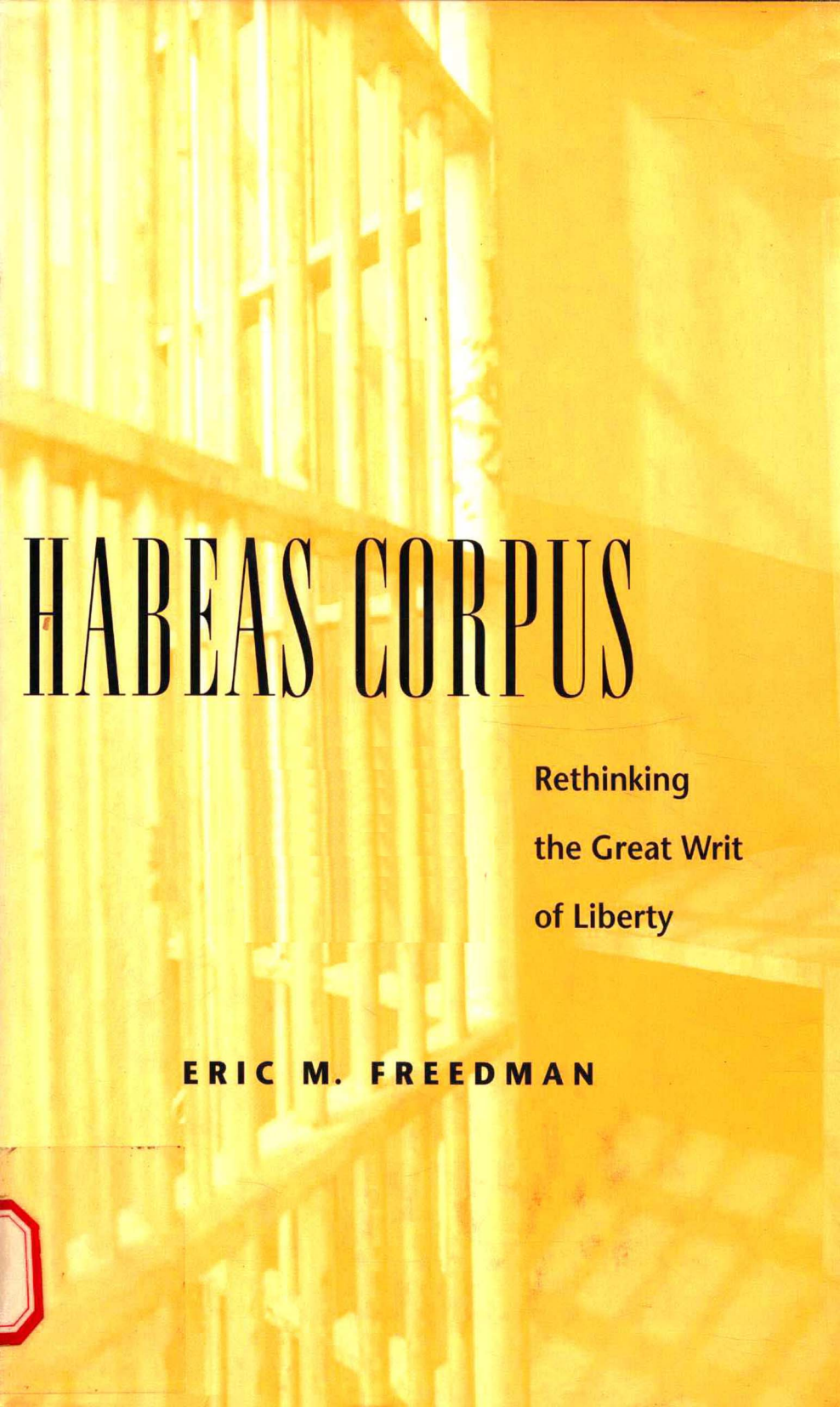
HABEAS CORPUS
Rethinking
the Great Writ
of Liberty
ERIC M. FREEDMAN

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14 And be it further enacted by the authority aforesaid, that all the before mentioned courts of the United States shall have power to issue writs of Scire facias, ~~subpoena to bring testes for witness~~, Habeas Corpus, & all other writs not specially provided for by Statute, which may be necessary for the exercise of their respective jurisdictions, & agreeable to the principles & usages of law. And that either of the Justices of the supreme court, as well as Judges of the district court, shall have power to grant writs of habeas corpus for the purpose of an enquiry into the cause of commitment. Provided that writs of habeas corpus shall in no case extend to prisoners in gaol unless where they are in custody under or by colour of the authority of the

21

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19 United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

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Some of the material in this volume is to be found in my prior essays: *Just Because John Marshall Said It, Doesn't Make It So:* Ex Parte Bollman *and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 Alabama Law Review 531 (2000), *Leo Frank Lives: Untangling the Historical Roots of Meaningful Federal Habeas Corpus Review of State Convictions*, 51 Alabama Law Review 1467 (2000), Brown v. Allen: *The Habeas Corpus Revolution That Wasn't*, 51 Alabama Law Review 1541 (2000), *Federal Habeas Corpus in Capital Cases, in* America's Experiment with Capital Punishment: Reflections on the Past, Present and Future of the Ultimate Penal Sanction 409 (James Acker et al. eds.) (Carolina Academic Press, 1998), and *The Suspension Clause in the Ratification Debates*, 44 Buffalo Law Review 451 (1996).

Although those works contain my thinking in more preliminary form, consulting them should in most instances satisfy any of my present readers who may desire more extensive documentation of the points that follow. These pages seek to take account of developments through the spring of 2001.

Finally, as the dedication reflects, my deepest thanks are reserved for my wife, Melissa Nathanson, who in this work, as in all other aspects of my life, has been my partner in the truest sense.

Contents

Introduction

In legal terms, habeas corpus is simply the name for the procedure by which a court inquires into the legality of a citizen's detention. But habeas corpus is rarely discussed in merely legal terms. The name carries a special resonance in Anglo-American legal and political history: habeas corpus is universally known and celebrated as the "Great Writ of Liberty."

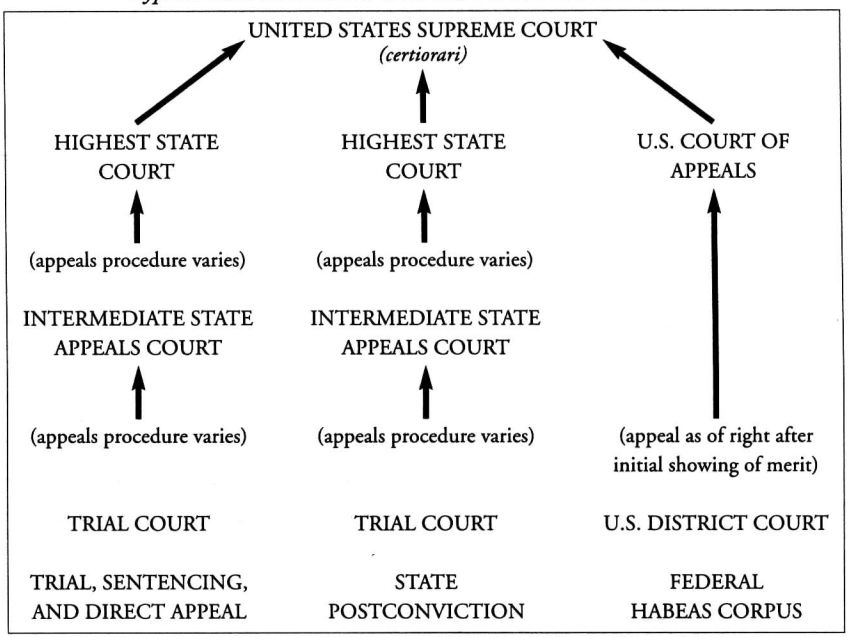
The reason is straightforward. The availability of habeas corpus means that if an individual is found to have been imprisoned unlawfully the court can release him or her, thus enforcing the rule of law and frustrating governmental oppression. Attempts to extend the range and efficacy of the writ have accordingly been inseparably connected for centuries with attempts to secure justice for those who at any particular moment find themselves execrated by the dominant forces in society.

In America, when a state prisoner files a petition in federal court challenging his or her criminal conviction, the federal court must decide, in the words of the federal habeas corpus statute, whether the prisoner is being held "in custody in violation of the Constitution or law or treaties of the United States."[1]

Thus, federal habeas corpus is closely linked to federalism—which our history has sometimes rightly understood as a device for insuring liberty by dispersing power, and sometimes misunderstood as an excuse for inaction in the face of injustice. Federal habeas corpus insures that, even though the Supremacy Clause of the Constitution already requires state courts to give criminal defendants every protection of the Bill of Rights and federal law,[2] those defendants are also entitled to insist that a federal court review the state court proceedings.[3]

In the context of the history, government, and public passions of the United States—especially with respect to the death penalty—this system of dual safeguards makes sense, implementing the fundamental, and mutually consistent, conceptions of individual liberty and constrained government power that underlie the Constitution.

FIGURE 1
Typical State and Federal Trial and Postconviction Procedure



Those who would limit federal court review of state prisoner convictions, whose views currently find expression in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[4] too often seek to defend injustice on the basis of federalism—thereby undermining both federalism and justice.

And, hitherto, they have often based their arguments on a misapprehension of the Supreme Court's landmark cases. The principal purpose of this book is to rectify three such errors that have for too long obscured the historical record.

Part I takes up the 1807 case of *Ex Parte Bollman.*[5] The Suspension Clause of the Constitution provides: "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."[6] In considering the scope of the Clause, the Court and scholars alike have unanimously proceeded on the assumption that the Clause did not originally cover state prisoners seeking a federal writ of habeas corpus.

The basis of this assumption is that, according to language in the *Bollman* opinion, which Chief Justice John Marshall delivered in the course of

releasing several of Aaron Burr's coconspirators, Section 14 of the Judiciary Act of 1789[7] did not give federal courts the authority to grant the writ to state prisoners; hence, it was unavailable to those prisoners.

Since the First Judiciary Act is a cornerstone of American jurisprudence (and the idea that it might violate the Suspension Clause has thus been deemed most implausible), 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.

But, I argue, Marshall's interpretation of the act was wrong, and so is any interpretation of the Suspension Clause based upon it. Since the Constitution came into force, the federal courts have had the authority to free state prisoners on habeas corpus, and the Suspension Clause applies as a matter of original intent to any attempt by Congress to limit that authority.

To prove that Marshall's politically convenient dicta in *Bollman*, and thus the implications that have been drawn from them, were simply incorrect, I draw on original sources to show that:

- sensibly read, Section 14 is a grant of authority to the federal courts to grant writs of habeas corpus to state prisoners;
- in any event, no statutory authorization was required, since the federal courts could use the powers granted to them by common law and state law to issue such writs;
- but if Marshall was correct in rejecting both of those positions, then the statute was indeed unconstitutional under the Suspension Clause.

Perhaps because contemporaries recognized how weak *Bollman* was, in several cases first uncovered by my research federal courts simply ignored the opinion, and did issue writs of habeas corpus to state prisoners.

Since Marshall erred in *Bollman* both in reading Section 14 of the Judiciary Act of 1789 as not granting the federal courts the authority to free state prisoners by habeas corpus and in concluding from this supposed absence of statutory authorization that the courts lacked the power, modern courts and scholars should pursue Suspension Clause analyses unbeguiled by his dicta.

The importance of their doing so is illustrated by a case decided on June 25, 2001, just as this volume was going to press (*Immigration and Naturalization Service v. St. Cyr*, 121 S.Ct. 2271 (2001)). The majority of the Court delivered an opinion that was commendable in both technique and result—except when it had to deal with Marshall's *Bollman* opinion.

The issue was whether AEDPA and related immigration statutes had deprived an alien of his pre-existing right to seek habeas corpus review of the Attorney General's decision that she lacked the statutory authority to waive his deportation. Applying much the same method that I employ in Section B of Chapter 4, the Court reached the sound conclusion that the statutes should not be read as depriving the federal courts of their habeas authority.

Critically for our purposes, one basis for this conclusion was an application of the doctrine, first enunciated by Marshall and discussed in Section (B) (6) of Chapter 4, that a court should avoid construing statutes in a way that might make them unconstitutional. In a significant pronouncement, the majority said that if the 1996 statutes were read as failing to carry forward the habeas corpus remedy, there would be a grave Constitutional question as to whether Congress had suspended the writ.

Quite appropriately, the Court seems to have recognized that Marshall's theory—that if Congress suspends the writ by simply failing to grant the courts the right to issue it, citizens are left without a judicial remedy—is untenable as a matter of both policy and history. But the Court did not face up to the implications of its own insight and reject *Bollman*'s dicta. Rather, the majority opinion attributed to Marshall the view that the purpose of the Clause was "to preclude any possibility 'that the privilege itself would be lost' by either the action or inaction of Congress"—an interpretative feat that it accomplished only by truncating the relevant passage of *Bollman.*

Justice Scalia's dissent objected, correctly, that Marshall's position was being distorted by "highly selective quotation," and then, incorrectly, read the Suspension Clause as Marshall had: the Clause is judicially enforceable only if Congress has affirmatively suspended some habeas authority previously granted.

Neither side saw the whole picture, as the historical evidence and legal argument presented in Part I will reveal. The majority got the Constitution right, but Marshall wrong; Justice Scalia got Marshall right, but the Constitution wrong. As a matter of history, Marshall's stated view is clear—the Suspension Clause requires Congress, but not the courts, to provide the habeas remedy in the first instance—but, as a matter of law, it is clearly erroneous.

Part II focuses on two habeas corpus decisions of ongoing importance, *Frank v. Magnum*[8] and *Moore v. Dempsey.*[9] In both cases, defendants who had been sentenced to death in Southern state courtrooms surrounded by hostile mobs brought habeas corpus petitions to the federal courts, and pressed due process claims upon the Supreme Court. But the outcomes were entirely different. The Court refused to intervene in the first case

(which resulted in the lynching of an innocent Jew), but granted relief in the second (which resulted in the release of innocent blacks)—asserting all the while that there was no inconsistency between the two decisions.

Both cases arose out of significant national events (the Leo Frank murder trial in one instance, and massive race riots in Elaine County, Arkansas, in the other), and continue to be the subject of conflicting interpretations by those who support broad habeas review (who argue that *Moore* overruled *Frank*) and those who oppose it (who argue that the cases are consistent).

Meanwhile, in the world of historical (as opposed to legal) inquiry, the cases have drawn continuing attention not only because both were major national events, but because they encapsulate a swirl of sexual, racial, religious, and regional tensions in the context of an urbanizing, industrializing, and ethnically diversifying society. Yet legal scholarship has made little use of the historical work that has been done, and none at all of the substantial unmined source material illuminating the cases that is to be found in libraries and archives.

Based on a review of many of these materials, such as draft opinions and Justices' papers (whose publication will, I hope, serve to enrich the ongoing debate over these cases by scholars in both law and history), my own, rather novel, position is that the cases are consistent but support broad habeas corpus review.

Part III refutes the views of those conservative scholars and Justices who have argued that *Brown v. Allen*[10]—which resulted in the denial of habeas corpus in a series of cases displaying all the worst features of Southern justice—represented a revolutionary broadening of the writ, and should be rejected as a modern usurpation of the states' authority.

I explore the question through a detailed examination of the seven surviving sets of papers of the Justices who sat on the case. This review—which includes two sets of notes of the critical Court conference—demonstrates that the Justices did not view themselves as making important new law concerning the scope of the writ. On the contrary, with the exception of Justice Jackson—who, egged on by a series of colorful memos from his law clerk William Rehnquist, wished to make significant cutbacks—they went out of their way to reaffirm the law as it had existed since *Frank* and *Moore*.

Moreover, statistics show that the ruling did not lead to an upsurge in successful petitions; indeed, it may have had the opposite effect. And, despite numerous contemporary legislative and judicial battles over habeas corpus, no one considered the case of major import until the appearance of a Harvard Law Review article ten years later.

I conclude that in attacking *Brown* as the source of the evils they decry, today's antiwrit Justices are attacking a ghost, when what really confronts them is a solid legal cathedral built over many generations by workers who were often at odds on points of decoration but had a common understanding of the contours of the whole edifice.

As Part IV discusses by way of conclusion to this study, federal habeas corpus is not an affront to federalism, but rather implements the theme of checks and balances that pervades our Constitutional structure. Just as the authority of states to provide more Constitutional protections for their citizens than the federal government is willing to recognize is a safeguard of individual liberty, so too is the power of the federal government to enforce federally protected interests against recalcitrant states. That was as true in the early national period, when the states might obstruct international relations by jailing foreign officials, as it has been in the post–Civil War period, when the willingness of the states to enforce the federal Constitutional rights of unpopular criminal defendants has often been in question.

The framers knew well that abuses of governmental power at the expense of individuals would inevitably occur. A vigorous writ of habeas corpus implements one of their key responses—the creation of two levels of government that, in Madison's words, will "control each other," so that "a double security arises to the rights of the people."[11]

Part I

1

Introduction to Part I

As proud heirs to the traditions of English liberty, the framers of the Constitution felt very deeply the importance of habeas corpus as a weapon against tyranny. Hence the Suspension Clause: "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."[1]

According to firmly entrenched wisdom, this provision was intended to protect only the right of federal—not state—prisoners to seek the writ in federal court.[2] Thus, any such right that state prisoners may have by legislation[3] is purely a matter of Congressional grace, and could be revoked at any time without violating the Suspension Clause.

As the Introduction indicates, I believe that this view is erroneous. The purpose of Part I is to correct it. The origin of the mistake is dicta inserted by Chief Justice John Marshall into *Ex Parte Bollman*.[4] In that case, Marshall discussed Section 14 of the Judiciary Act of 1789,[5] which (with the addition of clause numbers for ease in following the argument), reads:

> *And be it further enacted*, [1] That all the beforementioned courts of the United States shall have the power to issue writs of *scire facias, habeas corpus*, [2] and all other writs not specially provided for by statute, [3] which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.— [4] *Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.[6]

Marshall's opinion includes two key points. First, the proviso "extends to the whole section,"[7]—that is, clause [4] limits both the first sentence of the section (relating to courts) and the second (relating to judges)—with the result that the Act does not (except in very limited circumstances) grant the