Habeas Corpus and 'History' of the Warren Court

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This chapter examines the development of habeas corpus from 1915 to 1969 and the politics surrounding "Incorporation" or the application of the Bill of Rights to the states. Although habeas and incorporation are distinct constitutional categories with their own unique histories, they became linked in the second half of the twentieth century, specifically in the Warren Court's criminal procedure revolution.

The intercurrence of habeas and incorporation will produce change in their respective applications and in the larger political forces that other national and state institutions will devise to counter or support these changes.[1] However, these changes, because they are both political and historical, do not always conform to intended normative results. When significant change in habeas corpus jurisprudence does occur, it is only fleeting. As Karen Orren and Stephen Skowronek suggest, this is attributable to the persistent reality that "political change, even at critical junctures, is accompanied by the accumulation and persistence of competing controls within the institutions of government, the normal condition of the polity will be that of multiple, incongruous authorities operating simultaneously."[2] In fact, we see both a backlash to the marriage between habeas and incorporation and the beginning of its regression in the last years of the Warren Court. The goal of this chapter is to explain and account for the changes to habeas as it developed in the first part of the twentieth century and then became linked with incorporation.

The selection of habeas corpus to aid in the enforcement of the Warren Court's incorporation agenda therefore requires that both habeas and incorporation be explained

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[1] Characterizing institutions that carry over purposes from the past, Orren & Skowronek describe studies that emphasize "intercurrence" as analyzing "what occurs when institutional purposes ingrained in an earlier era encounter new and antithetical purposes later on; each [study] attributes to the presence of prior institutional arrangements the fact that political reform is often incomplete, that adverse principles and methods of operation remain in place."

[2] Karen Orren & Stephen Skowronek, The Search for American Political Development (Cambridge: Cambridge University Press, 2004) 108. See also, Smith, "Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America," *American Political Science Review* (September 1993) v.87, no.3.

historically with an eye to their political justifications by institutions on both the national and state levels. As previous chapters have shown, the ideas that shape federalism in the United States, and that therefore create the politics that animate and legitimize institutions, are significant variables that can account for the development of habeas over time. This means that conceptions of federalism both limit and enlarge possible institutional outcomes or, as Mark Graber notes, "the strategic and policy choices justices make are largely but not fully constrained by the legal arguments that can plausibly be made at a given time."[3] As both habeas and incorporation are often subjects that implicate federalist concerns, their intercurrence can best be explained through this lens.

Thus this chapter will examine the development of the doctrine of incorporation with an eye to its federalism components. Traditional doctrinal positions on incorporation can be traced to John Marshall's decision in *Barron v. Baltimore* (1833), in which he assuredly remarked that the question of the applicability of the Fifth Amendment to states is one that is not of "much difficulty."[4] The Bill of Rights was a check on national, not state, governmental power. Reconstruction efforts, however, specifically from some who wrote the text of the Fourteenth Amendment, sought to achieve a legislative counter-effort to the *Barron* decision. This position contended that the new amendment applied equally against state and national powers, and that its due process provisions would now apply the first eight amendments to the states. Other factors aside from federalism and its conceptions of state and national citizenship, prevented this full incorporation position from coming to fruition. Racial and nativist conceptions of equality in post-Reconstruction America almost always interjected themselves into political questions that

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[3] Mark Graber, "The Problematic Establishment of Judicial Review," in, Howard Gillman & Cornell Clayton, eds., The Supreme Court in American Politics: New Institutional Approaches, (Lawrence, KS: University of Press of Kansas, 1994) 30. Graber's notion is further explained by his paraphrasing of Quentin Skinner: "persons can only do what they can say."

[4] 7 Peters 243 (1833), 247

portended full equality, thus adding another significant variable to the explanation of partially successful attempts of incorporation that were stymied by federalism and racial concerns. The court's position on incorporation didn't stray too far from the fundamental holding of *Barron* until the minority opinions of the older Justice Harlan, the lone proponent of full incorporation on the court in the nineteenth century, began to take partial form in the late nineteenth and early twentieth centuries. Even these opinions, and the ones that would qualify and extend most of the Bill of Rights to the states in the next few decades, however, never fully accept the notion that the Bill of Rights completely applied to the states, as the court will adopt a theory of "selective incorporation" of these rights.

The concurrent development of the application of habeas corpus also undergoes some significant changes during the first third of the twentieth century. Most importantly, habeas corpus jurisprudence after 1915 is remade into a legal mechanism that can be used to examine the constitutionality of detention even when a court has competent jurisdiction, as habeas had always been limited (through the common law and through statutory legislation) by jurisdiction, a product of the persistent notion of federalism in the United States. This jurisdictional change in habeas is an important development in its potential use as a vehicle to vindicate both procedural and substantive rights. This change represents a marked and decided shift for the *potential* application of habeas to those held under state authority. However, these early decisions were still justified constitutionally in decidedly federalist, and even states' rights, language. While the changes had practical significance, they represented the traditional notions of dual federalism. Not until the Warren Court would a truly new habeas jurisprudence, linked to incorporation, find both a willing majority of justices and a larger constitutional vehicle – incorporation – to become operative. The Warren Court deliberately selected habeas as the legal

mechanism through which to protect notions of non-economic substantive due process in the twentieth century, most specifically in their criminal justice "revolution" through incorporation.[5] This use of habeas is typified in Justice Brennan's majority opinion in *Fay v. Noia*, the most salient habeas case of the Warren Court. Brennan's justification of the holding in the case is based on a particular progressive reading of habeas, incorporation, and national citizenship. This chapter will argue that Brennan's own idiosyncratic reading of the history of habeas corpus is indicative of a brand of a larger Warren Court jurisprudence that "reads" history in an overly developmental and Whiggish manner. This reading not only did not "square" with precedent, as the cases he uses to make this argument sometimes militate against his grand claims, but also met with almost immediate resistance from those who perceived that the new habeas rules were a threat to states' rights.

Habeas to 1953: *Frank*, *Moore*, & *Brown*

The concept of "jurisdiction" has always been a central and controlling feature of habeas corpus. Although significant changes have been made to it, the fundamental notion that habeas corpus will only issue from a higher court to release a person in custody of a lower court if that court (either state or federal) was without jurisdiction, had always been recognized.[6] This meant that when any "competent" court decided a habeas case no other court could go beyond or review the decision on habeas grounds. The origins of habeas' jurisdictional limitations can be

[5] Robert Cover, "Dialectical Federalism: Habeas Corpus and the Court," 86 *Yale Law Journal* 1035 (1976-1977)
[6] Questions of jurisdiction understood broadly have been revised by both congress and the judiciary: The early Congressional Acts of 1833 (the Force Act revisions); the 1842 Act (concerning the "McLeod Affair" that provided for removal from state to federal courts when foreigners were held by state courts); the 1868 "McCardle Repealer" of appellate jurisdiction and the subsequent 1885 Congressional reinstatement of appellate jurisdiction; and the court's self-imposed jurisdictional limits of "exhaustion." However, even considering these changes, the *fundamental* notion of jurisdiction as laid out by Marshall remained until the 1963 "trilogy" cases.

found in one of John Marshall's first engagements of habeas in *Ex parte Watkins*[7] and continued to hold true for habeas cases up until the first modification of the jurisdictional foundations of habeas in the 1915 case of *Frank v. Mangum*[8]. The court's new reading of this relationship hung on the interpretation of the due process clause of the Fourteenth Amendment, and specifically centered around exceptional courtroom circumstances – mob dominated trials and lynching -- that questioned the efficacy of the historical understanding of due process.[9] This exception to the traditional due process notions was subsequently extended even further in *Moore v. Dempsey*[10] in 1923, and then modified again in 1952. And although the court did expand its notion of what counted as acceptable due process for state criminal procedure, the jurisdictional component of habeas remained mostly intact. *Frank*, *Moore*, and *Brown* thus represent only minor nuances on traditional habeas jurisprudence.

In *Watkins*, Marshall enumerated the jurisdictional qualities of the writ that would govern its general application for the next eighty-five years:

> "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 puts an end to the inquiry concerning the fact, by deciding it."[11]

Watkins had been convicted in the Circuit Court of the District of Columbia but had petitioned the Supreme Court for a writ of habeas corpus, arguing that the Circuit Court had no jurisdiction to convict him of the offense for which he was charged. The controlling question for Marshall was simply whether Watkins had been convicted. Since he was, Marshall didn't even inquire

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[7] 28 US 193 (1830)
[8] 237 US 309 (1915)
[9] Duker makes the argument that the court's interpretation of due process in these two cases, although specific within these two cases (mob dominated trials, left future jurisprudence on this matter in limbo as no settled rule for determining what other circumstances might trigger this due process interpretation. See Duker, 257
[10] 261 US 86 (1923)
[11] 28 US 193, 202

into the cause of Watkin's confinement except to confirm that he had been convicted.[12] He went on to say that while Congress had given all federal courts the power to issue writs of habeas corpus, this power must be of a limited nature: "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."[13] His inquiry was limited to the legitimate use of the writ, not the alleged loss of jurisdiction claimed by Watkins. The writ's nature was one that was used to liberate "those who may be imprisoned without sufficient cause." However, because no laws dictated when the court could and could not issue the writ, Marshall felt compelled to limit its application in this case because the Court had no jurisdiction over general criminal matters and because a conviction had already issued.

The legacy of *Watkins* is one that establishes a general jurisdictional component to habeas corpus. Previous chapters have shown how the jurisdictional impact of *Watkins* has worked in ambiguous ways (when we look habeas cases for slaves, for example). And in many ways, the jurisdictional requirements and deference make a strong case for a nineteenth century vision of federalism as state and federal courts were sometimes seen as equals in their adjudication of Constitutional questions generally, especially criminal adjudication of state crimes.[14] Although Roger Taney's *Ableman* decision significantly altered this balance on habeas questions, even that case makes a claim consistent with *Marbury v. Madison*, that within each court's "spheres" of jurisdiction, they were sovereign.[15] It is also true that the Reconstruction Congress made significant changes to this classical notion of federalism with the habeas corpus

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[12] Here Marshall draws on the English origins of the writ which, in their post 1679 forms, excepted those who had been convicted from access to the writ. Therefore, because Watkins was convicted, he had no right to the writ. See Marshall's comments at 202.
[13] Ibid., 202
[14] See Belz et al., The American Constitution: Its Origins and Developments (New York: Norton, 1991)360-361
[15] The distinction made here, though, is one concerning the traditional state-level function of the adjudication of criminal procedure.

removal statute of 1863 and the Habeas Corpus Act of 1867. However, as the previous chapter demonstrated, especially after the doctrine of "exhaustion" was announced in 1885, the Supreme Court was more than willing to defer to state court decisions, thus reinforcing the federal-state relationship. Moreover, the significant changes made to habeas in the 1867 Act were primarily concerned with issues of race and the enforcement of the Thirteenth Amendment. But *Frank v. Magnum*, decided in 1915, would chart a new course for habeas' long-held ties to jurisdictional deference.

Leo M. Frank was a northern Jew who moved to Atlanta to manage a pencil factory. He settled in a rather large Jewish section of the city and was a leader in his local synagogue. Mary Phagan was a thirteen year old girl who worked at the factory with Frank. Although she was subsequently laid off from her position at the factory, on April 13, 1913, she came to the factory to collect $1.20 in lost wages and was murdered. Frank was charged with the murder largely on testimony from the factory's janitor, who many believe was the real killer. Frank's trial was clearly dominated by a mob, so much so, in fact, that for his own safety, and with his own consent, he was removed from the courtroom when the verdict was delivered. The verdict was guilty, and Frank was sentenced to death.

The mob-dominated atmosphere of the trial, and the absence of Frank during the jury's reading of the verdict, became the bases for Frank's appeals through the Georgia appellate process. All of his claims were adjudicated and his verdict was upheld at every step of the appeal process. Frank then applied for a writ of habeas corpus in the district court of Georgia, arguing both that his due process rights embodied in the Fourteenth Amendment were violated as a result of the mob-dominated trial and as a result of his absence – even though "voluntary" --

from the jury when the verdict was read also violated due process. The District Court denied Frank's habeas claim and he appealed to the Supreme Court.

The majority opinion in the case, written by Justice Pitney, confirmed the jurisdictional legacies of the writ but also advanced a new conception of both jurisdiction and due process. Frank had argued that his first trial had been dominated by a mob and that that atmosphere prevented both the trial judge and the jury from deciding the case based on objective standards, free from the violence that would presumably have ensued from an innocent verdict. Pitney began his opinion by reiterating the jurisdictional qualities of the writ that had always been controlling: Habeas could only issue from a federal court if the litigant claimed that he was being held in violation of some Constitutional provision and, if the matter is criminal in nature, and the adjudicating court has competent jurisdiction over the offense, then habeas cannot issue. Moreover, he argued that any "due process" claim under the Fourteenth Amendment must show that the state law in question is repugnant to the Constitution and that the judicial proceedings were not conducted according to the settled laws of the respective state.[16] Therefore, for Frank's habeas claim to be successful, he must show that the trial was so dominated by a mob that it precluded these minimal procedural requirements.

Pitney as much as admitted that Frank's first trial fulfilled this condition and that it was at least probable that a mob dominated the trial atmosphere and prevented the procedural requirements. However, he went on to say that because the case was appealed, and therefore the facts and testimony were reviewed by other courts within the appellate courts of Georgia, the initial trial was "corrected." With this in mind, he remarked that "it would be clearly erroneous to confine inquiry to the proceedings and judgment of the trial court … The laws of the state of

[16] 237 US 309, 326. Pitney declared that judicial state proceedings had to include "notice, a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure."

Georgia … provide for an appeal in criminal cases to the Supreme Court of that state upon divers grounds, including [the assertion] that the trial court was lacking jurisdiction."[17]

For Pitney and the court, the substantive and procedural notions of due process (mob domination in this case) are important considerations in Fourteenth Amendment claims, and federal habeas courts can "look beyond forms and inquire into the very substance of the matter." However, drawing both on notions of comity and the jurisdictional qualities of past habeas cases, the court still left state courts ample room to determine and correct these questions of constitutional law themselves. The jurisdictional nature of habeas claims thus still remained, although qualified ever so slightly. While federal courts can determine due process claims, when they originate in state criminal matters, the entire state procedural mechanism must be given the opportunity to address and correct violations. Past habeas cases, most particularly *Ex parte Royall*, which established the exhaustion doctrine that precluded federal habeas from state prisoners until all state appellate procedures were exhausted, is still controlling for the court, as it is still to this day. But we do see the court more willing to apply its independent power to review claims of due process while all the while still deferential to issues of comity and federalism.

Holmes' dissent in *Frank* lays out an alternative conception of jurisdiction rooted in more substantive conceptions of due process, at least in trials that are dominated by a "hostile mob." For Holmes, "The loss of jurisdiction is not general but particular, and proceeds from the control of hostile influence."[18] He cites federal civil cases that preclude state corrective processes as *res judicata* with respect to federal questions; therefore, in criminal matters, especially those involving capital punishment (like this one), criminal law should follow the same logic.[19]

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[17] Ibid., 327
[18] Ibid., 347
[19] *res judicata* means that a prior decision by a court of competent jurisdiction is binding. Holmes' argument here is simply that if *res judicata* is not binding in civil cases, it should not bind the fedral court in criminal proceedings.

Holmes justifies the loss of jurisdiction at any point in the state as uniquely vindicated by habeas corpus:

> "habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell."[20]

Holmes' dissent would eventually become the majority opinion in *Moore v. Dempsey* eight years later. *Moore* arose from the race riots in Phillips County, Arkansas in 1919. Black sharecroppers attempted to form an agricultural union to protect themselves against what they perceived were unfair labor and peonage practices from the white minority in the county. Black leaders who were assembled in a church were met with gunfire by a white mob and returned fire, killing one white man. Whites from surrounding counties then went on a vigilante-like rampage where some estimates suggest that as many as 250 blacks were killed. Seventy-nine blacks were prosecuted while twelve were convicted of murder. Five of those death sentence appeals were brought in the consolidated case of *Moore* to the Supreme Court.[21] The defendants in *Moore* argued that their due process rights had been violated through mob domination and systematic exclusion of blacks from the grand and petit juries.[22]

Like *Frank*, the question of the application of due process of law by state courts when allegations of mob domination are made were confronted. However, Holmes' position that any due process violation at any point in the state criminal process allowed the case to be removed via habeas to the federal courts now became the majority opinion. But does Holmes' opinion overturn or reaffirm *Frank*? This is a critical question, as both legal and political scholars, and

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[20] Ibid., 346

[21] See Michael Klarman, "The Racial Origins of Modern Criminal Procedure," *99 Michigan Law Review 48* (200-2001) 51.

[22] The exclusion of blacks from juries has a long factual and legal history which will be discussed below. Neither Holmes' or McReynold's opinions in this case address the constitutionality of racial discrimination on juries. This question will resurface in *Brown v. Allen* (1953)

most especially the Supreme Court, will craft a habeas jurisprudence in the second half of the twentieth century that turns on this interpretation.[23] I argue that *Moore* does not specifically overturn *Frank*. Instead, Holmes' seeming disagreement with Pitney's "corrective process" doctrine of habeas is misleading. As the *Moore* opinion will show, Holmes reaffirms this doctrine even though habeas is granted and the state's decision (as well as the lower federal court's) is overturned.

After a lengthy recitation of the history of the case, Holmes begins his opinion not with substantive analysis of the claims or with an announcement of a new doctrine concerning habeas, but rather with the holding of *Frank*. If, he says, there is evidence of mob domination in the trial, then due process is violated.[24] Moreover, he quotes from Pitney's opinion the holding that if the state fails to provide for any "corrective process" then due process is again violated. In the very next sentence, Holmes affirms this model:

> "We assume in accordance with that case [*Frank*] that the corrective process supplied by the State may be so adequate that interference by habeas corpus ought not to be allowed…But if the case is that the whole proceeding is a mask…neither perfection the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing the petitioners their constitutional rights"[25]

For Holmes the fact that mob intimidation was replete throughout the appellate process showed that the state's appellate courts were unable to conduct their inquiries with regard to the due

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[23] For arguments supporting the argument that *Moore* overturned *Frank*, and that the court was introducing what had always been a progressively developing habeas jurisprudence, see, Eric Freedman, "Milestones in Habeas Corpus: Part II. Leo Frank Lives: Untangling the Historical Roots of Meaningful Habeas Corpus for State Convictions" *51 Alabama Law Review* (2000) 1467-1540; for arguments that support the opposite position, see particularly, Paul M. Bator, "Finality in Criminal Law and federal Habeas Corpus for State Prisoners," *76 Harv. L. Rev.*(1962-19636) 441-528. More Recently, Michael Klarman has conceded that the "decisions may be technically consistent" but the differences in the outcomes between the two cases can be attributed to other factors, which will be discussed below. However, the "technical" particulars in the case are important for a meaningful *historical* understanding of the development of the writ. See, Klarman, "Racial Origins," 59.

[24] 261 US 86, 90-91

[25] Ibid., 91

process requirements encompassed in both the laws of Arkansas and the due process requirements under the Fourteenth Amendment.

Justice McReynolds' dissenting opinion in the case (with Sutherland concurring), however, seems to indicate that Holmes was overturning the "corrective process" model of *Frank*. McReynolds believed that the lower federal district court, like the one in *Frank*, did not commit error when it denied habeas to Moore and the other defendants because the state courts of Arkansas had fully reviewed the facts of the case apart from the valid accusations of mob domination in the original trial court's adjudication. And he has a point. Moreover, he also points to the fact that other defendants apart from the ones in this case actually had their cases overturned for lack of evidence, thus supporting his argument that the appellate process had not necessarily been tainted.[26] He also worried that Holmes' position would open the flood gates for state prisoners who claimed mob dominated trials in state courts would delay "prompt punishment," and that the court's ruling "probably will produce very unfortunate consequences."[27]

However, the doctrine in *Frank* and *Moore* is not as radical a departure from the traditional understanding of the jurisdictional requirements of habeas jurisprudence, although it did, in the limited circumstances of asserted mob domination of trial courts, slightly broaden the doctrine. We only need to see that Holmes, as quoted above, both relied on the "corrective process" model and reaffirmed its validity to see the similarities with *Frank*. The "corrective process," it should be remembered, assumed that if state appellate processes took into account the assertions of mob domination and sought to examine the facts apart from this, traditional habeas jurisdiction was still controlling. The fact that Holmes believed that these processes did

[26] Ibid., 101
[27] Ibid., 93.

not adequately take this into account is more indicative of affirming, rather than overturning, the rules set down in *Frank*.

Other factors can help us understand the Holmes decision, as well as the limited and even "exceptional" nature of both *Frank* and *Moore*. The "exceptions" to traditional habeas jurisprudence concerning jurisdiction would be developed in federal habeas corpus cases in the years following *Moore*.[28] In *Johnson v. Zerbst*[29], *Walker v. Johnson*[30], and *Waley v. Johnson*[31], for example, the Supreme Court held that habeas could issue to examine denials of constitutional right whether or not jurisdiction was lost. These cases, all dealing with the Sixth Amendment's guarantee of right to counsel for federal prisoners, argued that habeas was the only effective remedy to the deprivation of these (and presumably other) rights. These cases confirm in part the court's subsequent understanding of jurisdictional qualities of the writ. However, it should be remembered that because these cases involve *federal* defendants, the court's recognition and application of rights guaranteed in the Bill of Rights to them is a much easier process. Until parts of these amendments are incorporated in the due process clause of the Fourteenth Amendment later in the ensuing decades, their application to s*tate* defendants is not doctrinally possible. This suggests that even federal constitutional rights were held to a strict adherence to traditional notions of habeas as issuing only in "extraordinary" circumstances.[32] Federal habeas for state prisoners would presumably be held to an even more strict conception in its application.

Aside from the exceptions indicated above, other explanations for Holmes' seeming reversal of *Frank* deserve consideration. Most recently, Michael Klarman's work on the racial origins of criminal procedure has convincingly shown how race can help us understand the larger

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[28] Duker, 254-256 from which the following three cases are analyzed.
[29] 304 US 458 (1938)
[30] 312 US 275 (1941)
[31] 316 US 101 (1942)
[32] Duker, 255

political forces at work during the period between *Frank* and *Moore* that might explain the seeming disparity in the outcomes of both cases.[33] The rise of lynchings in the south, he argues, produced both a northern recognition of the brutal nature of southern justice directed towards blacks and a national response. The NAACP had tried, but failed, to persuade national leaders of the problems of lynchings in the south before World War I. Increasingly, lynchings were on the rise before the war and they posed serious constraints to effective procedural justice in the south. Theodore Roosevelt, in particular, was not persuaded by the appeals, as he claimed that blacks would not be victims of lynchings if they would just stop raping white women. After World War I, though, the NAACP began their anti-lynching campaign again in earnest. President Wilson was then forced to condemn lynching publicly.[34] Republican political leaders even backed and signed a written address from the NAACP detailing the pervasiveness of lynchings in the south. Even former President and soon to be Chief Justice William Howard Taft (who would be on the court during *Moore*), was a signatory. In Congress, the House passed the anti-lynching Dyer Bill in 1918 only to have it filibustered in the Senate where it never passed.

This "extralegal" explanation of the politically meaningful salience of lynching between *Frank* and *Moore* is a persuasive account of the new pressures of anti-lynching campaigns that almost certainly influenced Holmes, and the court, in their decision to reverse the *Moore* case on habeas corpus.[35] What the legislature and the executive couldn't do to correct obviously flagrant violations of due process, the court could correct in their reading of loss of jurisdiction through due process violations on the state level. What Klarman's analysis also allows us to suggest,

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[33] Klarman, "Racial Origins," and From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality (Oxford: Oxford University Press, 2004) ch.3

[34] Klarman, "Racial Origins," 60

[35] Klarman also smartly argues that the court, as a result of the filibuster of the federal anti-lynching bills, recognized the national consensus on the evils of lynching and that their decision in *Moore* is a counterfactual of sorts to those, like Alexander Bickel, who would emphasize a supposed "counter-majoritarian" tendency in the court more generally, Klarman, "Racial Origins."

though, is that the habeas jurisprudence of the court between *Frank* and *Moore*, while recognizing the extraordinary power of the writ in limited circumstances, only made these exceptions when political forces were strong enough to allow their national legitimacy. More importantly, it also suggests that these exceptions were specific only to flagrant state due process violations committed against black defendants. This means that we have to understand the limited jurisdictional expansion of habeas during this time not in terms of a progressively developing notion of due process, but rather as the affirmation of the traditional notion as applied to state criminal procedure with only racially salient violations providing the impetus for activating the "exceptions" to the rule. While the court was working to establish these exceptions to federal prisoners through the Bill of Rights, they were simultaneously carving out exceptions for state prisoners, but again, they never extended beyond politically charged and racially based circumstances. Returning again to both cases, we should see them both as affirming due process as meaning whatever state criminal procedure says they mean, with the exception that only extraordinarily flagrant violations concerning blacks will cause a loss of jurisdiction and removal to federal courts on habeas corpus.[36] Thus racial concerns, which had been used in conjunction with states' rights arguments to limit habeas towards the end of the nineteenth century, were again driving change in habeas, though in limited, but not insignificant ways.

***Brown v. Allen*: Development or Affirmation of Precedent?**

As the previous section suggested, habeas corpus had undergone two minor changes in terms of its traditional jurisdictional qualities. First, due process claims concerning alleged mob

[36] See, also, Ken Kersch, Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law, (Cambridge: Cambridge University Press, 2004), 125-126

domination of trials were held to be violations of the Fourteenth Amendment and cognizable on habeas corpus. Second, and as a result of the first, a state's failure to supply an adequate "corrective process" in its appellate processes could cause it to lose jurisdiction. These changes, though, are not attributable to a linear development of ever-increasing concerns of the rights of individuals generally. They are best explained as judicial responses to public opinion concerning egregious violations of normal due process conceptions, thus requiring judicial correction, especially when the rights were fundamental to the very workings of criminal trials.[37] The jurisdictional qualities of habeas thus remained, but now "exceptional" circumstances (however defined) could trigger federal habeas review of state court decisions.

The decision in *Brown v. Allen*[38] in 1953, though, potentially sets us off on a course that militates against the rather static conception of habeas development developed thus far. However, this case will show, as *Frank* and *Moore* showed, that race and federalism were the real engines of change with respect to habeas. This is not to suggest, though, that the change evinced in *Brown* was monolithic. Instead, consistent with my argument thus far, these two variables served more to mark out exceptions to the general procedures and understandings of the use of habeas to vindicate constitutional rights than to change the underlying historical conceptions of the extent and purpose of the writ. Just as important in understanding *Brown*, though, is the larger, extra-legal context of the post World War II conceptions of race and federalism that necessarily surrounded and affected it.

Brown had been charged, convicted, and sentenced to death for murder in North Carolina. He asserted in his state and federal appeals that his confession had been coerced and that the grand and petit juries in his cases were tainted by discriminatory practices, both of which

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[37] Klarman, "Racial Origins" and "From Jim Crow to Civil Rights"
[38] 344 US 443 (1953)

he asserted violated his due process and equal protection rights under the Fourteenth Amendment. Specifically, he charged that North Carolina's use of a "tax list" to determine prospective jurors was discriminatory because, for obvious reasons, it contained almost no blacks. His appeals were denied by the state courts and the lower federal courts also denied his habeas requests.[39]

The majority opinion was written by Justice Reed with Justice Frankfurter concurring. Brown's Fourteenth Amendment claims were fully litigated by the state courts who found no violations. Up until *Brown*, the court had only agreed to hear habeas cases for constitutional violations for mob dominated trials and specifically within a racially charged atmosphere. This decision, though, potentially broke new ground, as it provided that all federal questions, when brought on habeas to district courts, were fully reviewable, even though the state courts on every level had fully litigated and determined the federal constitutional claim. To many, this broke new ground.[40] However, if we approach the case in light of the historically developed jurisdictional qualities of the writ, we see that *Brown* actually conforms to this mode of habeas jurisprudence more than it announces another. This does not mean, though, that cases like *Brown* (and *Frank* and *Moore* for that matter) won't be seen differently by future courts.

On one level, Frankfurter's opinion in *Brown* seems to indicate a seismic change in the nature of habeas corpus. Up until now, when state courts – and specifically state supreme courts – adjudicated questions that were then said to violate federal constitutional rights on habeas,

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[39] It should be noted that this case had been denied certiorari (not habeas) by the Supreme Court earlier. The lower district court then took this denial into consideration in denying habeas to Brown et al. Presumably this colored their decision. Much of the case thus turns on whether the denial of certiorari by the Supreme Court should color decisions. The court emphatically says it should not. See *Darr v. Burford* 339 US 200 (1950). This strengthens my argument, in that the federal questions that were not taken into consideration by the lower courts were held to be error. Again, its not a direct extension of habeas jurisdiction as much as it is a conscious effort by the court to ensure federal questions are heard in federal courts.

[40] See, for example, Paul Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 *Harvard Law Review* (1962-1963) pp. 441-527

lower federal courts would not revisit (and not reverse) the state's judgment of the facts of the case. Again, there were "exceptions," but these, as we have seen, were limited to due process violations that were overly egregious, like mob dominated trials in *Frank* and *Moore*.[41] Frankfurter suggests in this case, though, that any federal question raised on an application for habeas corpus in the district courts of the United States could have its facts reviewed and, presumably re-decided, by a single district court judge: "The state court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right."[42]

Frankfurter's justification for allowing federal questions to be heard again by federal district judges is not a revolutionary call for an expanded habeas jurisprudence but rather a particular reading of how habeas corpus cases should be *adjudicated* by lower federal courts. Throughout his opinion he recognizes that criminal adjudication is fundamentally a state power and that concerns of federalism and states rights are necessarily implicated. After admonishing the lower federal court for denying habeas because the Supreme Court had denied certiorari in the case, he issues some caveats concerning the extent of his allowance for rehearing federal claims that had been fully adjudicated in state courts. "Most [habeas claims] are without merit," he asserts, and are "adequately dealt with in State courts." He then goes on to cite that in the recent years only 67 of 3,702 habeas cases applications were granted and in only a small portion of those was the state prisoner ultimately released. Federal habeas for state prisoners, even considering the paucity of legitimate claims, nevertheless poses a potential problem for the historical and constitutional relationship between state adjudication of criminal matters (in which

[41] It should also be noted that these "due process" provisions were not based on the Fourteenth Amendment's due process clause.

[42] 344 US 443 at 508. His reasoning here speaks of a particular jurisprudence, articulated by Frankfurter in other jurisprudential areas, most particularly in his conception of incorporation. This will be addressed later in the chapter, but it is fair to say here that his *Brown* opinion, while unique in many ways, is not advocating incorporation.

they are mostly sovereign) and those times in which federal constitutional rights are implicated. Therefore, particular care needs to be paid to the holding in this case. He confirms the need for care by saying:

> "The complexities of our federalism and the workings of a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other, are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others."[43]

Nevertheless, Congress has provided the district courts of the United States the power to hear habeas claims from state prisoners. Interestingly, Frankfurter then goes on to recount, if only briefly, the expanded habeas jurisdiction granted to the federal courts as a result of the Habeas Corpus Act of 1867. While Congress could have left to the states all of the residual power over criminal matters that they had always possessed, as they are equally as responsible as federal courts to enforce the Constitution, Frankfurter states that "it is not for us to determine whether this power should have been vested in the federal courts."[44] He then goes on to cite Justice Bradley's opinion in *Ex parte Bridges* that "although it might seem unseemly that a prisoner, after conviction in a state court, should be set at liberty by a single judge on habeas corpus, there seems to be no escape from the law."[45] With this in mind, he approvingly acknowledges how the court has deferred to state courts in the form of the "exhaustion rule" but goes on to admit that federal habeas from state prisoners is still precarious. The job of the court in Frankfurter's mind is to craft a rule or set of acknowledged procedures for habeas that still comports to a model of federalism that gives due consideration to the historical workings of federalism, particularly adjudications and judgments of state courts in criminal procedure, while recognizing the changes Congress has made to the writ:

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[43]Ibid., 498
[44] Ibid., 499
[45] 2 Woods 428 at 432

> "If we are to give effect to the statute and at the same time avoid improper intrusion into State criminal process by federal judges – and there is no basis for thinking there is intrusion unless 'men think dramatically, not quantitatively,' [quoting Holmes] – we must direct them to probe the federal question while drawing on available records of prior proceedings to guide them in doing so."[46]

These procedures that Frankfurter then enumerates are consistent with an approach that both recognizes the historical jurisdictional limitations on habeas while recognizing the ability for federal judges to rehear state determinations of constitutional questions. The first guideline for federal judges is an obvious one: the habeas claim must state a federal question. Secondly, the habeas claim must have exhausted the respective state's procedures for habeas appeals, consistent with *Ex parte Royall*. Third, the federal judge has the option when using his "legal judgment under the habeas statute" whether to rehear parts of the state's case. This independent judgment on the part of the district judge is important and needs to be qualified. Frankfurter asserts that, while the judge could call up the whole record of the case, and even re-hold hearings, it is still within his discretion not to do so. Some cases, he argues, are so frivolous that "it seems unduly rigid to require the District Judge to call for the record in every case."[47] However, some claims are legitimate enough that they will need to be reheard. Fourth, keeping with the spirit of the third rule, the district judge is to have the independent power to decide whether to have *de novo* factual hearings even if they've been heard and adjudicated by the state. This decision would turn on the question of whether there was a "vital flaw…found in the process of ascertaining such facts in the State court," but with the caveat that state courts cannot have the final say on law under the habeas statute. It is important to note, though, that he is not saying that their decisions are always wrong. Fifth, when the facts in question in a state habeas claim call for "interpretation of the legal significance of such facts," then the district judge "must

[46] 344 US 433, 501
[47] Ibid., 504

exercise his own judgment."[48] Frankfurter uses *Powell v. Alabama* (1932) to illustrate this point.[49] In *Powell*, the court ruled that the Fourteenth Amendment's due process clause required states to furnish defendants in capital criminal cases with counsel consistent with the Sixth Amendment. Powell and other young black males were charged with the rape of a white woman. Although nominally represented by counsel, the state only provided this help the day before the trial was to begin. Although presented with other claims of constitutional violations, the court held that *Powell* had been denied his Sixth Amendment and state right to counsel which the Alabama Constitution required. Frankfurter uses this case because if the federal judge is presented with state facts that indicate counsel was denied, he should be able to accept the state court's determination. If, however, the case does not deal with a capital crime, then the judge should still have the ability to determine whether there are other circumstances that might have contributed to error in a case where a state defendant is not represented by counsel, such as the age of the defendant, his mental condition, and his familiarity with legal proceedings, all in an effort to insure that fundamental procedural fairness had occurred in the course of the trial.[50] Sixth and finally, federal judges can take into consideration prior denials of habeas corpus by other federal courts, although they may still entertain them if they choose. In sum, Frankfurter says, the rules for district judges are "addressed as they are to the practical situation facing the District Judge," so he can "give weight to whatever may be relevant in the State proceedings, and yet preserve the full implication of the requirement of Congress that the District Judge decide

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[48] Ibid., 515
[49] 287 US 45 (1932)
[50] See Klarman, "Racial Origins," 61-63, for an account and explanation of *Powell v. Alabama*. Klarman rightly notes that although other constitutional deprivations were alleged through the Due Process clause of the Fourteenth Amendment in *Powell*, including coerced confessions and racist and biased jury selection, the court chose not to rule on their constitutionality and instead created "new law" in applying the Sixth amendment's right to counsel to state capital offenses because it was easier than extending the other charges to states because almost all states provided the right already.

constitutional questions presented by a State prisoner even after his claims have been fully considered by the State courts."[51]

These new rules seemingly give federal district judges wide latitude in construing state habeas claims as violating a broad notion of due process. Moreover, the "independence" and "judgment" that Frankfurter asserts as the bases for a judge's power to rehear state claims already adjudicated, is also the *modus operandi* of the jurisprudence that they should employ in their decisions. This is not an unimportant consideration, for if we take into consideration the obvious recognition by Frankfurter of the importance of federalism, and the constitutional validity of deference to state courts in criminal matters, the "novel" power granted judges by Frankfurter in this case is consistently recognized as one that should be limited and guided.

At the end of his opinion in *Brown*, Frankfurter makes two points that support this position. The first is a reiteration of the argument that these new standards are necessary because Congress has mandated that federal courts, via habeas, could hear state claims of constitutional violations. The second is point is more telling. As a result of the "discretion" now afforded district judges under habeas, some might fear that the "prison doors would open" and that the guilty would go free, thus subverting and frustrating the administration of criminal justice on the state level. This argument, though, is a "bogeyman" for Frankfurter, as he notes, consistent with court records from 1948 to 1952, that only five state prisoners were released. Moreover, he distinguishes this habeas power from a general framing of it as a case of a "higher" (federal) court sitting in judgment of a "lower" (state) court, thus casting a shadow of superiority. Instead, he simply invokes the Supremacy Clause as justifying federal review of constitutional questions.

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[51] 344 US 443, 508

Finally, he issued an encomium to habeas corpus as the salvo to the opinion. In it, we can see just how little the traditional conception is changed in his mind, as well as get a glimpse of some of the extra-legal context that influenced the opinion more generally:

> "The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for such detention. Of course this does not mean that prison doors may readily be opened … Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments."[52]

The writ's function as a "bulwark" of liberty is not a new characterization from the court. Since the founding justices have referred to the writ in just this way, although, as I have shown, the outcomes of habeas cases do not always conform to this normative claim. In this context, the contrast of "liberty" to "totalitarianism" with respect to the Great Writ is a particular feature of the larger democratizing effects of World War II on the entire country, including the judiciary.[53] Frankfurter's concern of insuring the procedural mechanics of due process through habeas corpus is both a product of the larger political realities of post World War II America and his particular jurisprudence. However, as we examine the extra-legal context of these habeas decisions in the next section, we will see that this particular jurisprudence – which maintains the federalist concerns about the relationship between state and federal courts – and the political realities of race in American politics by the middle of the twentieth century, do not create an easy alliance of theory to political practice.

Federalism, Race & Incorporation from *Frank* to *Brown*

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[52] Ibid., 449.

[53] See Kersch, pp.94-100, for a in in-depth discussion of the effects of World War II on criminal procedure and "due process."

As its etymology suggests, the writ of *habeas corpus cum causa* – "have the body with cause" – seemingly implicates an anonymous and individual equality before the law. However, as we have seen in preceding chapters changing notions of race and federalism nevertheless do shape its access, application, and development. The allocation of political and legal power over individuals by institutions in American constitutionalism aspires to equality by the very fact that equalizing commands are enumerated in the written text of the Constitution.[54] However, this power is necessarily a limited one by virtue of the fact that constitutional power is written and therefore limited. It is also limited in the further sense that power is allocated among national institutions and between these institutions and the states. Thus the legal power over the "individual" that habeas seeks to regulate is perpetually a political question in its application and one that is best explained through the lens of the development over time of conceptions, both political and legal, concerning federalism. Thus the question becomes one of *who* should administer this power – the state or the national government?

These jurisdictional questions of federalism, though, only partly explain the writ's development. Racial and ascriptive conceptions of the individual in question in habeas corpus jurisprudence have also shaped habeas development. Southern state laws concerning habeas in the ante-bellum south were overtly racial, as they allowed the writ to issue in service of the retrieval of runaway slaves or slaves whose ownership was contested by another party. Issues of federalism were obviously not always implicated in these contexts, so the salience of race as an explanatory variable also needs to be examined.[55] The period between *Frank* and *Brown v. Allen*, evidences the power of the variables of race and federalism. However, because the development of each of these variables occurs independently, we need to examine each

[54] For example: privileges and immunities clause; prohibitions of ex post facto laws and bills of attainder; habeas corpus; and the first eight amendments of the Bill of Rights;
[55] See chapter 2.

separately. This does not mean that race and federalism do not overlap at any one point in time in the form of legal and political justifications that affect habeas cases. There is "intercurrence," but treating the development of each independently also allows us to see how much development, in a progressive sense, actually occurs. If conceptions of racial equality before the law show some signs of improvement between 1915 and 1947 (from *Frank* to *Brown*), that does not mean that a concurrent development in notions of federalism that might make these more egalitarian developments easier to implement, does occur. Moreover, seeming developments in either variable are not necessarily permanent.

Race in the Progressive and Interwar Years

In the words of many observers, the Progressive period was a "nadir of race relations."[56] Even during the height of the *Plessy* period, a good percentage of blacks were able to vote; after the turn of the century, though, black voting, particularly in the south, was almost non-existent. Black migration to the north, which had begun in the 1890's, had created new racial tensions in the north as they always had in the south. Unions, for example, ever jealous of advancing the employment interests of their members, violently opposed the injection of blacks into the northern – and white – labor market. The white north during this period began to segregate public schools and neighborhoods, and the same racial discrimination in restaurants and public facilities that had existed in the south for decades began to appear in places like Cleveland and even Boston.[57]

Nationally, presidents Roosevelt, Taft, and Wilson showed indifference at best and malice at worst to the plight of blacks. Under all of these administrations, federal government facilities were segregated, black patronage almost fully disappeared, and national support for

[56] Klarman, 63
[57] Ibid.

even the most basic and humane legislation, like anti-lynching laws, were left to "hang." Teddy Roosevelt's stance towards lynching was manifest in his belief that its increase in the south was more the result of blacks not controlling their "own". The fate of anti-lynching legislation was almost always sealed through senatorial filibuster, as southern states argued that national criminal legislation was unconstitutional and contrary to "our federalism."[58] Moreover, northern sponsorship was seen, sometimes quite appropriately, as hypocritical, as "gangs" were usually excepted from proposed lynching legislation. Teddy Roosevelt also dismissed three companies of black soldiers supposedly involved in the "Brownsville Affair" who refused to testify against the one soldier who had allegedly killed a white man. President Taft, who succeeded Roosevelt, was equally indifferent towards civil rights. Aside from issuing the original order to discharge all of the soldiers in the Brownsville incident as Roosevelt's secretary of war, Taft countenanced black dis-enfrachisement in the south and had even agreed that patronage decisions should be deferred to southern Congressional delegations. He also refused to intervene, on grounds of states' rights, in the proposed anti-lynching laws in Congress. Moreover, he was one of the first Republican presidents since Reconstruction to campaign actively for the white southern vote. The election of Woodrow Wilson, seen by many black leaders (specifically the NAACP) as a choice of a lesser among the evils of Taft and Roosevelt, proved much worse for black civil and political rights than his predecessors. Under Wilson, federal buildings were segregated and the Civil Service Commission was authorized to require pictures of potential job applicants so their race would be identifiable. Wilson was also a proud southerner who never feigned this image. As Michael Klarman depicts the Wilson presidency, the south was "back in the saddle."

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[58] See, for, example, George C. Rable, "The South and the Politics of Antilynching Legislation, 1920-1940," *The Journal of Southern History*, Vol. 51, No.2 (May, 1985) 201-220, for a summary of the Congressional debates concerning proposed, but ultimately unsuccessful lynching legislation during this period.

This political manifestation of racial attitudes during and immediately after the Progressive era has many roots. Black migration and presidential indifference certainly explain much during the Progressive era. In a different sense, though, these conceptions of black inferiority and overt white supremacy also had an academic and jurisprudential origin. The Burgess school of Reconstruction historiography, which painted the failures of the last five decades as the result of radical Republican punishment of the south for the Civil War by mandating the political participation of corrupt and backwards blacks, seemed to many northerners who were confronted with black migration as an historically accurate scholarly position. The legal texts of Thomas Cooley were equally unsympathetic to the plight of blacks while they simultaneously argued for a traditional dual federalism conception of states' rights.

This is not to say that notions of civil rights and racial egalitarianism were not evident during this period. Interestingly, a series of civil rights cases did appear before the court from 1911 to 1914 that would seem to indicate a different perspective. These cases ranged from contract and peonage cases arising under the Thirteenth amendment, to 14th amendment claims of residential and transportation segregation, to Fifteenth amendment challenges to state Grandfather clauses. While these cases did indeed address topically fundamental civil rights issues, their effects were minimal: residential segregation persisted and black disenfranchisement continued, as did discrimination in restaurants, transportation, and education.[59] Nevertheless, these racial questions were addressed legally even in the face of political indifference and hostility as indicated above. As suggested earlier, recent scholarship has portrayed these decisions in particular as reflecting judicial recognition of only obvious and extreme violations of constitutional provisions such as due process affected by mob dominated trials and obvious infringements of Thirteenth amendment involuntary servitude for contract/peonage cases. This

[59] Klarman, From Jim Crow

larger recognition of civil rights can be attributed not so much to a Supreme Court that sought to finish what Reconstruction started, but rather to a court concerned with traditional federalism concerns in terms of state criminal jurisdiction in the face of heightened concerns about racial discrimination in states. Thus due process jurisprudence during this time, as seen in both the habeas cases of *Frank* and *Moore*, and other foundational criminal procedure cases like *Powell v. Alabama*, were only minor adjustments to traditional notions of due process as the application of accepted notions of procedure within state courtrooms. Even though *Powell* was the first case to incorporate a provision of the Bill of Rights apart from the First Amendment, it was done so in the context of overt discrimination in jury selection and denial of counsel, and was certainly not part of a larger program of incorporation of the court during this time.[60]

The New Deal seemed to provide some hope, at least economically, for blacks as Progressivism waned. Although most New Deal programs disproportionately benefited whites, as they were administered on the state level, these programs did provide some economic mobility for blacks. As economic concerns were obviously the most salient ones immediately after 1929, we can see how the New Deal both hurt and helped blacks. The post World War I era also generally dealt a significant blow to older, scientifically oriented conceptions of blacks, as they served side-by-side white soldiers during the war, a realization that would also significantly aid in the post World War II conceptions of racial equality. Other political factors also contributed to some racial progress, including the northern Democratic party's overt appeal to black votes, a broadened conception of unionization needs in the merger of the AFL and the CIO in the late 1930's, Roosevelt's eventual appointment of a black cabinet, and the elimination of the Democratic party's two-thirds nominating process. However, as Klarman suggests, these developments were not as monolithic as they might seem. Roosevelt never supported

[60] *Powell* applied the Sixth amendment's right to counsel in capital cases to the states.

meaningful civil rights legislation, including federal anti-lynching laws, nor could he effectively challenge the southern wing of his party if still wanted votes and his legislation to pass.[61] This means that while significant in many ways, race was only a partly significant factor in actual political outcomes, and certainly only a salient part of judicial decisions when there were outrageous violations.

During and immediately after World War II race was further pushed to center of national discourse. If World War I was fought to make the world safer for democracy, World War II was fought to purge the world of fascism. The NAACP in particular crafted much of their rhetoric during this period in just these terms, as they pointed out the obvious disconnect between the fight against racism abroad and the indifference to it at home. Moreover, the federal government, after the proliferation of bureaucratic national programs during the New Deal, was institutionally more capable of implementing a new recognition for racial equality (even if this conception was tempered) with a national policy that brought some of these conceptions to fruition. Even though Truman's integration of the military, and the Defense Department's public plea for racial equality, were more pleas to counter international conceptions of American inequality during and after the war, than a large-scale institutional effort at racial transformation, it nevertheless signaled what proved to be a sustained commitment to change.

Federalism & Incorporation

The composition of the Supreme Court had also changed between *Frank v. Mangum* in 1915 and our analysis of *Brown v. Allen* in 1947. According to traditional scholarship, the Fuller, White, and Taft courts had emphasized a substantive reading of the due process clause that favored laissez-faire and social Darwinistic conceptions of economic progress that these

[61] Klarman 109-110

courts felt moved to protect from stultifying state and national economic regulations. The court's jurisprudence, most often epitomized in its *Lochner* decision, is thus characterized as the last vestige of the Guilded Age that was toppled by Franklin Roosevelt's attacks on the court's doctrines, eventually culminating in the "switch in time" after the President's court-packing plan. Thereafter, a newly tamed, and newly staffed court, would seemingly aid in the establishment of national regulatory programs and a new understanding of individual rights.[62]

Revisionist scholarship has challenged some aspects of this conception of the pre and post 1937 court, but along with the traditionalists, they both emphasize how this post 1937 court jettisoned economic protection for protection civil liberties in the face of a powerful new state.[63] However, I want to suggest, at least in terms of the habeas cases reviewed thus far, that both traditional and revisionist literature neglect a larger, more structural concern of the pre and even the post 1937 courts, up to and including the Warren court: the persistent and traditional role of federalist conceptions of constitutional power more generally. While my brief summary of race in the Progressive and WW II eras suggested a modest hope of progress for individual liberty, the institutional means of bringing these changes to life almost always consisted of a simultaneous evaluation of the national or state government's power to regulate or carry out these changes. Thus race and federalism matter politically as determinants – and forecasters – of constitutional change. When federalism is mapped onto the habeas cases during this period, we see that the court's civil liberties jurisprudence, while distinct in many ways, was still consciously bound to a traditional conception of the relationship between state and national government.

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[62] This is the standard account of the "revolution of 1937." See, for example, Kelly, Harbison and Belz, The American Constitution; Robert McCloskey, The American Supreme Court, (Chicago: University of Chicago Press, 1994)

[63] See, for, example, Howard Gillman, "Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence" *Political Research Quarterly*, Vol. 47, No.3 (September 1994) and Barry Friedman, "The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner" 76 *New York University Law Review* 1383 (2001)

Incorporation, or the process by which enumerated clauses of the Bill of Rights are applied to the states through the Fourteenth Amendment's due process clause, can provide us with another lens through which to examine larger constitutional changes from the Progressive era to the beginning of the Warren Court. The development of incorporationist doctrines, and the arguments for and against them, are always fueled by considerations of federalism writ large, and thus they can help us map the concurrent doctrines of federalism alongside those of habeas. Most importantly, though, as the doctrine of incorporation reached its apex during the last decade of the Warren court, habeas was used to aid in the court's incorporationist agenda. The development of the incorporation debates is thus central to our examination of the development of habeas during this period. The potential impact of incorporation portended not only a reconfiguration of the power of state and federal courts, as it would potentially allow unprecedented national regulations of historically based state-level criminal adjudication. It also portended a fundamental revision of conceptions of state and national sovereignty generally, and the concomitant conceptions of state and national citizenship that had always been the theoretical building blocks of dual federalism. Even if the Civil War amendments were intended to modify this distinction and create a more nationalized notion of citizenship (which I argue they were not), its evisceration during and after Reconstruction in *Slaughter-House*, *Cruikshank*, and the *Civil Rights* cases, showed just how central and real the citizenship distinctions were to theories of constitutional law that confronted aspects of federalism.

Before the court's first incorporation decision in *Gitlow* in 1925[64], it had only dealt with two serious challenges to the proposition that the Bill of Rights were intended to limit national power, and therefore that its reach did not extend to the relationship between states and their

[64] Some argue that *Chicago, Burlington and Quincy Railroad v. Chicago* 166 US 226 was the first incorporation decision (involving eminent domain). See Abraham, Freedom and the Court: Civil Rights and Liberties in the United States (Lawrence, KS: University Press of Kansas, 2003) 40 and n.20

respective citizens. The first case was the 1833 case of *Barron v. Baltimore*.[65] In *Barron*, John Marshall held that the Fifth Amendment (and by extension all of amendments one through eight) was an enumerated clause limiting a specific government – the national government. The Constitution itself was established to create and limit this specific creation of the people; therefore, it could only extend its protection to those who fall under its jurisdiction. Moreover, each state had clauses limiting governmental power in their own constitutions (although with some considerable variation) which Marshall argued further buttressed his argument that they were created to limit only the specific creation of a national government.

Thus the conception of two sovereignties that each had power over two different conceptions of citizens – one national and one state – was the operative interpretation of federalism. The traditional state-level functions of police powers, criminal justice, and education also meant that the national government's reach into these areas of life – areas that might or might not have citizenship components in terms of state citizenship – saving exceptional circumstances, was not a viable conception of national power. The next explicit challenge to this conception was the debates in Congress during Reconstruction over the proposal and ratification of the Fourteenth Amendment. Constitutional and legal historians, and of course the Supreme Court itself, have interpreted the intent of the framers of the Fourteenth Amendment in three different variations. The first vein, which suggests that the intent of the amendment was to serve as a "short hand" for the Bill of Rights, was first advanced by John Marshall Harlan in his dissenting opinions in cases like *Twining v. New Jersey*. The most vociferous advocate of this position, though, was Hugo Black, whose dissent in *Adamson v. California* in 1947 contained a thirty-three page point-by-point exposition of the intent of the framers of the amendment. Black was convinced that the framers had in mind the *Barron* decision when writing the text of the

[65] 32 US 243 (1833)

amendment and indeed intended to overturn that decision. During the entire tenure of his career on the bench he never ceased to back away from his position of total incorporation. A second position is that the Fourteenth Amendment does not completely incorporate the Bill of Rights. The most identifiable position on this side is that of Benjamin Cardozo's "honor role" of superior rights, developed in the celebrated *Palko* decision in 1937. Also frequently referred to as "selective incorporation," this position adopts Cardozo's maxim that there are rights "of the very essence of a scheme of ordered liberty . . . so rooted in the traditions and conscience of our people to be ranked as fundamental."[66] Of these fundamental rights, of which some are enumerated in the Bill of Rights, there application to the states is necessary because without their application, "justice would perish."[67] Cardozo's theory of incorporation, then, somehow splits the Bill of Rights into "fundamental" and "non fundamental" rights, with the court's jurisprudence relying on the standard that an enumerated right in amendments one through eight would have to be so crucial to the functioning of the polity that without it, "justice" would not succeed. According to Henry Abraham, this "honor role" of superior rights jurisprudence has been accepted, in one form or the other, by justices as diverse as Chief Justices Hughes, Stone, and Warren, and other justices such as Brandeis, Reed, Jackson, Burton, Clark, White, and Stevens. However, Abraham also points out that when it comes to incorporation and criminal procedure, particularly the fourth through the eighth amendments, these justices have had some not unimportant differences among their opinions. Particularly for our analysis of the relationship between incorporationist doctrine applied to criminal process cases from the middle of the twentieth century onwards, this is a crucial admission. Linking the incorporation debate to questions of federalism, and differences in conceptions of the necessity or evisceration of state

[66] 302 US 319, 325
[67] Ibid at 325

and national citizenship dichotomies, will provide us a more accurate lens through which to understand the criminal process and habeas divergences within the court and also from political forces outside of it.

There is a third theory of incorporation, though, which is crucial to our historical understanding of the relationship between habeas doctrine, federalism, and race. Frankfurter's "case by case" approach to incorporation, which eventually became the approach taken by the younger John Marshall Harlan, Burger, Rehnquist, and Lewis Powell, rejected whole cloth the theory that the due process clause could be used to apply the Bill of Rights to the states. Consequently, they also rejected the "selective incorporation" approach of Cardozo. Instead, Frankfurter's due process jurisprudence, as we saw in *Brown v. Allen*, approached each due process case individually to ascertain whether or not a fair trial had taken place. The test for due process in these cases was not assumed to mean due process as a short-hand for the first eight amendments. Frankfurter's conception of due process was alternatively based on whether or not the whole trial in question offended "those canons of decency and fairness which express notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."[68] The Fourteenth Amendment, moreover, was to be plainly construed as only limiting state power in this way, as the court had done in due process cases alleging violations of the Bill of Rights in which they did not find any compelling constitutional justification for applying these amendments to the states. In these early incorporation cases, and especially in *Twining v. New Jersey*, which Frankfurter suggests "shows the judicial process at its best," the court effectively denied any incorporationist moves.

Thus the three conceptions of incorporation were alive and well before the Warren Court, although Hugo Black's attempt to carry over the total incorporation doctrines of the elder Harlan

[68] *Adamson v. California* 332 US 46 (1947) at 67

consistently left this position to lone dissenting opinions. We can get a sense of the extent to which the other positions – case-by case and selective incorporation – relied on or rejected a concomitant notion of federalism and the persistent dichotomy of state and national citizenship by examining the due process and incorporation arguments advanced in *Adamson v. California*. *Adamson* was the last incorporation case to reject the application of the Fifth Amendment's self-incrimination guarantee to the states before it was overturned in *Malloy v. Hogan* in 1964.[69] And *Adamson* also serves as the quintessential representation of the "Frankfurter-Douglas" debates over incorporation. As a whole, this case provides us with one of the most sustained and thoughtful expositions of all three approaches to the incorporation debate.

In *Adamson*, the court was asked to decide whether or not a portion of California's penal code, which allowed cross-examination of a defendant about former crimes, violated the Fifth Amendment's right against self-incrimination and the Fourteenth Amendment's due process clause. The court, in a majority opinion by Justice Reed, held that the statute was constitutional and that it did not violate the Fifth Amendment or the due process clause. Frankfurter wrote a concurring opinion, agreeing with the majority's decision not to strike down the state law, but differing from the majority in the standard used to reach the conclusion. Justices Black and Murphy dissented and issued a long and compelling defense of total incorporation based on the history of the intent of the framers of the Fourteenth Amendment.

Reed's majority opinion squarely relies on Cardozo's "ordered liberty" argument in *Palko* in rejecting the claim that the California statute violates the Fifth Amendment through the due process clause, because he nevertheless crafts his language in such a way as to hold out the possibility that other rights in the first eight amendments could be applied to the states: "The due process clause of the Fourteenth Amendment, however, does not draw all the rights of the federal

[69] 378 US 1 (1964)

Bill of Rights under its protection."[70] He goes on to say that "*Palko* held that such provisions of the Bill of Rights as were 'implicit in the concept of ordered liberty,' became secured from state interference by the clause."[71] The right against self-incrimination, although guaranteed by the national government, is nevertheless not so fundamental according to this schema.

This reading of Cardozo's opinion in *Adamson*, and the application of the selective incorporation jurisprudence to the case, has been the accepted mode of inquiry concerning the history and development of incorporation. However, I want to suggest that the majority's opinion with respect to the aspects of incorporation that reflect notions of federalism, and especially notions of state and national citizenship, have been underemphasized, if not completely ignored. Indeed, Reed begins the opinion not with a bow to Cardozo but with a recognition of the historical reality of two types of citizenship in American constitutionalism, and, therefore, two spheres of sovereignty that guarantee the rights that emanate from each type. Adamson is a "citizen" of the United States and brings his claim as such. The violations he contends would therefore have to violate those rights that emanate from and are secured by his national citizenship. Only a few paragraphs into the decision, though, Reed quickly makes a distinction. If, he says, Adamson was charged and convicted in a court of the United States, and was forced to stake the stand and thereby possibly incriminate himself, this would "infringe [the] defendant's privilege against self-incrimination under the Fifth Amendment."[72] However, he was charged, convicted, and subject to state-level processes, a process which is controlled by his state citizenship:

> "Such an assumption [the one above] does not determine appellant's rights under the Fourteenth Amendment. It is settled law that the clause of the Fifth Amendment,

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[70] Ibid., 53
[71] Ibid., 54. It should be noted that by the *Adamson* decision in 1947, most of the First amendment provisions, including freedom of speech, petition and assembly, and free exercise of religion had been incorporated. See *Gitlow v. New York* 268 US 652 (1925); *Fiske v. Kansas* 274 US 380 (1927)
[72] 332 US 46 at 50

> protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights."[73]

Reed justifies his reasoning from what claims is the "unquestioned premise" that the Bill of Rights was created only to protect individuals from actions from the federal, not the state, governments. Although the language of the Fourteenth Amendment might have initially seemed to collapse the distinction between state and national citizenship to provide federal protection from state violation only for those "elemental privileges and immunities of state citizenship,"[74] the decision in the *Slaughter-House Cases* seemed to suggest otherwise, as those "elemental" privileges and immunities were to be protected from the location of sovereignty that originally granted them – the respective state government of the individual. Other than *Slaughter-House*, both *Twining v. New Jersey* and *Palko v. Connecticut* also affirm the notion that the Fourteenth Amendment's first clause supports the notion that "state and national citizenship *coexist in the same person*" (Italics mine).[75] States are therefore permitted to abridge those privileges and immunities that flow from state citizenship; they are, however, not permitted to abridge those flowing from national citizenship, consistent with *Slaughter-House*. Moreover, this understanding for Reed and the majority conforms "with the constitutional doctrine of federalism."[76] The second contention in *Adamson* was that if the Fourteenth Amendment's due process clause does not protect self-incrimination, then it at least guarantees that the state should accord a defendant a fair trial. Reed agrees, but nevertheless argues that because the right of

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[73] Ibid., 50-51
[74] Ibid, 51
[75] The first clause of the Fourteenth Amendment states, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
[76] 332 US 46 at 53

self-incrimination is not incorporated, then this alone cannot prevent the state from claiming that it had provided due process through a fair trial. Interestingly, and not inconsequential for our discussion, Reed cites *Moore v. Dempsey* to confirm that the Fourteenth Amendment's due process clause does indeed guarantee a fair trial. However, considering the holding in *Moore* discussed earlier (that courts can lose jurisdiction at any point in the "corrective process" when extreme circumstances – like mob dominated trials – are present), Reed's opinion confirms that due process on the state level was construed in deference to state procedures.

As suggested earlier, Reed's conception of incorporation in *Adamson*, which is to say it is an affirmation of Cardozo's "selective incorporation" doctrine, while allowing the California statute to hold, necessarily held out the possibility that some of the rights in the first eight amendments could be applied to the states. Frankfurter's concurring opinion, though, provides us with another model. In referring to Cardozo's *Palko* decision, Frankfurter expresses difficulty with a model in which "Some [of the Bill of Rights] are in and some are out" without any concurrent "calculus" for deciding one way or the other. Selective incorporation for Frankfurter leaves the determination of which rights are so fundamental that they require a linkage to the first eight amendments to the caprice of individual judges. With this model, then, while free to choose which are in and which are out, the judge's referent to identifying clauses only in the Bill of Rights straight-jackets the judge. He even goes as far to say that recourse to "natural law" has a "much longer and much better founded meaning and justification than the subjective selection of the first eight Amendments for incorporation into the Fourteenth."[77]

There is also a federalism component to Frankfurter's objections and to his recommended solution. The previous cases that upheld state-level processes as not violating the due process

[77] Ibid., at 66

clause were decided by justices not unmindful of "of our federal system."[78] This does not mean, though, that they were not concerned with "the cause of human rights and the spirit of freedom," but rather that they balanced this concern with the realization "of the relation of our federal system to a progressively democratic society and therefore duly regard[ed]…the scope of authority that was left to the States even after the Civil War."[79] The only way to evaluate Fourteenth Amendment due process claims would be to give due process an independent meaning apart from the Bill of Rights. Linking due process to the Bill of Rights (and further deciding which are fundamental enough to count) would further undermine whatever residual authority was left to the states after the Civil War. In Frankfurter's words, if due process could only be some of the first eight amendments, it would "tear up by the roots much of the fabric of law in the several States" and further "deprive the States of opportunity for reforms in legal process designed for extending the area of freedom."[80] This argument suggests that instead of protecting fundamental rights and liberties by linking to the Bill of Rights through the due process clause, we would run the risk of actually allowing due process violations that couldn't be neatly "pigeon-hole[d]" into one of the clauses of the first eight amendments. The independence of the meaning of due process will allow a wider interpretation of potential due process violations. Finally, the only judge to assert that the Fourteenth Amendment was a short-hand for the Bill of Rights – John Marshall Harlan – is described by Frankfurter as "an eccentric exception." This, for him, shows that the only accepted interpretation of the Fourteenth Amendment's due process clause was one that did not accept total incorporation.

[78] In particular, he cites Miller, Davis, Bradley, Waite, Matthews, gray, Fuller, Holmes, Brandeis, Stone and Cardozo. Ibid., 63
[79] Ibid., 63
[80] Ibid, 67

The *Adamson* opinion indicates that both federalism and notions of state and national citizenship informed the court's Fourteenth Amendment's due process and incorporation jurisprudence up until the beginning of Warren's ascendance to the court. The larger debates about incorporation show that even among those justices that did accept Cardozo's "selective incorporation" doctrine, there were still strong traditional notions of federalism. Mapping this debate onto the habeas cases analyzed so far in this chapter, we can now see more clearly and more convincingly that the changes to habeas jurisdiction in *Frank*, *Moore*, and *Brown* were not linked to a wholly new conception of due process that sought to "nationalize" criminal procedure through habeas. Indeed, the discussion of both the Cardozo and the Frankfurter approaches to incorporation confirm the argument that these seeming enlargements of habeas were only meant to correct outlier cases of egregious due process violations on the state level, specifically in the south, and most often involving cases of blacks seeking only the fundamental characteristics of a fair trial. It should also be clear just how important the state and national citizenship distinction still was in the justification of constitutional doctrines that affected federalism. The notion that both types of citizenship inhered in the same person poses an interesting structural constraint to habeas corpus jurisprudence. Having a "body with cause" to inquire into the constitutionality of detainment, is necessarily limited within the traditional notion of American federalism that provides for two sovereigns – one national and one state – that had potential legal and constitutional control over any "body." The potential power of habeas' charge presupposes individual and even anonymous equality before the law. Both the ideas federalism and incorporation then center around debates over which each of these sovereigns is to have plenary power over the individual—the state or the national government. Again, though, these

conceptions are not fixed or exogenous. Any one interpretation will always be susceptible to the other within our federal system.

As we have seen, though, relative positions concerning incorporation parallel habeas development. Both Cardozo and Frankfurter (but certainly not Black) advocated an incorporationist jurisprudence that is clearly centered around a foundational conception of due process. For Cardozo and those who advocate "selective incorporation," any rights affecting an individual in her state character (criminal procedure) that are so foundational as to be of the "essence of ordered liberty," are to be applied to the states by national courts via the due process clause. There is, then, a sense of the bare foundations that are necessary for due process not to be unconstitutional. Without these basic or foundational rights in criminal trials on the state level "an enlightened system of justice would be impossible."[81] Although Frankfurter rejects selective incorporation because he feels that it would straight-jacket due process only to the first eight amendments of the Bill of Rights, he still shares the foundational due process jurisprudence of Cardozo. In defending a separate definition of due process in the Fourteenth Amendment apart from that in the Fifth, his approach to Fourteenth Amendment due process displays this bare-minimum foundation:

> "Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."[82]

When we compare this conception of incorporation with Frankfurter's seemingly new habeas rules laid down in *Brown v. Allen*, we can see how minimal they really were. The discretion that lower federal judges would have in issuing habeas corpus was never envisioned to extend

[81] 302 US 319 (1937) at 325
[82] 332 US 46 at 67

beyond the conception of traditional dual federalism that is consistent with Frankfurter's opinions concerning incorporation. Extended back further, we can also see how Holmes' *Moore* opinion isn't a call for more universal habeas irregardless of federalism concerns. Instead, its simply a recognition of the necessary fundamental aspects of any trial – state or federal – that would conform to the notion of due process. Habeas corpus would then only vindicate these outlier cases.

Habeas, "History," and the Warren Court

I have argued that the changes to habeas that had precipitated from the Progressive period to the beginning of Earl Warren's ascent to Chief Justice did not represent a significant departure from the traditional jurisprudence of habeas. The *Frank, Moore,* and *Brown* decisions had only sought to reinforce habeas with what were seen to be exceptional violations of only the most fundamental criminal trial rights associated with due process, such as the appointment of adequate counsel and mob-dominated trials. Habeas was only meant to help correct "outlier" cases mainly in the south that blatantly violated the rights of mostly indigent black defendants. When we mapped the development of incorporation decisions alongside the concurrent habeas decisions of the period, we saw that federalist conceptions of the distinction between state and national citizenship were still central concerns of the court. Even within those cases that enlarged both the protections of habeas and extended the protections of the Bill of Rights to state criminal trials, the integrity of this distinction was always maintained.

This does not mean that criticism of even these exceptional habeas remedies was not forthcoming in this period. Both the Judiciary Committees of the House and the Senate during this period heard testimony concerning almost yearly attempts for bills that would limit the

minimalist changes to habeas jurisdiction that had developed since *Moore*. One such bill, H.R. 5649, considered in the House in 1955, sought to limit habeas appeals from those held under state custody unless three conditions had been met by the defendant. The most significant part of this legislation concerned the prefatory phrase that only "substantial constitutional" questions raised in state courts could be removed via habeas to federal courts. Whatever these substantial questions were, the bill further limited them with the following three conditions: first, the claims in question on an application for federal habeas had to have been raised during the trials on the state level; second, if the claims had not been raised, the habeas petitioner must show that he was somehow prevented from raising them; and, third, if it is found that the petitioner simply failed to raise them, and was not prevented from raising them, these new claims on habeas could not be heard.

In their consideration of the bill, the House Judiciary Committee held hearings on the merits of the bill in June 1955. Testifying in favor of the bill were groups that had always been concerned with both the preservation of federalism and the potential enlargement of habeas corpus, most specifically the National Association of State Attorneys General. Testifying against the proposed bill was Thurgood Marshall, then special counsel of the NAACP. Howard Fatzer, who was representing the State Attorneys General, argued that the proposed limitations to habeas appeals were necessary because the increased volume of habeas appeals from state prisoners was not only creating an unmanageable case load for both state and federal courts, but also because it sought to return habeas to its proper role in a federal system.[83] Until the changes announced in *Moore* and *Brown* habeas had only been used to challenge the jurisdiction of a court to hold an individual. However, habeas was now fallaciously linked to "due process," possibly allowing a

[83] Howard Fatzer, just a year before, was the Attorney General of the state of Kansas and, in that capacity, had represented Kansas in *Brown v. Board of Education*.

single federal judge to find a violation under this fuzzy conception. To Fatzer, this enlargement of habeas precipitated "an attendant loss of prestige and respect by all citizens for the judiciary – State and Federal – and its ability to administer criminal justice."[84] He recounted the conditions in Kansas jails where he claimed prisoners were becoming "experts in the law of habeas corpus" and were enlarging "the avenues of possible escape from the penitentiary."[85] Other groups, including the Conference of State Chief Justices, echoed Fatzer's claim that this bill limiting habeas appeals would ensure that habeas would not continue to offend "basic constitutional rights [that can be protected] without paralysis of the administration of the States' criminal codes."[86]

Thurgood Marshall also testified at the hearing as special counsel for the NAACP. Without publicly accusing the authors and supporters of the bill of overt racial discrimination, he nevertheless felt that its passage would "all but completely eliminate" the power of state criminal defendants to remove their cases via habeas to the federal courts. Marshall is aware that issues of comity and states' rights are valid constitutional concerns but still felt that the integrity of the criminal justice process – especially when issues of federal constitutional rights of the accused are raised – needs the continued protection of habeas corpus. To those who think that more habeas appeals are too burdensome for both state and national courts, Marshall proclaimed that "the attorney generals of the States have a lot of work to do and the State's attorneys have a lot of work to do," but "frankly it does not impress me at all."[87] Instead, "the courts should bend over backward to be certain that they do not take a life without due process. I think a man's life is more important than dollars or cents or labor"

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[84] Hearings before subcommittee no.3, 84th Cong., 1st Sess., on H.R. 5649, June 7 & 24, 1955, p.55
[85] Ibid., 56
[86] Ibid., 61
[87] Ibid., 87

Even with the minor changes in habeas that came out of *Brown v. Allen* there was evidently a significant backlash, one founded on a traditional notion of dual federalism, especially with respect to criminal procedure. Aside from the obvious concerns from politicians and interest groups, the larger academic legal community was also interested (both positively and negatively) in the minor enlargements to habeas jurisprudence in the 1950's, including Harvard law professor Paul Bator, whose influential article critiquing *Brown* and its potential for stymieing "finality" in criminal law is still cited in habeas cases.

The Habeas Trilogy and Historiography

Even with these larger federalism concerns looming large, the Warren Court chose to enlarge habeas doctrine even further at the same time that it sought to enlarge the scope of rights in the Bill of Rights that would now be applied to the states through the due process clause of the Fourteenth Amendment. *Fay v. Noia*, and its companion case, *Townsend v. Sain* in 1963, were issued the same day as one of the most famous civil liberties cases during the Warren Court: *Gideon v. Wainright*. The fears of some legal academics – and certainly those who advocated more state-level control of criminal justice – were more than realized as a result of these two habeas cases. Indeed, partial and limited changes to the rules laid down in these cases have been central to the criminal procedure jurisprudence of both the Burger and Rehnquist courts that would follow.

As developed so far, we have seen the incorporation doctrines center around two viable approaches, the Cardozo selective incorporation doctrine and the Frankfurter case-by-case approach. For obvious reasons, Black's total incorporation never garnered more than two votes in these cases, so his arguments were never taken seriously enough to stand as a viable

alternative. Even with the Cardozo and Frankfurter approaches, there was still a large deferential tone to federalism and states' rights within their arguments, although we could easily characterize Frankfurter's jettisoning of any Fourteenth Amendment link to the Bill of Rights as much more federalist than Cardozo's. However, we also saw how much resistance was mounted even to the relatively minor changes advanced in the incorporation decisions and the even more conservative changes made to habeas doctrine. If either habeas or incorporation doctrine changed significantly, without a concurrent change in academic and state-level political arenas in terms of their federalism and finality-in-law concerns, we would expect an even more vociferous objection. And that is exactly what transpired.

The fact that both *Fay* and *Townsend* were handed down the same day as the much heralded decision of *Gideon* is not unimportant. In the Warren court's other major constitutional victory earlier in the previous decade – *Brown v. Board of Education* – which overturned *Plessy v. Ferguson*[88] and made "separate but equal" unconstitutional, a concomitant enforcement mechanism was also devised. Accompanying *Brown* and other civil rights cases, such as *Reynolds v. Sims*[89], was a simultaneous implementation of federal equity power. This meant that the federal courts provided more than just a legal remedy for litigants in a particular case. Instead, the power and threat of injunctive penalties would accompany the court's constitutional mandate that separate but equal was unconstitutional.[90] When a county, governor, or school board refused to implement or hampered a district court's desegregation plan, equity courts would serve to correct, implement (enjoin), and, if necessary, punish.[91] Thus the court's

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[88] 163 US 537 (1897)
[89] 377 US 533 (1964)
[90] See, for example, Robert Cover, 'Dialectical Federalism: habeas Corpus and the Court," *Yale Law Journal*, Vol. 86, (1976), 1035; and Owen Fiss, "Dombrowski," 86 *Yale Law Journal* 1103 (1976-1977.
[91] Cover cites *Lee v. Macon County Bd. Of Education*, 221 F. Supp. 297 (1963) as the quintessential example. In a series of cases throughout the year following this desegregation order, lower courts enjoined a mayor, school board officials, and the state superintendent of schools to carry out the district court's plan. The injunctive penalties also

monumental desegregation decisions had the added benefit of remedial force to back them up. The injunctive power of equity courts and lower district courts did not, however, accompany the court's criminal procedure and incorporation decisions. Instead, habeas corpus was chosen as the court's "remedial" vehicle to insure that its decisions would be carried out and obeyed.

Although habeas was chosen to aid in the enforcement of the Warren court's larger criminal procedure revolution, there had been one criminal procedure case two years earlier that in many ways portended the widespread dissatisfaction and backlash that the court would face in the ensuing years. *Mapp v. Ohio*[92], which was handed down in 1961, made the Fourth Amendment's exclusionary rule applicable to the states. It overturned *Wolf v. Colorado*[93] which had allowed illegally seized evidence in criminal prosecutions. As Abe Fortas, future Supreme Court justice said of the opinion in 1961, it was "the most radical decision in recent times."[94] *Mapp*'s controversy stemmed from both the internal criticisms from other justices who rightly noted that no where in the briefs filed on Mapp's behalf was the issue of excludable evidence raised except for one line in an *Amicus* brief filed on her behalf from the American Civil Liberties Union. The case was also an obvious blow to federalism and state criminal adjudication and procedure. Half of the states had already precluded the admissibility of illegally obtained evidence, but half also allowed it. The dissents in the case pointed out that the court overturned a twelve year old precedent, affecting half of the states, without even the solicitation of one brief from any state. The fallout from *Mapp* produced the inevitable response: guilty criminals would go free on mere technicalities that were forced onto the criminal procedure of states whose law enforcement officials were trying to protect the citizenry. As Scott Powe characterized the

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had beneficial effects according to Cover, including providing a forum in which both sides could work out manageable plans. Cover, "Dialectical Federalism," 1035.

[92] 367 US 643 (1961)

[93] 338 US 25 (1949)

[94] Quoted in Scott Poe, The Warren Court in American Politics, (Cambridge: Harvard University Press, 200) 195.

exclusionary rule's hard sell, "After all, evidence seized, unlike confessions coerced, is not untrustworthy." Just a few months after *Mapp,* Minneapolis police faced a rash of burglaries that they felt were unsolveable as a result of the decision.[95]

Unlike the "outlier" southern cases discussed earlier, the court was to move beyond this corrective role and step into the arena of an overt criminal procedure agenda. *Gideon* would be just such a case. Clarence Gideon's moving story inspired best-selling books and popular movies, but two important factors make the court's incorporation decision here, and its choice of a simultaneous revision in habeas in its service, a questionable move. Unlike the earlier southern cases, Clarence Gideon was white. Second, most states already had provisions in their state constitutions by 1963 that provided indigent defendants with the right to counsel. Not only were there only three states that didn't provide counsel, but many states that did actually filed *amicus* briefs in Gideon's behalf. *Gideon* did allow the court to supervise police behavior, though, because with counsel guaranteed in every case, the chances of a miscarriage of justice would substantially decrease.

On the same day as *Gideon* was decided the court also issued the "trilogy" of habeas cases to supervise further both "frontline" criminal procedure by the police and the legal processes of state level adjudication. The changes to habeas doctrine in these three cases are certainly important, for they altered significantly even the modest (though controversial) changes of the past few decades. However, I argue that we need to understand the court's – and especially William Brennan's -- historiographical approach in arriving at these decisions as the most important part of these habeas cases, a point that is further indicative of the court's larger criminal procedure revolution generally. Specifically in *Fay*, Brennan's reading of the historical "development" of the "Great Writ of Liberty" not only neglects embedded notions of federalism

[95] Poe, 198-199

that were identifiable as political realities, but also the actual doctrinal development of the writ itself, including the historical justifications both for and against its use. Without taking into consideration these political and historical factors, the court's criminal procedure revolution, in many ways, moved too soon with respect to the simultaneous development of federalism and racial concerns.[96]

Fay represents an unprecedented expansion of habeas. It not only confirms, but moves past, the developments in *Brown v. Allen* discussed earlier. In *Brown*, prisoners still were barred from raising issues in their federal habeas appeals if those issues had not been fully litigated in the original state court. In *Fay*, though, Brennan ruled that the prisoner had only to exhaust remedies still *available* to him. If the state appellate process had changed procedures since the original sentence, as the state of New York did in this case, the defendant was not barred from proceeding with successive habeas petitions based on the new procedures. *Fay* also significantly altered the "independent and adequate state grounds" rule. The independent and adequate state grounds rule suggests that federal courts have no jurisdiction to review state judgments that are decided on wholly state grounds with state-created procedures. However, now state prisoners, who never even raised federal constitutional questions through their entire state appellate process, had the ability to raise them *de novo* in federal habeas petitions. Brennan admitted that normally the federal courts, and particularly the Supreme Court, usually defer to state procedures independent of federal law as long as they are not "evasive of or discriminatory of federal rights."[97] This was done for mainly practical reasons, though, including, "the unfamiliarity of

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[96] For a similar criticism of the Warren Court's use of "history" in their desegregation decisions, see, Randall Kennedy, "The Supreme Court as teacher: Lessons from the Second Reconstruction," in, Wislon & Masugi, eds., The Supreme Court and American Constitutionalism, (Lanham: Rowman & Littlefield, 1998) 17-27. For a more sustained discussion on the use of "history" on the court, see, Charles A. Miller, The Supreme Court and the Uses of History, (Cambridge: Harvard University Press, 1969).

[97] 372 US 391 at 432.

members of this Court with the minutiae of 50 States' proceedings; the inappropriateness of crowding our docket with questions turning wholly on particular state procedures; the web of rules and statutes that circumscribe our appellate jurisdiction; and the inherent and historical limitations of such a jurisdiction."[98] However, this rule would now have no relevance in federal habeas hearings.

The second case issued that day was *Townsend v. Sain*.[99] As ambitious as *Fay*, this case, decided by Chief Justice Warren, considered whether, and under what conditions, a federal habeas court could hear new hearings on evidence and facts already determined in state courts. The court said that federal habeas courts could hear them *de novo* if the case fell under one of six new rules enumerated in the case. First, a new hearing could be had if the facts of the case were never fully resolved in the state hearings; second, the state's determination is not supported by the entire record of the proceedings; third, the procedures used in the state process were not supportive of a full or fair hearing; fourth, there are substantial allegations of new evidence; fifth, the facts were not developed adequately enough during the state hearings; and sixth, there is any reason to suspect that the court did not give the defendant a fair hearing of the facts.[100] These determinations were to be made by the district judge who first confronts the habeas petition.

The final case in the habeas "trilogy" of 1963 was *Sanders v. United States*.[101] If the other two cases confounded the argument of federalism and finality in criminal law, this case would only add fuel to that fire. In *Sanders*, Brennan in essence ruled that an unlimited amount of successive federal habeas petitions could be made to district courts, even if previous ones had

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[98] Ibid., 433
[99] 372 US 292 (1963)
[100] Ibid., 294. See also, Neil McFeeley, "A Change of Direction: Habeas Corpus from Warren to Burger," *The Western Political Quarterly*, 32 (June 1979): 181.
[101] 373 US 1 (1963)

been denied, as long as the new petition raised a different question from the previous ones, and as long as one of the six criteria in *Townsend* were met.

It is not a stretch of the imagination to suggest that these three cases represented the most drastic and expansive enlargement of the "Great Writ." Not only were federalism and states' rights issued a blow; the extent to which the federal courts would be involved in enforcing these changes was also significantly increased. The jettisoning of the independent and adequate state grounds rule was extreme and novel enough, but when combined with the *Sanders* ruling concerning successive federal habeas petitions, state courts were effectively rendered moot. Robert Cover's characterization of these cases as the court's "enforcement mechanism" for their new criminal procedure revolution, while accurate, is a tame formulation of the effects of these cases. When we look closer at the court's justification, we can see that, while concerned in these habeas cases as in others during the decade with regulating state police and adjudicative procedures, the court was also writing a new "history" of what they felt was the inevitable progressive development of civil rights and liberties more generally. This "historiography" of the Warren court moves us past simple "enforcement" explanations, for if they were the only motivation, we would have to wonder why the court ignored the overwhelming popular, academic, and political opposition to drastic changes in the state-federal relationship. Only a teleological assumption on the court's part could explain such momentous changes.

The most sustained exposition of the court's progressive historiography is Brennan's opinion in *Fay*. After a recitation of the facts of the case at hand, Brennan next devotes a large chunk of the opinion to his reading of the "development" and historic function of habeas corpus. He quotes the most venerable jurisprudential authorities in asserting the writ's historic importance. According to Blackstone, it's the "most celebrated writ in the English law." For

Marshall "there was no higher duty than to maintain it unimpaired." For Brennan, "these are not extravagant expressions," because "behind them may be discerned the unceasing contest between personal liberty and government oppression." Although he next admits that the writ was first used simply as a "mode of procedure," he nevertheless asserts that it "became inextricably intertwined with the growth of fundamental rights and personal liberty," and, skipping a few hundred years, proclaims that "vindication of due process is precisely its historic office." Building on this in an even more interesting assertion, he admits that "of course standards of due process have evolved over the centuries. *But the nature and purpose of habeas corpus have remained remarkably constant*." (emphasis mine) After dispensing with the obvious fact that habeas had been historically limited to questions of jurisdiction for most of its history in the United States by relying on an equally questionable reading of English common law history, he said that "But at all events it would appear that the Constitution invites, if it does not compel, a generous construction of the power of federal courts to dispense the writ." His explanation for this was that because Congress had originally granted federal courts power to issue the writ (although they did so only for federal prisoners), because they never explicitly defined the writ, we are to look to the common law for its use. According to him, though, its historic common law use was amazingly broad.

As problematic as his reading of the writ's common law use is his reading of the writ's development in American Constitutional law. Although the case law before the Habeas Corpus Act of 1867 makes clear the separation of state from federal habeas, Brennan glosses over this fact by characterizing seventy-eight years of law. He says of this period that "the development of the law in this area was *delayed* (emphasis mine)." After the 1867 Act he rightly claims the power of federal courts to hear habeas petitions from state prisoners was summarily removed,

which further prevented the proper use of the writ. During the "McCardle repealer" era that he cites, from 1868 to 1885, he nevertheless asserts that lower federal courts "did not hesitate to discharge state prisoners whose convictions rested on unconstitutional statutes or had otherwise been obtained in derogation of constitutional rights." In support of this bold claim, he cites seven lower federal court opinions.[102] Although these cases did in fact involve state prisoners who had applied for federal habeas, and had been granted release as a result, they are hardly indicative of a sweeping and unilinear development of habeas jurisprudence; in fact, with more scrutiny, they suggest just the opposite.

One of the cases, *Ex parte Bridges*, was already discussed at length in Chapter 3. In this case, Justice Bradley, while sitting on circuit, did in fact free the defendant on habeas corpus. However, he also lamented the fact that he actually could release him, as he felt it was an affront to federalism and states' rights. He even goes on in the opinion to declare that the very law (the 1867 Act) which allows to him to issue the opinion be modified. This is hardly a ringing endorsement of federal habeas for state prisoners. Also in support of his assumption of the ever-increasing habeas jurisprudence on the court are four cases from the district and circuit courts of California in 1880, all involving challenges to California state laws that discriminate against Chinese nationals. The defendants in the cases, charged with crimes ranging from exhumation of dead bodies to corporate violations of employing Chinese immigrants, all claim Fourteenth Amendment violations. However, the force of these Fourteenth amendment claims is questionable on further investigation. All of the Chinese national cases also claim that federal habeas should be entertained because of the Burlingame Treaty which gives China and its immigrants "most favored nation status." *In re Wong Yung Quy* makes this point very clear:

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[102] 372 US 391 (1963) at 410, n.19. The cases are *Ex parte McCready*, 1 Hughes 598 (1874); *Ex parte Bridges*, 2 Woods 428 (1875); *In re Wong*, 6 Sawyer 237 (1880); *In re Parrott*, 6 Sawyer 349 (1880); *In re Ah Lee*, 6 Sawyer 410 (1880); *In re Ah Chong*, 6 Sawyer 451 (1880); and *Ex parte Houghton*, 7 Fed. 657 (1881).

"whether he is in custody in violation of the constitution or treaty [Burlingame] is the very question to be investigated." However, the circuit court equated the special status of immigrants under the treaty as due process violations under the Fourteenth Amendment by the state, thereby partly voiding its jurisdiction.

Although these seven cases hardly square with Brennan's argument, there were cases on the district and circuit court level during the repealer period where the 1867 Act was given an extensive and liberal interpretation. However, as was argued in the previous chapter, these cases were the subject of the American Bar Association's, and Congress', "repeal of the repealer" in 1884. Returning habeas jurisdiction under the 1867 Act to the Supreme Court was seen as a way to limit habeas appeals and restore the proper balance between state and federal criminal law with respect to the "Great Writ." Moreover, even when these cases did in fact release state prisoners on federal habeas, the court first ruled that the lower court was without jurisdiction because of a constitutional error, thus retaining the very jurisdictional limitations that Brennan claimed were clearly not part of the writ's common law development.

One of the other limitations that Brennan claimed prevented habeas from developing as neatly as it was meant to, was the fact the Fourteenth Amendment was only recently "deemed to apply some of the safeguards of criminal procedure contained in the Bill of Rights to the States." As these rights were applied further the court has been "led to find correspondingly more numerous occasions upon which federal habeas corpus would lie."[103] Aside from the obviously controversial and unsettled incorporation jurisprudence described in this chapter, there is also the persistent question of conceptions of federalism more broadly. The testimony in Congress just a few years before from the Association of State's Attorneys General and other groups such as the ABA and state judge's associations suggest that the conception of dual sovereignty, especially in

[103] Ibid., 410

areas as dramatic as criminal procedure, were not keeping pace with the increasing incorporationist agenda of the court.

Just two years before his decision in *Fay*, Brennan addressed the fundamental issues of incorporation, federalism, and habeas corpus jurisprudence in a lecture at the University of Utah law school.[104] His argument attempts to justify an enlargement of habeas review by federal courts as an inevitable result of the fact that "under one formulation or another, the Supreme Court has extended to state prisoners many of the procedural safeguards of the federal Bill of Rights." As the court is thus moving in the direction of applying more of the protections of the first eight amendments and "the Supreme Court brings state criminal proceedings more and more within the protections and limitations of the Federal Bill of Rights, federal habeas corpus jurisdiction will correspondingly expand."[105] Incorporation is thus here to stay. Issues of federalism will also have to change. However, for Brennan, this is a natural development. He says of our "federal system" that it exists to protect individual liberty and, moreover, that it exists to protect the individual from the "excesses" by any of those powers, including the state governments. The discord between state and federal governments in areas of criminal procedure, and particularly habeas corpus, have simple solution: states and their judiciaries must change their procedural rules governing criminal procedure to bring themselves more in line with the development and application of new fundamental rights that supposedly accord to all individuals. Once Brennan decides that incorporation is a foregone constitutional conclusion, "the States have it within their power substantially to reduce occasion for resort by state prisoners to federal habeas corpus."[106] If states only provided more procedural safeguards for those charged with

[104] Reprinted as William Brennan, "Federal Habeas Corpus and State Prisoners: An Exercise in Federalism," 7 *Utah Law Review* (1960-1961), 423-442.
[105] Ibid., 440
[106] Ibid., 441

crimes, including more post conviction remedies that seek to "vindicate . . . violations of fundamental constitutional rights," then federalism, habeas, and individual rights would all accord. However, the unsettled meaning of both the nature and source, as well as the proper adjudicative repository of these rights, is anything but settled. For Brennan they are settled and inevitable; for others, though, these "fundamental constitutional rights" are not only vague, but are inapplicable to the states.

The choices involved in habeas corpus appeals are further clouded by a jurisprudential "dilemma" faced by federal circuit and district court judges who hear the bulk of habeas appeals from state prisoners. As lower federal courts mostly apply settled constitutional law with well-developed precedent, habeas presents a choice for the judge to decide between deferring to state sovereignty or vindicating national and fundamental rights. This "art" of judging consists not only in "choosing," but in "choosing well." This might explain his final thoughts on habeas development in *Fay*, where he admits that habeas precedent has not "always followed an unwavering line in its conclusions as to the availability of the Great Writ."[107] Because precedent has not always been completely clear, there is still for Brennan a correct model of judging. The fundamental constitutional rights of the individual have to remain the basis of habeas corpus no matter the "possibly grudging scope" given it. If fundamental individual rights are the writ's antecedent, then as they seem to increase (through incorporation and Fourteenth Amendment jurisprudence), so should the availability of the writ.

Post-*Fay* Developments

[107] 372 US 391, 411-412

Fay, Townsend, and *Sanders* were issued not only to enlarge the writ's scope, but also to aid in the enforcement of the court's Fourteenth Amendment incorporation agenda. As more of the rights accorded federal prisoners were applied to state prisoners, habeas would serve to ensure that these rights were protected and individual liberty was vindicated. However, the court's assumption of the inevitable relationships between habeas and incorporation hung both on the legitimacy of this tidal change in state-federal criminal procedure with respect to habeas appeals and the larger and more difficult acceptance of the propriety of applying these changes directly to the states. Thus the efficacy of enlarged habeas was directly tied to the continuing acceptance of incorporation. If the individual and her fundamental rights are the subject of meaningful habeas jurisprudence, then definitions of legitimate "individuals" and "fundamental rights" had to walk hand-in-hand. If one of these conceptions changed – nationalistic conceptions of federalism or the reach of the Fourteenth Amendment and incorporation – then habeas would be directly affected.

We can see this interaction most starkly in two post-*Fay* incorporation cases and their political contexts. *Escobedo v. Illinois* and *Miranda v. Arizona*[108] pushed the limits of federalism and incorporation to their political limits and ushered in and hastened an already burgeoning backlash to the Warren Court's decisions. *Gideon* had incorporated the sixth amendment right to counsel generally, but the specifics of when and where of counsel aside from representation at trial had not been articulated by the court. At issue in *Escobedo* was the point at which the right counsel begins. Is it before, during, or after questioning by police before a charge is brought? The decision, issued by Justice Goldberg, stated the when police interaction within citizens ceased to be investigative and became accusatory (i.e., when the police begin to elicit confessions) the right to counsel exists. Daniel Escobedo had been in custody by the Chicago

[108] 384 US 436 (1966)

Police Department for questioning concerning the murder of his brother-in-law. While homicide detectives were talking with him in the police station they elicited from him an accusation that another man had actually committed the murder. Unknown to Escobedo, this knowledge of the crime itself constituted a violation of Illinois law and made him complicit in the murder. A state's attorney then was brought in to take Escobedo's "statement." He was subsequently charged and convicted of the murder. However, when Escobedo was brought into the police station for custody, and before he was charged, his lawyer came to the station and requested from numerous police officers and detectives that he be given access to his client. At every attempt, his request was denied by the police, who consistently stated that only after their "interview" was completed could he see Escobedo.[109]

Goldberg's opinion struck directly at the most fundamental tool that law enforcement have in the execution of their duties: the interview and interrogation process. With time as a critical factor in criminal investigations, and the real difficulties in obtaining immediate physical proof in the form of criminal instrumentalities (evidence), the one-on-one interaction between police and suspects is sometimes the only real chance law enforcement has to confront suspects and elicit confessions or garner and develop investigative leads. The "confession" was the cornerstone to efficient (although not always accurate) law enforcement. If everyone has the right to counsel during investigations and before charges are even made, then this tool is severely limited. Goldberg railed against a system (state criminal investigative procedures) that relied almost exclusively on the confession. He admitted that with this decision almost everyone, when confronted with the possibility of incrimination or accusation would request the service of counsel. However, he also felt that the need to protect the fundamental right of counsel outweighed the burden of law enforcement to solve crimes. In his words, "a system of criminal

[109] See Poe pp.388-394 for an excellent overview of *Escobedo*

law enforcement which comes to depend on the confession will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."[110]

The backlash effects of *Escobedo* were pre-saged in Justice Stewart's dissenting opinion, where he retorted that *Escobedo* prevents society from obtaining the benefits of meaningful and honest police investigation of crime. As Scott Powe points out, the facts in *Escobedo* are very "atypical" compared to most police investigations, because Danny Escobedo already had an attorney and his attorney was immediately notified by his mother when police took him in for questioning.[111] For the most part, police confront and question citizens before they have established attorney-client relationships. Asserting the right to counsel at the moment investigation reaches the stage of "accusation" would presumably be devastating to investigative tactics. This is why Justice Stewart's dissent was so caustic. To him, even purely voluntary confessions (whether elicited or not) would now be inadmissible. The traditional test of confessions, according to Stewart had been a "voluntary-involuntary" standard. In the court's quest to constitutionalize their "nebulous" ideas of the Fourteenth Amendment's due process clause, they are crafting a "rule wholly unworkable and impossible to administer unless police cars are equipped with public defenders."[112]

Extra-judicial reaction was swift. William Parker, Chief of Police of Los Angeles, stated that the decision had the effect of "handcuffing police." Michael Murphy, Chief of Police of New York quipped that *Escobedo* "is akin to require one boxer to fight by the Marquis of Queensbury rules while permitting the other to butt, gouge and bite."[113] Poe points out that

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[110] 378 US 438 at 489.
[111] Poe, 390
[112] 378 US 478 at 496
[113] Quoted in Poe, 391

immediately after the decision the country's views of the Warren court's agenda were reaching their limit of acceptability. Decisions like *Mapp* and especially *Escobedo* spurned "Impeach Earl Warren" bumper stickers. Politicians, like former President Eisenhower and presidential candidate Barry Goldwater saw the court's incorporation and due process decisions as actually contributing to increase crime in cities at the same time that they prevented police and states from prosecuting the obvious guilty parties. This was the beginning of the era of "technicality" arguments that asserted that the criminal justice system had eclipsed the rights of those who were victims of crime and tipped the scales to those who committed them. With state and local governments quivering (and claiming cripple) as a result of *Escobedo*, other quasi-judicial groups, including the American Law Institute and the American Bar Association began to develop plans that would seek to challenge the court's province in dictating the pre-arraignment realities of the investigative process. Headed by Harvard law school professors James Vorenberg and Paul Bator, the ALI proposed, with the ABA's support, an alternative plan that would allow state legislatures to enact a "comprehensive code [that could] evaluate and adjust the various interrelated portions" of criminal processes more faithfully and accurately than the court could.[114] The conservative bent of the ALI was obvious in their proposal that would defer to state legislatures in crafting criminal procedure codes for determining the exact rules for counsel in pre-arraignment circumstances. Even more telling was the fact that Bator was a former Harlan clerk and Vorenberg a former Frankfurter clerk.

The stark reality of the power of habeas corpus within this larger context implicated its function as well. Bator had written extensively and persuasively in the *Harvard Law Review*

[114] Ibid., 393

criticizing *Brown v. Allen* in 1962.[115] He argued that federal habeas should only be available when the state loses jurisdiction because it failed to provide adequate procedural processes for deciding federal questions. However, federal habeas should not be available simply because a federal court thinks a state's decision is incorrect. Instead, Bator emphasized the necessity of "finality" in the criminal process so that matters that have been fully and fairly litigated and determined on one level (the state level) are not forced into redundancy at the cost of justice by another court (a federal one). Other members of the ALI, including federal court of appeals judge Henry Friendly, also wrote prestigious and influential articles criticizing the Warren court's habeas developments. Friendly argued that for all the concern over due process in criminal procedure on the state level, the ultimate decision for granting or denying federal habeas corpus from state prisoners should be the "innocence" of the defendant. If mere technicalities are violative of perceived constitutional rights, they can be addressed by other means besides freeing the guilty.[116]

Before the ALI and the ABA could vote on their plan that would advocate for legislative, as opposed to judicial, determination of proper constitutional pre-arraignment procedures, the Warren Court beat them to the punch with arguably the most controversial and famous case of the court's tenure. *Miranda v. Arizona* would serve as a lightening rod for the court's civil libertarian supporters as one of the most important decisions protecting fundamental constitutional rights. To its opponents, though, it became a symbol of everything that was wrong with the court's due process revolution. To get a sense of just how far the court had moved in terms of the controversial content of the cases it chose to affect their "revolution," Poe points out

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[115] Paul M. Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 *Harvard Law Review* (1962-1963) pp. 441-527

[116] Henry Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," 38 *University of Chicago Law Review*, (1970) 1067.

that the *Gideon* decision demanded that only five states change their criminal procedure rules as twenty-seven amicus briefs from states encouraging the court to apply the sixth amendment to the states; *Mapp v. Ohio* required half of the states to change their exclusionary-rule procedures; and *Miranda* required *every* state to change their most basic "frontline" criminal process procedures.[117] Of all the decisions issued by the Warren court, *Miranda* produced the most visceral reactions. From police chiefs to state judges to presidential candidates like Barry Goldwater and later Richard Nixon, the court had abandoned its constitutional duty of deciding cases between litigants based on precedent and traditional notions of federalism in favor of crafting legislation out of thin air. *Miranda* required that before any questioning by police a suspect be informed of their right to remain silent and other rights accruing to them as a result of their encounter with law enforcement, including the fact that any admissions to questions can be used by law enforcement if prosecution results. Brennan's argument was that police interrogation created unknowable and secretive "gaps" that prevent us from determining the constitutionality of the interrogation, thus the immediate verbal admission by police that those they are seeking information from do not have to comply with their requests.

Miranda came at a very bad time for the court. As crime became a central issue of the 1968 presidential campaign, and public opinion polls showed that the majority of Americans felt the court was "soft on crime," the Warren court had moved passed relative notions of judicial activism, federalism, and incorporation. In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act that actually legislatively overturned *Miranda*. It said that voluntary confessions without *Miranda* warnings were to be evaluated by courts on appeal under a "totality of circumstances" test, a procedure which had actually governed pre-*Miranda* appellate processes. Aside from the questionable constitutionality of the legislation, and the fact that

[117] Poe, 394

Attorney General Ramsey Clark directed the Justice Department not to comply with the legislation, the bill became a poster child for Nixon's and even George Wallace's anti-crime stance in 1968.[118]

The racial significance of freeing criminals was also a real, though covert, part of the unpopularity of the court's habeas and incorporation agendas. "Race Riots" were featured all too prominently on nightly news casts, and the reality that those guilty of such crimes might go free on habeas corpus technicalities was perceived as a perversion of the criminal justice system. George Wallace's campaign speeches in 1968 warned that "If you walk out of this hotel tonight and someone knocks you on the head, he'll be out of jail before you're out of the hospital, and on Monday, morning they'll try the policeman instead of the criminal."[119]

Conclusion

This chapter argued that the doctrinal changes to habeas corpus from the beginning of the twentieth century to the end of the Warren Court can best be explained by the simultaneous developments of two political variables: conceptions of federalism and race. The changes to habeas in both *Frank* and *Moore*, although quite dramatic in terms of the changes to jurisdiction that had always governed the issuance of the writ, were nonetheless relatively minor. The conscious deference and sympathetic understanding of states' rights arguments by the court during this period is quite evident in both the majority and dissenting opinions in both cases. The most salient factor in pushing the court to change the rules for allowing federal habeas from state prisoners was racial. As developed throughout this chapter, the southern state courtroom was seen as an outlier compared to the majority of the country. This is not to suggest that blacks

[118] Ibid., 410
[119] Quoted in Poe, 410

received perfectly equal treatment, right to counsel, and balanced jury representation, for they surely did not, even in the seemingly liberal and progressive denizens of the north. However, with the rise of lynchings in the early twentieth century, and the concomitant mob-dominated trials that accompanied controversial trials, the court, and the country, were moved to bring the south back in line. The due process components of these habeas cases, though broad, were concerned with only the most fundamental procedural mechanisms of a trial, including adequate and timely representation of counsel, jury representation, and adequate and fair appellate procedures within state court systems. If the court brought southern courtrooms "back in line," that line was drawn with only the most fundamental notions of due process as its guide. Thus change in habeas was driven by a legitimate (though moderate) concern over racial egalitarianism in criminal procedure. The implementation of the habeas changes, though, was still motivated by a federalist concern of the traditional relationship of state and federal courts, one in which states still had almost plenary control over criminal justice and the procedures used to effectuate that justice.

As habeas developed into a "corrective" mechanism, there was a simultaneous and separate development beginning in the more general areas of civil liberties. Cast predominantly in "incorporationist" debates, some on the court were beginning to advocate for a more pervasive conception of the due process clause of the Fourteenth Amendment and its application to the states. With Cardozo's opinion in *Palko v. Connecticut* in 1937, the possibility that some, but maybe not all, of the first eight amendments to the Constitution were applicable to state courts and legislatures. However, except for the "eccentric exception" of Hugo Black, even the most ardent "selective incorporation" advocates still interpreted the due process clause as something similar, but not identical, to the Fifth Amendment's due process clause, thereby nodding partial

deference to states' rights. The most vocal anti-incorporationist, Felix Frankfurter, went even further, arguing that the Fourteenth Amendment's due process clause that limited state behavior was wholly different from the due process clause that limited the national government. His "case-by-case" approach, developed most thoroughly in his concurrence in *Adamson v. California* in 1947, left ample room for states to develop their own notions of due process in criminal procedure, with only the caveat that it not violate constitutional provisions. It is not unimportant that *Brown v. Allen* decision, which according to many scholars drastically altered habeas procedure, was authored by Frankfurter. Even the changes in *Brown* have to be understood as still accepting, and even advancing federalist and states' rights concerns.

With the ascendance of Earl Warren to the Court, and the retirement of Frankfurter and other states' rights and anti-incorporationist justices, the Fourteenth Amendment's due process clause was applied to the states with great speed. If moderate states' rights and moderately racially egalitarian principles motivated the past three decades of habeas and due process jurisprudence, the Warren Court's decisions were dramatically anti-states' rights and dramatically egalitarian. The changes to habeas in Brennan's decision in *Fay v. Noia* in 1963 were consciously developed to ensure that the federal government, and specifically the district and circuit courts, could monitor and enforce the simultaneous application of an ever-increasing application of the Bill of Rights to the states. Initially, incorporation decisions like *Gideon* met with little hostility, as a vast majority of states had already had right to counsel provisions in their state constitutions. Habeas, though, was met with resistance, as those legitimately concerned with state-federal relations argued that this traditional balance was upset. As the decade moved on, and more incorporation decisions were issued, and more state defendants had access to federal habeas courts, the backlash increased dramatically. With *Escobedo v. Illinois*

and *Miranda v. Arizona*, state judiciaries, legal academics, and even Congress, felt that the court had moved too far too soon.

Habeas initially began with a moderately conservative basis in correcting blatant due process violations in southern courtrooms, all the while with an identifiable deference to federalism. Its jurisprudence never fundamentally changed. However, when linked to a due process agenda that did change dramatically, the coalition between habeas and incorporation began to disintegrate. The independent but simultaneous development of habeas, incorporation, and racially based criminal justice reforms came together in a short, but dramatic, period during the Warren Court. The non-simultaneity in the development of each, though, ultimately spelled the end of a project of strong federal habeas corpus for state prisoners.