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# Habeas Corpus in the New American State, 1789–1915

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Rights declared in words might be lost in reality.  
—*Weems v. United States*

THE FIRST SIGNIFICANT era of habeas corpus in American political history extends from the passage of the Habeas Corpus Act in 1867 through 1915, when the Supreme Court denied a writ of habeas corpus to Leo Frank, in the celebrated murder case, *Frank v. Magnum*.<sup>1</sup> This chapter reviews this first period of the Supreme Court's habeas corpus jurisprudence with a brief look at the writ in the antebellum period. Habeas corpus in the antebellum period is distinctive (when compared with its postwar history) in terms of its congressionally led expansion across federal-state jurisdictional lines. The use of federal habeas corpus and removal statutes to interfere with state laws regarding arrest before and during the Civil War mirrors more closely the writ's English past than its American future.

Sectional differences and party divisions over the extent of federal power were facts of political life in the antebellum period that, in part, highlighted the federal government's incapacity to reach state action.<sup>2</sup> One notable but overlooked example of pre-Civil War sectional stress and party division took the form of state arrests of federal military and revenue personnel during wartime and the crisis over tariff collection.<sup>3</sup> State-sanctioned arrests of federal officers (first in the North, then in the South) capitalized on the inability of state arrestees to appeal directly to the federal courts for relief from unjust confinement.

During the war of 1812, Massachusetts arrested U.S. custom officers to prevent the federal government from collecting taxes over a war it did not support. In 1815, the thirteenth Congress responded to the arrests of federal revenue officers in New England by passing "An Act to prohibit Intercourse with the Enemy, and for other Purposes." The act allowed federal prisoners held in state jails to remove their cases to the federal judiciary.<sup>4</sup> Section eight of the act allowed for any suit begun in state court against persons "civil or military," who had acted under color of U.S. law pursuant to their duties, to "file a petition for the removal of the cause for trial at the next circuit court of the United States." The law forbade the state courts from further proceedings. The act also allowed for removal after "trial judgment," but it did not apply to criminal trials.

Throughout the tariff and secession crisis of 1833, South Carolina threatened to arrest any federal revenue officer who came to collect revenue from "the tariff of abominations." The main sections of the 1833 act, numbers three and seven, dealt respectively with removal and habeas corpus. Removal was restricted to any time before the state trial began, but it allowed for "*de novo*" review if no state record existed.<sup>5</sup> The habeas clause granted power to federal court judges, but not to the courts themselves, to grant writs "in all cases of a prisoner or prisoners, in jail or confinement, . . . for any act done, or omitted to be done, in pursuance of a law of the United States." The debate in Congress took several forms: sectional strife, fears of executive power, deference to executive power, state sovereignty concerns, partisan differences, and concerns over the power of the national judiciary.<sup>6</sup>

In 1842, Congress passed an emergency habeas corpus law to allow a foreign national held in a state jail to remove his case to the federal courts (and perforce all similarly situated foreign nationals), to avoid prejudice against him by the local jury. A British naval officer, Alexander McLeod, who boasted that he had killed "a damned Yankee," was arrested upon entering New York harbor. The British government made a formal request for the release of McLeod, and entreated President Martin van Buren to expedite the matter. The president responded that McLeod was held under state law, and neither he nor the federal government had the authority to release him. Teetering on the brink of war,<sup>7</sup> Congress in August of 1842 empowered federal district court judges to issue writs of habeas corpus to foreign nationals, upon removal to a federal court.

The 1842 bill "to provide remedial justice" provoked common fears among states-rights advocates that it would force the states to "surrender a vital part of [their] most cherished and rooted institutions."<sup>8</sup> Charles Ingersoll, a Whig congressman from Pennsylvania, thought the bill would "repeal all the state courts of justice," "unhinge the law, annihilate state jurisdictions, truckle to a mercenary foreign power, [and] humble the United States before the world." He was concerned, moreover, that foreigners would have

more appellate rights than Americans (which was largely true). “War,” he declared, “would be better.”<sup>9</sup> As in 1833, the southern states opposed the expansion of federal habeas corpus powers because they feared the writ would be used to free enslaved blacks.<sup>10</sup> According to William Duker, the Democratic party opposed the 1842 act because they deemed it to be “destructive of state sovereignty in the enforcement of their criminal codes.”<sup>11</sup> Despite Ingersoll’s claim that “This bill will not be carried by a party vote,”<sup>12</sup> the vote in the Senate was strictly partisan. The Senate voted 27:17 in favor of the bill, with only one Democrat voting with the Whigs. The *Congressional Globe* did not record the House vote, though it noted that several Whigs had voted against, and the majority was small.<sup>13</sup>

Finally, in 1863, Congress passed a habeas corpus act designed to achieve three objectives. The first provision ratified Abraham Lincoln’s suspension of habeas corpus in April 1861, which he had done in the name of “public safety.” On July 4th of that same year, Lincoln formally notified Congress, in special session, of his actions.<sup>14</sup> The 1863 act<sup>15</sup> ensured that Congress, not the president, had ultimate constitutional authority over the suspension of the writ. Second, the act indemnified federal officers held in state jails (mostly in Kentucky and Delaware) from further prosecution and detention.<sup>16</sup> Third, as with the previous habeas corpus acts, the 1863 act allowed the federal courts to grant habeas corpus following removal from the state courts.<sup>17</sup>

The debate in 1863 ranged between the legality of Lincoln’s suspension to the historical meaning of habeas corpus as a writ of liberty, some calling it “a second Magna Carta,” and a “great bulwark of English liberties.”<sup>18</sup> When the debate got to the matter at hand, indemnifying federal officers, the Republicans turned not to the English law on habeas corpus, but to previous congressional actions to extend habeas corpus jurisdiction, dating back to the removal act of 1815.<sup>19</sup> In passing three habeas corpus statutes over a brief but critical era in American history, Congress overcame the differences that existed between the two parties in the antebellum period, particularly the fears among southern Democrats that habeas corpus, like internal improvements, would lead to the abolition of slavery.<sup>20</sup> In all cases, Congress could have done nothing, either by claiming a lack of constitutional power to reach state action or by relying on historical restrictions on habeas corpus and removal statutes. Congress’ novel action in 1815 formed the basis for all later habeas corpus acts of the antebellum period.

Before the Civil War, no court, state or federal, could issue a writ of habeas corpus to a prisoner after conviction. The Judiciary Act of 1789 prevented any “postconviction” appeal process by granting the federal courts the power to issue writs of habeas corpus only to those held “under or by color of the authority of the United States.”<sup>21</sup> The language of the act effectively denied state prisoners the right to appeal for habeas corpus after conviction by

a state court. Removal statutes, too, were not designed for releasing prisoners from custody. Removal statutes were to be applied only in diversity of jurisdiction claims. Yet a series of revenue and later military crises exposed the federal government's core jurisdictional weakness: the government was incapable, barring extraordinary measures, of removing federal prisoners from state jails. By confronting this limitation through legislation, Congress turned habeas corpus and removal into vehicles for jurisdictional political change.

A focus on history and a focus on jurisdiction produce different responses to similar events. During the same period, the Supreme Court failed to see the writ in the same way as Congress. In *Ex parte Watkins*<sup>22</sup>(1836), Chief Justice John Marshall denied habeas corpus because he believed it would have been improper to issue the writ to a prisoner already under sentence of a state court. Removal to a federal court, then, provided an extraordinary means of relief for federal prisoners held in state jails. Ordinarily, removal statutes were used to resolve commercial matters, to prevent local prejudice against foreigners and outsiders. Until 1815, removal had never been used to free United States marshals arrested for collecting revenue from hostile state and local authorities. Removal provided a way around the restrictions on the appellate and habeas processes found in the Judiciary Act of 1789 and maintained by pre-Civil War Supreme Court decisions.<sup>23</sup> Notably, the removal and habeas corpus clauses of the Judiciary Act of 1789 were the only two sections of the act to expand during the antebellum period.<sup>24</sup>

In the absence of a broad, constitutional grant of authority to reach state jurisdictions and alter their laws, such as we find in section 5 of the Fourteenth Amendment, purposeful and periodic congressional overrides of historically sanctioned limitations on the states' power over detainees belies the general characterization of the antebellum state as weak or limited. The enactment of removal and habeas corpus statutes in 1815, 1833, 1842, and 1863 created a "pathway to the states" that helped ease the passage of the Habeas Corpus Act of 1867, which offered state prisoners access to the federal courts.<sup>25</sup> That is, until the 1867 act, the federal courts had only temporary powers to release persons held in state jails awaiting trial. Before the Civil War, the general notion was that federal courts do not serve as courts of appeal for state prisoners. Taken together, however, these congressional acts illuminate a trajectory of developmental interests within Congress that has gone unnoticed in discussions of the antebellum period and of habeas corpus. Pre-Civil War congressional actions were more than just moments of adjustment and change to endogenous and exogenous forces. They were intentionally developmental. The lack of constitutional guidance regarding the meaning of habeas corpus empowered Congress to act as the British Parliament had in 1641 and again in 1679, when it located habeas corpus securely in legislative courts and kept the king's courts at bay. In spite of any perceived historical or actual limitations then in existence, Congress, like Parliament before it, extended the reach

of habeas corpus against recalcitrant local or collateral organs of power. The key question is whether Congress could maintain the same level of interest in federal-state criminal justice matters after the Civil War.

#### HABEAS CORPUS IN THE NEW AMERICAN STATE

At the time of the Constitutional Convention in 1787, the common law tradition on habeas corpus was well established. Dallin Oaks writes that there was a “close conformity” between state legislation on habeas corpus and the Habeas Corpus Act of 1679. Of the twelve states with constitutions in 1787 (Rhode Island relied on its charter), “there were four states with habeas corpus guarantees in their constitutions, eight with none,” but none “made any affirmative guarantee of the writ.”<sup>26</sup> The assumption was that the constitutional prohibition against suspending the writ, except in times of rebellion, guaranteed its availability at the state level.

Despite the implication that this might mean that federal habeas corpus is always available to state prisoners,<sup>27</sup> habeas corpus in the new republic retained its formal, common law meaning. The usual guide for habeas’ connection to the common law is Chief Justice Marshall’s opinion in *Ex parte Bollman* (1807).<sup>28</sup> In that case, involving charges of treason against the United States, Chief Justice Marshall wrote “that for the meaning of the term habeas corpus, resort may unquestionably be had to the common law.” Commentators omit, however, the crucial second part of that sentence: “but the power to award the writ by any of the courts of the United States, must be given by written law.”<sup>29</sup> And yet, despite Chief Justice Marshall’s recognition that American law defines habeas’ parameters, not the common law operating in isolation from the American experience, sectional concessions in the first Congress prevented Congress from establishing a national criminal law that could reach state action.<sup>30</sup> One of the reasons federal prisoners had such trouble getting out of state jails is because the first Congress had not created federal jails, and it could only request the states to hold federal prisoners with state prisoners.<sup>31</sup> In fact, there were no federal prisons in the United States until the latter half of the nineteenth century.<sup>32</sup> Consequently, throughout most of U.S. history, the control over federal prisoners fell to the state courts, allowing them to exercise supreme jurisdictional authority over all prisoners contesting their confinements on constitutional grounds.<sup>33</sup>

Because of party and sectional divisions in Congress, the framers of the first Judiciary Act did not provide for full, federal court appellate review.<sup>34</sup> From the nation’s founding to the latter half of the nineteenth century, federal jurisdiction did not cover the entire spectrum of possibilities intended by the phrase “the judicial power of the United States.”<sup>35</sup> As there was no federal criminal law at the time of the Judiciary Act of 1789, the drafters of the

Constitution refused to grant federal district courts the power to hear cases that might subsequently arise under federal law. Congress remedied this with the act of March 3, 1875.<sup>36</sup> In 1889, Congress passed a law allowing federal criminals to appeal their convictions, including capital offenses, directly to the Supreme Court.<sup>37</sup>

The writ's success in the antebellum period against entrenched state interests came about despite these limitations. Short of a show of force, it was the only corrective available to release arrested federal revenue and military officers held in state jails. External crises, such as wars and the threat of war, revealed in part the depth of partisan and sectional divisions plaguing the country. But it was the way in which these divisions manifested themselves that is significant to the development of habeas corpus, that is, through sectional arrests of federal officers and foreigners that forced Congress to turn to habeas corpus as a national solution to a local problem. This development was not inevitable. The framers of the Constitution had understood habeas corpus as a limited and extraordinary writ. With the exclusion of the South at the end of the Civil War, Congress achieved enough partisan support to permanently alter habeas' jurisdiction. Only then—freed from institutional constraints rooted in evolving conceptions of federalism that had limited the central government's authority—did it become the great writ of liberty.

Taken together, the strong congressional responses during these crises altered the politically agreed upon jurisdictional boundaries set in 1789. Each crisis deepened the path for a constitutional-level change.<sup>38</sup> Each resolution of the particular crisis forced the states to give up some degree of their sovereignty over captured persons. The 1867 act codified the budding relationship that prisoners would have with the national judiciary, not the states, under the Fourteenth Amendment. The act thus stands as an example of Reconstruction era liberal statemaking<sup>39</sup> and marks not only a passage of power from state courts to Congress (as an overseer of federal court jurisdiction) but also an apparent disjunction between antebellum and postbellum politics. Nonetheless, once passed, the act ushered in the beginning of a century-long pattern of legislative and judicial forbearance on civil rights. The act, by institutionalizing habeas corpus as a permanent form of judicial relief from unjust state confinement, allowed Congress to turn over control of state prisoners to the federal judiciary. In doing so, Congress was relieved from investing its time in local and state affairs. The Supreme Court did not see the matter differently, either. Rather than having habeas corpus serve as the instrumental means to attack state court convictions, the Supreme Court after the Civil War deferred to state court judgments and forced federal habeas courts to do the same. The "command" of the habeas statute was not fulfilled.

In this chapter I focus on the rise of federalism as the most important structural inhibitor in habeas' history. But I cannot ignore the role of Supreme Court justices in defining this term. The writ in the post-Civil War United

States created not just a language of rights and of protest, but a language of federalism, of deference, of guilt, punishment, and respect for state court finality. It is the state of California, Justice Anthony Kennedy wrote in *Calderon v. Thompson* (1998), that “is entitled to the assurance of finality” on habeas challenges, because finality preserves “the federal balance” and protects the states’ “good faith attempts to honor constitutional rights.”<sup>40</sup> In this case, Justice Kennedy ignored the petitioner’s interest in liberty and did not speak of that to which the petitioner was entitled. His opinion is devoid of historical references to the writ’s contribution to individual liberty in Britain and of California’s violation of Thompson’s Sixth Amendment rights. He meant by finality the right of the state to proceed to execution or to close the door to more appeals. Finality as a code word for the administration of the death penalty in habeas corpus cases finds its roots in the Court’s late nineteenth-century habeas cases that molded federalism’s meaning to conform to the ends of criminal justice. More important, though, is that the desire for finality denies the individual a voice in the judgment of his own fate. Finality elevates jury determinations of guilt and lowers Fourteenth Amendment due process claims. Not unlike today’s Supreme Court, cost effectiveness determined full citizenship in the post-Civil War industrial regime, with concerns for personal safety running a close second.

Outside the context of race or property or the protections offered by the Bill of Rights, federalism has no meaning. A common definition of federalism, such as that of Daniel Elazar, that it “represents a synthesis of the Puritan idea of the covenant relationship as the foundation of all proper human society and the constitutional ideas of the English natural rights school of the seventeenth and early eighteenth centuries,”<sup>41</sup> means nothing when placed alongside the daily realities of black life in the nineteenth- and early twentieth-century South. Only by bracketing out lynchings, the forceful denial of the right to vote, and other forms of violence directed at blacks could federalism be thought of as a structure outside of historical circumstances, as the outcome of “reflection and choice,”<sup>42</sup> as an institution that deserves respect for what it is. Federalism’s meaning only gains content by the accretion of case law, by the interplay of citizens and state actors challenging state practices, and by the judgments of federal courts determining whether or not it is acceptable for a state to stack the rules “in favor of death.”<sup>43</sup>

Federalism is reflexive. It can only refer back to some practice, idea, or challenge to justify its existence. Federalism scholars treat federalism as a given, then propose some sort of reform to make it explainable.<sup>44</sup> But this confuses federalism with the rule of law itself. Federalism is evolutionary; it ripens on the vine of criminal justice case histories. It gets its meaning by saying no to those on the outskirts of political power.<sup>45</sup> By the end of the nineteenth century, in the name of “federalism,” or more properly “comity,” the justices had granted the states wide powers over criminal justice, but this concern was

notably absent from the Supreme Court's discussions of corporate behavior, which flooded the Court's docket during the Gilded Age. Before passage of the habeas act, the Court had not defined federalism.<sup>46</sup> Federal-state comity was the vague composite the Court used to uphold state law or common law practices used by the states regarding arrest or due process. Federalism was born in the aftermath of the collapse of Reconstruction, as a policy instrument to reduce national involvement in civil rights, particularly in light of the expansive language of the Fourteenth and Fifteenth amendments.<sup>47</sup> Federalism's powers over criminals have been shaped neither by the founding generation nor by treatises written by philosophers but by the practical aspects of everyday life: arrest, conviction, sentence; race, class, occupation and status.

The 1867 act, like the due process clause of the Fourteenth Amendment, never reached its full potential in the nineteenth century because neither Congress nor the Court fully accepted the goals behind it. Without congressional prodding, that is, without jurisdictional intervention, the Court's restrictive interpretation of the Habeas Corpus Act proved infallible simply because the historical judgment of the Supreme Court was final.<sup>48</sup> Merging the remnants of British feudalism and the inchoate feelings of devotees of "states' rights" before it became more respectable as "American federalism" into a defense of state sovereignty, the Supreme Court found a way to merge the patterns of congressional weakness and the limitations on congressional intervention of the Supreme Court's jurisdiction into traditional and historic state functions regarding arrest, incarceration, and execution. The creation of a deferential "jurisdiction standard" during the latter half of the nineteenth century for state courts, which allowed the federal judiciary to deny habeas corpus, provided the state court's conviction was not without jurisdiction over the matter, was the Supreme Court's boldest attempt to thwart the goals of the Radical Republicans in Congress, and as a parry, it went unanswered.

In 1886, the same year the Supreme Court first subsumed the meaning of the habeas act within federal-state relations in *Ex parte Royall*, it made corporations persons under the Fourteenth Amendment.<sup>49</sup> Like all historical constructs, this is no accident. In 1884, the Court had refused to apply the Fifth Amendment's guarantee of a grand jury in criminal cases to the states. In 1890, it refused to connect the Eighth Amendment's protection against cruel and unusual punishment to the Fourteenth Amendment's due process clause. As Felix Frankfurter has written, "By 1900 the applicability of the Bill of Rights to the States had been rejected in cases involving claims based on virtually every provision in the first eight Articles" of the Bill of Rights.<sup>50</sup> But in 1897, the Court applied the Fifth Amendment's protection against taking property without due process to the states.<sup>51</sup>

Justices William Douglas and Hugo Black echoed Frankfurter's point about the failure to incorporate the Bill of Rights in the nineteenth century in their dissent in *Wheeling Steel Corporation v. Glander*.<sup>52</sup> "Since 1886," they



wrote, “the Court has repeatedly struck down state legislation as applied to corporations on the ground that it violated the Equal Protection Clause.” Carl Mayer has written, “For the period from 1889 to 1918 attacks upon state statutes were made in 422 cases involving state police power. Fifty-three of these were held invalid, of which the greater number involved the regulation of public service corporations. Only 14 involved legislation affecting the general rights and liberties of individuals.”<sup>53</sup> Until the 1960s, the Court had refused to extend federal protection to natural persons in every conceivable state criminal case, but it granted corporations Fourteenth Amendment protections in 1897 (extending the equal protection clause to corporations), in 1889 (due process, Fifth Amendment), in 1893 (due process, Fifth Amendment), in 1906 twice (Fourth Amendment and Fifth Amendment, self-incrimination), and in 1908 (Sixth Amendment),<sup>54</sup> all before such protections were extended to real live human beings. More pointedly, “By 1938 Justice Hugo Black observed with dismay that, of the cases in which the Court applied the Fourteenth Amendment during the first fifty years after [*Santa Clara County v. Southern Pacific Railroad* (1886), the first case to apply the Fifth Amendment to corporations] ‘less than one-half of 1 percent invoked it in protection of the Negro race, and more than 50 percent asked that its benefits be extended to corporations.’”<sup>55</sup> Between 1873 and 1906, Justices Joseph Bradley, David Brewer, Stephen Field, Samuel Miller, Rufus Peckham, and Chief Justice Morrison Waite all pushed the Court’s corporate jurisprudence in the direction of greater acceptance for the corporation’s Fourteenth Amendment’s due process claims by disparaging the states’ use of their police powers, because it was historically limited to the right to contract.<sup>56</sup>

Why deference to federalism in one set of cases and not another? Why make nonhumans persons and deny that criminals are persons for Fourteenth Amendment purposes? These historical dichotomies establish at the least that, because of a strengthened Congress (the antebellum era; the New Deal) or a strengthened Court (the Hughes and Warren Courts), because of economic developments or changed ideologies, because of the intensity of propertied interests and the weaknesses of others to include excluded minorities within the meaning of the word *person* in the Fourteenth Amendment, the meaning of federalism changes over time. Yet the Supreme Court has ignored federalism’s fundamental alterity because it treats federalism as if its meaning were transhistorical or timeless, much like it treated corporations in the Gilded Age.

Between 1870 and 1905, when the Supreme Court struck down New York’s regulation of bakers’ hours in *Lochner v. New York* (1905), the Court moved, slowly but inexorably, away from Chief Justice Roger Taney’s limited notion of police powers in *Brown v. Maryland* (1827) and John Marshall’s common law understanding of corporations. In 1870, the Court struck down the Legal Tender Act, in part because the Court believed that it deprived

creditors of property without due process.<sup>57</sup> In *Loan Association v. Topeka* (1875), Justice Samuel Miller struck down a Kansas law designed to help local industries because it was an unauthorized invasion of the right to private property.<sup>58</sup> In *Munn v. Illinois* (1877), the Court upheld Illinois' regulation of grain elevators but not without a visceral dissent from Justice Stephen Field.<sup>59</sup> In *Allgeyer v. Louisiana*<sup>60</sup> (1887), Justice Rufus Peckham declared, for a unanimous Court, that a Louisiana law denying out of state corporations the right to do business in Louisiana, without having at least one place of business within the state, to be a violation of the due process clause of the Fourteenth Amendment. And in *Lochner v. New York* (1905), Justice Peckham declared, in overturning the New York law regulating hours of work for bakers, "the limits of the state's police powers have been reached."<sup>61</sup>

What is notable is that, as early as 1878, the Court was becoming concerned about the number of state cases pressing for due process relief on property grounds, but it showed no signs of interest in the "problem" of federal-state relations.<sup>62</sup> The 1880s began habeas' path to restriction. With military troops removed from the South, and that region now an integral part of the Union, there was the "appearance of new economic interests in Congress," which once again divided the country by section, and there was pressure to restrict federal judicial power over the states.<sup>63</sup> Rather than striking the habeas act down, the Court, within twenty years of its passage, deemed it incompatible with the workings of a federal republic that by tradition had allowed the states to determine the boundaries of arrest and punishment. The loose language of the habeas corpus act, and a historical occlusion of the due process rights of prisoners beyond state borders, allowed the Court to make the case for federalism by focusing on an abstract notion of liberty that, curiously, never mentioned race or ethnic prejudice as factors in its decisions. The Court declared the states' regulations of health and safety incompatible with individual liberty under the Fourteenth Amendment's due process clause but extorted confessions and the first use of the electric chair by New York state against William Kemmler drew no protection from the Constitution. Motivated by economic and administrative concerns regarding federal court access, the Court in the latter half of the nineteenth century intentionally bifurcated federalism questions by category of privileged personhood and recast the habeas problem. When the Supreme Court decided its first important habeas corpus case in 1886, *Ex parte Royall*, for the first time a Supreme Court narrative spoke of constitutional privileges extended to one class but not another, while other late nineteenth-century cases focused on the historic mission of the states, and still other narratives ignored these concerns and concentrated on economic and administrative efficiency issues.<sup>64</sup>

The introduction of these new narratives limiting federal relief created a criminality/habeas corpus discourse that turned upside down the writ's British legacy. Rather than a writ of liberty that endangered and sought to curtail

arbitrary governmental power, habeas corpus threatened the states' administration of justice because it allowed for the release of convicted criminals. Rather than a writ that drew its support from the legislative branch rather than the executive, because that branch was the most willing to act in an arbitrary fashion, and therefore more dangerous to civil liberties, the Supreme Court favored state executive powers over the individual's right to be free from unlawful confinement.

Throughout the nineteenth century, the Court tied rights claims to institutional capacities. Weighing limitations on the Court's time, neither Congress nor the Supreme Court wanted to increase federal remedies for both corporations and civil rights defendants. The courts chose commerce.<sup>65</sup> Sectional and institutional differences also impinged on congressional policy.<sup>66</sup> The House of Representatives supported restrictions on the federal courts; the Senate, regardless of the party in charge, did not. The Senate wanted corporations protected by the federal courts. During a period of congressional inaction to relieve the courts of jurisdictional burdens, the Supreme Court's nineteenth-century rulings on property and habeas corpus helped establish a pattern of legislative forbearance and judicial autonomy that has lasted until the present time.

By creating a forum for the articulation of constitutional rights in federal courts, Congress in 1867 thought it had eliminated the need for congressional intervention and oversight at the state level. In the name of separation of powers, it removed itself from the conflict over citizens' criminal rights and remedies. It removed itself from the important question that lies at the core of habeas corpus law: who has the body? Postwar, illegal detention was strictly a judicial matter, a question of form and of forum, and not a question of national sovereignty. Not surprisingly, waning congressional interest in protecting the rights of the accused after 1877 encouraged federal judicial forbearance as well, and thereafter, the protection of persons from arbitrary arrests remained with the state courts.

#### THE DEVELOPMENT OF THE JURISDICTION STANDARD

The Habeas Corpus Act of 1867, passed just four years after Lincoln's suspension of habeas corpus, directed its strongest language not to the problem of containing rambunctious presidential power, but to the likelihood of state recalcitrance in enforcing federal law.<sup>67</sup> Congress' pressing concern in 1867 was not fear of arbitrary executive action, for the end of the Civil War had restored the presidency to its traditional and limited role.<sup>68</sup> Rather, the Radical Republicans were concerned with the ability of the national government to reach state and individual behavior. To Congress, the states were exercising

arbitrary executive power, not the national government.<sup>69</sup> The habeas act followed a number of legislative reforms with judicial content, with the Civil Rights Act of 1866 and the Thirteenth and Fourteenth Amendments the most prominent efforts by the Radical Republicans to bring about federal-state changes.<sup>70</sup>

The drafters of the 1867 act did not take into account the questions involving transferring jurisdiction from state to nation, standing, or the baroque patterns of the states' appellate processes.<sup>71</sup> As Laurent Frantz has made clear, "the framers and backers of the Fourteenth Amendment were primarily interested in enlarging the powers of Congress, not those of the federal judiciary, which was looked upon with considerable distrust."<sup>72</sup> They created an arena for change without considering the institutional and political barriers that existed to thwart it. They sought to free the writ from the historical limits of federal-state comity concerns and partisan compromise and focused on the inability of those detained by the states to get federal protection. They assumed that Northern victory and subsequent congressional legislation had eliminated those limitations. They then attempted to prevent those barriers from reappearing with a general law, without regard for judicial capacity.

To implement vertical jurisdictional change, Congress needed the Supreme Court to enforce the notion of one superior jurisdiction presiding over the myriad jurisdictions that had hitherto possessed the primary police powers.<sup>73</sup> This was a formidable task, but not insurmountable.<sup>74</sup> Under the Habeas Corpus Act of 1867, lower federal court judges would have to be the agents for change, not Congress, supervising alterations in state criminal procedures on a case-by-case basis. With their newfound power, they could deny that, in a given case, and as a matter of jurisdiction, a defendant's criminal conviction was no longer constitutionally final at the state level. In effect, during the era when presidents were weakest, Congress needed federal judges to act as national executives. They could not merely be the arbiters of federal-state relations, weighing state concerns equally against those of the federal government. Eliminating unconstitutional confinement requires partisanship, not cooperation. Rather than promoting neutrality between governments, federal judges, armed with the power to remedy any individual's complaint that came before them, would become sentries, looking out for constitutional violations at the state level.

For the Court, deference, forbearance, and federalism fundamentally meant the same thing during the postwar era. Whichever word was invoked, the point was to reject habeas petitions alleging unconstitutional confinements. Postwar national political development on civil rights was incremental and unsuccessful in large part because the battle for control over America's postwar political development was rooted in the formalized language of jurisdictional boundaries. Congress, consumed with questions of economic growth

and beset by increased partisanship, fell silent concerning its Fourteenth Amendment enforcement powers.<sup>75</sup> Moreover, the Court, equally consumed with the same concerns, did not just sit back and do nothing. As Charles Warren has written, the Supreme Court “largely eliminated from National politics the negro question which had so long embittered Congressional debates; they relegated the burden and the duty of protecting the negro to the States, to whom they properly belonged; and they served to restore confidence in the National Court in the Southern States.”<sup>76</sup> The *Slaughterhouse Cases* (1873), which kept citizenship dual, is the clearest example of the Court’s late nineteenth-century formal and jurisdictional methodology. “[P]roperty ownership was viewed as establishing the economic basis for freedom from governmental coercion and the enjoyment of liberty.”<sup>77</sup> From that point forward, crimes not related to property remained state concerns throughout the nineteenth and early twentieth centuries.<sup>78</sup>

The Supreme Court developed its defense of states’ rights during the suspension of its appellate habeas powers (1868–1885).<sup>79</sup> Through a series of mostly federal cases that began in the 1870s, the Supreme Court, on direct review, frequently denied claims of illegal detention. During this period, however, because of Congress’ suspension of the Supreme Court’s appellate habeas jurisdiction, the lower federal courts were free to overturn state convictions on habeas corpus without the possibility of Supreme Court review.<sup>80</sup> The federal courts, in fact, had shown some sympathy for due process claims made by state prisoners during the Court’s appellate suspension. By 1885, pressure was building in Congress, where the power of the Radical Republicans had already weakened,<sup>81</sup> to restore the Supreme Court’s jurisdiction to protect the states from federal intervention.<sup>82</sup>

The pressure to reestablish the Court’s jurisdiction was for the benefit of the states, not for civil rights defendants, not for the affirmation of federal law. Riding circuit in 1875, Justice Joseph Bradley tipped off his colleagues and members of the bar to the power exercised by federal court judges in overturning state convictions.<sup>83</sup> Charles Warren, quoting from an 1884 law review article, wrote that the “the federal judges have asserted power ‘to annul the criminal judgments of the state courts, and to pass finally and conclusively upon the validity of the criminal codes, the police regulations, and even the constitutions of the states.’”<sup>84</sup> Fearing federal court power over state criminal convictions, and with the hope for a renewed federalism on the horizon, Congress, on March 3, 1885, restored the Supreme Court’s appellate jurisdiction on habeas corpus.<sup>85</sup>

A defense of property expanded the federal government’s jurisdiction and restricted the states’ powers; a fear of race limited the federal government’s jurisdiction and expanded the states’ powers. The Court began searching for the meaning of federalism after 1875, when Congress increased the jurisdiction of the federal courts.<sup>86</sup> The Act of March 3, 1875, enabled the federal

courts to hear cases previously restricted by the 1789 Judiciary Act, which had not bestowed upon the federal courts the complete judicial power mentioned in the Constitution. The Act of 1875, as Charles Warren has noted, granted to the federal courts “for the first time, jurisdiction in all suits arising under the Constitution and laws of the United States.”<sup>87</sup> The act increased the classes of cases that could be removed from state to federal court, which led to increased federal judicial oversight of state court decisions.<sup>88</sup>

The Supreme Court created the jurisdiction standard in an 1876 case, *Ex parte Parks*,<sup>89</sup> and relegated an 1873 habeas corpus case, *Ex parte Lange*,<sup>90</sup> to a “special” category of habeas cases.<sup>91</sup> Parks was convicted of forgery. The federal district court denied Parks a writ of habeas corpus. On appeal, Justice Bradley relied on the common law notion of the sanctity of a court’s jurisdiction and stated that a superior federal court can only interfere with a lower federal court’s ruling “if the inferior court had exceeded its jurisdiction, or was not competent to act.”<sup>92</sup> The Court now had its definition of federalism. Merging concerns over what was not yet called “federalism” with simple deference to lower court judgments, the Supreme Court applied the distinction between “superior” and “inferior” courts to the federal-state relationship, with the hierarchical components of that relationship reversed to favor deference toward state cases.

In *Ex parte Siebold*<sup>93</sup> (1880), the Court fixed its eye on the growing problem of federal interference in state police matters. The Court stated that habeas corpus could issue only if the committing court lacked jurisdiction over the prisoner. “An unconstitutional law is void, and is no law. . . . A conviction created under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.”<sup>94</sup> The Court gave the federal courts room to issue habeas corpus under certain circumstances but denied habeas corpus in this case, finding the law in question to be constitutional. It was a question not of rights but of the preservation of the federal structure. The Court followed the general rule that the judgment of a court of competent jurisdiction that convicts a defendant, even if constitutional infractions occurred, should stand. *Ex parte Siebold* set the tone for the Court’s deferential jurisprudence in criminal justice cases. “[T]hat the nature of sovereignty is such as to preclude the joint co-operation of two sovereignties, even in a matter in which they are mutually concerned, is not, in our judgment, of sufficient force to prevent concurrent and harmonious action on the part of the national and state governments. . . . There is nothing in the Constitution to forbid such co-operation in this case.”<sup>95</sup> With this insignificant case lies the peculiar contribution of habeas corpus to the development of federal-state relations. Around a group of cases commonly referred to as “state police powers,” the Court in the late 1870s carved out a sphere of sovereignty that the federal courts could not invade, barring exceptional circumstances. Federalism meant deference to state court jurisdiction

largely on matters relating to crime, intended for this particular class of cases and not applicable across the constitutional spectrum.<sup>96</sup>

As a response to the formalism of the Supreme Court's property cases, progressive academics in the early twentieth century tried to replace the rigid application of rules with the sociology of law and the sovereign command of the law with an understanding of the interests behind it and to redirect the restraint rooted in principles of comity to the necessity for judicial action in light of political realities.<sup>97</sup> The legal realists' threat to the Court's late nineteenth-century jurisprudence required the justices to develop a forceful defense of federalism to challenge their notions. Instead, the justices obscured the full reach of the federal government's remedial powers. To counteract the centralizing tendencies of a large, commercial nation that was not yet a state but was willy-nilly becoming one, the Court needed to anchor the states' claims for finality in a constitutional doctrine of federalism that was tied historically to the jurisdiction standard or to some notion of federal limits, as outlined in the Constitution.

Lacking a historic referent for such a defense, the Court offered the exhaustion rule. The Court accepted the 1867 act's expansion of federal protection but created a way to work around it. The exhaustion doctrine required habeas petitioners to exhaust all available state appellate opportunities, including applications for certiorari to the United States Supreme Court, before collaterally attacking their convictions in the federal courts. With the exhaustion doctrine, the Court accepted the power of federal habeas corpus jurisdiction, while demonstrating respect for state court procedures by requiring strict adherence to its rules. The underlying idea is that, with sufficient evidence of the petitioner's guilt established at the state level, through years of trial and appeals, a federal court judge will be reluctant to release a prisoner on habeas corpus.

A narrative of character is already apparent within the Court's emerging habeas jurisprudence. It will take some years to develop, as we will see in chapter three. But the exhaustion rule had characterological elements that cannot be denied in that it placed the burden of asking for relief not on the state court but on the petitioner himself. The habeas petition would consist of a narrative of the petitioner's crimes. The Court first used the exhaustion doctrine in *Ex parte Royall* (1886). *Royall* is the first case of significance following the restoration of the Court's habeas appellate jurisdiction.<sup>98</sup> It upheld national supremacy in speech while relegating federal habeas corpus powers to the discretion of the district court judge in fact. In effect, the Court declared a clear policy preference for state sovereignty on habeas corpus by denying that federal habeas corpus was a command. Because *Royall's* legacy is tied closely to the Court's creation of corporate personhood and the narrative of character of which I have been speaking, which has ramifications for the writ's failure to attach to the Bill of Rights, I discuss *Royall* separately in the next chapter.

THE WEAKNESS OF THE JURISDICTION  
STANDARD AND THE RISE OF DUE PROCESS

The first Justice John Marshall Harlan, who supported full incorporation of the Bill of Rights in *Hurtado v. California* (1884), found support for federal forbearance on habeas corpus in *Covell v. Heyman*<sup>99</sup> (1884). In that case, the Supreme Court justified federal judicial deference by stating that “forbearance . . . is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and therefore of necessity.”<sup>100</sup>

The Court recognized the problem of the jurisdiction standard in a rights-based regime. It limited attacks against state courts in the name of something more powerful than a claim of unjust confinement, the states’ sovereignty over criminal justice. But the paradox was clear. In an attempt to redirect the nascent language of the Fourteenth Amendment away from convicted criminals, the Court tried to ground federal-state comity in something more than utility. It was clear from the start that a state court’s jurisdiction could be breached. The question, however, was: was federal forbearance necessary in light of an illegal detention claim? The Court had still not worked out a viable definition of federalism, comity, or deference. The Supreme Court could not decide if federalism was a process or if it had substantive value; if it was a means to an end or it was an end in itself; if it was a technical principle to facilitate governance in a large nation or if it was a great principle of democracy.

A search of nineteenth-century Supreme Court cases regarding both property and criminality demonstrates that the Court had not successfully articulated federalism’s independent value.<sup>101</sup> Rather, the Court ignored federalism in its contract cases and focused on the liberty of the individual. In its habeas cases, it reversed those concerns, subsuming “rights” claims under the general concerns of comity, finality, and conviction. From the standpoint of individual rights, the exhaustion doctrine was another jurisdictional hurdle for a habeas petitioner to overcome that was not mandated by the habeas statute. Created to protect state court judgments from untimely federal review, the doctrine in fact immunized the states from federal review. But it is a weaker standard than jurisdiction because it lacks constitutional moorings.

The jurisdiction standard and the exhaustion doctrine give the impression that federal habeas corpus review is inappropriate but not unconstitutional. For habeas to be effective, as in property or contract cases that moved from state to federal courts, the Court had to go beyond the mere words of the habeas corpus act and the limitations of the Fourteenth Amendment’s history. It had to argue that rights were fungible, that procedure implied substance, that federal supremacy was tied to the claims of due process, that



claims of illegal or unlawful detention had substantive meaning within the Fourteenth Amendment that would allow a state prisoner access to a federal court. Of course, the Court did not do this. Yet, perhaps unwittingly, the more substance the Court gave to due process on economic matters, as in *Lochner v. New York* (1905), the more it undermined its restrictive stance on habeas corpus. The jurisdiction standard became porous only when the concept of a state's jurisdiction expanded to include events surrounding a trial, such as the quality of a defendant's counsel or mob influence of a jury. The jurisdiction standard weakened with the slow application of the Bill of Rights to the states, driven by property cases. The Court's property jurisprudence paradoxically undermined its restrictive view of jurisdiction for civil rights defendants. In the next section, I discuss the conflict over due process and habeas corpus as an aspect of federal-state development in the nineteenth century.

### HABEAS CORPUS AND DUE PROCESS

Habeas corpus has a historical connection with due process. Among seventeenth-century English writers, it was common to link the two from their mutual birth at Runnymede in 1215. Modern historiography has disproved that connection,<sup>102</sup> but the relationship between them is difficult to sever. It is problematic to separate the function of habeas corpus, a process-oriented writ, from what process is due a prisoner alleging illegal detention.

Institutionally, the prospects for substantive due process in criminal cases were bleak. A limited federal judiciary and sufficient case law to prevent the applicability of the Bill of Rights to the states through the Fourteenth Amendment presupposes a limited scope for due process. Moreover, from 1789 to 1889, prisoners could not challenge their federal convictions in the Supreme Court. Cases involving life or death reached the Court only because of a division of opinion among district courts.<sup>103</sup> This gave the single federal judge enormous power. To remedy this, Congress passed the Act of February 6, 1889, which gave federal defendants the right to appeal to the Supreme Court.<sup>104</sup> The Act of 1889 "restricted resort to the Supreme Court in criminal cases to capital crimes."<sup>105</sup>

On March 3, 1891, Congress passed a bill establishing the circuit courts of appeals.<sup>106</sup> The purpose of that act was to reduce the Supreme Court's docket by creating nine federal courts of appeals, which cut off whole classes of cases the Court had previously been obligated to accept.<sup>107</sup> "The history of latter-day judicial acts," Felix Frankfurter has written, "is largely the story of restricting the right of appeal to the Supreme Court."<sup>108</sup> The Court's smaller docket increased the power of the lower federal courts and helped the Court concentrate on those classes of cases that were pressing on the Court's time, principally commerce and Fourteenth Amendment cases.

The replacement of Chief Justice Morrison Waite with Chief Justice Melville Fuller in 1888 was another significant change concerning the Court's view of due process. In the period from 1890 to 1910, "the ceaseless accumulation of power' in the National Government became the theme of law writers."<sup>109</sup> Time and again, the Fuller Court prevented state criminal defendants from obtaining federal habeas review.<sup>110</sup> The Court, for example, rejected claims by a black man charged with murder and sentenced to die who alleged that his conviction was unconstitutional on the basis of a biased and all-white jury; by a Japanese subject charged with murder whose lawyer had not been admitted to the state bar; and by a white man charged with murder. Most important, it rejected William Kemmler's novel constitutional claim that New York State's first use of the electric chair was a violation of the Eighth Amendment's "cruel and unusual" clause.<sup>111</sup> A typical decision by the Supreme Court denying habeas corpus during this era stated: "[A] habeas corpus proceeding is a collateral attack of a civil nature to impeach the validity of a judgment or a sentence of another court in a criminal proceeding, and it should, therefore, be limited to cases in which the judgment of sentence attacked is clearly void by reason of its having been rendered without jurisdiction, or by reason of the court's exceeding its jurisdiction."<sup>112</sup> The Supreme Court was still under the standard set forth in *Ex parte Royall* (1886), which limited federal court jurisdiction to issue the writ of habeas corpus to cases of "peculiar urgency" or when a state court blatantly exceeded its jurisdiction.<sup>113</sup> "Upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions."<sup>114</sup>

This was the last word on habeas corpus before *Frank v. Magnum*. In the early twentieth century, the Court continued to defer to the state courts on due process challenges, such as in *Maxwell v. Dow*<sup>115</sup> (1900), upholding a conviction by a jury of eight rather than of twelve. Between *Holden v. Hardy*<sup>116</sup> in 1898 and *Twining v. New Jersey*<sup>117</sup> in 1908, the Court allowed the states to set their own standards on juries free from the restrictions asked for by defendants on due process claims. Following an 1891 habeas corpus case,<sup>118</sup> the Court held that the Fourteenth Amendment did not interfere with the protection of life, liberty, and property, "nor with the exercise of that power in the adjudications of the courts of a state in administering process provided by the law of the state."<sup>119</sup> By the beginning of World War I, all that could be asked of federal courts in habeas proceedings was that they "carefully inquire into any matter involving the legality of the detention and remand or discharge as the facts may require."<sup>120</sup> To establish a general rule governing habeas corpus would concede the argument for national supremacy. The Court feared unprecedented federal control over the administration of criminal justice in the states.<sup>121</sup>

By the twentieth century, the Court was operating on two discursive levels that were on a collision course. Concerning commercial matters, the Court had given the states little room to maneuver. State defendants seeking federal

redress in matters relating to finances had little difficulty getting into federal courts.<sup>122</sup> In criminal cases, particularly habeas corpus, the Supreme Court treated the states as virtual sovereign entities. Federal review was nearly impossible in light of the jurisdiction standard and the exhaustion doctrine. The Leo Frank case pushed those doctrines to their limits but could not penetrate the Court's protections. *Frank v. Magnum* laid the basis for all habeas challenges that followed.

### THE LEO FRANK CASE

The defense of the jurisdiction standard in *Frank* revealed the difficulties the Court's nineteenth-century property jurisprudence had created for civil rights. By the end of the nineteenth century, the Supreme Court had applied the Fifth Amendment's property clause to the states. Why not the Eighth Amendment's protection against cruel and unusual punishment? Rather than noting a problem of enforcing justice at the state level, the Court assumed that state prisoners were causing federal-state conflict. It is here, then, that we can locate the rise of the Court's linguistic methodology regarding habeas appeals. The basis for the exhaustion rule was not jurisdictional but personal. The burden was on habeas petitioners to establish a reason why the federal courts should even consider overriding a state court decision. The exhaustion doctrine assumed federal-state comity; the habeas corpus act did not. The Court recast the problem.

From early on, the Supreme Court clearly saw the administrative difficulties of habeas corpus. Granting the writ redirects authority from the states' executive branches to the national judiciary. But beyond making overtures to federal-state harmony, the Court never stated what benefit protecting federalism and denying claims of illegal detention would bestow on individuals. At best, a case for federal forbearance was made "in recognition of the fact that the public good requires that those [federal-state] relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."<sup>123</sup>

By acknowledging the threat posed by individual rights claims and the due process clause of the Fourteenth Amendment to the jurisdiction standard, the Court made its defense of comity more difficult. It created the problem of the interests of justice versus the interests of federalism. If a right was in question, why was a remedy not at hand?<sup>124</sup> The Supreme Court's task was to reconcile the protection of rights against competing structural concerns, in light of its own attempts to minimize state interference in individuals' lives on economic matters.

In 1913, accused of murdering Mary Phagan, Leo Frank was tried, convicted, and sentenced to death in Atlanta, Georgia. A motion for a new trial

was filed on the day his sentence was imposed. Two months later, Frank's attorneys amended their motion to include one hundred and three grounds for error, such as an unfair trial, a biased jury, disorder inside and outside the courtroom that disrupted the trial, and inadmissible testimony. In February 1914, the Georgia Supreme Court affirmed the trial court's judgment of conviction and denied the motion for a new trial.

Leo Frank operated a pencil factory in Atlanta. Although born in Texas, he was a New Yorker living in the South, was educated at Cornell University and was Jewish. During the first quarter of the twentieth century, the post-Reconstruction South was industrializing, and there was local resentment over the influx of "foreigners" and the sight of women and children working in factories. The Leo Frank case operated against this backdrop.<sup>125</sup>

During Frank's trial, a mob outside the courtroom shouted anti-Semitic epithets and chanted for his death.<sup>126</sup> The Georgia Supreme Court did not find sufficient evidence that the mob in any way influenced the jury's decision.<sup>127</sup> After conviction, the Georgia Supreme Court denied a writ of error to have the judgment reviewed by the Supreme Court. Frank next applied to individual Supreme Court justices, all of whom denied his petition.

Having exhausted his state's remedies, Frank petitioned the U.S. district court for a writ of habeas corpus, arguing a denial of due process protection at trial and a loss of jurisdiction by the trial court, as it had failed to maintain peace and good order during the trial. The district court rejected Frank's plea for habeas corpus. On appeal, Justice Mahlon Pitney, for a 7:2 majority, denied Frank's claims.

Frank's attorneys made five procedural points in defense of their client.<sup>128</sup> Justice Pitney responded with three points of his own. First, to grant Frank habeas corpus, it must appear "that he is held in custody in violation of the Constitution." Second, regarding the jurisdiction standard, Pitney held that habeas corpus could not be issued to correct errors in law. And third, the limits of due process circumscribed the power of habeas corpus to overturn a state court conviction.

*Twining v. New Jersey* (1908) was the final word on due process up to this point. *Twining* tried to strike a balance between individual rights claims and the preservation of the federal order. "Whenever a new limitation or restriction is declared, it is a matter of grave importance, since, to that extent, it diminishes the authority of the state, so necessary to the perpetuity of our dual form of government, and changes its relation to its people and the Union."<sup>129</sup> But *Twining* did not solve the problem, and the imbalance remained. As for due process, the Court rooted its understanding of that historic phrase in the common law.<sup>130</sup> Justice William Moody, writing for the Court in *Twining*, refused to inquire into the meaning of an individual right to due process. Unlike *Lochner v. New York*, decided just three years earlier, the Court in *Twining* defined due process procedurally, not substantively. "The essential

elements of due process of law, are singularly few though of wide application and deep significance,” the Court held. Due process requires “that the court which assumes to determine the rights of parties shall have jurisdiction.” And finally, “given a court of justice with jurisdiction and acts, not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence are complied with.”<sup>131</sup>

Following *Twining’s* formalism and respect for state court jurisdiction, the Court in *Frank* believed that it had no choice but to deny habeas corpus to Frank. Notice and a hearing, or an opportunity to be heard, the Court stated in *Frank*, “according to established modes of procedure, is due process in the constitutional sense.”<sup>132</sup> There is no doubt that Frank had had his day in court. But was it a trial in form only? This was the crucial question that the Supreme Court did not answer. Frank’s attorneys argued that the trial court had lost its jurisdiction over the case by failing to control the mob and by not dismissing two jurors before the trial who were openly biased against Frank. Yet the Court maintained that “the writ of habeas corpus will lie only in case the judgment under which the prisoner is detained is shown to be *absolutely void* for want of jurisdiction in the court that pronounced it.”<sup>133</sup> It is not clear if “absolutely void” adds anything to the Court’s previous standard.

The Court in *Frank* accepted that “due process of law guaranteed by the Fourteenth Amendment has regard to substance of right, and not to matters of form and procedure,” without acknowledging that the jurisdiction standard was effectively undermined in the process. Moreover, the Court also accepted that the 1867 act empowered federal courts and judges in a habeas challenge “to look beyond forms and inquire into the very substance of the matter,”<sup>134</sup> while at the same time failing to acknowledge that its decision in *Frank* was based on the formalism of the law of jurisdiction.

Until *Frank v. Magnum*, the Supreme Court was silent concerning the connection between due process and the appellate stage of a criminal procedure. Before *Frank*, the Court had ruled that the Fourteenth Amendment did not require appellate review in criminal cases.<sup>135</sup> With *Frank*, the Court could no longer ignore the significance of the appellate process in a criminal adjudication. The appellate process was an extension of the state’s jurisdiction over the prisoner. Consequently, appellate courts had to conform to the rules governing jurisdiction and due process that applied to trial courts. “This is not a mere matter of comity,” Justice Pitney wrote. “This rule stands on a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon relations between the state and federal governments.”<sup>136</sup>

The appellate process, then, was a significant addition to any defendant’s due process rights. As Justice Pitney acknowledged, “the petition contains a

narrative of disorder, hostile manifestations, and uproar, which, if it stood alone, and were to be taken as true, may be conceded to show an environment inconsistent with a fair trial and an impartial verdict.”<sup>137</sup> The purpose of appellate review is to defend a defendant’s due process rights and to inquire into the truthfulness of the petition’s narrative. But Frank’s understanding of the trial does not impress Pitney. Frank’s narrative is a legal formality which Pitney finds to be of a lower order than the trial court’s verdict. Frank’s narrative, despite its important claims, does not remove the trial court’s jurisdiction, which remains the foundation for the Court’s deference policy. Pitney then switches the burden of appeal from the state to the petitioner. “The narrative has no proper place in a petition addressed to a court of the United States except as it may tend to throw light upon the question whether the state of Georgia, having regard to the entire course of the proceedings, in the appellate as well as in the trial court, is depriving appellant of his liberty and intending to deprive him of his life without due process of law.”<sup>138</sup> Frank’s petition, Pitney finds, is “only a reiteration of allegations that appellant had a right to submit, and did submit, first to the trial court, and afterwards to the supreme court of the state, as a ground for avoiding the consequences of the trial.”<sup>139</sup> Appellate review, for Pitney, does not add anything of substance to a petitioner’s narrative; indeed, it subtracts from it by drawing attention to the reason for the appeal in the first place: Frank’s murder of Mary Phagan. Mere reiteration of the petitioner’s narrative of events by an appellate court has no power to break the deference that the Supreme Court is required to show to state courts.

Once again, the Court tried to create a comity standard that was more than a mere formality. But the Court expressed nothing more than a preference not to disturb federal–state relations or the judgment of the trial court. The *Frank* case was the Court’s most formidable challenge to the formalism of the jurisdiction standard and it lacked a satisfactory response to meet that challenge. Without admitting as much, the Court’s *dicta* from its commerce cases about the primacy of individual rights had undermined its decisions on habeas corpus.

Justices Oliver Wendell Holmes and Charles Evans Hughes dissented on the grounds that the jurisdiction standard could no longer contain a substantive plea of illegal detention. Holmes pointed to an unresolved jurisdictional issue that the majority did not consider, namely, that “the loss of jurisdiction is not general, but particular, and proceeds from the control of a hostile influence.”<sup>140</sup> For Holmes, however, the argument for habeas corpus was even stronger. Habeas corpus, he wrote, “cuts through all forms and goes to the very tissue of the structure. It comes in from the outside . . . and opens the inquiry whether they have been an empty shell.”<sup>141</sup>

The practical problem with Holmes’ metaphor was that while it denied that the states had any constitutional jurisdictional foundation to hold some-

one unlawfully detained, it continued to stress that habeas corpus was an extraordinary remedy, not part of the constitutional fabric. Coming in from the outside meant that other courts in different situations could close the door to habeas' entreaties. Holmes proposed no structural revision of Georgia's criminal justice system or of federal habeas corpus. As a practical matter, Holmes' colleagues in the majority realized that Holmes' description would only bring more habeas cases before the Court. This is why the dissent in *Frank* was so radical. A jurisdiction standard based on forbearance wants to preserve federal-state relations as they existed in the post-Reconstruction era, not to contribute to the enmity that lies dormant between the two judicial systems. Holmes' dissent and metaphor (whatever its limitations) were ill-suited to the limited demands on the judiciary in the era of legal formalism.

As the Court came to accept a more expansive definition of federal jurisdiction over the states, it reluctantly confronted an expanded definition of due process. The Court met the expansion of rights against the states with an increase in one's duties toward the Court. The Court did not negate those claims, it accepted them, with the concession that individual conditions be attached to each state petitioner's habeas challenge. Any violation of these regulations (which the defendant may be unaware of prior to his suit) would result in denial of the writ. A high standard of individual behavior had subtly replaced the jurisdiction standard. A narrative of personal behavior was in the making. The *Frank* decision was just the beginning of the enactment of judicial barriers to habeas challengers.

## CONCLUSION

Throughout the first wave of habeas jurisprudence, the Court relied on a policy of comity between state and nation. But it was not an impenetrable doctrine. The purpose of the comity standard was to mitigate federal involvement in light of the nationalist intent of the Habeas Corpus Act of 1867, which had broadened the Court's powers over state prisoners. By deferring to state court decisions, the Court hoped to facilitate governance in a large nation, not to increase the trend toward centralization.<sup>142</sup>

To be sure, the command of the writ operated against the Supreme Court's policy of deference to the state courts, if only because habeas corpus has a historic connection to due process of law. The development of substantive rights through due process violations threatened the necessity of federal restraint and the legitimacy of a federal state that was decentralized by legal category. By the twentieth century, the jurisdiction standard, which was designed to protect the states, could no longer do so. Evolving conceptions of due process from property cases ate into the state courts' criminal justice jurisdiction and forced the final determination of a prisoner's status into the

federal courts. The jurisdiction standard and the exhaustion doctrine could only delay what the command of the habeas corpus statute sought to obtain, that is, federal review of state court convictions. The Leo Frank case embodied all of these concepts, and it should be clear how mired in contradiction the Court's decision was. The final case of the jurisdiction era is in fact the first case of the due process era that follows. The protection of the individual at trial becomes the new ground for habeas challenges.