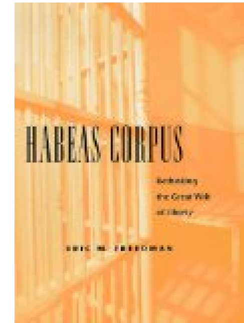
H-Net Reviews in the Humanities & Social Sciences

Eric M. Freedman. *Habeas Corpus: Rethinking the Great Writ of Liberty.* New York and London: New York University Press, 2001. x + 243 pp. $22.00 (paper), ISBN 978-0-8147-2718-8; $45.00 (cloth), ISBN 978-0-8147-2717-1.



Reviewed by Steven Semeraro (Thomas Jefferson School of Law)
Published on H-Law (January, 2004)

Reconfirming Habeas Corpus

Reconfirming Habeas Corpus

Eric M. Freedman's *Habeas Corpus: Rethinking the Great Writ of Liberty* is effectively two books. The first digs deeply into primary source material–perhaps deeper than any legal historian has–to examine three critical moments in the development of habeas corpus doctrine in the United States. The second uses this history as a springboard to draw startling new legal conclusions about the state of habeas corpus law in each of these three periods. Professor Freedman's analysis would greatly strengthen the case for broad federal oversight of state criminal procedure (pp. 147-153), if it was supported by the historical record. Unfortunately, the history that Freedman presents so well often fails to support the conclusions he draws from it.

Professor Freedman examines the debates surrounding the drafting and ratification of the Constitution and the early case law, presenting a thorough record of the early views of the Suspension Clause[1] and the habeas power that Congress vested in the federal courts through the Judiciary Act of 1789.[2] Next, he takes up the early-twentieth-century cases of *Frank v. Magnum*[3] and *Moore v. Dempsey*,[4] describing the tense social environments from which those cases arose and presenting intriguing commentary from that period on both the actual events and the court decisions. Third, and most fascinatingly, he provides a rare behind-the-scenes look at the tortured proceedings in the U.S. Supreme Court leading to the perplexing decision in *Brown v. Allen*.[5] Through communications among the justices and their clerks, Freedman presents more than a glimpse into the secret world in which Supreme Court decisions take form. In the process, he explains one of the Court's most obtuse decisions in illuminating light.

As a descriptive history of these three periods, the book is quite extraordinary. Although there is no shortage of historical writing on habeas corpus,[6] prior writers have limited themselves principally to the case law, the legislative history of more recent statutes, and the effects of macro shifts in global legal policy on habeas corpus. Freedman's approach is refreshingly different in its focus on primary sources that reflect directly on the thought processes of the men creating the doctrine at these woefully under-examined critical points.[7] And his technique of integrating social history with legal materials lends even greater insight by helping the reader to comprehend the influences affecting the decision-makers of the time.[8]

The second, more analytic, aspect of Freedman's book is less effective than the first in large part because the historical presentation strongly supports the traditional interpretations of that history that Freedman seeks to debunk. And therein lies the rub. The U.S. Supreme Court has never seriously questioned the existence of a constitutional requirement of some form of federal judicial review of serious deprivations of liberty, including those in state criminal proceedings.[9] By presenting what might be the clearest historical account in the literature, and cit-

ing it as support for a broad, constitutionally mandated right to habeas corpus review of state criminal convictions in federal court, Freedman may legitimize the use of that history as a primary, if not sole, determinant of habeas's future. To be sure, Freedman does not support an entirely historical approach to legal analysis;[10] he just wants to ensure that those who do look to history "get the facts right" (p. 46). By failing to deliver on the historically based analytic argument for the broad federal right, however, he may be unwittingly strengthening the case of those who would use the ghost of habeas past to narrow federal review[11] in the battle with those who look beyond history in steering habeas future.[12]

The following three sections discuss Freedman's analytic arguments and explain how the historical material he has uncovered undermines those arguments.

I. The Suspension Clause

Virtually every legal historian to consider habeas corpus has concluded that Section 14 of the Judiciary Act of 1789 prohibited federal courts from adjudicating petitions for writs of habeas corpus from prisoners held in custody pursuant to state court criminal proceedings.[13] Freedman boldly proclaims that his historical research proves his predecessors wrong. As he sees it, the first Judiciary Act "does not deny federal courts th[e] power to liberate state prisoners by habeas corpus but instead grants it" (p. 10). Second, even if the statute did not grant that power, he believes that the common law and state law supplied federal courts with the necessary authority to grant the writ to state prisoners (p. 10). And third, if the Act were interpreted to prohibit federal courts from granting the writ to state prisoners, it would violate the Suspension Clause.[14]

To support his conclusion, Freedman cites many historical sources and then-existing policy considerations. But virtually all of the historical evidence appears to point quite strongly in the opposite direction. And even as to policy, the force of Freedman's analysis is less than persuasive in light of the historical evidence.

As an initial matter, the Articles of Confederation included no mention of habeas corpus.[15] During the drafting of the Constitution, Charles Pinckney proposed language that would have created a habeas corpus power in the federal government.[16] That grant of authority, however, did not appear in the final version of the Constitution.[17] All that remained of Pinckney's proposal was the Suspension Clause, a prohibition on suspending the writ except in limited circumstances.[18] Given that the Constitution created a government of limited powers,[19] the decision to cut language extending the habeas power to the federal government is a troubling one for the historian who seeks to find a constitutional right to federal habeas review of state criminal cases.

Freedman expresses little concern about that omission, however. He focuses instead on Madison's notes and other materials describing the drafting and ratification process, which show that the debate centered on whether the federal government should ever be permitted to suspend the writ. All apparently assumed that the writ of habeas corpus would continue to exist. Freedman thus contends that because "the authority of the federal courts to issue the writ to state prisoners" was never questioned, "all parties [must have] read [the Suspension Clause] as protecting broadly against Congressional interference with the power [of] federal and state courts ... to order the release on habeas corpus of both federal and state prisoners" (p. 19).[20]

The primary sources that Freedman cites, however, actually cast doubt on his conclusion that the Constitution's framers silently enshrined federal habeas oversight of state criminal cases. Those who objected to the Suspension Clause were concerned with the potential abuse of federal authority, not the lack of federal power. They expressed fear that if given the power to suspend the writ, the federal government would undermine the authority of state courts to free improperly held political prisoners (p. 13). There was no reason to risk placing so much power in the federal government, the opponents argued, because the states could "make use" of the suspension power themselves if need be, and there would never be a need to suspend the writ "at the same time through all the states" (pp. 12-13, 18).

These statements reveal that the habeas power that the framers assumed was a state power, and that their concern was that the federal government would interfere with that state authority.[21] It hardly follows that the framers sought to empower the federal government to free state prisoners. Logically, those concerned with overly broad federal power would be just as concerned with the misuse of federal power to free properly detained prisoners as with the abuse of that power to block the release of those improperly held.[22]

Section 14 of the Judiciary Act is entirely consistent with this conclusion. The statutory section has a simple three-sentence, one-paragraph, structure: the first two sentences grant powers (1) federal courts may generally grant writs, including the writ of habeas corpus, and (2)

individual justices may also grant writs of habeas corpus to inquire into the legal cause of commitment. Then, the third sentence limits the power to grant habeas relief to those prisoners held in federal custody. The one recorded reference to habeas corpus in the legislative history reads cryptically "Hab. Corpus and Sovereignty of the State–" (p. 37 n. 6). Although precious little can be drawn from that, it does at least suggest that the first Congress thought about federal court interference with the state's sovereign right to administer its criminal law. And in 1807, Justice Marshall interpreted = 14 as limiting the grant of the habeas power in the federal courts to prisoners held in federal custody.[23] To be sure, Marshall's interpretation in *Bollman* was dicta (p. 26), but his interpretation continues to influence Justices on the Court.[24]

Rejecting Marshall's dicta, Freedman interprets the limiting third sentence to modify only the second power–that of individual judges–leaving courts with the authority to grant habeas relief to any prisoner, state or federal. Given how easy it would have been to specify that the limitation applied only to judges, it should come as no surprise that the Supreme Court in *Ex parte Door*[25] explicitly rejected Freedman's reading of the statute in terms that could not be less unequivocal: "The words of the proviso are unambiguous. They admit of but one construction. And that they qualify and restrict the preceding provisions of the section is indisputable."[26] Professor Freedman may argue that the Court has been improperly influenced by Chief Justice Marshall's dicta in *Bollman*.[27] Tellingly, however, Justice McLean's opinion for a unanimous Court in *Door* does not even cite *Bollman*.[28]

Professor Freedman nonetheless contends that Marshall's *Bollman* dicta is best understood as inconsequential political propaganda that was inconsistent with the intent of the framers and the first Congress.[29] Freedman cites habeas legislation in England, and the practice in the early United States, recognizing the importance of empowering individual judges to grant the writ because courts had infrequent sessions in those days and there was a compelling need to act quickly when one's liberty is wrongly denied (p. 33). Prohibiting individual federal judges, but not federal courts, from granting the writ to state prisoners would thus, Freedman contends, have been a meaningful limitation (pp. 31-34). But a meaningful limitation is not necessarily a sensible one. If the first Congress thought that federal courts should have jurisdiction to free improperly detained state prisoners, it seems odd that it would have hamstrung federal judges in a way that could require those unlawfully detained to wait substantial periods for a remedy.

Professor Freedman may respond that the pressing political need to respect state judicial processes justified the first Congress in limiting habeas jurisdiction to courts when dealing with state prisoners (p. 29). But, he contends, Congress would have been unlikely to omit all federal review of state criminal processes, because a key concern in adopting the Constitution was ensuring that individual states did not obstruct the central government's ability to handle foreign affairs by, for example, detaining foreign dignitaries in violation of international agreements (p. 26). A federal habeas power over state prisoners could help alleviate this concern. To combat this problem without stirring the then-super-heated political pot, Freedman contends that the first Congress deliberately drafted a vague statute to mask the breadth of the federal jurisdiction it created.[30]

Although one might expect a more thorough historical record of this sort of governmental slight-of-hand at the highest levels, Professor Freedman's argument would be worthy of more serious consideration if the only alternative interpretation of the Judiciary Act of 1789 called for no federal court oversight of state criminal proceedings. But there is a more plausible alternative explanation. Congress clearly provided for federal oversight of state criminal procedures by granting writ of error jurisdiction to the U.S. Supreme Court (p. 29).[31] The structure of the Judiciary Act thus suggests that Congress sensibly sought to appease concerns about overly broad federal judicial power by limiting federal review of state criminal processes to the highest court presumably presided over by the most able and respected jurists.[32] By contrast, the compromise that Professor Freedman puts forward would senselessly compel some state prisoners–i.e., those unlucky enough to be detained when the federal court was not in session–to wait extended periods to challenge their detention before the very same judges who would ultimately review their petition.[33]

Professor Freedman has uncovered a couple of lower court federal cases that accepted habeas jurisdiction over state prisoners. He readily admits, however, that these cases do not provide conclusive evidence that his theory is correct (pp. 42-45). Indeed, he cites other federal cases both before and after *Bollman* holding that the federal courts had no habeas power over state prisoners.[34] If the *Bollman* dicta misread Congressional intent, particularly with regard to jurisdiction over foreign digni-

taries imprisoned by a state, one would have expected Congress to correct the mistake shortly after these decisions. In fact, Congress did not amend the habeas statute for twenty-six years after *Bollman* was decided, and then it addressed a specific then-contemporary concern with state interference with the work of federal officials.[35] Not until 1842 did Congress address the problem of state interference with foreign officials, and that amendment was in direct response to a British diplomatic protest filed the prior year.[36] And in 1867 when Congress explicitly extended federal court jurisdiction to grant the writ to all state prisoners,[37] it acted again in response to then-contemporary problems, namely those arising in the immediate aftermath of the Civil War.[38] In none of these cases is there evidence that Congress sought to restore a power granted in the Constitution or the first Judiciary Act that the courts had erroneously interpreted away.[39]

II. The Landmark Decisions in *Frank* and *Moore*

The Supreme Court decisions in *Frank* and *Moore* have given rise to considerable scholarly debate. Some claim that the cases stand for only a narrow proposition that utterly inadequate review procedures give rise to a federal due process violation.[40] Others contend that *Moore* overruled *Frank* and established a broad principle that federal habeas courts could redress any federal constitutional violation in a state criminal proceeding.[41] And perhaps the leading habeas scholar contends that the two cases reflect the Court's evolving approach to mixed questions of law and fact.[42]

Professor Freedman claims to draw on "previously unutilized historical materials" to reach "a novel legal conclusion: *Frank* and *Moore* are consistent, and both require in-depth federal habeas corpus review of state prisoner convictions. The differing outcomes of the cases reflect no more than differing discretionary determinations in specific factual settings."[43] If by "in-depth" he means that federal courts have the power to scrutinize federal constitutional violations in state criminal cases, his conclusion is hardly novel. Shortly after the 1867 expansion of the habeas statute, the Court recognized that the amendment provided jurisdiction to review state criminal proceedings for violations of federal constitutional law that was "impossible to widen."[44] By the time of *Frank*, the meat of the matter rested not on the scope of jurisdictional power, which was quite broad, but on the discretionary considerations that control whether a federal court would exercise that power.[45]

Perhaps Professor Freedman's point is that *Frank* and *Moore* demonstrated conclusively that the Court was willing to use that power much more freely than it had in the past. He says, however, that these cases embodied the established distinction between, on the one hand, " '[m]ere errors in point of law, however serious' which could only be reviewed by writ of error," and, on the other hand, "the fundamental or 'jurisdictional' (particularly Constitutional) claims cognizable on habeas corpus" (p. 61). But that was not the state of the law during this era. Both before *Frank* and after *Moore*, the Court insisted that all Constitutional claims were not cognizable in federal habeas. Throughout the 1920s and 1930s, the Court repeatedly reiterated this traditional prudential limit on the exercise of its habeas power, making clear that a Constitutional violation is not necessarily either fundamental or jurisdictional.[46] "[T]he judgment of state courts in criminal cases will not be reviewed on *habeas corpus*," the Court held in 1925, "merely because some right under the Constitution of the United States is alleged to have been denied to the person convicted. The proper remedy is writ of error."[48] And Justice Holmes, the author of the opinion for the Court in *Moore*, wrote for the Court in a post-*Moore* case that the writ should be granted by a federal court "only upon definitely and narrowly limited grounds."[48] A more limited interpretation of *Frank* and *Moore* recognizing that a court completely dominated by a mob should be treated as one without jurisdiction would fit better with the surrounding case law than Freedman's broader interpretation of those opinions.

III. The Curious Case of *Brown v. Allen*

The Court's decision in *Brown v. Allen* is widely believed to be the first case recognizing that a federal habeas court should–as opposed to *could*–reexamine the merits of any federal constitutional claim that had been decided in state court.[49] Professor Freedman again takes issue with the conventional wisdom, declaring that the historical materials show that the justices in *Brown* were "working within a consensus that the substantive nature of the inquiry that a federal habeas corpus court should make into the constitutionality of prior state criminal proceedings was simply not on the table" (p. 95).[50] *Frank* established, Freedman says, that federal habeas courts should reexamine the merits of all federal constitutional claims (pp. 141-42). The only real issue in *Brown*, which Freedman apparently sees as an entirely separate matter, was whether a federal habeas court should give weight to the Supreme Court's denial of certiorari in undertaking that reexamination (pp. 95, 99).[51]

As discussed in part II, *Frank* and *Moore* did not establish the broad principle that Professor Freedman attributes to them, and the subsequent pre-*Brown* case law that purported to expand habeas review to more constitutional claims was confined to federal criminal cases and thus did not pose the federalism concern that arises when a state conviction is challenged.[52] But even putting all that aside, the historical materials that Professor Freedman presents could not be clearer in demonstrating the polar opposite of the claim he makes for them: that is, the appropriate weight to be given to a state court's determination of the merits of a federal claim was very much *on the table* in *Brown*.

As a matter of logic, the relevance of a denial of U.S. Supreme Court review, the issue that Freedman admits was disputed in *Brown*, is directly related to the weight to be given a state court's determination of the federal issue. Whatever consideration is given to the Court's denial of certiorari is tantamount to a concomitant grant of deference to the state court decision that the Supreme Court had allowed to stand without comment. Ultimately, if enough weight were given to a denial of certiorari, a federal habeas court would effectively defer completely to the state court's determination on the merits of a federal claim. So, even if the *Brown* Court purported to focus exclusively on the issue of the weight to be given a denial of certiorari, it would necessarily be considering the degree of deference appropriate for a state decision.

As a matter of historical fact, however, the communications among the justices and their clerks demonstrate that the Court explicitly considered the weight to be given the state court's resolution of the federal issue. Justices Reed and Frankfurter circulated a joint memorandum setting out the two issues facing the court. The first was the effect of a denial of certiorari; the second read: "The bearing of the adjudication by the state court of federal claims upon the [federal] district court's disposition of the application for habeas corpus..." (p. 110). A subsequent Frankfurter memorandum recognized that the Court had completed its work on the first issue by deciding that a denial of certiorari would have no effect on a subsequent habeas petition, but that more deliberation was needed "regarding the relation of the State proceedings to proceedings in the District Court" (p. 113).

Professor Freedman points out that Reed tried to convince Frankfurter that the two actually agreed on the state court deference issue (pp. 113-14). Nevertheless, Frankfurter persisted in expressing concern about Reed's approach, and that concern was apparently justified. On Reed's own copy of one of Frankfurter's memoranda next to a passage reading "[i]t is inadmissible to deny the use of the writ merely because a State court has passed on a Federal constitutional issue," Reed handwrote "Why? No reason not to" (p. 114 and n. 54). Freedman argues that this note was referring to the right to an evidentiary hearing rather than to the scope of review. In context, however, Reed's memoranda indicate that he believed federal courts ordinarily ought to defer to the state court's decision, although he recognized that in exceptional circumstances a federal court could reexamine the merits.[53] That position reflected existing law quite accurately,[54] but contrasted sharply with Frankfurter's view that a federal court should review de novo the merits of all federal claims.[55]

Lending support to the belief that there was a continuing divergence of views, the two justices were unable to reach agreement on an opinion on the state deference issue, leading to confusing dual-majority opinions. Reed compared the scope of review of a state court decision to the scope of review applied to a second habeas petition in a federal case after one court had already rejected the petition: "a refusal of the writ without more, if the court is satisfied, by the record, that the state process has given fair consideration to the issues and the offered evidence, *and has resulted in a satisfactory conclusion...*" (p. 117). Although Reed purportedly added the highlighted language to appease Frankfurter, the meaning of the passage is hardly beyond dispute.[56] At a minimum, it is inconsistent with Frankfurter's proposal that a federal habeas court should give the rulings of a state court "the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional law issues," which is to say whatever persuasive authority can be found in the reasoning of the opinion and nothing more.[57]

The persistence of this disagreement between Reed and Frankfurter should not be surprising. No matter how much Reed may have protested that he did not disagree with Frankfurter on the state deference issue, his belief that some weight should be given to the denial of certiorari ensured that he could never fully support Frankfurter's de novo review approach. Perhaps for this reason, Justice Frankfurter never ceased rebuking Justice Reed for suggesting that a federal habeas court should ordinarily deny the writ where a state court had given "fair consideration" to the merits.[58] "Callous and even cruel though it may seem," Frankfurter wrote in an internal memorandum, "the fate of the four petitioners is to me a matter of little importance. What this Court may

say regarding the writ of habeas corpus I deem of the profoundest importance. Put in a few words, it makes all the difference in the world whether we treat habeas corpus as just another legal remedy in the procedural arsenal of our law, or regard it as basic to the development of Anglo-American civilization and unlike other legal remedies, which are more or less strictly defined" (p. 112). For habeas corpus to live up to the role Frankfurter thought it should play, he contended that it could not "be imprisoned within any such rubrics as 'jurisdiction,' or 'habeas corpus is not a substitute for appeal,' etc., etc..." (p. 112).

Professor Freedman argues that Frankfurter sought only to maintain the writ's existing scope, not to extend it further.[59] But those verbal rubrics criticized by Frankfurther were not the creation of Justice Reed. On the contrary, they were precisely the ones that the Court had used repeatedly to describe the deference appropriate to a state court decision in virtually every state habeas case prior to *Brown.*[60] In firmly rejecting those limits on federal review, *Brown* was indeed a seminal decision.

Conclusion

Professor Freedman has greatly expanded our knowledge about three critical events in the development of habeas corpus doctrine. But the conclusions he draws from those materials–principally that the framers intended to impose a constitutional requirement of federal habeas review of state criminal convictions and that the federal courts engaged in careful scrutiny of all constitutional violations throughout the twentieth century–are contradicted by the primary sources that he cites. As one who has great sympathy for Professor Freedman's point of view, I wonder whether his use of history to support a less than thoroughly convincing argument for expansive habeas review will end up being cited in favor of new restrictions on habeas corpus. The Court has never seriously questioned that the Constitution compels Congress to provide for federal judicial scrutiny of decisions restraining individual liberty, including state criminal convictions.[61] Absent unequivocal historical evidence, the place to look for the bounds of that constitutional mandate is in the evolving notions of due process that arose with the adoption of the Fourteenth Amendment and developed in the latter half of the twentieth century, rather than among the quite different concerns that motivated the drafters of the Suspension Clause and the first Judiciary Act and the justices who decided *Bollman*, *Frank*, *Moore*, and even *Brown.*

Notes

[1]. U.S. Const. Art. I, = 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[2]. First Judiciary Act, ch. 20, = 14, 1 Stat. 73, 81-82 (1789).

[3]. 237 U.S. 309 (1915).

[4]. 261 U.S. 86 (1923).

[5]. 344 U.S. 443 (1953).

[6]. See, e.g., Chester James Antieau, *The Practice of Extraordinary Remedies: Habeas Corpus and the Other Common Law Writs*, vol. 1, sec. 1.01, p. 1 (1987); William F. Duker, *A Constitutional History of Habeas Corpus* (1980); Clarke D. Forsythe, "The Historical Origins of Broad Federal Habeas Review Reconsidered," *Notre Dame Law Review* 70 (1995): p. 1079; Ann Woolhandler, "Demodeling Habeas," *Stanford Law Review* 45 (1993): p. 575; James S. Liebman, "Apocalypse Next Time? The Anachronistic Attack on Habeas Corpus/Direct Review Parity," Columbia Law Review 92 (1992): p. 1997; Gary Peller, "In Defense of Federal Habeas Corpus Relitigation," *Harvard Civil Rights-Civil Liberties Law Review* 16 (1982): p. 579; Paul Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," *Harvard Law Review* 76 (1963): p. 441.

[7]. Here is a small taste of what Professor Freedman dishes out: In commenting on the differing results in *Frank* and *Moore*, Freedman quotes correspondence between Justice Louis Brandeis and then-Justice-to-be Felix Frankfurter, two of the greatest legal minds of the twentieth century. Frankfurter asked Brandeis why the Court had granted the writ in *Moore*, after denying it in *Frank*, given that both cases involved compelling allegations that threatening mobs undermined the fairness of the trials. Rather than engage some legal nuance that was surely there for the taking–indeed Freedman details several legal arguments on this question just pages before (pp. 86-87)–Brandeis explained the cases entirely by commenting on the men who decided them. "Pitney was gone," he wrote, referring to Associate Justice Mahlon Pitney who had left the Court by the time Moore was argued (p. 89). Brandeis continued by describing Pitney as having "a great sense of justice ... but no imagination whatever. And then he was much affected by his experience & he had mighty little...." Perhaps even more interesting were Brandeis's comments about whether to join an opinion for the Court or to dissent. He wrote of prac-

tical limits on dissenting based on concerns about "exasperating men" and the constraints of time–"Holmes [the author of the majority opinion in *Moore*] shoots down so quickly & is disturbed if you hold him up." Brandeis added that he had to consider cases of his own "as to which you do not want to antagonize on a less important case, etc. etc." (p. 89). One cannot help but wonder whether Brandeis was hinting that he provided an inconsequential vote for Holmes's opinion granting the writ in *Moore* in order to secure Holmes's support for one of Brandeis's own *more important* opinions.

[8]. Freedman has this to say about his technique: "to say that one legal theory or another provides a more persuasive explanation for the differing outcomes ... is to say a good deal, even if one is thinking historically. For it is that explanation–and not the one closer to capturing the texture of the contemporary events of the past ... –that is likely to have the most impact on the future" (p. 90).

[9]. Although the Court has never squarely addressed the Constitutional minimum level of habeas review of judicial detention, it has repeatedly taken seriously the argument that some review is constitutionally required. *I.N.S. v. St. Cyr*, 533 U.S. 289, 300-01 (2001) (finding that interpretation of statute to prohibit all review of certain detention decisions would raise a serious constitutional question); *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996) (assuming Suspension Clause limits any contraction of the writ); *Swain v. Pressley*, 430 U.S. 372, 380 (1977) (holding that eliminating habeas review without providing an adequate substitute would raise serious constitutional questions); *United States ex rel. Turner*, 194 U.S. 279, 295 (1904) (Brewer, J., concurring) (interpreting opinion of the Court as consistent with the notion that "the courts may and must, when properly called upon by petition in habeas corpus examine and determine the right of any individual restrained of his personal liberty to be discharged from such restraint. I do not believe it within the power of Congress to give to ministerial officers of final adjudication of the right to liberty, or to oust the courts from the duty of inquiry respecting both law and facts."); *Ex parte Yerger*, 75 U.S. (8 Wall.) 75, 95 (1868) ("The terms of this provision necessarily imply judicial action. In England, all the higher courts where open to applicants for the writ, and it is hardly supposable that, under the new government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them."); see generally Jordon Streiker, "Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners? " *Michigan Law Review* 92 (1994): p. 862 (finding constitutional support for a right to federal habeas review of state criminal cases in the Fourteenth Amendment). The alternative position that the Suspension Clause does not preserve a constitutional minimum level of review, or alternatively that that minimum level is fixed at the level of review recognized by the common law as of 1789, has never commanded a majority of the Court. And with good reason. Criminal procedural was markedly different in the late eighteenth century than it is today. Among other things, "incarceration was not routinely imposed as a means of postconviction punishment for criminal acts until the nineteenth century" (Marc M. Arkin, "The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners," *Tulane Law Review* 70 [1995]: pp. 1, 11).

[10]. On the contrary, Freedman argues that "history should be written without presentist bias, and public policy formed without being unduly constrained by the past" (p. 147).

[11]. See, e.g., *Swain v. Pressley*, 430 U.S. 372, 384 (1977) (Burger, C.J., concurring in part and concurring in judgment) ("The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted.").

[12]. See n. 9 above.

[13]. In Freedman's words, "the 'fact' that Congress effectually withheld the federal writ from state prisoners in 1789 has been a premise of substantially all judicial and academic writing on the Suspension Clause" (p. 46); see also p. 9, describing this viewpoint as "firmly entrenched wisdom." The Supreme Court has regularly proceeded on this assumption. See, e.g., *Felker v. Turpin*, 518 U.S. 651, 659-60, 663 (1996); *Fay v. Noia*, 372 U.S. 391, 409 (1963) ("The first Judiciary Act did not extend federal habeas to prisoners in state custody....").

[14]. U.S. Const. Art. I, = 9, cl. 2.

[15]. Zechariah Chafee, Jr., "The Most Important Human Right in the Constitution," *Boston University Law Review* 32 (1952): pp. 143, 145.

[16]. The passage read, "the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner: and shall not be suspended by the legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding—– months" (p. 12).

[17]. Four state ratifying conventions explicitly objected to the absence of an affirmative guarantee of habeas corpus review in the federal Constitution. Rex A. Collings, Jr., "Habeas Corpus for Convicts: Constitutional Right or Legislative Grace? " *California Law Review* 40 (1952): p. 340 and nn. 39-41.

[18]. U.S. Const. Art. I, = 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[19]. The Tenth Amendment confirms this limitation on the federal government quite explicitly: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" (Const. Amend X).

[20]. Freedman dedicates several pages to supporting his contention that the Suspension Clause embodies a special protection for a federal habeas power (interpreting concern with preserving the writ as a concern that "the habeas corpus powers of the federal judiciary have not been unduly constricted"; pp. 14-19, 29).

[21]. Duker (see n. 6 above), interpreting the framers' intent with respect to the Suspension Clause as protecting the writ of habeas corpus recognized in the state courts from federal interference (pp. 126-180); see also Akhil R. Amar, "Of Sovereignty and Federalism," *Yale Law Journal* 96 (1987): pp. 1425, 1509.

[22]. Freedman appears to recognize this point: "As a result of fears expressed during the ratification process over the expansive Constitutional language regarding federal judicial authority, there was heavy political pressure on the First Congress to limit the scope of the federal court system" (p. 29).

[23]. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 99 (1807) (explaining that the proviso limiting the power to issue the writ to federal prisoners "extends to the whole section" and thus prohibits both federal courts and individual judges and justices from issuing the writ to state prisoners).

[24]. *I.N.S. v. St. Cyr*, 533 U.S. 289, 304 n. 24 (2001); *Felker v. Turpin*, 518 U.S. 651, 664 (1996); *Schlup v. Delo*, 513 U.S. 298, 350 (1994) (Scalia, J., dissenting); *Fay v. Noia*, 372 U.S. 391, 400 (1963).

[25]. *Ex parte Door*, 44 U.S. (3 How.) 103 (1845).

[26]. *Ex parte Door*, holding that the limitation on habeas jurisdiction that prohibits the federal courts from granting the writ to state prisoners "is so clear, from the language of the section, that any illustration of it would seem to be unnecessary" (p. 105).

[27]. Indeed, Freedman makes this argument quite explicitly in the introduction to the book, arguing that "acceptance of Marshall's interpretation has served as conclusive evidence for the proposition that the right of state prisoners to obtain federal habeas corpus was not originally protected by the Constitution" (p. 3).

[28]. Freedman also contends that the punctuation in the original hand-written version of the statute–which he reproduces in the book–at least suggests that the third sentence modifies only the second (p. 30). To these eyes, however, the punctuation between each of the sentences looks the same, thus suggesting just the opposite.

[29]. Freedman argues that Chief Justice Marshall's opinion in *Bollman* suggests that Congress could suspend the writ by doing nothing, a possibility that contrasted sharply with the English practice that required an Act of Parliament and thus would likely have shocked the framers (p. 26). As the Court has recently recognized, Marshall's opinion is open to the interpretation that Congress was constitutionally required to provide for habeas corpus, because if it did not the Constitutional privilege for which protection was mandated would be obliterated. *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 304 n. 24 (2001). But even if Marshall meant that Congress could constitutionally fail to provide any federal right to habeas review, Freedman's analogy to the English system would be inapplicable because it ignores the distinction between a unified and a federal system. Congress, by failing to create a federal habeas power, could not suspend the writ in the sense that Parliament might suspend it in England. At most, such an omission by Congress would leave federal courts without habeas jurisdiction. But just as Parliament could not suspend the writ in all English courts without an affirmative act, Congress could not interfere with the power of the state courts to grant the writ without affirmative legislation.

[30]. In Freedman's words, "In the case of federal habeas corpus for state prisoners, the authors wrote a statute containing the appearance rather than the substance of a limitation on federal court authority" (p. 29, n. 7).

[31]. Professor Freedman recognizes that Congress provided writ of error review over state criminal cases.

Without addressing the possibility that this power may have made federal habeas review unnecessary in the minds of the first Congress, Freedman argues that it undermined serious scrutiny of Marshall's *Bollman* dicta because there was another avenue of federal review available to state prisoners (p. 29, n. 7).

[32]. This view is supported by contrasting Congress's approach to state cases with its approach in federal cases where it granted federal courts habeas jurisdiction over federal prisoners, but it did not create writ of error jurisdiction in the Supreme Court to review federal criminal cases.

[33]. James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* (3d ed., 1998), vol. 1, = 2.4d, pp. 43-46.

[34]. *Ex Parte Door*, 44 U.S. (3 How.) 103 (1845); *Ex Parte Caberra*, 4 F. Cas. 964, 966 (CD. Pa. 1805) (No. 2,278); *Elkison v. Deliesseline*, 8 F. Cas. 493 (C.D. S. C. 1823) (No. 4,366).

[35]. 4 Stat. 634-35 (extending power of federal courts to grant the writ in favor of a prisoner "committed or confined on, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof,...").

[36]. 5 Stat. 539 (extending power of federal courts to grant the writ in favor of a prisoner held "on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exception, set up or claimed under the commission, or order, or sanction, of any foreign State or Sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof"); *People v. McLeod*, 25 Wend. 483 (N.Y. Sup. Ct. 1841).

[37]. Stat. 385 ("[T]he several courts of the United States ... shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.").

[38]. See Forsythe, n. 6 above, pp. 1108-17.

[39]. The Court itself has interpreted each of these amendments to the habeas statutes as coming in response to then-contemporary "grave political crises." *Fay v. Noia*, 372 U.S. 391, 402 n. 9 (1963).

[40]. *Wright v. West*, 505 U.S. 277, 299 (1992) (O'Connor, J., concurring in judgment); Forsythe, n. 6 above, p. 1139; Bator, n. 6 above, pp. 485-89.

[41]. Peller, n. 6 above, pp. 646-48; Henry M. Hart, Jr., "Forward: The Time Chart of the Justices, The Supreme Court, 1958 Term," *Harvard Law Review* 73 (1958): pp. 84, 105; Curtis R. Reitz, "Federal Habeas Corpus: Impact of an Abortive State Proceeding," *Harvard Law Review* 74 (1961): pp. 1315, 1329; *Fay*, 372 U.S. at 421.

[42]. Leibman, n. 6 above, pp. 2079-81.

[43]. Freedman makes this point a few times throughout this section of the book, on pp. 50 and 88 (explaining that the decision to hold a hearing turned on all relevant factors, including the rigor of the state's appellate process, the outcome of that process, and the completeness of the record), p. 91 ("An examination that integrates historical evidence and legal argument leads to the conclusion that the power of a federal habeas corpus court to conduct an independent investigation of the facts claimed to render a state conviction unconstitutional was firmly established by Frank and strengthened by Moore."), and on p. 96 (explaining that a federal habeas court may re-determine the merits of any federal constitutional claim raised in a state criminal proceeding).

[44]. *Ex parte McCardle*, 6 Wall. 318, 325-26 (1867) ("This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws."); *Ex parte Bridges*, 2 Woods 428, 432 (Cir. Ct. N.D. Ga. 1875) (No. 1,8732) (holding that habeas statute granted federal courts the power to grant the writ to redress a federal constitutional violation before state appellate processes were utilized).

[45]. *Cook v. Hart*, 146 U.S. 183, 194-95 (1892) ("While the federal courts have the power and may discharge the accused in advance of his trial, if he is restrained of his liberty in violation of the federal constitution or laws, ... the practice of exercising such power before the question has been raised or determined in the state court is one which ought not to be encouraged."); *Ex parte Royal*, 117 U.S. 241, 252-53 (1886).

[46]. *McNally v. Hill*, 293 U.S. 131, 138 (1934) (applying prudential requirements post-*Moore*); *Ash v. United States ex rel. Valotta*, 270 U.S. 424, 426 (1926) (same); *Knewel v. Egan*, 268 U.S. 442, 446 (1925) (same); *Henry v. Henkel*, 235 U.S. 219, 228-29 (1914) (describing pre-*Frank* practice).

[47]. *Knewel*, 268 U.S. at 447.

[48]. *Ash*, 270 U.S. at 426.

[49]. Bator, n. 6 above, p. 500.

[50]. Freedman makes this point a few times throughout this section of the book, on p. 98 ("To adopt th[e] theory [that *Brown* expanded the scope of habeas review] has always required ... a certain willingness to suspend disbelief: the idea that a permanent revolution in the law of habeas corpus took place because of an unexamined novel assumption silently shared by eight Justices who collectively wrote six opinions in a controversial area of the law is implausible at best.... In any event, we now have direct evidence that the theory is wrong, as the next chapter shows."), and p. 143 ("The theory that independent federal habeas corpus review of the constitutional validity of state criminal convictions is a modern innovation attributable to Brown is simply inconsistent with the historical evidence.").

[51]. Freedman explains that *Darr v. Burford*, 339 U.S. 200 (1950), had required a petitioner to seek certiorari in the U.S. Supreme Court prior to petitioning for habeas review and that this decision caused confusion in the lower courts as to what, if any, weight should be given to such a decision denying certiorari in a subsequent habeas proceeding (pp. 95, 99, 100-103).

[52]. For what it's worth, in an internal memorandum to Justice Jackson, then law clerk William Rehnquist interpreted existing law in this fashion (p. 120) ("[T]he important question of the weight to be given to previous adjudication by state courts has never been squarely decided recently, and language supporting any view can be found in the opinions.").

[53]. For examples of Reed's comments in this regard see p. 114 (asserting federal courts have ability "to take up those unusual situations" when justice is not done in state proceedings), and p. 117 (suggesting that "fair consideration" and a "satisfactory result" in state proceedings, rather than *full consideration* and the *correct result* are sufficient to enable a federal habeas judge to deny the writ).

[54]. See n. 46 above.

[55]. *Brown*, 344 U.S. at 463.

[56]. In *Wright v. West*, three justices read this language as requiring considerable deference to state court decisions. 505 U.S. at 287 (per Thomas, J. announcing the judgment of the Court) ("We had no occasion [in *Brown*] to explore in detail the question whether a 'satisfactory' conclusion was one that the habeas court considered *correct*, as opposed to merely *reasonable*").

[57]. *Brown*, 344 U.S. at 458.

[58]. Frankfurter wrote, "I don't want District Judges to assume that merely because a federal claim has been examined in the state courts, it need not be examined even once in a federal court" (pp. 109, 115, 117).

[59]. Freedman makes this point a few times throughout this section of the book, on p. 112 (arguing that Frankfurter "was concerned not with broadening [habeas jurisdiction] but with preventing a threatened narrowing of it"), p. 118 (asserting that "the Justices focused on the substance of the inquiry to be made by the federal habeas court, their effort was not to broaden it, but rather to insure that the published opinions would not be wrongly read as narrowing it"); p. 131 ("*Brown* ... made no new law on the scope of review"); and p. 142 ("Brown thus represented a restoration of the legal and practical status quo ante that Darr had threatened").

[60]. See n. 46 above.

[61]. See n. 9 above.

If there is additional discussion of this review, you may access it through the network, at:

https://networks.h-net.org/h-law

Citation: Steven Semeraro. Review of Freedman, Eric M., *Habeas Corpus: Rethinking the Great Writ of Liberty*. H-Law, H-Net Reviews. January, 2004.

URL: http://www.h-net.org/reviews/showrev.php?id=8755

Copyright © 2004 by H-Net, all rights reserved. H-Net permits the redistribution and reprinting of this work for nonprofit, educational purposes, with full and accurate attribution to the author, web location, date of publication,

originating list, and H-Net: Humanities & Social Sciences Online. For any other proposed use, contact the Reviews editorial staff at hbooks@mail.h-net.msu.edu.