) (introducing H.R. 1582, 48th Cong., 1st Sess. (1884) which limited the use of the writ of habeas corpus); 15 *CONG. REC.* 292 (1884) (introducing H.R. 2841, 48th Cong., 1st Sess. (1884) which regulated proceedings and appeals in writs of habeas corpus); 15 *CONG. REC.* 1,719 (1884) (introducing H.R. 5691, 48th Cong., 1st Sess. (1884) which amended Rev. Stat. § 764). Poland also introduced H.R. 4308, a bill that would have allowed a writ of error in certain criminal cases. 15 *CONG. REC.* 738 (1884).

185 H.R. REP. NO. 730, 48th Cong., 1st Sess. 4-5 (1884) (citing *Ex parte* Houghton, 7 F. 657 (C.C.D. Vt. 1881); *In re* Wong Yung Qui, 6 Sawyer 237 (C.C.D. Cal. 1880); *In re* Ah Lee, 6 Sawyer 410 (D. Or. 1880); *In re* Lee Tong, 1 West Coast Rep. 35 (1884)). This Report was cited by Justice Harlan in *Fay v. Noia*, 372 U.S. 391, 453 n.8 (1963) (Harlan, J., dissenting), and by Justice Powell in *Schneekloth v. Bustamonte*, 412 U.S. 218, 225 n.9 (1973) (Powell, J., concurring), but neither explained (or perhaps realized) that it was the official House Report that accompanied the Habeas Jurisdiction Act of 1885.

vored restoring the Supreme Court's jurisdiction in the belief that the Court would, in turn, restore the proper scope of the 1867 Act. The Report summarized all federal laws granting habeas jurisdiction and then noted that the 1867 Act was "the act which has had the effect of greatly enlarging the jurisdiction of the Federal courts and judges, in granting writs of *habeas corpus*."¹⁸⁶ The Report noted:

The condition of things caused by the late civil war is the well known origin of this act. In that portion of the country which had been in revolt against the national authority, and which had been largely the theater of hostile military movements, there existed a very anomalous and unsettled condition of society. A minority of the former citizens had adhered, so far as lay in their power, to the old Government, and rendered as little aid and allegiance as possible to the Confederacy.

The overthrow of slavery and the conferring of citizenship upon the colored population were results of the war, and could not be expected to meet favorable consideration by the people of the States mainly affected by these changes. It was felt that these classes could hardly expect to get fair and impartial justice at the hands of the local tribunals, and many acts of Congress were passed to extend to them, as far as possible under the Constitution, the protection of the Federal courts. This act of 1867 was of that class of statutes. It may be that the danger and necessity of such legislation was overestimated, but that it did exist to some extent was apparent from the condition of things and the ordinary operation of human motives and passions.¹⁸⁷

After criticizing various federal decisions which expansively construed the 1867 Act,¹⁸⁸ the Report stated:

These cases, and some others that might be cited, show that under this act of 1867, the early and long-established idea of keeping the jurisdictions of national and State tribunals distinct and separate, as to this class of cases, is entirely overturned.

The committee do not believe that Congress, in passing the act of 1867, intended any such thing, or that the true construction of the act warrants any such thing. Nor does there seem to have been any occasion for such action, or to stretch

186 H.R. REP. NO. 730 at 3.

187 *Id.*

188 See generally cases cited *supra* note 185.

Federal jurisdiction into the clear domain of State jurisdiction, as has been done. In the Vermont case, if the petitioner claimed that the Vermont statute under which he was convicted conflicted with a national statute, a writ of error would have carried his case to the Supreme Court of the United States, if the State court decided against his contention. So, if he did not raise the question on his trial, but the court had no jurisdiction, so that the conviction and sentence were void, the State courts and judges had ample jurisdiction to relieve him on *habeas corpus*.

The same may be said in substance of the other cases. But if the act of 1867 intended to allow interference in cases of arrests by State officers, under State authority, the committee do not believe that it was contemplated by its framers or can properly be construed to authorize the overthrow of the final judgments of the State courts of general jurisdiction, by the inferior Federal judges, whose judgments shall be final, and thus make them a court of errors over the highest tribunals of the States.¹⁸⁹

The Report cited the Supreme Court's decision in *Watkins* as establishing the correct rule of law, "that when a court has pronounced judgment in a case where it has general jurisdiction of the subject-matter, that judgment, unless reversed in a direct proceeding for that purpose, pronounces the law of the case."¹⁹⁰

The Report concluded by recommending a substitute bill (H.R. 5691)—which would restore the right of appeal to the Supreme Court under the 1867 Act—for the Committee bill (H.R. 2841), which would have specifically curtailed federal habeas for state prisoners. This substitute became the bill that restored the Court's appellate jurisdiction in 1885.¹⁹¹ The Report explained:

The bill referred to the committee [H.R. 2841] attempts to curtail and restrain to a certain extent the powers assumed by the Federal judges under the act of 1867. The committee find this a nice and difficult task. *The special causes which were deemed sufficient to make the act of 1867 necessary may exist yet to some extent, so that the committee do not feel justified in recommending its repeal.* They deem it advisable now to do no more than to recommend the restoration of the right of appeal to the Su-

189 H.R. REP. NO. 730 at 5; *see also Fay*, 372 U.S. at 453 n.8 (Harlan, J., dissenting) (citing Report without examination or comment).

190 H. REP. NO. 730 at 5.

191 15 CONG. REC. 1,719 (1884).

preme Court, just as the act of 1867 gave it, and therefore report a bill to that effect as a substitute for the bill referred to them. *With this right of appeal restored, the true extent of the act of 1867, and the true limits of the jurisdiction of the Federal courts and judges under it, will become defined, and it can then be seen whether further legislation is necessary.*¹⁹²

Congressman Poland repeated this purpose in the House on May 31, 1884, the day the bill was debated and passed:

The Judiciary Committee have made a full report upon this subject and have pointed out the evils that have grown out of this taking away of the right of appeal to the Supreme Court of the United States. Inferior Federal judges have taken a very wide jurisdiction and have overthrown the decisions of the highest courts of the States, and have made themselves really a court of error over the decisions of the highest State tribunals. The object of this bill is to restore this right of appeal to the Supreme Court, so that the proper exercise of its decision may be brought about.¹⁹³

In response to a question by Congressman Hammond whether "this legislation do[es] anything more than restore the law to what it was prior to the McCardle case," Poland responded, "Nothing more. It makes the act of 1867 just as it was when it was passed."¹⁹⁴ The bill passed the House unanimously and was referred to the Senate Judiciary Committee.¹⁹⁵

Two months after the House passed the substitute bill, the ABA held its 1884 Annual meeting in August, which Congressman Poland attended as Chairman of the Executive Committee. Judge Thompson's paper of the previous summer was discussed at length and Poland participated.¹⁹⁶ During the discussion of Thompson's paper, Poland reported on the purpose and status of the legislation before Congress:

The case that was decided in my own state two or three years ago—and one that is alluded to by Judge Thompson in his paper—caused me to give some attention to it, before that paper was read What troubled me in reference to it was, that the lowest class of federal judges, district judges, were thereby turned into courts of error, to overthrow the final judgments of

192 H.R. REP. NO. 730 at 5-6 (emphasis added).

193 15 CONG. REC. 4,710 (1884).

194 *Id.*

195 15 CONG. REC. 4,733 (1884).

196 See ANNUAL REPORTS, *supra* note 182, at 12-44.

the highest jurisdiction of the state; and from them there is no appeal. There have been other instances in other parts of the United States of far more flagrant cases than this in Vermont. Within the last year, the United States District Judge in the state of Oregon, released a man who had been convicted and sentenced for keeping a gambling house, in violation of an ordinance of some town in that state.^[197] That man was brought before the judge on a writ of *habeas corpus*. The judge decided that the ordinance was invalid because it went beyond what the general law of the state authorized. But the way that he obtained jurisdiction, was by putting it upon the ground that the man was unlawfully imprisoned, because the ordinance was invalid, and, therefore, he was imprisoned in violation of the Fourteenth Amendment of the Constitution.

That interpretation would give to a United States judge the most unlimited jurisdiction. So I gave my attention to this subject in the last session of Congress, and considered a good many ways of reaching the difficulty, but I finally satisfied myself that all that could practically be done was to restore the appeal to the Supreme Court of the United States, which was given by this broad act of 1867.¹⁹⁸

Working independently of Poland since the ABA's 1883 Annual meeting, the ABA's Committee on Jurisprudence and Law Reform analyzed Thompson's paper and suggested reforms at the August 1884 meeting.¹⁹⁹ The ABA proceeded to approve a motion instructing the Committee "to advocate the passage of a bill, by Congress, restoring the right of appeal in *habeas corpus* cases to the Supreme Court as given by the act of 1867."²⁰⁰ The House bill was favorably reported by the Senate Judiciary Committee in 1884 and was finally enacted in 1885, with virtually no debate in the Senate.²⁰¹

197 This is presumably *In re Lee Tong*, 1 West Coast Rep. 35 (1884) (decision filed November 3, 1883).

198 See ANNUAL REPORTS, *supra* note 182, at 29-30.

199 The Committee reported that "the complaint that the process, judgments, and decrees of state courts are improperly interfered with by writs of *habeas corpus* issued by federal tribunals" was "a just one, and the abuse still remains as a mischief in our jurisprudence which surely demands a remedy by the passage of an act of Congress, whereby it may be provided that when a prisoner under a writ from a state court is discharged under a *habeas corpus* issued by circuit or a district court, an appeal may be taken by the proper state authorities to the Supreme Court of the United States." *Id.* at 17.

200 *Id.* at 43.

201 16 CONG. REC. 2481 (1885).

In *Ex parte Royall*,²⁰² the first case applying the 1867 Act after its jurisdiction was restored, the Court adopted the exhaustion doctrine and the jurisdictional principles of *Watkins* that would be applied for the next forty years. The Court's focus on the primacy of "jurisdiction" accorded exactly with the Judiciary Committee's invocation of *Watkins* as the true interpretation of the law, thus effectively precluding "further legislation" that the Committee Report contemplated. The Court came to read the Act in line with the habeas corpus principles of the 1679 English Act and the Court's decisions in *Bollman* and *Watkins*. Professor Wiecek concluded that the Court "took the hint."²⁰³

IV. THE SUPREME COURT'S JURISDICTION DOCTRINE AND ITS CRITICS

A. *Challenging Court Jurisdiction Before Brown v. Allen*

The importance of the jurisdiction of the committing court in defining and limiting the scope of the writ extends back at least to the English Habeas Corpus Act of 1679.²⁰⁴ The Act of 1679—which, as the Court held, "enforces the common law"²⁰⁵—expressly excluded "those committed or detained for treason or felony plainly expressed in the warrant, and persons convict, or in execution by legal process."²⁰⁶ A number of common law authorities confirmed, as the general rule, that the writ of habeas corpus for illegal detention was not available to persons convicted or in execution by legal process.²⁰⁷

202 117 U.S. 241 (1886); see also *Ex parte Royall*, 117 U.S. 254 (1886) (original).

203 Wiecek, *supra* note 139, at 544-45.

204 See *supra* notes 81-83 and accompanying text.

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

206 *Ex parte Parks*, 93 U.S. 18, 21 (1876).

207 Coke "excepted from the privilege of the writ persons imprisoned upon conviction for a crime, or in execution." *Parks*, 93 U.S. at 21 (citing 2 Inst. 52). Hale stated, "If it appear by the return of the writ that the party be wrongfully committed, or by one that hath not jurisdiction, or for a cause for which a man ought not to be imprisoned, he shall be discharged or bailed." *Parks*, 93 U.S. at 21-22 (citing 2 Hale's H. P. C. 144); see also *Parks*, 93 U.S. at 22 ("[W]hen a person is convict or in execution by legal process issued by a court of competent jurisdiction, no relief can be had."); *Ex parte Lange*, 85 U.S. (1 Wall.) 163, 187 (1873) (Clifford, J., dissenting) ("[N]or is it true that the writ of habeas corpus was ever intended to operate as the means of delivering a prisoner from his imprisonment if he had been duly indicted, convicted, and sentenced, and is in prison by virtue of a lawful conviction under a valid indictment and a legal sentence passed in pursuance of a constitutional law of the jurisdiction where the offence was committed."); *The King v. Suddis*, 102 Eng. Rep. 119 (1801) ("It is a general rule, that where a person has been committed under the judgment of another Court of competent

The seminal case of the nineteenth century on the jurisdiction doctrine is *Ex parte Watkins*,²⁰⁸ where the Court followed the doctrine in applying the Judiciary Act of 1789 to federal prisoners. There, Marshall wrote for a unanimous court that the writ of habeas corpus was "in the nature of a writ of error, to examine the legality of the commitment" and "brings up the body of the prisoner, with the cause of commitment."²⁰⁹ The Court could "inquire into the sufficiency of that cause" but the judgment of a court of "competent jurisdiction" was sufficient to uphold the commitment and refuse the writ.²¹⁰

A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it.²¹¹

Watkins' counsel contended that these principles were true for "a case in which the indictment alleges a crime cognizable in the court by which the judgment was pronounced," but not to a case "in which the indictment charges an offence not punishable criminally according to the law of the land." Marshall denied that the Court could "look into the indictment," because "[a]n imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous."²¹²

criminal jurisdiction, this Court [King's Bench] cannot review the sentence upon a return to a habeas corpus In such cases this court is not a court of appeal.").

208 28 U.S. (3 Pet.) 193 (1830).

209 *Id.* at 202.

210 *Id.*

211 *Id.*

212 *Id.* at 203. Moreover, "[i]f its judgment was erroneous, a point which this court does not determine, still it is a judgment, and, until reversed, cannot be disregarded" and "the judgments of a court of record, having general jurisdiction of the subject, although erroneous, are binding, until reversed." *Id.* at 206-07.

Marshall reasoned that the *Watkins* case was analogous to *Kempe's Lessee v. Kennedy*, 9 U.S. (5 Cranch) 173 (1809), involving a writ of error to a judgment, in which the court was held to have no jurisdiction and its judgment held to be an "absolute nullity." "If the jurisdiction does not appear upon the face of the proceedings, the presumption of law is, that the court had not jurisdiction, and the cause was *coram non iudice*, in which case no valid judgment could be rendered." *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 204 (1830).

It is universally understood, that the judgments of the courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world; and that this apparent want of jurisdiction can avail the party only on a writ of error. This acknowledged principle seems to us, to settle the question now before the court. The judgment of the circuit court, in a criminal case, is, of itself, evidence of its own legality, and requires for its support, no inspection of the indictments on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decisions. We cannot usurp that power, by the instrumentality of the writ of *habeas corpus*. The judgment informs us that the commitment is legal, and with that information, it is our duty to be satisfied.²¹³

The Court held that "the judgment of a court of general criminal jurisdiction justifies his imprisonment, and that the writ of *habeas corpus* ought not be awarded."²¹⁴ Thus, the importance of the committing court's jurisdiction stems from *Watkins*, which derived it from the English Act of 1679. *Watkins* became the seminal American decision, cited by state and federal courts for the next 100 years.²¹⁵

Between the Civil War and *Frank v. Mangum*,²¹⁶ the Court consciously adhered to the jurisdiction doctrine of *Watkins*, even as it evolved. The most significant part of that evolution involved the concept that a court's jurisdiction was eliminated by a void judgment and the corresponding distinction between void and voidable judgments. This concept was elaborated and extended through a series of cases until the Court tried to make some sense of the exceptions in *Henry v. Henke*²¹⁷ on the eve of *Frank*. *Frank* and *Moore v. Dempsey*²¹⁸ significantly broadened the Court's habeas jurisprudence, and the Court's jurisdiction doctrine was further diluted over the ensuing thirty-five years leading up to *Brown v. Allen*.²¹⁹ The evolution of the Court's doctrine has been the subject of continuing debate within the Court and by legal scholars since *Brown v. Allen*. The various schools of thought, in turn, continue

213 *Watkins*, 28 U.S. (3 Pet.) at 207.

214 *Id.* at 209.

215 *See infra* note 267.

216 237 U.S. 309 (1915).

217 235 U.S. 219 (1914).

218 261 U.S. 86 (1923).

219 344 U.S. 443 (1953).

to shape Supreme Court doctrine, as is indicated by the colloquy between Justices Thomas and O'Connor in their opinions in *Wright v. West*.²²⁰

Contemporary advocates of broad habeas jurisdiction rely on cases like *Ex parte Lange*,²²¹ decided during the period that the Court's appellate jurisdiction was suspended under the 1867 Act. *Lange* involved a federal indictment for stealing mailbags and was decided under the Judiciary Act of 1789. The prisoner had been sentenced to a fine of \$200 and one year imprisonment when the statutory authority allowed only the power to punish by fine or imprisonment. The district court vacated the judgment and imposed another punishment on the same verdict. The Supreme Court held that the power of the court came to an end when the judgment had been executed, "when the prisoner . . . by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone."²²² The Court "[d]isclaim[ed] any assertion of a general power of review over the judgments of the inferior courts in criminal cases, by the use of the writ of habeas corpus or otherwise"²²³ It is important to point out that *Lange* involved a federal prisoner and the action of a federal circuit court, not a state prisoner or state court. *Lange* exemplifies no more than the Supreme Court's exercise of discretionary review over the federal courts, as one commentator suggested.²²⁴

The Court in subsequent cases denied a broad interpretation of *Lange*.²²⁵ Even when the Court expanded habeas in *Frank* and

220 112 S. Ct. 2482 (1992).

221 85 U.S. (18 Wall.) 163 (1873).

222 *Id.* at 176. The holding in *Lange* is specifically supported by other state and federal cases of the era construing the concept of jurisdiction. See ROLLIN C. HURD, A TREATISE ON PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS 327-30 (2d ed., Albany, W.C. Little & Co. 1876).

223 *Lange*, 85 U.S. at 166.

224 Thompson, *Void Sentences*, *supra* note 180, at 832-33. In fact, the Court said exactly this in *Ex parte Parks*, 93 U.S. 18, 21 (1876): "This [a writ of habeas corpus] is one of the modes in which this court exercises supervisory power over inferior courts and tribunals; but it is a special mode, confined to a limited class of cases."

225 See, e.g., *Harlan v. McGourin*, 218 U.S. 442 (1910). The Court noted:

We find nothing in these cases [citing *Lange*, *In re Snow*, 120 U.S. 274 (1887); *In re Bain*, 121 U.S. 1 (1887); *Nielsen, Petitioner*, 131 U.S. 176 (1889)] to conflict with the well established rule in this court that the writ of *habeas corpus* cannot be made to perform the office of a writ of error The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to

Moore, it never relied on *Lange*. For example, the Court in *Ex parte Parks*²²⁶ interpreted *Lange* as being consistent with the general rule of jurisdiction and distinguishable. *Parks* involved a federal forgery conviction and an application for habeas under the Judiciary Act of 1789. The Court denied the writ, holding that the district court "had plenary jurisdiction" of the matter:

In *Ex parte Lange* we proceeded on the ground, that, when the court rendered its second judgment, the case was entirely out of its hands. It was *functus officio* in regard to it. The judgment first rendered had been executed and satisfied. The subsequent proceedings were, therefore, according to our view, void.

But, in the case before us, the District Court had plenary jurisdiction, both of the person, the place, the cause, and everything about it. To review the decision of that court by means of the writ of *habeas corpus* would be to convert that writ into a mere writ of error, and to assume an appellate power which has never been conferred upon this court.²²⁷

Advocates of broad federal habeas, like Professor Gary Pellér, would take the last phrase to mean that the lack of appellate jurisdiction was the reason for denying habeas. But the Court said something quite different—that the use of habeas in such a manner would "convert" it and make it something it was not. It was only stated as an *additional* reason why that conversion would make it into an appellate power that had not been conferred, and that additional reason simply confirmed why habeas could not be used in that manner.

The Court's early doctrine was stated quite plainly in *Parks*: "[W]hen a person is convict or in execution by legal process issued by a court of competent jurisdiction, no relief can be had. Of course, a superior court will interfere if the inferior court had exceeded its jurisdiction, or was not competent to act."²²⁸ Here

show the guilt of the accused. This has never been held to be within the province of a writ of *habeas corpus*. Upon *habeas corpus* the court examines only the power and authority of the court to act, not the correctness of its conclusions.

Id. at 447-48. See also *Henry v. Henkel*, 235 U.S. 219, 228 (1914) (referring to *Lange* as "exceptional").

226 93 U.S. 18 (1876).

227 *Id.* at 23.

228 *Id.* at 22. The Court also stated:

[W]here the prisoner is in execution upon a conviction, the writ ought not to be issued, or, if issued, the prisoner should at once be remanded, if the court below had jurisdiction of the offence, and did no act beyond the powers conferred upon it. The court will look into the proceedings so far as to determine

again, the Court focused on the *nature* of habeas and distinguished it from a writ of error. The Court denied habeas because "the court below had power to determine the question before it" ²²⁹

Likewise, the Court in *Ex parte Bigelow*²³⁰ construed *Lange* as consistent with the general rule of jurisdiction and distinguished it:

In that case [*Lange*] the petitioner had been tried, convicted, and sentenced for an offence for which he was liable to the alternative punishment of fine or imprisonment. The court imposed both. He paid the fine, and made application to the same court by writ of habeas corpus for release on the ground that he was then entitled to his discharge. The Circuit Court, on this application, instead of releasing the prisoner, set aside its erroneous judgment, and sentenced him to further imprisonment. This court held that the prisoner, having been tried, convicted, and sentenced for that offence, and having performed the sentence as to the fine, the authority of the Circuit Court over the case was at an end, and the subsequent proceedings were void.

In the present case no verdict, nor judgment was rendered, no sentence enforced, and it remained with the trial court to decide whether the acts on which he relied were a defence to any trial at all.²³¹

Bigelow involved an action for a writ under the Court's original jurisdiction. The Court denied habeas for a prisoner whose conviction and sentence for embezzlement were affirmed by the Supreme Court of the District of Columbia. The petitioner contended that he had been subjected to double jeopardy contrary to the Fifth Amendment, that the court below exceeded its jurisdiction, and that the sentence was therefore void. Justice Miller, for a

this question. If it finds that the court below has transcended its powers, it will grant the writ and discharge the prisoner, even after judgment. [citing *Kearney*, *Wells* and *Lange*] But if the court had jurisdiction and power to convict and sentence, the writ cannot issue to correct a mere error.

Id. at 23.

²²⁹ *Id.* at 23.

²³⁰ 113 U.S. 328 (1884).

²³¹ *Id.* at 331; see also *Harlan v. McGourin*, 218 U.S. 442, 447-48 (1910) (citing *Lange* as an example of a case "where collateral attacks have been sustained through the medium of a writ of *habeas corpus*, the grounds were such as attacked the validity of the judgments, and the objections sustained were such as rendered the judgment not merely erroneous, but void").

unanimous Court, commented on the concept of jurisdiction:

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

It may be confessed that it is not always very easy to determine what matters go to the jurisdiction of a court so as to make its action when erroneous a nullity. But the general rule is that when the court has jurisdiction by law of the offence charged, and of the party who is so charged, its judgments are not nullities.²³²

Similarly, Justice Bradley stated the general rule very clearly in 1879 in *Ex parte Siebold*,²³³ also involving a federal prisoner:

The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.²³⁴

He sought to distinguish the instance of an erroneous judgment from an illegal or void judgment by reference to *Lange* and *Parks*:

In the former case [*Lange*], we held that the judgment was void, and released the petitioner accordingly; in the latter [*Parks*], we held that the judgment, whether erroneous or not, was not void, because the court had jurisdiction of the cause; and we refused to interfere.²³⁵

However, the Court in *Siebold*, stated, in dictum, that if acts of Congress were unconstitutional, the Court could consider that question on habeas jurisdiction:

If this position is well taken, it affects the foundation of the

232 *Bigelow*, 113 U.S. at 330-31.

233 100 U.S. 371 (1879).

234 *Id.* at 375.

235 *Id.*

whole proceedings. An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it We are satisfied that the present is one of the cases in which this court is authorized to take such jurisdiction. We think so, because, if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes. Its authority to indict and try the petitioners arose solely upon these laws.²³⁶

Siebold stated a general rule in line with the Court's precedents because an unconstitutional statute as the sole basis for conviction deprived the court of jurisdiction and rendered its sentence void, "not merely erroneous." Like *Lange*, *Siebold* is relied on by modern advocates of broad habeas jurisdiction, but the Court itself denied such an expansive view of *Siebold*.²³⁷ And when the Court expanded habeas in *Frank* and *Moore*, it never relied on *Siebold*. In fact, the Court in *Frank* cited *Siebold* for the proposition that the writ may not be used "as a substitute for a writ of error."²³⁸

Professor Paul Bator suggested that the Court's decision in *Siebold* was uniquely influenced by the fact that, in the case of federal prisoners in criminal cases, no appeal to the Court was available by statute at that time, and that the Court pragmatically reached out, through its habeas jurisdiction, to address the underlying issues of constitutionality.²³⁹ This inference was also voiced and criticized in a contemporaneous article by Judge Seymour Thompson,²⁴⁰ but Thompson also pointed out, like Bator, that

236 *Id.* at 376-77. In the companion case of *Ex parte Clarke*, 100 U.S. 399 (1879), the Court also considered and upheld the constitutionality of certain acts of Congress and held that "the cause of commitment [of the petitioner] was lawful and sufficient." *Id.* at 404.

237 *See, e.g., Ex parte Crouch*, 112 U.S. 178, 180 (1884) (denying writ, citing *Lange* and *Siebold* for the proposition that the "office of a writ of habeas corpus" is not to correct errors committed in determining the sufficiency of defense).

238 *Frank v. Mangum*, 237 U.S. 309, 326 (1915). Not until *Fay* was *Siebold* relied upon to expand habeas jurisdiction. *Fay v. Noia*, 372 U.S. 391, 408 (1963).

239 Bator, *supra* note 27, at 473 (citing Act of April 29, 1908, ch. 31, § 6, 2 Stat. 159; Act of June 1, 1872, ch. 517, § 1, 17 Stat. 196).

240

The Supreme Court of the United States, which, as already pointed out, has insensibly drifted into the habit of using the writ of *habeas corpus* as a substitute for the writ of error in criminal cases, has lately promulgated the opposite doctrine, and the ground on which they place their conclusion is thus stated by Mr.

this tendency was subsequently discouraged by the Court, starting with *Ex parte Reed*.²⁴¹ In fact, as Bator noted, the Court itself seemed to acknowledge this temporary tendency in retrospect in *Salinger v. Loisel*.²⁴²

A significant element of this modern debate over habeas jurisdiction is a reluctance to understand the nineteenth century doctrine on its own terms, and an inclination to superimpose the hundred years of succeeding constitutional criminal procedure on to the language of the 1867 Act. Almost all modern commentators view the Court's jurisdiction doctrine as arcane. Contemporary commentators were less skeptical, however, and gave the doctrine serious consideration within the context of then-prevailing views of jurisdiction. Judge Seymour Thompson's exhaustive 1883 article, published four years after the *Siebold* decision, sought to clarify the law.²⁴³ Thompson wrote that the law distinguished between court judgments which are "merely void and those which are voidable in a direct proceeding instituted for the purpose of vacating them, setting them aside, or reversing them. A void judgment is, in law, a nullity. It is as nothing."²⁴⁴ If a void judgment was enforced by imprisoning a defendant, it could be attacked collaterally and the prisoner discharged through habeas corpus. However, if the error did not render the judgment "absolutely void," collateral relief was

Justice Swayne [Thompson's quotation from *Ex parte Reed*, 100 U.S. 13, 23 (1879) omitted here]

The reasons which uphold this use of the writ of *habeas corpus* in the Supreme Court of the United States do not apply in the state courts. No writ of error is allowed to remove criminal cases from the inferior federal courts to the Supreme Court of the United States. If the inferior federal judicatories abuse their powers, the only direct remedy which is afforded to the defendant is an appeal from the District to the Circuit Court, which, in most cases, is simply an appeal from one judge to another. *The absolute need of some superintending control on the part of the federal court of last resort seems lately to have induced it, contrary to its decision in the earlier case of Watkins, to extend the writ of habeas corpus to the case which we are now considering.*

Thompson, *Void Sentences*, *supra* note 180, at 832-33 (emphasis added); *see also id.* at 806 (suggesting same reason for *Siebold* decision).

241 100 U.S. 13 (1879).

242 265 U.S. 224, 230-31 (1924) ("In early times when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number. But when a right to an appellate review was given the reason for that practice ceased and the practice came to be materially changed,—just as when a right to comprehensive review in criminal cases was given the scope of inquiry deemed admissible on *habeas corpus* came to be relatively narrowed.")

243 Thompson, *Void Sentences*, *supra* note 180.

244 *Id.* at 798.

not available and the defendant could only seek to correct the error by appeal or writ of error. Thompson demonstrated that there were many "irregularities," such as change of venue, which did not render the sentence void. Some courts made finer distinctions between errors which were illegal—which "for want of power or jurisdiction [] are wholly illegal and void"—and those which were irregular—"voidable only in direct proceedings by appeal, writ of error, *certiorari* and the like."²⁴⁵

When, therefore, the judgment of the court in which a prisoner is held in confinement is called in question in a proceeding by *habeas corpus*, the question is to be, Is the judgment "contrary to the principles of law, as distinguished from the rules of procedure?" Or, is there a complete defect in it? Or, is there something which the law deems material and requires to be stated, and which is altogether omitted?²⁴⁶

Thompson cited *Watkins* as denying the distinction and *Siebold* as upholding it.

Thompson cited five types of error which rendered criminal judgments "absolutely void." First, "pretended judgments rendered by persons usurping the functions of lawfully-constituted courts." These would be upheld against collateral attack when the act was by a *de facto* officer. Second, judgments by courts with no jurisdiction. Under the general rule derived from the 1679 English Act, "where it appears by the return of a writ of *habeas corpus* that the prisoner is held in execution under the judgment of a court having competent jurisdiction, he must be remanded to custody."²⁴⁷ Third, judgments for "offenses" which are not offenses under the law. These resulted in a conflict of judicial opinion over whether a court could inquire into the basis for such offense on *habeas corpus* review. Citing Chief Justice Marshall's opinion in *Watkins*, Thompson concluded:

[T]he only rule capable of vindication upon principle, is that if the crime of which the prisoner stands convicted is a crime of

245 *Id.* at 805. For example, "to sentence a man in his absence, when the absence was occasioned by the order of the court pronouncing the sentence, would be an irregularity merely, reviewable alone on error; while to sentence him to imprisonment for a crime punishable by a pecuniary fine only, would be illegal, and hence, wholly void." *Id.* (citing ROLLIN HURD, *HABEAS CORPUS* 333 (1st ed. 1858)). This example supports the Supreme Court's analysis in *Lange* and *Siebold*.

246 Thompson, *Void Sentences*, *supra* note 180, at 806.

247 *Id.* at 810.

which the court convicting him would have had jurisdiction if it were a crime in point of law, the judgment of the court cannot be assailed collaterally under the writ of *habeas corpus*; but if the court has committed error in adjudging that to be a crime which is, in point of law, no crime, the error can only be corrected by a direct proceeding for that purpose.²⁴⁸

Thompson noted that *Watkins* had been reaffirmed in *Ex parte Parks*.²⁴⁹ Fourth, sentences which are not authorized by law. Thompson held these to be assailable only on direct review. Although Thompson considered the Supreme Court to have "insensibly drifted into the habit of using the writ of habeas corpus as a substitute for the writ of error in criminal cases," he pointed to *Ex parte Reed*²⁵⁰ as reaffirming the opposite rule. Finally, "sentences which are so informal and uncertain that they cannot be carried into execution." Unless an express enabling statute allowed discharges, as some states provided, Thompson held that habeas corpus was not available in such cases. Similar discussions of jurisdiction were replicated in the leading treatises of the day.²⁵¹

248 *Id.* at 820.

249 93 U.S. 18 (1876).

250 100 U.S. 13 (1879).

251 *See, e.g.,* HURD, *supra* note 46, at 327:

The jurisdiction over the process being only *collaterally* appellate, the habeas corpus, as before intimated, cannot have the force and operation of a writ of error or a certiorari; nor is it designed as a substitute for either. It does not, like them, deal with errors or irregularities which render a proceeding voidable only; but with those radical defects which render it absolutely void A proceeding defective for irregularity and one void for illegality may be reversed upon error or certiorari; but it is the latter defect only which gives authority to discharge on habeas corpus.

An *irregularity* is defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unreasonable time or improper manner It is the technical term for every defect in practical proceedings or the mode of conducting an action or defence as distinguishable from defects in pleadings.

Id. at 332-33 (citations omitted); 3 JOSEPH CHITTY, *THE PRACTICE OF THE LAW* 509 (2d ed. 1835) (discussing irregularities and nullities); 1 HENRY CAMPBELL BLACK, *A TREATISE ON THE LAW OF JUDGMENTS* § 170 (2d ed. 1902) (distinction between voidable and void judgments); *id.* at § 255 (errors and irregularities not reviewable on habeas corpus).

The writ of habeas corpus is very frequently sued out to obtain the release of a person held in custody under the judgment or sentence of a court, and in a great many instances the attempt has been made to impeach such judgment on grounds going to its legality or regularity, or even upon objections to the anterior proceedings. But the courts have resolutely set their faces against this

After Congress restored the Court's appellate jurisdiction in 1885, *Ex parte Royall*²⁵² was the first habeas case concerning state prisoners that the Court considered. There was no careful examination of the text or legislative history of the 1867 Act in the context of the contemporary body of habeas law. Instead, the Court imported principles of comity and federalism into its construction of the 1867 Act. The petitioner was a commercial agent indicted and held in custody *pretrial* for violating a Virginia law against selling public bonds without a license, which he alleged to be unconstitutional. The Court unanimously affirmed the denial of habeas corpus. Citing *Siebold* for the proposition that a conviction under an unconstitutional statute "is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment," the Court held that "the Circuit Court has jurisdiction upon writ of habeas corpus to inquire into the cause of appellant's commitment, and to discharge him, if he be held in custody in violation of the Constitution."²⁵³ However, the Court also wrote that "while the Circuit Court has the power to do so, and may discharge the accused *in advance of his trial* if he is restrained of his liberty in violation of the national Constitution, it is not bound in every case to exercise such a power immediately upon application being made for the writ."²⁵⁴

We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in

practice, refusing to look beyond the judgment itself, except in the single case where a want of jurisdiction is alleged.

Id. at § 254. See also 1 JOEL PRENTISS BISHOP, CRIMINAL PROCEDURE § 1410 (3d ed. 1880). Bishop states:

There are circumstances in which release from imprisonment in a criminal cause may be had under the great writ of *habeas corpus ad subjiciendum*. Where the restraint proceeds from a judgment erroneous but not void, it will not lie. Nor, under it, can the party impeach a judgment as contrary to the facts. And, in general, this is not the remedy where the imprisonment is on a judicial sentence. But where the sentence is void, not merely voidable, or the term of imprisonment under it has expired, relief may be had by *habeas corpus*.

Id. at 818.

252 117 U.S. 241 (1886).

253 *Id.* at 250.

254 *Id.* at 251 (emphasis added).

violation of the Constitution of the United States.²⁵⁵

Royall adopted a notion of "special circumstances." The Court held that the circuit courts should use discretion in exercising their jurisdiction in light of principles of federalism and comity in special cases involving foreign states, the law of nations, "cases of urgency[]" involving the authority and operations of the General Government" or foreign relations or federal court administration. The Court noted that no such special circumstances were involved and that the state court had jurisdiction, in the first instance, to consider the constitutionality of the state law. The Court held:

[W]here a person is in custody, under process from a State court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has discretion, whether it will discharge him, upon habeas corpus, *in advance of his trial* in the court in which he is indicted; that discretion, however, to be subordinated to any *special circumstances* requiring immediate action. When the State court shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States.²⁵⁶

The Court then cited *Ex parte Bridges*²⁵⁷ to suggest that a state prisoner was required to seek a writ of error unless the state court proceeding was void for "want of jurisdiction."²⁵⁸ Hence, although somewhat meandering, this dictum did not contradict the *Watkins* jurisdiction doctrine.

The Court's application of the jurisdiction rule between the Civil War and *Frank and Moore* involved exceptions, or expansions, to the rule of jurisdiction in various cases. Much has been written about the Court's elasticity in interpreting the concept of "jurisdiction" of the inferior courts during these years.²⁵⁹ Yet, for nearly

255 *Id.* at 251.

256 *Id.* at 252-53 (emphasis added).

257 *Brown v. United States ex rel. Bridges*, 4 F. Cas. 98 (C.C.N.D. Ga. 1875) (No. 1,862), *aff'd sub nom.*, *Ex parte Bridges*, 2 Woods Cir. Ct. Rep. 428 (5th Cir. 1875).

258 *Royall*, 117 U.S. at 253 (citing *Bridges*, which cited *Lange*).

259 *Bator*, *supra* note 27; *Peller*, *supra* note 21; *Liebman*, *supra* note 1; *Hart*, *supra* note 104, at 104-07; *Woolhandler*, *supra* note 28.

seventy years after the passage of the 1867 Act, the Court adhered to the general rule that habeas corpus was available only to challenge a court's jurisdiction. What is important is that the Court saw and described its jurisprudence as either fitting within the concept of jurisdiction or falling within limited exceptions, as *Henry v. Henkel*²⁶⁰ clearly demonstrates.²⁶¹ On the eve of *Frank*, in a unanimous opinion by Justice Lamar, the Court in *Henry* adhered to the general rule of jurisdiction. A congressional committee investigating the national banks summoned Henry for testimony. After indictment by a grand jury for refusing to answer questions, Henry was arrested and sought habeas corpus. The Court consciously identified the exceptions to the jurisdiction doctrine, but reaffirmed it nevertheless:

But, barring such exceptional cases,^[262] the general rule is that, on such applications, the hearing should be confined to the single question of jurisdiction, and even that will not be decided in every case in which it is raised. For otherwise the "*habeas corpus* courts could thereby draw to themselves, in the first instance, the control of all prosecutions in state and Federal courts." To establish a general rule that the courts on *habeas corpus*, and in advance of trial, should determine every jurisdictional question would interfere with the administration of the criminal law

The question has been before this court in many cases—some on original application and others on writ of error; in proceedings which began after arrest and before commitment; after commitment and before conviction; after conviction and before review. The applications were based on the ground of the insufficiency of the charge, the insufficiency of the evidence, or the unconstitutionality of the statute, state or Federal, on which the charge was based

But in all these instances, and notwithstanding the variety of forms in which the question has been presented, the court, with the exceptions named, has uniformly held that the hearing on *habeas corpus* is not in the nature of a writ of error nor is it intended as a substitute for the functions of the trial

260 235 U.S. 219 (1914).

261 Professor Duker agrees that the exceptions to the jurisdiction doctrine were limited. DUKER, *supra* note 28, at 230-34, 240, 247.

262 The exceptional cases to which the Court referred were: *Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1873); *Ex Parte Royall*, 117 U.S. 241 (1886); *In Re Loney*, 134 U.S. 372 (1890); *New York v. Eno*, 155 U.S. 89 (1894).

court.²⁶³

The Court refused to address the jurisdictional questions and affirmed the denial of habeas. The modern claim that the exceptions to the Court's jurisdiction doctrine consumed the rule is directly rebutted by the Court's conscious categorization of the case law in *Henry*. It may be that the exceptions were vague and ambiguous, and the *Henry* opinion may imply a self-conscious need for judicial housecleaning, but clearly the Court did not believe that the exceptions consumed the rule. Nor did the Court imply anything to the contrary in any case leading up to *Brown v. Allen*.²⁶⁴ It may have ignored the jurisdiction doctrine after *Moore*, but the Court never repudiated it.

Given this line of cases, contemporary commentators emphasized the prominence of jurisdiction in the scope of habeas corpus.²⁶⁵ One treatise writer, W.F. Bailey, wrote in 1913, on the eve of *Frank*: "The underlying principle which controls [the] use [of habeas corpus] is that of jurisdiction."²⁶⁶ Many state courts also emphasized the centrality of the jurisdiction of the committing court, often citing *Watkins*.²⁶⁷

263 *Henry*, 235 U.S. at 228-29.

264 *Brown v. Allen*, 344 U.S. 443 (1953). For example, in *Craig v. Hecht*, 263 U.S. 255 (1923), the United States (citing *Henry*) contended that that case did not fall within any of the "five classes of cases in which the court on *habeas corpus* will go beyond the question of jurisdiction." *Id.* at 265. These five were defined as: "(1) Where there is a conflict of jurisdiction between a State and the United States; (2) where the authority and operations of the Federal Government are or may be interfered with by state action; (3) where rights or obligations of the United States under a treaty are involved; (4) where the petitioner is held under state process based upon state law which is in violation of the Constitution; and (5) where the judgment or order under which he is held is a nullity because in excess of the power of the court." *Id.*

265 Thompson, *Void Sentences*, *supra* note 180 at 798-802; see also 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 126 (1841); HURD, *supra* note 46, at 332.

266 W.F. BAILEY, 1 A TREATISE ON THE LAW OF HABEAS CORPUS AND SPECIAL REMEDIES iii (1913). After surveying state and federal cases, Bailey "found that the majority of cases, where the writ of habeas corpus was issued, involved the question of contempts." *Id.* at v; see also Thompson, *Void Sentences*, *supra* note 180, at 802.

267 See *Ex parte Chandler*, 22 So. 285, 285 (Ala. 1896) ("[I]t is not the office of *habeas corpus* to review and correct errors or irregularities, however gross, of a trial court of competent jurisdiction."); *Ex parte Perdue*, 24 S.W. 423 (Ark. 1893); *Ex parte Noble*, 31 P. 224 (Cal. 1892); *Ex parte Gibson*, 31 Cal. 620 (1867) (citing *Watkins*); *Russell v. Tatum*, 30 S.E. 812 (Ga. 1898); *People ex rel. Wayman v. Zimmer*, 96 N.E. 529 (Ill. 1911) (citing *Watkins*); *McGuire v. Wallace*, 10 N.E. 111 (Ind. 1887); *Platt v. Harrison*, 6 Iowa 79 (1858) (citing *Watkins*); *Sennott v. Swan*, 16 N.E. 448 (Mass. 1888) (citing *Watkins*); *In re Underwood*, 30 Mich. 502 (1875); *State ex rel. Jackson v. MacDonald*, 128 N.W. 454 (Minn. 1910); *In re Mitchell*, 16 S.W. 118 (Mo. 1891), *Ex parte Toney*, 11 Mo. 420 (1848) (judgment of a court of competent jurisdiction cannot be examined by habeas, but not citing *Watkins*) (for a Missouri case with a different outcome see *Ex parte Lucas*, 160 Mo.

Given *Henry v. Henkel*, there is no real break with the Court's jurisdiction doctrine that cannot be logically explained as merely an expansion of that doctrine until *Frank v. Mangum*²⁶⁸ and *Moore v. Dempsey*.²⁶⁹ The defendant in *Frank* appealed his state court conviction alleging that the trial court had been dominated by the mob. After thoroughly reviewing the evidence for error, the state supreme court affirmed.²⁷⁰ The Supreme Court denied habeas, but said that habeas could be available if the state failed to provide "corrective process." Although the Supreme Court introduced this new principle in *Frank*, it did not apply it in that case. Not until *Moore* was decided in 1923 did the Court apply the principle that *Frank* introduced. Certainly, *Moore* represents a judicial expansion of the Court's habeas jurisdiction. Justice Holmes' dissent in *Frank* fails to cite even one American or English opinion involving habeas let alone any that would *justify* habeas under the facts of *Frank*.²⁷¹ The only precedent Holmes cites in his majority opinion in *Moore* is *Frank's* dictum that "if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law."²⁷²

The Court's refusal to reverse the detention in *Frank* is often considered reversed by *Moore*. But it is more appropriate to view *Moore* as an application of the rule stated in *Frank* and not as overturning *Frank* itself.²⁷³ The proposition that *Moore* overruled *Frank* does not survive close scrutiny. It does not account for the different facts in the two cases, or how much *Moore* relied on and incorporated *Frank*, or that the Court subsequently cited *Frank* as good law on several occasions. In *Ashe v. United States ex rel.*

218 (1900) (5-4 decision, can contest constitutionality of act by habeas corpus)); *Ex parte Edgington*, 10 Nev. 215 (1875); *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559 (1875); *Ex parte Watson*, 72 S.E. 1049 (N.C. 1911); *Ex parte Shaw*, 7 Ohio St. 81 (1857); *Ex parte Millsap*, 118 P. 135 (Okla. 1911); *Merriman v. Morgan*, 7 Or. 69 (1879); *Ex parte Bond*, 9 S.C. 80 (1877) (citing *Watkins*); *Winnovich v. Emery*, 93 P. 988 (Utah 1908); *In re French*, 51 N.W. 960 (Wis. 1892); *Hovey v. Sheffner*, 93 P. 305 (Wyo. 1908); *see generally*, *Oaks*, *supra* note 86; *Thompson, Void Sentences*, *supra* note 180, at 802 & n.1. Shepard's Citations reveals that courts in 46 states have cited *Watkins* with approval.

268 237 U.S. 309 (1915).

269 261 U.S. 86 (1923).

270 *Frank v. State*, 80 S.E. 1016 (Ga. 1914) (29 page opinion).

271 *Frank*, 237 U.S. at 345-50 (Holmes, J., dissenting).

272 *Moore*, 261 U.S. at 90-91 (quoting *Frank*, 237 U.S. at 335).

273 *See Faye v. Noia*, 372 U.S. 391, 457 (1963) (Harlan, J., dissenting).

Valotta,²⁷⁴ a unanimous Court overturned a grant of habeas to a state prisoner.²⁷⁵ In an opinion by Justice Holmes, the Court concluded:

There was not the shadow of a ground for interference with this sentence by *habeas corpus* [citing *Frank*]. Extraordinary cases where there is only the form of a court under the domination of a mob, as was alleged to be the fact in *Moore v. Dempsey*, offer no analogy to this. In so delicate a matter as interrupting the regular administration of the criminal law of the State by this kind of attack, too much discretion cannot be used, and it must be realized that it can be done only upon definitely and narrowly limited grounds.²⁷⁶

Likewise, the general rule of jurisdiction was upheld by the Court in 1925 in *Knewel v. Egan*.²⁷⁷

It is the settled rule of this Court that *habeas corpus* calls in question only the jurisdiction of the court whose judgment is challenged [citing *Frank*].

A person convicted of crime by a judgment of a state court may secure the review of that judgment by the highest state court and if unsuccessful there may then resort to this Court by writ of error if an appropriate federal question be involved and decided against him; or, if he be imprisoned under the judgment, he may proceed by writ of *habeas corpus* on constitutional grounds summarily to determine whether he is restrained of his liberty by judgment of a court acting without jurisdiction [citing *Royall*]. But if he pursues the latter remedy, he may not use it as a substitute for a writ of error [citing *Parks*]. It is fundamental that a court upon which is conferred jurisdiction to try an offense has jurisdiction to determine whether or not that offense is charged or proved. Otherwise every judgment of conviction would be subject to collateral attack and review on *habeas corpus* on the ground that no of-

274 270 U.S. 424 (1926).

275 The district court granted habeas on the rationale that the state court lost jurisdiction "by the denial of the prisoner's fundamental right to a separate trial . . ." which denied him due process. *United States ex rel. Valotta v. Ashe*, 2 F.2d 735, 743 (W.D. Pa. 1924). The court cited both *Frank* and *Moore* but did not suggest that *Moore* overruled *Frank*.

276 *Ashe*, 270 U.S. at 426 (citation to *Frank*, 237 U.S. at 326 omitted).

277 268 U.S. 442 (1925). The defendant's conviction under state law for filing a false insurance claim was upheld by the state supreme court and the defendant sought federal habeas corpus on grounds that the state information did not "describe a public offense" and that the trial court had no jurisdiction because the information did not provide for venue. *Id.* at 443.

fense was charged or proved. It has been uniformly held by this Court that the sufficiency of an indictment cannot be reviewed in *habeas corpus* proceedings [citing *Watkins* and other cases].²⁷⁸

The Court held "that the judgment of state courts in criminal cases will not be reviewed on *habeas corpus* merely because some right under the Constitution of the United States is alleged to have been denied to the person convicted. The proper remedy is by writ of error."²⁷⁹ Finally, in *Ex parte Hawk*, the Court identified *Moore* as a case where "the remedy afforded by state law proves in practice unavailable or seriously inadequate."²⁸⁰

In addition to the changes brought about by *Frank* and *Moore*, the jurisdiction doctrine is generally considered to have been further weakened in *Bowen v. Johnston*,²⁸¹ *Walker v. Johnston*²⁸² and *Waley v. Johnston*.²⁸³ Although *Waley* is cited as having explicitly rejected the principle of jurisdiction, *Waley* had a limited scope.²⁸⁴ *Johnson v. Zerbst*²⁸⁵ widened the conflict in 1938, but

278 *Id.* at 445-46 (citations omitted).

279 *Id.* at 447. Although Justice Brennan regarded this history as "revisionist," in *Stone v. Powell*, 428 U.S. 465, 517 (1976) (Brennan, J., dissenting), many Justices of the Court—former and present—have generally assented to this historical survey, as first analyzed in Professor Bator's 1963 article. In his dissent in *Fay v. Noia*, 372 U.S. 391 (1963), Justice Harlan saw only two exceptions to the doctrine of jurisdiction until *Frank* was decided in 1915.

The expansion of the definition of jurisdiction occurred primarily in two classes of cases: (1) those in which the conviction was for violation of an allegedly unconstitutional statute, and (2) those in which the Court viewed the detention as based on some claimed illegality in the sentence imposed, as distinguished from the judgment of conviction.

Id. at 451 (Harlan, J., dissenting). Justice Harlan and, later, Justice Powell also viewed *Frank* and *Moore* similarly. In *Frank*, the state provided a "corrective process" that was absent in *Moore*. "In no case prior to *Brown v. Allen*," Harlan concluded, "was there any substantial modification of the concepts articulated in the *Frank* decision." *Id.* at 457. In *Stone v. Powell*, Justice Powell saw the significant expansion of the jurisdiction doctrine come in *Frank*. He construed *Frank* as broadly holding that "if a habeas corpus court found that the State had failed to provide adequate 'corrective process' for the full and fair litigation of federal claims, whether or not 'jurisdictional,' the court could inquire into the merits to determine whether a detention was lawful." *Stone v. Powell*, 428 U.S. 465, 476 n.8 (1976).

280 321 U.S. 114, 118 (1944) (distinguishing *Moore* from *Hawk*).

281 306 U.S. 19 (1939).

282 312 U.S. 275 (1941) (holding that a habeas petitioner who alleged a coerced confession was entitled to a federal hearing).

283 316 U.S. 101 (1942).

284 *Waley* involved a federal prisoner who alleged that his guilty plea had been coerced by threats from an FBI agent. The district court denied the writ without hearing

the constraints on federal habeas jurisdiction were not entirely thrown off until *Brown v. Allen*.²⁸⁶ It is important to note that *Bowen*, *Walker*, *Waley*, and *Zerbst* were all federal prisoner cases, involving no interpretation of the 1867 Act. In the wake of the widening of habeas jurisdiction in these cases, however, the Court simply imported that development into state prisoner cases without analysis.²⁸⁷

If decisions after the 1867 Act had limited federal habeas corpus review of state convictions to examining the jurisdiction of the court—with growing exceptions after *Frank* and *Moore*—the Supreme Court's 1953 decision in *Brown v. Allen*²⁸⁸ was the modern landmark decision which expanded the availability of habeas corpus. Even if *Frank* and *Moore* broke new ground by allowing federal habeas review when the state failed to provide an adequate "corrective process," *Brown* broke further ground by allowing a federal court to reexamine all constitutional claims raised by a state prisoner, even when there was no apparent objection to the state appellate proceedings and no claim that the state failed to provide an adequate "corrective process." Recent commentators have contended that *Brown* was insignificant, and that the Court had really assumed all constitutional claims within habeas jurisdiction before *Brown*. But contemporary scholars, like Professor Henry Hart, have concluded that *Brown* "manifestly broke new ground" in holding that "due process of law in the case of state prisoners is not primarily concerned with the adequacy of the

evidence and without directing the production of the prisoner in court. 38 F. Supp. 408 (N.D. Cal. 1941). The court of appeals affirmed. 124 F.2d 587 (9th Cir. 1941). The Government then confessed error on the basis of *Walker* and the Supreme Court reversed and remanded for "a hearing in conformity" with *Walker*. *Waley*, 316 U.S. at 105:

In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.

Id. at 104-05 (citing *Moore*, *Mooney v. Holohan*, 294 U.S. 103 (1935), and *Bowen*, 306 U.S. at 24).

285 304 U.S. 458 (1938) (authorizing a federal habeas court to reexamine de novo a Sixth Amendment waiver of counsel claim in a capital case).

286 344 U.S. 443 (1953). Justices Frankfurter and Rutledge apparently first asserted broad habeas jurisdiction to be the intent of Congress in the 1867 Act, and questioned the viability of the *Watkins* jurisdiction doctrine in *Sunal v. Large*, 332 U.S. 174, 184-92 (1947) (Frankfurter, J., dissenting).

287 See *supra* note 122, surveying cases between *Frank* and *Brown*.

288 344 U.S. 443 (1953).

state's corrective process or of the prisoner's personal opportunity to avail himself of this process . . . but relates essentially to the avoidance in the end of any underlying constitutional error"²⁸⁹ Likewise, Professor Paul Bator concluded that the Court affirmed the convictions not on the basis of *Frank*—that the state had provided an adequate corrective process—but by reaching and rejecting on the merits the federal claims presented which had been previously adjudicated by the state courts.²⁹⁰ *Brown* assumed, for the first time, that the purpose of habeas is to make sure that no constitutional error has been made, and thus effectively overruled the nearly 130 year old rule of *Watkins* that habeas corpus is not to serve as an appeal.²⁹¹

In 1963, the Supreme Court in *Fay v. Noia*²⁹² significantly expanded the *scope* of federal habeas corpus for state prisoners, just as *Brown* had changed the *function*. If *Brown* held that virtually any constitutional claim justified federal habeas jurisdiction, *Fay* (and the companion case of *Townsend v. Sain*²⁹³) went further procedurally by effectively eliminating the "adequate and independent state ground" rule which applied on direct review. Thus,

289 Hart, *supra* note 104, at 106.

290

The Court did so without any explicit discussion of the question of jurisdiction or any apparent understanding of how radical this step was: with only Mr. Justice Jackson disagreeing, eight of nine Justices assumed that on habeas corpus federal district courts must provide review of the merits of constitutional claims fully litigated in the state court system And ever since *Brown v. Allen* the Supreme Court has continued to assume, without discussion, that it is the purpose of the federal habeas corpus jurisdiction to redetermine the merits of federal constitutional questions decided in state criminal proceedings.

Bator, *supra* note 27, at 500.

291 Cf. Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 252 (1988):

The divorce of the writ of habeas corpus from a satisfactory rationale explaining the purposes of the writ can be traced back to the Court's seminal decision in *Brown v. Allen*. In that case the Court acknowledged an expansion of the scope of the writ of habeas corpus from its traditionally narrow focus on jurisdictional errors to encompass any claim of constitutional error raised by a prisoner in state custody. The expansion of the scope of the writ in *Brown*, however, took place in a most peculiar fashion. Rather than explicitly discussing the expansion in the scope, and thus the nature, of the writ, the *Brown* Court simply presumed the enlarged scope of the writ. Because the change in habeas corpus occurred sub silentio, the Court never provided a rationale for the writ's expansion. Since *Brown*, habeas corpus has been in search of a rationale.

Id. (footnotes omitted).

292 372 U.S. 391 (1963).

293 372 U.S. 293 (1963).

federal collateral review was made even broader than federal direct review.

B. *Revisionist Criticisms of the Jurisdiction Doctrine*

Shortly before *Fay v. Noia*, the Court's jurisdiction doctrine was systematically reviewed by Professor Paul Bator, in the most influential article ever written on federal habeas jurisdiction.²⁹⁴ Professor Bator's 1963 article, though dismissed by the majority opinion in *Fay*, nevertheless anticipated the rationale of *Fay*. The article constituted a thorough critique that proved more persuasive and enduring than the majority opinion in *Fay*, and, consequently, was adopted by Justice Harlan and subsequent Justices.²⁹⁵ Bator's article is a classic because it identified the most important questions in the exercise of federal habeas jurisdiction, anticipated many of the questions that the courts have addressed since then, attempted to comprehensively answer them, and influenced Supreme Court doctrine. Bator sought to determine when "a federal district court on habeas corpus [has] the power to redetermine the merits of federal questions decided by the state courts in the course of state criminal cases."²⁹⁶ Although he touched on history and statutory construction, Bator's article emphasized procedure and policy. Bator stressed the need for finality in the administration of criminal justice. Because the "possibility of mistake always exists," the function of habeas corpus cannot be to *ensure* that no mistakes are ever made. No state court or federal court can fulfill that purpose. Justice Jackson captured this common sense in his famous aphorism from *Brown*: "We are not final because we are infallible. We are only infallible because we are final."²⁹⁷ As Bator wrote:

[I]f the lawfulness of the exercise of the power to detain turns on whether the facts which validate its exercise "actually" hap-

294 See Bator, *supra* note 27.

295 See, e.g., *Wright v. West*, 112 S.Ct. 2482, 2486 (1992); *McCleskey v. Zant*, 499 U.S. 467, 478, 491 (1991); *Kuhlmann v. Wilson*, 477 U.S. 436, 453 & n.14 (1986); *Reed v. Ross*, 468 U.S. 1, 15 (1984); *Engle v. Isaac*, 456 U.S. 107, 127-28 nn.32-33 (1982); *Rose v. Mitchell*, 443 U.S. 545, 580 (1979) (Powell, J., concurring); *Stone v. Powell*, 428 U.S. 465, 476 n.7 (1976); *Fay v. Noia*, 372 U.S. 391, 421 n.30 (1963); *Id.* at 449 n.1 (Harlan, J., dissenting); Liebman, *supra* note 1; Mayers, *supra* note 33, at 38 n.31; Peller, *supra* note 21; Woolhandler, *supra* note 28, at 583.

296 Bator, *supra* note 27, at 443.

297 *Brown v. Allen*, 344 U.S. 443, 540 (1953). H.L.A. Hart expressed the same idea in another way: "It is impossible to provide by rule for the correction of the breach of every rule." H.L.A. HART, *THE CONCEPT OF LAW* 139 (1961).

pened in some ultimate sense, power can never be exercised lawfully at all, because we can never absolutely recreate past phenomena and thus can never have final certainty as to their existence

. . . If any detention whatever is to be validated, the concept of "lawfulness" must be defined in terms more complicated than "actual" freedom from error; or, if you will, the concept of "freedom from error" must eventually include a notion that some complex of institutional processes is empowered definitively to *establish* whether or not there was error, even though in the very nature of things no such processes can give us ultimate assurances²⁹⁸

The process for which freedom from error in trial court decisions is to be sought, as much as humanly possible, is the appeal or writ of error. Perhaps it was just this truth that early Supreme Court habeas jurisprudence sought to incorporate when the Court repeatedly held that habeas jurisdiction could not be used as a writ of error.²⁹⁹

Bator surveyed the most important of the Court's decisions between *Watkins* and *Brown* and concluded that the evolution in the Court's jurisdiction doctrine was limited and pragmatic—occurring in cases in which due process was violated and no corrective process appeared—moving the Court to reach beyond precedent to change the law. Bator sought to understand the Court on its own terms, not construct a "model" for federal habeas. Bator concluded that federal habeas review was justified under the full and fair litigation standard of *Ex parte Hawk*³⁰⁰ when the state failed to provide its own corrective process for state trial court errors. Thus, if it is alleged that the trial judge was bribed, that a mob dominated the trial, that the prisoner was tortured to

298 Bator, *supra* note 27, at 447. This same truth was recognized by Hart & Wechsler:

[L]aw is not a simple concept . . . consisting as it does of rules distributing authority to make decisions as well as rules that govern the decisions to be made. There is a sense, therefore, in which a prisoner is legally detained if he is held pursuant to the judgment or decision of a competent tribunal or authority, even though the decision to detain rested on an error as to law or fact.

That there must be some room for limiting conceptions of this kind seems clear enough: the writ cannot be made the instrument for re-determining the merits of all cases in the legal system that have ended in detention.

HENRY M. HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1238-39 (1953); see also Hart, *supra* note 104, at 103 (citing part of the same passage).

299 See *infra* note 314.

300 321 U.S. 114 (1944).

plead guilty, that there was knowing use of perjured testimony by the prosecution, or that the defendant was entirely deprived of the assistance of counsel, and "the state provided no fair process, direct or collateral, for the testing of these allegations themselves, the habeas court should proceed to inquire into them and, if it finds the allegations true, set aside the trial court's conclusions."³⁰¹

1. Peller: Jurisdiction Review As Merits Review

The most thorough scholarly response to Bator's influential article is Professor Gary Peller's 1982 article, *In Defense of Federal Habeas Corpus Relitigation*.³⁰² A full relitigation standard for habeas is justified, in Peller's view, "by the *actual* refusal of state courts to vindicate federal rights during various periods in American history."³⁰³ Peller made five general criticisms of Bator's analysis of the Court's jurisdiction doctrine: (1) that Bator's interpretation of *Watkins* was wrong; (2) that state courts are not able or willing to "vindicate federal law" and that the 39th Congress in 1867 knew it; (3) that Bator ignored *Ex parte McCordle*³⁰⁴ and the lower federal court decisions decided between 1867 and 1885; (4) that the Court's doctrine was really based on the notion that its lack of appellate jurisdiction over criminal cases precluded habeas corpus jurisdiction; and, (5) that exceptions to the Supreme Court's jurisdiction doctrine consumed the rule. Although thorough and creative, Peller's revisionist view of *Watkins* and its jurisdiction doctrine is at odds with the evidence, the purpose of Congress's 1885 Supreme Court jurisdiction bill, and the contemporary understanding of the Supreme Court's jurisdiction doctrine. Peller's thesis is "revisionist" in the sense that he retrospectively imputes to the Court a doctrine that was consciously rejected by the Court, Congress, and leading commentators of the day. It is one thing to offer a new interpretation of historical events that challenge the interpretation of other observers; it is quite another to offer a new interpretation that directly challenges the Court's own explicit statement of what its case law meant at the time.

301 Bator, *supra* note 27, at 457.

302 Peller, *supra* note 21. Peller's thesis is criticized in many respects by Liebman, *supra* note 1, and Woolhandler, *supra* note 28.

303 Peller, *supra* note 21, at 582.

304 73 U.S. (6 Wall.) 318 (1867) (*McCordle I*); 74 U.S. (7 Wall.) 506 (1869) (*McCordle II*).

Peller bases much of his argument on his revisionist interpretation of Chief Justice Marshall's statement in *Watkins* that a writ of habeas corpus was "in the nature of a writ of error."³⁰⁵ Peller contends that this (combined with the fact that the Court had no appellate jurisdiction in criminal proceedings at the time) meant that the Court's "lack of appellate jurisdiction; not a narrow view of the habeas remedy, prevented review of the merits."³⁰⁶ However, there are three sufficient responses that effectively rebut this contention.

First, Peller failed to distinguish a writ of habeas from a writ of error. He pointed out Marshall's statements, but failed to closely analyze them. Marshall's specific statements were that habeas (1) "is in the nature of a writ of error, to examine the legality of the commitment" and (2) is "in the nature of a writ of error which brings up the body of the prisoner with the cause of commitment."³⁰⁷ Peller assumed that Marshall's phrase "in the nature of a writ of error" equated habeas with a writ of error. But "in the nature of" does not mean "the same as." It means "having the characteristics of."³⁰⁸ Thus, a writ of error is "in the nature of" an appeal, a writ of certiorari, and a writ of habeas corpus to the extent that it has similar characteristics to any of those.³⁰⁹ One way in which habeas and a writ of error had similar characteristics, for example, was that they were both writs, which at common law was simply "a short written command issued by a person in authority."³¹⁰ Another way in which habeas, under section 14 of the Judiciary Act of 1789, had a characteristic similar to a writ of error was that both could bring up the case to a superior court.³¹¹

305 *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-02 (1830). The Court did not have appellate jurisdiction over criminal cases until 1891. See *In re Wood*, 140 U.S. 278 (1891).

306 Peller, *supra* note 21, at 611.

307 *Watkins*, 28 U.S. at 201-02.

308 "Nature" means "a kind of class usu[ually] distinguished by fundamental or essential characteristics." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 789 (1987).

309 See, e.g., 4 C.J.S. *Appeal and Error* § 9, at 65-72 (1993) (distinguishing writ of error from writ of certiorari, writ of review, writ of right, and appeal).

310 Jenks, *supra* note 95, at 523.

311 3 BLACKSTONE, *supra* note 74, *405; see *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 349 (1816) ("A writ of error is, indeed, but a process which removes the record of one court to the possession of another court, and enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant").

Another way they were similar was in the scrutiny called for by the superior court. Blackstone wrote that a writ of error "only lies upon matter of law arising upon the face of the proceedings; so that no evidence is required to substantiate or support it" 3

However, these common characteristics were limited; habeas and writs of error were not similar in all respects. Elsewhere in *Watkins*, Marshall distinguished habeas from a writ of error.³¹² Whatever similarities writs of error and habeas corpus had, they also had significant differences. The most important, which *Watkins* specifically affirmed, was that habeas was limited by the jurisdictional limitation of the 1679 English Act, which, Marshall held in *Watkins*, "enforces the common law" and "excepts from those who are entitled to its benefit, persons committed for felony or treason plainly expressed in the warrant, as well as persons convicted or in execution."³¹³ (Peller did not review the common law or the English Habeas Act of 1679 which established the jurisdiction doctrine.)

Second, even if Marshall's statements are ambiguous to modern commentators, such as Peller, they were not ambiguous to the Court or contemporary commentators. The Court consistently stated in numerous cases throughout the nineteenth century and extending as late as 1938—often citing *Watkins*—that habeas could not serve as a writ of error.³¹⁴

BLACKSTONE, *supra* note 74, *405. A writ of habeas corpus was similar at common law, because a court was required to make a decision based on the face of the return, which could not be controverted by the defendant.

312 *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 206 (1830):

The cases are numerous, which decide that the judgments of a court of record having general jurisdiction of the subject, although erroneous, are binding until reversed. It is universally understood that the judgments of the courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world; and that this apparent want of jurisdiction can avail the party only on a writ of error. This acknowledged principle seems to us to settle the question now before the court. The judgment of the circuit court in a criminal-case is of itself evidence of its own legality, and requires for its support no inspection of the indictments on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decisions. We cannot usurp that power by the instrumentality of the writ of *habeas corpus*. The judgment informs us that the commitment is legal, and with that information it is our duty to be satisfied.

313 *Id.* at 201-02.

314 *See, e.g., Johnson v. Zerbst*, 304 U.S. 458, 465 & n.15 (1938) ("True, *habeas corpus* cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial; and the 'writ of *habeas corpus* cannot be used as a writ of error.'" (citing *Watkins* and *Knewal v. Egan*)); *Riddle v. Dyche*, 262 U.S. 333, 335 (1923) (citing *Frank* for the proposition that habeas cannot be used as substitute for writ of error); *Henry v. Henkel*, 235 U.S. 219, 229 (1914) ("[T]he court, with the exceptions named, has uniformly held that the hearing on habeas corpus is not in the nature of a writ of error . . ."); *Glasgow v. Moyer*, 225 U.S. 420, 428

Professor Peller also contended, based on his review of eight Supreme Court cases between 1873 and 1906, that the Court narrowly construed its habeas jurisdiction only because it lacked appellate jurisdiction over criminal cases until 1889.³¹⁵ Since it

(1912) ("The writ of habeas corpus cannot be made to perform the office of a writ of error."); *Harlan v. McGourin*, 218 U.S. 442, 447-48 (1910):

We find nothing in these cases to conflict with the well-established rule in this court that the writ of *habeas corpus* cannot be made to perform the office of a writ of error The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of *habeas corpus*. Upon *habeas corpus* the court examines only the power and authority of the court to act, not the correctness of its conclusions.

Id.; *In re Lincoln*, 202 U.S. 178, 182 (1906) ("[A] writ of *habeas corpus* is not to be made use of as a writ of error"); *Felts v. Murphy*, 201 U.S. 123, 129 (1906) ("[T]he writ cannot perform the function of a writ of error."); *Crossley v. California*, 168 U.S. 640, 641 (1898) ("[N]or can the writ of *habeas corpus* be made use of as a writ of error."); *In re Lennon*, 166 U.S. 548, 552 (1897); *In re Belt*, 159 U.S. 95, 100 (1895) ("[G]eneral rule is that . . . *habeas corpus* will not issue unless the court . . . is without jurisdiction; and that it cannot be used to correct errors."); *United States v. Pridgeon*, 153 U.S. 48, 63 (1894) (writ "cannot be made to perform the function of a writ of error in relations to proceedings of a court within its jurisdiction"); *In re Swan*, 150 U.S. 637, 648 (1893); *In re Lennon*, 150 U.S. 393, 400 (1893); *In re Tyler*, 149 U.S. 164, 180 (1893); *In re Frederick*, 149 U.S. 70, 75-76 (1893) (*habeas* "not a proceeding for the correction of errors," and is "limited to cases in which the judgment or sentence attacked is clearly void by reason of its having been rendered without jurisdiction, or by reason of the court's having exceeded its jurisdiction in the premises"); *In re Schneider*, 148 U.S. 162, 166 (1893) ("The ground of the application does not go to the jurisdiction or authority of the Supreme Court of the District, and mere error cannot be reviewed in this proceeding." (citing *Parks, Bigelow, Wilson*, 114 U.S. 417 (1887), *Nielsen, Petitioner*, 131 U.S. 176 (1889)); *In re Wood*, 140 U.S. 278, 286 (1891); *Ex parte Terry*, 128 U.S. 289, 304, 305 (1888); *In re Coy*, 127 U.S. 731, 758-59 (1888) (applying rule of *Watkins*); *Ex parte Crouch*, 112 U.S. 178, 180 (1884) ("The office of a writ of *habeas corpus* is neither to correct such errors [in determining the sufficiency of a defense at trial] nor to take the prisoner away from the court which holds him for trial, for fear, if he remains, they may be committed. Authorities to this effect in our own reports are numerous." (citing *Watkins, Lange, Parks, Siebold, Virginia, Rowland*, 104 U.S. 604, 612 (1881)); *Ex parte Yarbrough*, 110 U.S. 651, 653-54 (1884) (applying rule of *Watkins*); *Ex parte Curtis*, 106 U.S. 371 (1882); *Ex parte Reed*, 100 U.S. 13, 23 (1879) ("A writ of *habeas corpus* cannot be made to perform the function of a writ of error. To warrant the discharge of the petitioner, the sentence under which he is held must be, not merely erroneous and voidable, but absolutely void." (citing *Kearney and Watkins*)); *Ex parte Parks*, 93 U.S. 18, 23 (1876) ("To review the decision of that court by means of the writ of *habeas corpus* would be to convert that writ into a mere writ of error, and to assume an appellate power which has never been conferred upon this court." (citing *Watkins*)); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 166 (1873) ("Many of these decisions in the English courts are on writs of error and have but little bearing on the question before us." (citing *Watkins*)).

315 Peller emphasized eight cases: *In re Moran*, 203 U.S. 96 (1906); *In re Belt*, 159

could not review criminal cases on appeal, Peller says, the Court declined to exercise habeas jurisdiction. The limited significance of several of these cases has been addressed above. Virtually all are federal cases and do not involve an interpretation of the 1867 Act. Virtually all are encompassed by the exceptional categories noted by the Court in *Henry v. Henkel*. Virtually none are relied upon by the Court to expand habeas jurisdiction in *Frank* or *Moore* or any case thereafter. The lone exception is *Nielsen*,³¹⁶ a case involving federal prisoners and not the 1867 Act. The Court did cite *Nielsen* in *Johnston v. Zerbst*³¹⁷ and *Bowen v. Johnson*,³¹⁸ both cases involving federal prisoners. Although there is much dicta that can be cited, the actual holding in *Nielsen* is exactly in line with the jurisdiction doctrine developed to that time—the conviction of the petitioner for the crime of unlawful cohabitation was a bar to a second prosecution for adultery and “the court was without authority to give judgment and sentence in the latter case”³¹⁹

Peller hangs much of his argument on merely one 1861 lower federal court decision, *In re McDonald*,³²⁰ for the proposition that federal habeas jurisdiction allowed the relitigation of all constitutional claims of prisoners.³²¹ Even Professor Liebman—who otherwise supports broad habeas review—recognizes the weakness of Peller’s reliance on *McDonald*.³²² The Court never cited *McDonald* and the 1884 House Judiciary Committee Report directly repudiated it.

In addition, Peller contends that the Court, in effect, actually considered all federal constitutional claims on habeas corpus during these years. This is so, Peller maintains, because federal constitutional review of state criminal proceedings was very limited until the expansion of due process and the advent of the incorporation

U.S. 95, 100 (1895) (“The general rule is that the writ of *habeas corpus* will not issue unless the court, under whose warrant the petitioner is held, is without jurisdiction; and that it cannot be used to correct errors.”); *Nielsen, Petitioner*, 131 U.S. 176 (1889); *Ex parte Bain*, 121 U.S. 1 (1887); *In re Snow*, 120 U.S. 274 (1887); *Ex parte Bigelow*, 113 U.S. 328 (1885); *Ex parte Siebold*, 100 U.S. 371 (1879); *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873).

316 131 U.S. 176 (1899).

317 304 U.S. 458, 467 (1938).

318 306 U.S. 19, 24 (1939).

319 *Nielsen*, 131 U.S. at 190.

320 16 F. Cas. 17 (C.C.E.D.Mo. 1861) (No. 8,751).

321 Peller, *supra* note 21, at 612-18.

322 Liebman, *supra* note 1, at 2046 n.277.

doctrine in the twentieth century.³²³ (This argument was adopted by the American Bar Association and presented to Congress in recent testimony against constraints on federal habeas corpus jurisdiction.³²⁴) Yet, Peller's argument here, too, is revisionist, because it imputes a position to the Court that the Court consciously rejected in the nineteenth and early twentieth century. No further authority is needed than the Court's decision in *Knewel v. Egan*,³²⁵ where the Court held that "the judgment of state courts in criminal cases will not be reviewed on *habeas corpus* merely because some right under the Constitution of the United States is alleged to have been denied to the person convicted. The proper remedy is by writ of error."³²⁶ Likewise, *Glasgow v. Moyer*³²⁷ involved a challenge to the constitutionality of a federal statute making it a crime to deposit obscene books in the mails. The prisoner filed for habeas corpus, the district court denied the writ, and the Supreme Court affirmed. The Court cited *Harlan v. McGowrin* for the proposition that habeas was "confined to a determination whether the restraint of liberty was without authority of law" and *Matter of Gregory* for the rule that "[u]pon *habeas corpus* the court examines only the power and authority of the court to act, not the correctness of its conclusions."³²⁸ The Court held that these rules were still applicable even where constitutional issues were raised:

The principle is not the less applicable because the law which was the foundation of the indictment and trial is asserted to be unconstitutional or uncertain in the description of the offense. Those questions, like others, the court is invested with jurisdiction to try if raised, and its decisions can be reviewed, like its decisions upon other questions, by writ of error. The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of *habeas corpus* cannot be employed to re-try

323 Justice O'Connor, who formerly relied on Bator's history, seemed to adopt the Peller and Liebman theories, at least in part, in *Wright v. West*, 112 S.Ct. 2482, 2493 (1992).

324 See *Habeas Corpus Issues: Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary for the House of Representatives*, 102d Cong., 1st Sess. 448, 455 (1991) (testimony of John J. Curtin and James S. Liebman).

325 268 U.S. 442 (1925).

326 *Id.* at 446.

327 225 U.S. 420 (1912).

328 *Id.* at 428.

the issues, whether of law, constitutional or not, or of fact.³²⁹

Without recognizing, much less refuting, Lewis Mayers' review of the legislative history of the 1867 Act, Professor Peller also contends that the 39th Congress believed state courts would not "vindicate federal law," and enacted the 1867 Act to allow federal relitigation of all federal claims.³³⁰ It is quite obvious, however, that the Civil War was not fought over the federal constitutional rights of state criminal prisoners in either the North or the South, and the Reconstruction legislation was obviously not directed at that broad class of persons either.³³¹ The broad proposition that the balance of power shifted from the states to the federal government during Reconstruction says nothing about Congress's specific purpose for the 1867 Act. Moreover, the contemporary understanding of the 1867 Congress and the contemporaneous interpretation by the 38th Congress (and the House Judiciary Committee) that enacted the 1885 Habeas Jurisdiction Act belies Peller's undocumented assertion. The evidence is clear that Congress was not concerned about all state prisoners who might raise constitutional claims. Rather, Congress was concerned with a special and limited class of cases in the South during Reconstruction.

Professor Peller also criticizes Bator for "ignoring" the Court's decision in *Ex parte McCordle*,³³² which upheld Congress's 1868 withdrawal of the Court's appellate jurisdiction over the 1867 Act. Chief Justice Chase's opinion in *McCordle I* contained broad dictum which supporters of broad federal habeas often cite.³³³ But the statement from *McCordle I*, where the Court denied a motion to dismiss, was obviously dictum, given the Court's dismissal of the case for lack of jurisdiction in *McCordle II*. *McCordle's* irrelevance is

329 *Id.* at 429.

330 Peller, *supra*, note 21, at 602.

331 See *supra* notes 135-76 and accompanying text. A number of general historians of the period have recognized that the 1867 Act was focused on the cause of freedmen or Unionists in the South. See Warren, *supra* note 174 and accompanying text; ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 440-41 (1988); see also Neil McFeeley, *Habeas Corpus and Due Process: From Warren to Burger*, 28 BAYLOR L. REV. 533, 535 (1976) ("Historical research indicates that the . . . [1867 Act][was] instituted to protect the newly-freed slaves against the vagrant and apprentice laws formulated by the southern states.").

332 73 U.S. (6 Wall.) 318 (1867) (*McCordle I*); 74 U.S. (7 Wall.) 506 (1869) (*McCordle II*).

333 "This legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction." *McCordle I*, 73 U.S. (6 Wall.) at 325-26.

confirmed by the fact that, with one exception, the Court never invoked *McCardle I*'s dictum in any habeas case or in support of any expansive interpretation of the 1867 Act until *Fay v. Noia*.³³⁴

Likewise, Professor Peller criticizes Bator for "ignoring" lower federal court cases decided between the time the Act was passed in 1867 and the time when the Court's jurisdiction was restored in 1886. However, because Peller did not discover or examine the legislative history of the 1885 appellate jurisdiction legislation, he did not discover the work of Thompson, the ABA, Congressman Poland, or the House Judiciary Committee, all of which rejected the same federal court cases which Peller relies upon as inconsistent with the intent of the 1867 Act. Their work sought to restore the Supreme Court's jurisdiction so as to reinstate a proper interpretation of the 1867 Act, grounded in the doctrine of *Watkins*, and to effectively overrule these cases. Based on the purpose of the 1885 legislation, *Ex parte Royall* and the following cases adopting the doctrine of *Watkins* were eminently correct. Their decisions fulfilled the 48th Congress's purpose in restoring the Court's appellate jurisdiction over the 1867 Act. Accordingly, the foundation of Bator's 1963 thesis survives Peller's criticism intact.

2. Liebman: Habeas As Substitute For Direct Review

Recently, Professor James Liebman, author of an encyclopedic treatise on habeas corpus, has provided a second perspective on the Court's jurisdiction doctrine and launched a different attack on Professor Bator's 1963 thesis.³³⁵ Although he accepts Peller's

334 Only in *In re Burrus*, 136 U.S. 586, 592 (1890) (child unlawfully detained by grandparents) is the *McCardle I* dictum cited and there, it was cited only in regard to Congress's jurisdiction over federal appeals. See *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946); *Estep v. United States*, 327 U.S. 114, 132 (1946) (Rutledge, J., concurring); *Cross v. Burke*, 146 U.S. 82, 86 (1892); *Kurtz v. Moffitt*, 115 U.S. 487, 497 (1885); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 620 (1874); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 166 (1873); *McCardle II*, 74 U.S. (6 Wall.) 506 (1869). Only in *Fay* is the *McCardle I* dictum cited in support of broad federal habeas jurisdiction. *Fay*, 372 U.S. at 417.

335 Liebman, *supra* note 1, at 2041-55. Liebman says that Bator's article "dominates" habeas scholarship. *Id.* at 2041. But while it may be true that Bator's article has influenced a number of scholars (see Woolhandler, *supra* note 28, at 583 n.43), his policy conclusions have been virtually ignored. While Bator's article has influenced many Supreme Court Justices since 1963, habeas scholarship either ignores Bator's article, or relies on Peller's, without a critical understanding, to support broad habeas review. See, e.g., Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451, 470 n.115 (1990-91) (accepting Peller's view of the

ultimate conclusion calling for broad federal habeas review, Liebman levies criticisms at both the Bator and (what he calls) the "Brennan-Peller" theses and attempts to construct his own version of habeas history that supports broad modern habeas review.

Liebman states his thesis as follows:

Federal habeas corpus is not a substitute for a *general* writ of error or other direct appeal as of right. Since 1789, however, it has provided statutorily specified classes of prisoners with a *limited* and *substitute* federal writ of error or appeal as of right. That appellate procedure has been *limited* because it has lain only to hear claims of particular national importance—which Congress since 1867 has defined as all constitutional claims. It has been a *substitute* because it has served only in default of Supreme Court review as of right.

The *limited* class of nationally important claims cognizable in habeas corpus has changed over time under the influence of (1) constitutional and statutory limitations on the federal courts' jurisdiction—claims arising under state law, even if jurisdictional, have never been cognizable; (2) case law identifying the legal defects in *civil* cases that are subject to collateral attack; and (3) developing notions of due process and constitutional law. At no time was the line between jurisdictional and nonjurisdictional claims a very good proxy for this line between important and unimportant claims.

As a *substitute* for federal direct appeal, habeas corpus has never duplicated, but has always mirrored the scope of, Supreme Court review on direct appeal. Although the line between legal and factual questions has changed over time, the scope of both modes of review has always been *de novo* on legal claims and deferential-to-nonexistent on factual findings.

"Innocence" claims and their close cousins, claims that the penal statute was not intended to reach the particular prisoner's conduct, are both nationally unimportant because *sui genesis*, and subject to little or no review because aimed at the central fact determination at trial. For these reasons, the Court has been particularly careful to exclude such claims from habeas corpus.³³⁶

Like Peller's, Liebman's thesis is revisionist in imposing a theory on the Court's habeas jurisprudence up to *Frank* and *Moore* that the Court itself never adopted and, in fact, consciously dis-

Court's jurisdiction cases without a crucial analysis).

336 Liebman, *supra* note 1, at 2055-56 (footnotes omitted).

avowed. Liebman fails ultimately because, like Peller, he disregards or misreads the *Watkins* decision and its influence as the seminal habeas decision of the nineteenth century, underestimates the coherence of the Court's jurisdiction doctrine in its nineteenth century context, and overlooks the purpose and legislative history of the 1867 Act and the 1885 Habeas Jurisdiction Act.

Professor Liebman acknowledges several defects in Professor Peller's thesis.³³⁷ For example, he points out that Peller's theory (that the Court's grant of habeas relief was coextensive with contemporary constitutional construction of the Due Process Clause) is undermined by the Court's 1891 decision in *In re Wood*,³³⁸ where the Court denied relief for a claim of racial discrimination in a grand jury. The Court held that the issue "was a question which the trial court was entirely competent to decide, and its determination could not be reviewed by the circuit court of the United States, upon a writ of habeas corpus, without making that writ serve the purposes of a writ of error."³³⁹ As Liebman points out, "the equal protection claim in *Wood* enjoys the same explicit constitutional status as the due process claims that Brennan and Peller believe were consistently cognizable on habeas corpus."³⁴⁰

A general response to Liebman is set out in the foregoing response to Peller, since part of Liebman's thesis presupposes the correctness of some of Peller's thesis. For example, unless one exaggerates the importance of Senator Trumbull's 1866 Senate statement on the scope of the 1867 Bill—and ignores the text, context, and the rest of the legislative history as some advocates of broad habeas review are inclined to do—it is untenable to say that in the 1867 Act Congress authorized "all constitutional claims" of

337 In his testimony before Congress, Professor Liebman wrote that Peller "seriously challenged" the accuracy of Bator's 1963 article. *Habeas Corpus Issues: Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary for the House of Representatives*, 102d Cong., 1st Sess. 448, 459 (1991) (statement of James S. Liebman). In his later law review article, however, he noted many weaknesses in Peller's article. Liebman, *supra* note 1, at 2046-48. Liebman points out that *In re McDonald*, 16 F. Cas. 17 (E.D. Mo. 1861) (No. 8,751), "acknowledges that most lower federal courts on habeas corpus considered themselves bound by the same jurisdictional constraints as the Supreme Court." Liebman, *supra* note 1, at 2046 n.277; see also Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 U.C.L.A. L. REV. 503, 540 n.163 (1992) (*McDonald* "seems less indicative of earlier practice than Peller argues[,] concluding that the *McDonald* court was "apparently influenced by the oncoming civil war, engaged in rhetorical flights . . .").

338 140 U.S. 278 (1891).

339 *Id.* at 286.

340 Liebman, *supra* note 1, at 2047.

all state prisoners to be reviewed on federal habeas without regard to the jurisdictional and pre-conviction constraints of the English Act of 1679. Moreover, in *Henry v. Henkel*,³⁴¹ the Court expressly rejected the notion that habeas was a "substitute" for a writ of error or appeal, and as late as 1925 in *Knewel v. Egan*,³⁴² the Court expressly denied that habeas authorized review of any constitutional claim by a state prisoner.

It is still necessary to make some more specific responses to Professor Liebman's most recent article. Liebman relies on two decisions, *Whitten v. Tomlinson*³⁴³ from 1895, and *Ex parte Tyler*³⁴⁴ from 1893, to support what he says is "a regime of rather broad federal review as of right . . ."³⁴⁵ However, neither case supports this nor undercuts Bator's thesis. *Tyler* is a federal case not involving an interpretation of the 1867 Act. In *Tyler*, a federal circuit court appointed a receiver for a railway company which filed a bill in equity against county sheriffs, including Tyler, who threatened to levy and seize the property of the railroad to pay for taxes.³⁴⁶ The court issued an injunction, Tyler allegedly violated it, and he was held in contempt and arrested by a U.S. marshal.³⁴⁷ The Supreme Court denied the application on the straightforward principle of the sufficiency of the jurisdiction of the circuit court: "Unless the order of commitment was utterly void for want of power, this application must be denied. The writ of *habeas corpus* is not to be used to perform the office of a writ of error or appeal . . ."³⁴⁸ The Court concluded that the cause was "confessedly within [the] jurisdiction of the circuit court."³⁴⁹ Chief Justice Fuller, writing for the Court, focused on the lack of jurisdiction. He immediately went on to state, however: "[W]hen no writ of error or appeal will lie, if a petitioner is imprisoned under a judgment of the Circuit Court, which had no jurisdiction of the person or of the subject matter, or authority to render the judgment complained of, then relief may be accorded."³⁵⁰ But this is clearly dictum. *Tyler* is simply an example of W.F. Bailey's

341 235 U.S. 219, 229 (1914).

342 268 U.S. 442, 446-47 (1925).

343 160 U.S. 231 (1895).

344 149 U.S. 164 (1893).

345 Liebman, *supra* note 1, at 2048.

346 *Tyler*, 149 U.S. at 165.

347 *Id.* at 165-70.

348 *Id.* at 180.

349 *Id.* at 190.

350 *Id.* at 180 (citing *Parks, Terry, and Neilsen*).

observation in his 1913 treatise that habeas was frequently sought in cases involving contempt.³⁵¹ Finally, *Tyler* established no broader precedent that was relied on in subsequent cases.³⁵²

Professor Liebman contends that *Tyler* "transcends jurisdictional questions and rather precisely track[s] the era's definition of due process."³⁵³ However, this contention mistakes coincidence for cause and effect, and similarity for equality. The Court's jurisdictional doctrine—arising out of *Watkins* and the English Act of 1679—long preceded the Fourteenth Amendment and is independently supported by treatises and case law of the day. While enterprising litigants attempted to fold the jurisdiction doctrine into a claim of denial of due process, as in *Whitten*, that does not mean that the Court adopted such an equation or, much less, entertained other constitutional claims on habeas prior to *Frank* and *Moore*. Liebman forgets *In re Wood*,³⁵⁴ which he suggested undermined a similar claim by Peller. In *Wood*, a litigant claimed that a leading due process and equal protection precedent of the day, *Neal v. Delaware*,³⁵⁵ authorized the writ. The Court rejected the claim.³⁵⁶

In addition to *Tyler*, Professor Liebman relies on *Whitten v.*

351 See *supra* note 266.

352 See *Sunal v. Large*, 332 U.S. 174, 186 (1947) (Frankfurter, J., dissenting) (citing *Tyler* as standing for one of the special circumstances noted in *Royak*: "[d]ue regard for harmonious Nation-State relations"); *Frank v. Mangum*, 237 U.S. 309, 329 (1915) (citing *Tyler* for importance of comity).

353 Liebman, *supra* note 1, at 2053.

354 140 U.S. 278 (1891).

355 103 U.S. 370 (1880) (reversing conviction on due process and equal protection grounds because blacks were excluded by law from grand jury service).

356

We do not perceive that anything said in *Neal v. Delaware* would have authorized the Circuit Court to discharge the appellant from custody, even if, upon investigation, it had found that citizens of the race to which he belongs had been, in fact and because of their race, excluded from the lists of grand and petit jurors That was a matter arising in the course of the proceedings against the appellant, and during his trial, and not from the statutes of New York, and should have been brought at the appropriate time, and in some proper mode, to the attention of the trial court It often occurs in the progress of a criminal trial in a state court, proceeding under a statute not repugnant to the Constitution of the United States, that questions occur which involve the construction of that instrument and the determination of rights asserted under it. But that does not justify an interference with its proceedings by a Circuit Court of the United States, upon a writ of *habeas corpus* sued out by the accused either during or after the trial in the state court.

Wood, 140 U.S. at 285-86 (emphasis added).

Tomlinson, a state case where the petitioner challenged his state detention and extradition. Liebman contends that the use of the phrase "in the first instance" in *Whitten* means that the Court considered habeas a failsafe backup.³⁵⁷ *Whitten* invoked the exhaustion and "exceptional circumstances" doctrines of *Royall*. But there is another way of reading *Whitten* that is entirely consistent with both Bator's analysis and *Watkins*. The petitioner in *Whitten* challenged his state detention and extradition *pretrial*, before any conviction or any judgment by any court (with or without appropriate jurisdiction) had occurred. Consequently, it was entirely consistent with the English Habeas Act of 1679 and *Watkins* for the *Whitten* Court to say (as Liebman quotes) that it would not grant habeas "in advance of any proceedings in the courts of the State to test the validity of his arrest and detention."³⁵⁸ It is a stretch to interpret this as a hint by the Court that it would grant habeas afterwards. Like *Tyler*, *Whitten* is never subsequently cited by the Court for the broad proposition Liebman suggests.

Professor Liebman also contends that the legislative history of the 1867 Act supports broad habeas review, but his review of the legislative history is incomplete. He cites Mayers' analysis of that history only once,³⁵⁹ but offers no direct response. Likewise, he demonstrates no knowledge of the legislative history of the 1885 jurisdiction bill. He cites an article by Seymour Thompson once,³⁶⁰ but out of context and without the understanding that Thompson was a severe critic of the lower court decisions interpreting the 1867 Act prior to 1884, and that Thompson worked with the ABA and Congressman Poland to enact the 1885 Jurisdiction Act to restore a correct and narrow interpretation of the 1867 Act.

Liebman contends that "[t]he most common criticism" of Bator is that he ignores "the Court's repeated statements that state court review need only occur 'in the first instance' or 'in advance of' habeas corpus review"³⁶¹ But the seven cases Liebman cites—within the context of the one hundred twenty-four cases (at least) on habeas that the Court decided between the Civil War and *Frank v. Mangum*—can hardly be called "repeated statements."³⁶² Moreover, Liebman acknowledges, in criticizing Peller's

357 Liebman, *supra* note 1, at 2053.

358 *Id.* at 2051 (quoting *Whitten v. Tomlinson*, 160 U.S. 231, 247 (1895)).

359 *Id.* at 2041.

360 *Id.* at 2064.

361 *Id.* at 2044.

362 *Id.* at 2045 n.264 (citing *Urquhart v. Brown*, 205 U.S. 179, 181-82 (1907) and

thesis, that these cases also contain language suggesting that the petitioner must be left to a writ of error.³⁶³ But, most importantly, the language in these seven cases is mere dictum. Peller and Liebman can cite few, if any cases in which the Court actually did review constitutional claims after a state court (with jurisdiction) reviewed the case. Professor Bator's analysis of these cases is unimpeached. As he wrote, "the 'discretionary' nature of the trial courts' power to postpone habeas was rather illusory, for whenever the trial court granted the writ prior to exhaustion of state remedies . . . the Supreme Court reversed."³⁶⁴ Bator did not conclude, as Liebman says, that the Court's exhaustion doctrine was legally "preclusive," only that the Court did not, *in fact*, review constitutional claims on habeas where state courts had jurisdiction to decide the questions.³⁶⁵

Professor Liebman also contends that *Frank* and *Moore* are indistinguishable because the petitioners had the "same opportunity" to litigate their claims in the state courts in both cases. While he argues that neither Brennan-Peller nor Bator have a completely coherent explanation for the divergent outcomes, neither does Liebman and neither did the Court. Justices Harlan and Powell came to see them as factually distinct, and this view was shared by the Court in several opinions and by contemporary scholars.³⁶⁶

Cook v. Hart, 146 U.S. 183, 195 (1892)); *see also id.* at 2047 n.285 (citing, in addition, *Whitten*, 160 U.S. at 242; *New York v. Eno*, 155 U.S. 89, 93-95 (1894); *Ex parte Royall*, 117 U.S. 241, 251-53 (1886); *Tinsley v. Anderson*, 171 U.S. 101, 104-05 (1898)).

In a similar vein, Liebman cites only three cases to support his view of the Court's "surprisingly frequent use" of the writ on behalf of state officials. *Id.* at 2051 n.306.

363 *Id.* at 2047.

364 Bator, *supra* note 27, at 478 n.87 (citing *Urquhart v. Brown*, 205 U.S. 179 (1907); *Minnesota v. Brundage*, 180 U.S. 499 (1901); *Fitts v. McGhee*, 172 U.S. 516 (1899); *Baker v. Grice*, 169 U.S. 284 (1898); *New York v. Eno*, 155 U.S. 89 (1894)).

Similarly, subsequent cases held that habeas should be denied while a prisoner seeks to vindicate his federal rights in state appellate courts and through state postconviction procedures. And still another line of cases established that even after all state remedies were exhausted, habeas corpus should be denied and the prisoner put to his writ of error in the United States Supreme Court.

Id. at 479 nn.89-91.

365 Liebman, *supra* note 1, at 2044. Liebman himself writes that the Court's language "in the first instance" or "in advance" suggests an "as if"—"as if a 'second instance' of federal review was to occur in the *wake* of state court review." *Id.* at 2044-45. But the "as if" did not in fact occur except in a limited number of cases like *Loney* and *Neagle* which the Court itself called "exceptional" in *Henry v. Henkel*. *See supra* note 262 and accompanying text.

366 *See supra* notes 268-80 and accompanying text; *see also Ex parte Hawk*, 321 U.S. 114 (1944). One contemporary commentator concluded that the issue in *Frank* and *Moore*

The question for contemporary policy and jurisprudence, however, is whether the broad federal habeas review of *Brown v. Allen* or *Fay v. Noia* is dictated or justified by either *Frank/Moore* or the Court's jurisprudence before them. In fact, neither *Frank* nor *Moore* nor the Court's preceding jurisprudence justify the break in *Brown v. Allen*.

The essential problem with Professor Liebman's thesis is his reference to jurisdictional questions as representing constitutional due process decisions. Following Peller, Liebman conflates these two, saying that the Court's jurisdiction doctrine, *in effect*, was almost identical to the scope of its contemporary interpretation of due process.³⁶⁷ Though creative, the fatal defect in this theory is that the Court never tied its jurisdiction doctrine to the leading due process cases of the day. Those cases simply are not cited in the Court's habeas jurisprudence. The connection that Peller and Liebman would like to find was in fact never made by the Court.³⁶⁸ The jurisdiction cases, not the due process cases, are relevant because they are the cases the Court relied on in its habeas decisions.

3. Woolhandler: Habeas as Evolving Remedy

Professor Ann Woolhandler has added an additional perspective on the Court's jurisdiction doctrine.³⁶⁹ Her thesis is that both Peller and Bator focus too narrowly on the habeas cases and that the analysis would profit from focusing, as she proposes, on "the broader context of the evolving patterns of remedies against government available in the federal courts."³⁷⁰ She concludes:

was "how much weight is to be given the determination of the state courts as to the existence of due process." Charles B. Nutting, *The Supreme Court, The Fourteenth Amendment and State Criminal Cases*, 3 U. CHI. L. REV. 244, 256 (1935). See also Note, *Federal Habeas Corpus as a Means of Review of State Decisions*, 73 U. PA. L. REV. 430, 431 (1925) (stating that the Court in *Frank* held "that there was not sufficient evidence of mob violence.").

367 The leading due process decision of the day stated that "Due process of law, guaranteed by the Fourteenth Amendment, does not require the state to adopt a particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution." *Rogers v. Peck*, 199 U.S. 425, 435 (1905); see also *Neal v. Delaware*, 103 U.S. 370 (1880) (reversing conviction on due process and equal protection grounds because blacks were excluded by law from grand jury service).

368 See, e.g., Nutting, *supra* note 366, at 255-56 ("In the main it seems evident that the limitations [on habeas] thus imposed have been adhered to in practice." (citing *Loney and Neagle*)).

369 Woolhandler, *supra* note 28.

370 *Id.* at 580.

[T]he federal habeas remedy was not uniformly available to address all constitutional wrongs arising in criminal cases in the nineteenth century. Nevertheless, the scope of habeas review reflected the Court's gradual willingness to address ad hoc or random acts of official illegality . . . as constitutional violations rather than common law violations, and to provide federal remedies for such abuses.³⁷¹

As a result, Professor Woolhandler contends that "the process of transforming common law violations into constitutional violations supports a full review model of habeas, even if claiming for it an evolutionary rather than a static pedigree."³⁷²

Professor Woolhandler is critical of Peller's analysis in several ways. She disputes his expansive reading of *Nielsen*, noting that it was "consistent with" federal habeas cases "decided before the Court had appellate jurisdiction" and that the *Nielsen* Court itself "continued to state that habeas review was more limited than direct review."³⁷³ She concludes that "little evidence supports his interpretation of the language in the [Court's jurisdiction] cases relating to limitations on the scope of habeas review"³⁷⁴ and that the Court's "cross-referencing of federal and state cases is inconsistent with the view [Peller's] that in state prisoner cases writs of habeas corpus and direct review were coextensive."³⁷⁵ She points out the problems with Peller's argument that *Penmoyer v. Neff*³⁷⁶ was a direct review case in which the Court's due process analysis was limited to focus on the Court's jurisdiction, noting that it involved not direct review but "a collateral attack on a civil judgment." Thus, "the Court allowed habeas to the same extent that it would entertain a collateral attack on a civil judgment—that is, only on very narrow grounds."³⁷⁷ Professor Woolhandler also points out that Peller overlooks the fact that the Court addressed equal protection claims of jury discrimination on direct review (*Neal v. Delaware*³⁷⁸) but refused to do so on habeas review (*In re*

371 *Id.*

372 *Id.* at 581.

373 *Id.* at 597 n.140.

374. *Id.* at 598.

375 *Id.* at 599.

376 95 U.S. 714 (1878).

377 Woolhandler, *supra* note 28, at 600.

378 103 U.S. 370 (1881).

*Wood*³⁷⁹ and *In re Juiro*³⁸⁰). Thus, she concludes that "it is probably correct to place habeas in the context of its historical limitation to questions of jurisdiction and to recognize, as Bator did, that the scope of habeas was not coextensive with direct review."³⁸¹

Unfortunately, Professor Woolhandler entirely overlooks the common law history of habeas and Chief Justice Marshall's reliance on the English Act of 1679 in *Watkins*, implying that Marshall created the jurisdiction limitation from contemporary American case law. To this she adds musings about Chief Justice Marshall's subjective motives for the *Watkins* decision, but provides no documentation.³⁸² She finds "contradictory strands" in *Watkins*—"the assertion that habeas is limited to a narrow version of jurisdictional review, and its statement that habeas is in the nature of an appeal or writ of error"—when there is no contradiction.³⁸³ And she concludes that these "make sense in terms of the common purpose of upholding federal judicial supremacy," when there is a more straightforward understanding based on the English limitations on habeas to which Marshall clearly appealed. Ultimately, then, like Peller and Liebman, Professor Woolhandler fails to take *Watkins* at face value.

Essentially, Woolhandler's criticism of Bator is that he gave "insufficient attention to the alternative definitions of 'jurisdiction,'" and "understated the importance of deviations from the jurisdictional rule in two important respects"—mischaracterizing both the Court's consideration of the constitutionality of statutes and its consideration of "illegal sentences" as "narrow exception[s] to the jurisdictional rule."³⁸⁴ Professor Woolhandler provides a well-written, lucid description of the growth of federal jurisdiction and the Court's interpretation of unconstitutional acts after Reconstruction. The problem, however, is that she fails to tie her broad discussion of nineteenth century jurisdiction case law to the Court's habeas jurisprudence. They coexisted, but there is little, if

379 140 U.S. 278 (1891).

380 140 U.S. 291 (1891).

381 Woolhandler, *supra* note 28, at 600.

382 *See, e.g., id.* at 592-93 ("Indeed, to protect federal judicial supremacy, Marshall had to decide *Watkins* in a way that insulated federal court judgments from merit-based collateral attacks . . . Marshall's concern in *Watkins* was that any ruling allowing broad collateral review of federal judgments would undermine federal judicial authority.").

383 *See supra* notes 305-14 and accompanying text.

384 Woolhandler, *supra* note 28 at 602.

any, evidence that the Court relied on broadening notions of jurisdiction in its habeas jurisprudence. The two developments coincided, but Woolhandler does not show cause and effect.³⁸⁵

If Woolhandler's argument is that the Court's definition of jurisdiction for purposes of its habeas jurisdiction doctrine was expanding, this is uniformly acknowledged. She does not show that corresponding developments in federal jurisdiction *did* influence the Court on habeas, nor does she show that these developments *could have* provided a legitimate rationale for the Court's broadening of habeas in or after *Frank* or *Moore*. That doctrinal developments allowed an expanded examination of constitutional claims under other federal statutes does not show that such a result in habeas was justified by the language or legislative history of the 1867 Act. The categories defined by the Court in *Henry v. Henkel* are not explained by reference to other areas of law, nor is the Court's implicit dispensing of the jurisdiction rationale in *Johnson v. Zerbst*³⁸⁶ or *Waley v. Johnson*³⁸⁷ justified by developments in other areas of law.

V. CONCLUSION: HISTORY AND HABEAS

The reliance on general history rather than text by proponents of broad federal habeas review reflects, perhaps, doubt that the 1867 Congress really intended to change the nature of habeas corpus rather than simply expand the class of persons to encompass freedmen who might apply to federal court. The text, in fact, does not demonstrate an intent to change the nature of habeas, and the legislative history of the 1867 Act positively refutes the notion. The history of the 1885 jurisdiction act confirms this view.

The Court's construction of the 1867 Act, with many fits and starts over the years, demonstrates the problem of judges appealing to broad notions of general history in interpreting statutes. The ultimate issue in statutory construction is one of political and constitutional authority—what institution of government is en-

385 For example, Professor Woolhandler cites *United States v. Lee*, 106 U.S. 196 (1892). *Lee* is a poor example of the intersection of due process, jurisdiction, and habeas corpus. This was a suit by Lee to recover possession of a parcel of land in Virginia. Habeas corpus is referred to only in passing and that is dictum, and the case really stands for the proposition that, except where Congress has provided, the United States cannot be sued.

386 304 U.S. 458 (1938).

387 316 U.S. 101 (1942).

dowed with the authority to create or revise the law at issue? Professor Willard Hurst's comment, made in the context of constitutional interpretation, applies, perhaps even more forcefully, to statutory interpretation: "If the idea of a document of superior legal authority is to have meaning, terms which have a precise, history-filled content to those who draft and adopt the document must be held to that precise meaning."³⁸⁸

Resort to unauthoritative sources from general history has led to embarrassing arguments to support broad federal habeas review. For example, what authority should be given to a supposed "misplaced parenthesis" in the English Act of 1679? Professor Paul Freund was appointed by the Supreme Court in 1951 to argue *United States v. Hayman*,³⁸⁹ and filed a brief that supported a broad conception of the history of habeas. Freund countered the previously unassailed (and since unchallenged) understanding that habeas corpus was not available to convicted criminals under the English Habeas Corpus Act of 1679 by arguing that "a misplaced parenthesis has distorted the true reading of the Act."³⁹⁰ Relying only on the "misplaced parenthesis" and *Bushell's Case* (a contempt case), Freund contended that habeas was available to convicted criminals at common law.³⁹¹ The Government, in reply, rightly

388 Willard Hurst, *The Role of History, in SUPREME COURT AND SUPREME LAW* 55, 57 (Edmond Cahn ed., 1954).

389 342 U.S. 205 (1952).

390 See Brief for the Respondent at 31-32, and Reply Brief for the United States at 21-23, *United States v. Hayman*, 342 U.S. 205 (1952) (No. 23) (on file at Harper Memorial Library, University of Chicago). Freund's argument is relied on in Wiecek, *supra* note 139, at 531-32; Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 874 n.49, 887 n.129 (1994); Mello & Duffy, *supra* note 335, at 461 n.54, 462-63.

Freund found this "misplaced parenthesis" in the difference between the following two sentences: "it shall and may be lawful to and for the person or persons so committed or detained (other than persons convict or in execution by legal process) . . . to appeal or complain to the lord chancellor or lord keeper" (the standard version of the 1679 Act) versus "it shall and may be lawfull to and for the the person or persons so committed or detained (other than persons Convict or in Execution) by Legal Process . . . to complaine to the Lord Chauncellor" (Freund's version). For Freund, the second version (with "legal process" outside the parenthesis) was more inclusive, meaning "convicted persons were wholly excepted from the section, leaving their rights to be worked out through the common-law writ." Brief at 31-32 (again without citation). This theory confounds the entire historical understanding that the 1679 Act was an improvement over the common law because it codified or "enforced" it, as Chief Justice Marshall concluded in *Watkins*.

391 Freund's only cited authority refutes him:

As the Habeas Corpus Act, 1679, applied only to cases where persons were detained in custody for some criminal or supposed criminal matter, the benefit of

suggested that "this Court will doubtless be anxious to know who misplaced the parenthesis in the Act of 1679."³⁹² No mention was made in the Court's *Hayman* decision of the "misplaced parenthesis," although the Court cited *Watkins* to restate that "at common law a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that confinement was legal" and that "[s]uch a judgment prevented issuance of the writ without more."³⁹³ Eleven years later, however, Justice Brennan relied on Freund's "misplaced parenthesis" and *Bushell's Case* in *Fay v. Noia*³⁹⁴ to conclude that habeas at common law extended to convicted prisoners.³⁹⁵ This "history" was thoroughly disparaged by scholars, but of such arguments has judicial expansion of federal habeas been made.

The *legal* case for broad habeas review is a house of cards. It must disregard the text and history of the 1867 Act. And its use of Supreme Court decisions begs the essential question—what is precedent? The cases on which advocates rely—*Nielsen*, *Lange*, *Siebold*,

its provisions in facilitating the issue of the writ did not extend to cases of illegal deprivation of liberty otherwise than on a criminal charge, as, for example, where children were unlawfully detained from their parents or guardians by persons who were not entitled to their custody, where a person was wrongfully kept under restraint as a lunatic, or where a person was illegally kept in confinement by another. In all such cases the issue of the writ during vacation depended solely upon the common law, and remained unregulated by statute until the year 1816

10 LAWS OF ENGLAND 44 (Halsbury ed. 1909). Duker agrees. See DUKER, *supra* note 28, at 273 n.3.

392 Reply Brief for the United States at 23, *United States v. Hayman*, 342 U.S. 205 (1952) (No. 23).

393 *Hayman*, 342 U.S. at 211. Without analysis, however, the Court preemptorily stated that "Congress changed the common-law rule" in the 1867 Act (citing dictum in *Johnson v. Zerbst*, 304 U.S. 458 (1938), and *Frank v. Mangum*, 237 U.S. 309 (1915), and other post-*Moore* cases). *Id.* at 211-12 nn.10 & 12.

394 372 U.S. 391, 403-04 n.13 (1963).

395 *Id.* Two years after he argued *Hayman*, Freund suggested at an academic conference that the Supreme Court had power to expand habeas corpus because there was an "organic element" in the institution. See Hurst, *supra* note 388, at 61. Freund's argument, however, ignored the Court's conclusions in *Watkins* that the English Habeas Corpus Act of 1679 "enforces the common law" and that Congress effectively adopted the Act of 1679 in the Judiciary Act of 1789 by leaving "habeas corpus" undefined. Professor Freund's view, however, was untethered from history. Freund's notion that habeas corpus had a "dynamic element" and that the "courts of England were capable of developing the writ" ignores the authority of both Parliament and the Congress over the courts' construction of the common law. Parliament codified, but did not expand, the common law with the English Act of 1679, and the Supreme Court made clear in *Bollman* and *Watkins* that federal court power vis-a-vis habeas corpus was derived from Congress and not from a general appeal to common law notions.

Whitten or *Tyler*—were never taken to mean what the advocates contend. When the Court expanded habeas in *Frank* or *Moore*, or afterwards, these cases were virtually never relied upon. Basically, the Court expanded habeas for federal prisoners and incorporated these decisions into its application of the 1867 Act—simple *ipse dixit*.

An appeal to history in statutory interpretation must delineate what is authoritative. If judges are untethered from text and history, they are free to consider unauthoritative factors and, by sleight of hand, to contract or enlarge Congress's purposes. This is demonstrated by Justice Brennan's opinion in *Fay*, where he relied on extraneous incidents like Parliamentary bills that were never passed by Parliament, and English cases, like *Bushell's Case*, which had nothing to do with freeing criminal defendants after conviction. Greater respect is due to Congress's purposes.

Precedent and *stare decisis* in the Court's construction of the 1867 Act have gone unmentioned in most Supreme Court habeas corpus decisions. This started at least as early as *Frank* and *Moore*, where no recognition was made that the Court was significantly altering federal habeas jurisdiction. Supreme Court precedents which more narrowly interpreted the history of habeas and the 1867 Act were implicitly or explicitly overruled in favor of broader interpretations in *Moore v. Dempsey*, *Brown v. Allen*, and *Fay v. Noia*. Conversely, much of *Fay* was overturned in *Wainwright v. Sykes*³⁹⁶ and *Coleman v. Thompson*,³⁹⁷ and a significant part of *Townsend* was overturned in *Keeney v. Tamayo-Reyes*.³⁹⁸ The rule of *Brown v. Allen*—that any constitutional claims can be raised on federal habeas without regard to the jurisdiction of the state courts or the corrective process provided—still stands, but federal court consideration of those claims now requires that a prisoner satisfy a number of procedural rules. These rules include "cause and prejudice" for procedural defaults and successive petitions and retroactivity for new rules. Most of these decisions have not explicitly mentioned the relevance of *stare decisis*.

Stare decisis et qujeta non movere (or *stare decisis* for short) means to "stand by what has been decided and not disturb what is at rest." *Stare decisis* in judicial decision making is intended to promote stability, continuity, consistency, and orderly development in

396 433 U.S. 72 (1977).

397 501 U.S. 722 (1991).

398 504 U.S. 1 (1992).

the law.³⁹⁹ But *stare decisis* is “not a mechanical formula of adherence to the latest decision”⁴⁰⁰ In *Desist v. United States*,⁴⁰¹ for example, Justice Harlan considered *Fay v. Noia* far from settled law. Why are stability, continuity, and consistency important? Not for their own sakes, ultimately, but because they promote respect for the law and the authority which promulgates the law—the people or their representatives. In statutory construction, the Court’s interpretation must reflect proper respect for the preeminent lawmaking function of Congress in our constitutional system.

In the context of the Court’s interpretation of the habeas corpus statutes, however, there has been much change and little stability over the 125 years since the 1867 Act was passed. *Watkins* was the governing Supreme Court decision throughout the nineteenth century.⁴⁰² The jurisdiction doctrine survived at least until *Frank* and *Moore*. It was further diminished by procedural rulings until *Brown* allowed the presentation of all constitutional claims, subject to the adequate and independent state ground rule. That lasted only ten years, until *Fay v. Noia* eliminated the rule. *Fay* was subjected to immediate and sustained criticism both within and outside the Court, and *Fay*’s elimination of the adequate and independent rule lasted only fourteen years, until *Wainwright v. Sykes*. Further procedural limitations on the dictum of *Fay* have continued in the sixteen years since *Wainwright*.

The notion that limits on federal habeas jurisdiction began with the Rehnquist Court downplays the actual criticism of expansive federal habeas jurisdiction, and of *Brown* and *Fay*, which has been growing since Justice Jackson’s original opinion in *Brown*. Justice Harlan picked up the theme in his dissent in *Fay v. Noia*, which he continued in his dissents in *Henry v. Mississippi*, *Desist v. United States*, and *Mackey v. United States*. Justice Black also criticized the use of habeas in *Kaufman v. United States*⁴⁰³ in 1969. Justice Powell adopted Justice Harlan’s criticisms and thoroughly articulated them in *Schneckloth v. Bustamonte*⁴⁰⁴ in 1973. His dis-

399 See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Vasquez v. Hillery*, 474 U.S. 254 (1986); *Runyon v. McCrary*, 427 U.S. 160, 190 (1976) (Stevens, J., concurring). See generally William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988).

400 *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

401 394 U.S. 244 (1969).

402 See *supra* notes 208-15, 267, 314 and accompanying text.

403 394 U.S. 217 (1969).

404 412 U.S. 218 (1973).

sent in *Schnecko* became the majority opinion four years later in *Stone v. Powell*.⁴⁰⁵ Criticism of expansive habeas jurisdiction was also expressed in *Castaneda v. Partida*⁴⁰⁶ and *Brewer v. Williams*⁴⁰⁷ in 1977, and by Justice Blackmun in *Braden v. 30th Judicial Circuit Court*⁴⁰⁸ and in *Rose v. Mitchell*⁴⁰⁹ in 1979. Judge Henry Friendly, a revered federal court judge, also levied criticism against expansive habeas jurisdiction in a famous 1970 law review article, which has since been cited regularly by the Court.⁴¹⁰ Following on Justice Harlan's dissenting opinion in *Fay* and Justice Powell's criticism of expansive habeas in *Schnecko* and *Stone*, a majority of the Court soon came to emphasize principles of finality, comity, federalism, and fairness.

Ultimately, judicial opinion and scholarly commentary up to *Fay* recognized that the Court's habeas jurisprudence had become as much (or more) a matter of policy judgments or equitable considerations as a matter of statutory construction. Indeed, such judgments go back to the Court's first decision construing the 1867 statute in *Royall* after its appellate jurisdiction was restored.⁴¹¹ In a 1961 law review article, Justice Brennan wrote that "administration in the exercise of the federal habeas corpus jurisdiction when invoked by state prisoners" was a problem of "choosing well" where "[t]he reality often is that logical consistency will no more demand one outcome than another."⁴¹² The generality

405 428 U.S. 465 (1976).

406 430 U.S. 482, 508 n.1 (1977) (Powell, J., dissenting).

407 430 U.S. 387, 428-29 (1977) (Burger, J., dissenting).

408 410 U.S. 484, 501 (1973) (Blackmun, J., dissenting).

409 443 U.S. 545 (1979).

410 Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). Judge Friendly's "model" of federal habeas for state prisoners would go beyond the historic function of habeas because habeas was not intended to oversee a trial court's determination of guilt; that was the function not of habeas but of the appeal process.

411 This was also implied by Justice Frankfurter in *Brown* where he noted that it was "important . . . to lay down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus . . ." 344 U.S. 443, 501-502 (1953). It was more explicitly noted by Justice Jackson in *Brown*, where he lamented the lack of practical guidance from the federal habeas statutes. This reality has since been acknowledged by Justice Brennan and Justice Stevens in *Wainwright* in 1977. 433 U.S. 72, 100-101 n.2 (1977) (Brennan, J., dissenting); *id.* at 96 n.4 (Stevens, J., concurring). Similarly, Professor Bator in his 1963 article emphasized the necessity of "functional, institutional, and political considerations." Bator, *supra* note 27, at 449.

412 William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 423-24 (1961). After reviewing the impact of the incorporation doctrine in imposing on the states certain federal procedural guarantees for

of the language of the 1867 Act and subsequent amendments simply does not provide for many contingencies that the courts have faced since the expansion of habeas corpus in 1953 in *Brown v. Allen*. As faithfully as a judge might read the federal statutory language, policy judgments of one kind or another were inevitable once the traditional function and guidelines governing habeas at common law were completely thrown off in *Brown and Fay*.

The contention has been made that, whatever dispute may be made over the history of habeas corpus, Congress settled the issue by adopting *Brown* in its 1966 amendments to the federal habeas statutes.⁴¹³ But Congress's 1966 amendments were quite limited. Congress amended section 2244 by eliminating the words "or of any state" from the 1948 version, and by adding two additional subsections.⁴¹⁴ The 1948 version provided that no federal judge was "required to entertain" a habeas petition by a *federal* or *state* prisoner "if it appears that the legality of such detention" was determined on a prior application *and* "the petition presents no new ground not theretofore presented and determined" *and* the judge is satisfied "the ends of justice will not be served" by reviewing the petition.⁴¹⁵ The 1966 amendment struck petitions by "state" prisoners from this section and added new provisions. Subsection (b) provides that a second petition "need not be entertained" if (1) the application alleges a factual or other ground not adjudicated on the prior petition, and (2) unless the judge is satisfied that the applicant did not (a) "deliberately" withhold the "newly asserted ground" or (b) "otherwise abuse the writ." The "abuse of the writ" phrase has been a fertile source for judicial discretion. Section (c) provides that a Supreme Court judgment

state prisoners, Justice Brennan wrote that "throughout the entire reach of the Fourteenth Amendment, the federal habeas corpus statute empowers a single federal judge, sitting at *nisi prius*, to set aside state convictions affirmed by the highest state court. You will easily see that to confer such a jurisdiction was a step of major proportions" *Id.* at 424. This implicitly imputes the foreknowledge of the Supreme Court's incorporation doctrine of the 1950s and 1960s back upon the 1867 Congress and implies that Congress intended to give federal courts power that the Supreme Court would not create until 90 years later. Through such "anticipatory legislative history," the Court's expansion of federal habeas corpus jurisdiction after 1953 was implicitly imputed to the legislative intent of the 1867 Congress.

413 *Stone v. Powell*, 428 U.S. 465, 507-08, 528-29 (Brennan, J., dissenting) ("Congress has legislatively accepted [the Court's] interpretation of congressional intent as to the necessary scope and function of habeas relief.")

414 Act of Nov. 2, 1966, Pub. L. No. 89-711, 1966 U.S.C.C.A.N. (80 Stat.) 1104, 1290-93.

415 Pub. L. No. 80-773, 62 Stat. 965 (1948).

on appeal or certiorari "shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right . . . actually adjudicated by the Supreme Court" unless (a) the petitioner pleads and the court finds a new material and controlling fact not in the Supreme Court record and (b) the court finds that the petitioner "could not have caused such fact to appear in the record "by the exercise of reasonable diligence." Congress also amended section 2254 and added subsections (d), (e), and (f) to establish deferential standards for the federal review of factual determinations in state proceedings. Under subsection (d), state court determinations of factual questions supported by written documentation "shall be presumed to be correct" unless any of eight conditions appears.⁴¹⁶ The Senate Report accompanying the legislation makes no reference whatsoever to the Court's decisions in *Fay* or *Townsend*. The Report makes clear that Congress sought "to alleviate the unnecessary burden by introducing a greater degree of finality of judgments in habeas corpus proceedings."⁴¹⁷ Subsections (b) and (c) were intended "to add . . . provisions for a qualified application of the doctrine of res judicata." Section (d) creates a presumption of correction and imposes the burden on the petitioner "to establish by convincing evidence that the factual determination by the State court was erroneous."⁴¹⁸

Consequently, the *stare decisis* claim based on the 1966 amendments seems to be more an argument from silence: If Congress does not affirmatively overturn a Supreme Court interpretation of a federal statute, that interpretation is deemed adopted by Congress and not subject to judicial change. It seems just as clear that Congress amended section 2254 to limit specific effects of *Fay* and *Townsend* on federalism and the state courts, but nothing more.

Given the history of the 1867 Act, the 1885 jurisdiction act, and the Court's interpretation of the 1867 Act through *Brown*, the certainty of the correctness of *Brown* or *Fay* in their interpretation of the purpose of the 1867 law is quite strained. Likewise, given the evolution in doctrine from *Frank* to *Brown* to *Fay* to *Wainwright* to *Teague v. Lane*, adherence to whatever is left of *Fay* and *Brown*

416 Act of Oct. 23, 1970, Pub. L. No. 91-504, 80 Stat. 1104, 1105 (codified at 28 U.S.C. § 2254 (1982)).

417 S. Rep. No. 1797, 89th Cong., 2d Sess. 2 (1966), reprinted in 1966 U.S.C.C.A.N. 3663, 3664; see also H.R. Rep. No. 1892, 89th Cong., 2d Sess. (1966); 112 CONG. REC. 21,754 (1966) (House vote); 112 CONG. REC. 27,974 (1966) (Senate Report).

418 S. Rep. No. 1797, 89th Cong., 2d Sess. 2 (1966), reprinted in 1966 U.S.C.C.A.N. 3665.

cannot be said to promote real stability, continuity, or consistency in the law. What is left is essentially a policy judgment as to the value and necessity of a second tier of federal appeal over and above the criminal justice system of the states and direct federal review. This is the Court's policy, not Congress's.

